**Lets Deep-Six Rule 11**

By Michael J. McNamara

The thoughtful article of Mr. Tanick in the March-April issue of *The Hennepin Lawyer,* "Tooling Up After O'Toole: The Agony of Abusive Lawyers," struck a responsive chord in me because of both an intellectual and an experiential interest in Rule 11.

Since the language change in Federal Rule 11 in 1983 making a finding of bad faith signing of pleadings "and other papers" turn upon an *objective* analysis by the court rather than a *subjective* explanation by the accused attorney, I have followed the twists and turns of its application closely. My interest in *new*, Rule 11, like that of countless other attorneys, was piqued even more when Minnesota incorporated the federal language into its own state district court rules in 1985. My own anecdotal comparison of decided cases under the federal and state rules leaves me with the conviction that Rule 11 as it now exists should be abandoned.

Although the *O'Toole* decision is a welcome step in an effort at placing limits on the discretion of trial courts and providing due process protections for every attorney who has advocated an innovative or conceptually-difficult legal theory, it does not remove the inherent fuzziness in trial court determinations of a Rule 11 violation. Accordingly, though *O'Toole* theoretically diminishes some of the extremely broad latitude trial courts have had in determining Rule 11 violations, the rule remains a substantial tool for curbing innovative but valid legal argument.

For example, in an effort to demonstrate a client's interest in insurance proceeds following a fire which destroyed inventory, I recently presented economic evidence about the fungible nature of inventory in a commercial enterprise and received an adverse ruling because the trial judge did not understand the concept. I and my client were subsequently found to have presented a bad faith, frivolous position and an award of fees was accordingly made against us. Previously in the same case, the judge did not agree that unrefuted evidence of agreement between a building owner and one tenant to eject that tenant's partner from the premises during the term of a lease amounted to breach by the landlord, and she accordingly dismissed the landlord from the proceeding. When she then said she intended to refer the case to arbitration because it had been "languishing" in court for one month since the date of filing, I advised her that the referral to arbitration might be affected by a potential interlocutory appeal of her dismissal decision by my client, given the gravity of that decision. She thereupon, *sua sponte,* asked the landlord's attorney if he would like to bring a motion under Rule 11 for bad faith attorneys fees, Of course, until that moment there had been no allegation or discussion about any "bad faith," and the spontaneous invitation by the trial judge to the landlord's attorney was obviously her reaction to having a ruling questioned. Hopefully, the *O'Toole* decision will be recognized by that trial judge as preventing this type of abusive *judicial* conduct in the future, but history in our jurisdiction and others doesn't offer much hope.

Empirical studies of Rule 11 confirm the aberrant nature of its application. For example, in a recent study by the Federal Judicial Center, ten hypothetical cases (modeled after actual ones) were presented to federal judges. The study found that there was unanimous agreement on *none* of the cases, and in only three of the ten was there even more than 75% consensus.[1]

According to one author, the study demonstrated that:

> Rule 11 has become primarily an anti-plaintiff tool used by defense counsel. Although some appellate courts have recently cut back on various abuses by trial judges, they have also noted the extra and unnecessary expense imposed on counsel and their clients out of all proportion to any perceived harm. Rule 11, in practice, tends to be arbitrary. [2]

Even the United States Supreme Court is inconsistent in determining appropriate sanctions for presenting claims or positions which may not be objectively reasonable. As indicated above, Rule 11 provides that the reasonableness of a position asserted is to be determined according to objective standards rather than the subjective belief, or explanation, of the accused party. [3] However, the Supreme Court recently vacated a finding of willful violation of tax reporting laws and held that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, *whether or not the claimed belief or misunderstanding is objectively reasonable. Cheek v. United States.* [4]

Although the *Cheek* decision can be distinguished as dealing with tax reporting as opposed to Rule 11, at minimum the language of the Court in *Cheek* regarding potential relief from an objectively *unreasonable* position can (and probably will) be used to defend a Rule 11 motion.

Other inconsistent applications of Rule 11 hopefully have been settled by the United States Supreme Court in *Cooter & Cell v. Hartmarx Corporation, et al,* [5] which affirmed the position of the District of Columbia district court and Court of Appeals that the voluntary dismissal of a claim did not divest the district court jurisdiction to rule on a Rule 11 motion. Previously, our own Eighth Circuit Court of Appeals had held that voluntary dismissal *did* deprive the district court from determining a Rule 11 motion. [6]

Another area of disagreement between the courts in the application of Rule 11 concerns construction of the words "shall impose" in the rule, which appears to compel sanctions by the trial court if it finds a violation. However, such a seemingly straightforward interpretation runs afoul of the advisory comments to the federal rule, which state in pertinent part:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid the wisdom of hindsight and should test the signers conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. [7]

Not surprisingly, this internal inconsistency has resulted in conflicting opinions. For example, the court in *Westmoreland v. CBS, Inc*. [8] stated that "once the court finds that… factors [constituting a breach of Rule 11] exist, Rule 11 requires that sanctions of some sort be imposed," whereas the court in *Bill v. Bill* [9] stated that "we are not constrained to say that the district court must, upon the establishment of a violation of the rules at issue here, impose some sort of sanction, however nominal ... [t]he appropriate sanction under the circumstances of this case was no sanction."

