RULE 11: FRAMEWORK FOR DEBATE

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The hue and cry against the unpredictable results, the clear bias against plaintiffs, increased incivility, and the cottage industry of satellite litigation spawned by Rule 11 has finally borne fruit. The Rules Committee has recognized Rule 11 must be addressed "to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." This recognition, and specific revisions to the Rule proposed by the Rules Committee, now call for a serious national debate by the bar, the bench, and Congress. Every litigator and every client has a stake in the outcome.

The real purpose of Rule 11, as is or as revised, its efficacy in meeting its stated goal, and the fairness of its application must be weighed against the attendant dangers and countervailing policies. The articles, and the alternative proposed rules contained in this issue, will form an important framework for the debate.

Judge Sam D. Johnson of the Fifth Circuit Court of Appeals is the author of the seminal decision interpreting Rule 11, *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc). The *Thomas* decision anticipated the Supreme Court in focusing on the deterrent effect of sanctions and rejecting the uniform award of attorneys' fees. It therefore made clear that the courts were to impose "the least severe sanction adequate to serve the purpose" of deterrence. The *Thomas* Court noted, as Judge Johnson and his clerks do in their article here, that courts tend to forget the enormous sting of public criticism and the serious professional and personal consequences that follow from a ruling that their filings are sanctionable. In light of experience following the *Thomas* decision, Judge John-

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son's article rejects the notion that the mere formulation of the "least severe sanction" standard, now contained in the Rules Committee's proposed revision to Rule 11, will reverse the avalanche of decisions that routinely shift the cost of litigation and impose attorneys' fees without even examining alternative sanctions. Judge Johnson's experience and sensitivity to the real problems of both the courts and lawyers requires that his comments receive serious attention in the forthcoming debate. Judge Johnson casts doubts on the ability of appellate courts to supervise the now habitual grant of fees in light of the deferential standard of review applicable to Rule 11 cases. He calls for more findings by district courts, heightened review, and the elimination of the award of fees in all cases save those involving bad faith.

The alternative bench-bar proposal to revise Rule 11 (shepherded by John P. Frank) also takes note of the undue incentive to litigate engendered by the fee shifting aspects of Rule 11. The proposal would entirely eliminate attorney fee awards and would make any sanction discretionary. The bench-bar proposal also objects to the Rules Committee's imposition of a continuing duty and to the increased exchange of paper called for in the Rules Committee's "safe-harbor" proposal. Like Judge Johnson, the alternative proposal would require findings of fact and conclusions of law.

Professor George Cochran, with whom we have joined in representing attorneys who have been demoralized by the mere pendency of Rule 11 motions, has an even stronger reaction to the Rules Committee's proposal. He sees no hope for a Rule purportedly aimed at "frivolous filings," which were not a problem in the first place. Professor Cochran's contention is that the Rule was not well conceived, and has been erratically applied and improperly used to stifle creative lawyering. He articulates the well-grounded fear that Rule 11 is in reality simply a sword of Damocles held over lawyers in the trenches so that the courts may deal with fewer and perhaps more lofty disputes. He suggests that the first reduction in filings should take place in the field of sanctions. Rule 11 motions will no longer be a routine adjunct to all other motions if the rule is eliminated. He points out, as does Judge Johnson, that following the *Thomas* decisions

a clear articulation of the "least severe sanction" has been largely ignored by the district courts. Professor Cochran raises serious doubt whether rewording the Rule will curb the abuses everyone now acknowledges.

All of these materials deserve careful attention; their concerns and criticisms must be addressed and dealt with if any revision of Rule 11 is to meet the felt needs of those who are most familiar with the past operation of the Rule. Most of all, these articles should encourage the participation of the entire legal community in the forthcoming debate over amendment or repeal of Rule 11. This is a debate which the legal community cannot afford to ignore.