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## Rule Revision Roundelay

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to choose among various adults, these adopted children understand that the most important parent is the one who stays.

Why not give these children a break? Once a parent enters into a child's life, whether by virtue of genes, gestation or declaration, there is an unbreakable bond of psychology and history between the two. Crispina C., Anna J., Mrs. Moschetta and Mary Beth Whitehead are *all* mothers to their children. Even for those whose parents are absent due to contract, abandonment, or involuntary events, there is a mutual tie of emotion, of wondering how the other is doing and of moral responsibility. While courts and legislatures may see the need to determine who has a primary role in raising the child, there is no need to cut these other people out entirely. Indeed, from the child's point of view, it is simply wrong to do so. It has been said that you can never be too rich or too thin. Shall we add, perhaps, that you can never have too many parents to love you.

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### **Rule Revision Roundelay**

*To the editors:*

The recent resolve of the Advisory Committee on the Civil Rules to revise Rule 11, which the Congress and the Supreme Court revised as recently as 1983, is replete with ironies. After only eight years of experience with revised Rule 11, and having taken the unusual step of issuing an open call for comments before proposing an amendment, the Committee published a preliminary draft of a proposal to revise Rule 11. The Committee's proposal skirts most of the problems in implementing Rule 11 since 1983, during which time it had become the most controversial rule revision in the half-century history of the Federal Rules. Moreover, were Congress and the Court to adopt the preliminary draft, federal litigants, practitioners and judges could experience another decade of inconsistent judicial application, satellite litigation and chilling effects.

The Civil Rules Committee premised its decision to propose preliminary amendment partly on the perception that Rule 11 was unduly discouraging vigorous advocacy on behalf of particular parties, especially civil rights plaintiffs. The reality appears to be that Rule 11 has

disadvantaged civil rights plaintiffs less than many of the parties contended, at least as evidenced by the 1991 Federal Judicial Center (FJC) study of Rule 11 and civil rights litigation in five districts that the Committee commissioned. Indeed, the 1991 American Judicature Society assessment of lawyers' experiences with Rule 11 in the Fifth, Seventh and Ninth Circuits suggests that the Rule is more problematic in some forms of "ordinary litigation," such as comparatively routine automobile accident cases, than in controversial or high profile suits, such as civil rights actions.

In another component of its recent study, FJC circulated a questionnaire to all federal district judges. Eighty percent of those judges who replied believed that Rule 11 should be retained essentially intact, even though a similar number thought that groundless litigation—the reduction of which was a principal purpose for the 1983 revision—is a minor problem, and the judges were evenly split over whether such litigation had decreased since 1983. A majority of the judges polled also considered Rule 11 less effective in managing groundless lawsuits than expeditious disposition of Rule 12 motions to dismiss and Rule 56 motions for summary judgment, Rule 16 pretrial conferences, sanctioning under Rules 26 and 37, and informal warnings. The Committee itself recently acknowledged that current Rule 11 should not be considered the principal means for deterring and controlling groundless motions and pleadings, in part because Rule 11 consequences may frustrate the judicial process.

The recent Rule 11 revision efforts of the Civil Rules Committee ultimately may please none of the interests that the Rule affects. The Committee labored mightily to develop the preliminary draft, commissioning the FJC study, soliciting and reading written public comments from 125 individuals and groups, hearing testimony of sixteen experts at a public hearing and conscientiously drafting proposed changes that it believed would be responsive to most interests affected by Rule 11.

For example, the preliminary draft's imposition of a continuing duty to withdraw minuscule portions of papers, such as pleadings and motions, once they become untenable, and the possibility of incurring large monetary sanctions, could chill civil rights plaintiffs and other public interest litigation efforts. Although the draft's provision of a safe harbor enabling parties to withdraw deficient claims upon notification of their insufficiency would afford civil rights plaintiffs and other litigants some protection, safe harbors may reinforce one of Rule 11's worst features, its "threat and retreat" aspect. The preliminary draft's express inclusion of denials as components of pleadings subject to Rule 11 requirements and the reduced prospects for recovering monetary sanctions when plaintiffs violate the Rule will trouble the defense bar. Those provisions and others, such as safe harbors, constitute significant elements of the Committee's effort to equalize the burdens that the Rule places on

plaintiffs and defendants. How substantially the prescriptions will right the current imbalance remains uncertain. For instance, the Committee apparently ignored the present disequilibrium created by the judicially-fashioned requirement in every circuit that civil rights plaintiffs plead with particularity under Rule 8. Even if the preliminary draft were to impose similarly onerous responsibilities on plaintiffs and defendants, the parties should have decreased, less onerous, not equally burdensome, obligations.