The resounding failure of Rule 11 to achieve uniformity and consistency in its application invites re-examination of its underpinnings. Two years ago a distinguished federal judge told the New York Times that "Rule 11 has become another way of harassing the opponent and delaying the case. It's increased the tensions in litigation, and increased the amount of extra motions and extra appeals. To date, the effects have been adverse." [10]

Although legal detractors and humorists suggest an appropriate solution to abusive litigation tactics by attorneys is to adopt the suggestion found in Shakespeare's Henry VI, i.e, "the first thing we do, let's kill all the lawyers," [11] the answer is really much more simple and far less bloody---let's return to the pre-amendment version of Rule 11. [12]

Although the intentions of the drafters and sponsors of change to Rule 11 undoubtedly were laudatory, the results of their efforts have neither streamlined the operation of the courts nor imposed any uniformity and equity to application of the amended rule. On the contrary, case decisions from both state and federal courts show that an inordinate amount of time is being given to the *satellite litigation* spawned by Rule 11, and that the decisions themselves are highly inconsistent and subjective, dependent upon the whims and caprices of individual judges, subject only occasionally to the correcting hand of an appellate court.

The revised Rule 11 has had its *day in the sun* and has failed to fulfill its promise. It is time to reject it and return to reliance on an attorney's ethics and integrity [13] and to the procedural and substantive rules which served us well until 1983. [14]

[1] "Race to Court House--or Walk? (Not Much Bang in Litigation Explosion)"; *Legal Times,* August 15, 1988, Rotunda, Professor Ronald.

[2] Ibid. Professor Rotunda gave a vivid example of changing perspective in litigation over the years when he quoted Bruce Bromley, a respected trial lawyer who has a chair named after him at Harvard Law School, who bragged in the late 1950's: "Now, I was born, I think to be a protractor… I quickly realized in my early days at the bar that I could take the simplest antitrust case that the Department of Justice Assistant Chief could think of and protract it for the defense almost to infinity."

[3] See Notes of Advisory Committee on Rules, 1983 Amendment to M.R. Civ. P. 11; Moore v. *City of Des* Mo*in*es, Iowa, 766 F. 2d 343 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 805 (1986); *Business Guides v. Chromatic Communications Enterprises, Inc., et al,* 111 S. Ct. 922 (1991).

[4] 110 S. Ct. (1991).

[5] 110 S. Ct. 2447 (1990).

[6] *Foss* v. *Federal Intermediate Credit Bank,* 808 F. 2d 657 (8th Cir. 1986).

[7] Official Comments, 7th paragraph.

[8] 770 F. 2d 1168, at 1174-75 (D.C. Cir, 1985).

[9] unpublished, 801 F. 2d 396 (5th Cir. 1986).

[10] See footnote 1, *supra,* quoting the Honorable Jack Weinstein.

[11] Contrary to popular belief, that statement was meant by Shakespeare as a compliment to lawyers and judges, who protect the rights of people. The quotation comes from Dick the Butcher, a follower of the rebel Jack Cade, both of whom were intent on destroying all government buildings and all who stood in their way.

[12] If proof was needed of the inessential, if not redundant, nature of Rule 11 it was just provided by the United States Supreme Court in *Chambers v. NASCO, Inc.*, U.S..S.C., No. 90-256 (decided June 6, 1991), in which the Court affirmed an attorney fee sanction of $1,000,000.00 against Petitioner Chambers under the "inherent authority" of trial courts to "manage their own proceedings and to control the conduct of those who appear before them."

[13] This phrase needs not be an oxymoron, and in the writer's opinion is not an oxymoron for the vast majority of attorneys. For the remaining minority, mandatory legal ethics classes for all attorneys provide a more reasonable answer than continued warfare with the current Rule 11.

[14] According to Professor Rotunda (see footnote 1), the average number of cases per federal judge is almost the same today as it was in 1960. In that year, Judge Charles Breitel of New York complained about the "decline in litigation" over the years, and concluded that "[i]t is the public that is the loser" in this decline. 25 Mo. L. Rev. 225, 232 (1960).