The federal judiciary may feel restrained by the explicit provision for sanctioning on courts' own initiative and by its decreased discretion, especially to impose substantial sanctions. Moreover, all interests affected by the preliminary draft should be concerned about its considerable latent ambiguity and the prospect of ten more years of inconsistent judicial enforcement, satellite litigation and potential chilling. The preliminary draft replaces relatively clear concepts with ambiguous ones. For example, substitution of the term "nonfrivolous" for "good faith" as the adjective modifying the types of legal arguments that would not violate the draft's requirements incorporates a concept which courts have experienced difficulty applying felicitously.

The inability to satisfy these affected interests, particularly those as disparate as certain members of the federal bench and of the civil rights bar, was inherent in the rule revision process. The Committee, in attempting to accommodate fairly all relevant interests, may have failed to satisfy any of the interests. All interests may attack the preliminary draft, albeit from some similar, and certain other diametrically opposed, reasons. These interests, if unsuccessful in persuading the Committee or subsequent decisionmakers in the rule revision hierarchy to adopt perspectives more responsive to viewpoints which they favor, will take their case to Congress. Indeed, the Committee's action virtually invites those dissatisfied with its work product to seek congressional intervention.

The reconsideration of Rule 11 is one of the first major experiments with procedures for rule revision that Congress prescribed in late 1988, ostensibly to improve the process by making it more open to public scrutiny. The very openness of these procedures could enable affected interests to short-circuit the process by affording them the ammunition necessary to make an effective case with Congress. The interests may persuade Congress to modify Rule 11 statutorily, despite justifiable congressional reluctance to prevent the nascent procedures from running their course. If the interests were successful, the new revision process could be perverted before Congress and the Supreme Court have sufficient opportunity to ascertain whether it works, while the procedures and the Civil Rules Committee might even be casualties of this new openness in government.

There is little need to retain Rule 11 in its present or proposed form. The primary problem that led to the 1983 amendment, litigation abuse, has been ameliorated. Judges implementing the existing Rule have

accomplished several other important purposes underlying revision. Most significantly, Rule 11 has prompted many lawyers to conduct reasonable inquiries before filing papers, encouraging them to stop and think before they file and discouraging the pursuit of numerous frivolous cases. Although achieving some of these objectives and others has been and is important, courts can attain the goals with several effective mechanisms that impose fewer costs than Rule 11. Comparatively efficacious techniques for deterring abuse of the litigation process are civil contempt, 28 U.S.C. § 1927, and tort causes of action. Moreover, sanctioning prescriptions in Rules 16, 26, and 37 address much improper litigation behavior that occurs after papers are filed, thereby reducing the need for the onerous continuing duty that the preliminary draft would impose. *Chambers v. NASCO*, 111 S.Ct. 2123 (1991), also enhances the prospects for sanctioning abuse with inherent authority, thus decreasing the necessity to sanction under Rule 11. Sanctioning pursuant to Rule 11's relatively clear standards, however, may be preferable to sanctioning under inherent authority which enhances judicial authority at the expense of Congress and litigants.

Few of these phenomena relating to rule revision are new. Professor Judith Resnik observed that the "history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms" in *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984). Professor Richard Marcus similarly stated, in *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 494 (1986), that the cyclical character of procedural change in the United States means that those interested in rule reform, "as tinkers . . . will have to repeat the cycle of revision and relapse again and again." Indeed, the arresting portrait that he paints of American proceduralists consigned to a perpetual purgatory in which they tinker with proposals to revise the Rules and with the rule revision process assumes an almost surreal quality in the form of the Advisory Committee's recent efforts to revise Rule 11.

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