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Order in the Court: Deterring Frivolous Lawsuits in Rhode Island's Federal District Court

SAMUEL D. ZURIER, ESQ.

Samuel D. Zurier is a partner at Michaelson, Michaelson & Zurier where he has a general litigation practice. He served as a law clerk to Rya W. Zobel of the Federal District Court in Massachusetts and Stephen G. Breyer of the U.S. First Circuit Court of Appeals.

Rhode Island's Federal District Court has a rich history, with decisions on such important issues as prison reform(fn1) and the constitutional separation of church and state.(fn2) It also is a model of efficient administration, providing litigants with a trial as soon as they are ready, if not sooner. This combination of circumstances has allowed the court to avoid some difficulties that have plagued other districts, such as slow dockets, or the inability to manage the discovery process adequately.

In recent years, the difficulties elsewhere in the national system have led to certain national "solutions" to problems that do not affect Rhode Island's federal court. For instance, the Federal Rules of Civil Procedure governing discovery were amended in 1993 to include a requirement that parties disclose information at the outset of litigation before the discovery process begins.(fn3) In other federal districts, these amendments have generated litigation and controversy.(fn4) Fortunately for Rhode Island, these amendments contained an "opt-out" provision which Rhode Island's federal district court exercised, thereby preserving the "old" discovery regime.(fn5)

Problems in courts elsewhere also led, in 1993, to amendments to Federal Rule 11, which governs the imposition of sanctions. As shown in further detail below, the national problems that motivated this amendment generally do not apply to the Rhode Island experience with regard to frivolous lawsuits.(fn6) Also, the amendment carries with it certain features that will make it harder forcourts to deter the filing of frivolous lawsuits. Unfortunately for Rhode Island, courts do not have the opportunity to "opt out" of amended Rule 11. Instead, Rhode Island's federal district court must adopt new techniques to retain effective control over frivolous litigation.

This article will describe the national debate on sanctions for frivolous lawsuits, and the reasons behind the recent reforms. It then will review the Rhode Island federal court's experience with sanctions for frivolous lawsuits, and discuss why the problems confronted nationally do not apply in Rhode Island. The consequences of amended Rule 11, and what the federal court can do to adapt to these consequences(fn7) will also be discussed.

The Need To Deter Frivolous Federal Lawsuits

The primary protection against frivolous litigation is the self-regulation of attorneys, based upon personal and professional standards of conduct.(fn8)

Fortunately, the overwhelming majority of attorneys, here and elsewhere, take their ethical duties seriously, minimizing the extent of frivolous litigation. However, there are undoubtedly a few who do not exercise adequate self-restraint. Courts must deter this group through the imposition of sanctions. Deterrence is especially necessary in federal court, due to the federal bias against disposition of lawsuits prior to a trial on the merits, and the relatively large costs associated with federal lawsuits.

Over the past half-century, there has been a clear bias in the federal courts against the disposition of matters prior to a trial on the merits. This bias dates back to the 1938 institution of the Federal Rules of Civil Procedure, which replaced rigorous "fact pleading" rules with the requirement that a plaintiff need only present a "short and plain statement of the claim" in order to get into court.(fn9) Under the post-1938 rules, the United States Supreme Court has held that courts cannot dismiss actions for failure to state a claim (Fed.R.Civ.P. 12(b)(6)) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."(fn10) Similarly, parties are not entitled to summary judgment unless the moving party can show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Also, a party seeking summary judgment often will not be permitted to file the motion until the conclusion of discovery. Fed.R.Civ.P. 56(f).

These liberal rules combine to give viability to frivolous lawsuits by requiring discovery and a trial before resolution. If a potential plaintiff and lawyer are willing to stretch the truth, they can file a complaint with allegations (including allegations based upon "information and belief" that is, in reality, nothing more than speculation and suspicion) sufficient to survive a motion to dismiss and require discovery. Then, client and counsel can combine to prepare affidavits that create the illusion of material, disputed facts, and thereby survive a motion for summary judgment and require a trial.

The Rhode Island federal district court faced this issue in Fusco v. Medeiros, a case that will be described in further detail below.(fn11) As the magistrate judge related in his report and recommendation on a motion for sanctions,(fn12) client and counsel combined to file a verified complaint in which the plaintiff verified the truth of several obviously false "facts." The plaintiff in this case was a retail store sales clerk whose employment was terminated after a security manager claimed to see her, without authorization, sell a $79.99 Guess jeans jacket to a friend of her brother's for 4.99.(fn13) In her verified complaint, the plaintiff claimed that the security manager was sexually harassing her, and that she was the victim of an unconstitutional false arrest.(fn14) Also, plaintiff verified through the complaint that she had "personal knowledge that other women similarly situated have been denied rights guaranteed by the United States Constitution, Title VII and Rhode Island Law," and that she was suing on behalf of a class of at least 200 other women whose civil rights had been violated by the defendants during the three-year period leading up to plaintiff's "false arrest."(fn15) This type of verified allegation could have been sufficient to guarantee the plaintiff and her counsel wide-ranging discovery, followed by a federal trial on class action allegations. However, after conducting an evidentiary hearing, the magistrate judge who granted a later motion for sanctions concluded that "neither plaintiff nor her attorney knew of any other women whose Constitutional rights had been violated by loss prevention personnel and/or constables at the ... store between July 1, 1988 and July 1, 1991."(fn16) In that report and recommendation, the magistrate judge concluded that this and other frivolous factual allegations and legal claims had caused the defendants to incur counsel fees and costs of $65,170.16.(fn17)

Fusco v. Medeiros provides a clear example of the harms that can result from frivolous federal litigation. In light of such requirements as the filing of legal memoranda for almost all motions,(fn18) and the prospect of trial within one or two years, the defense of a federal lawsuit may require a greater expenditure of resources on a faster schedule, regardless of the merits of the case. As a result, the "nuisance value" of a federal lawsuit may be higher than that of a case brought in superior court, even if the substance of the two cases is the same. This in turn can create a possible incentive for an unscrupulous attorney to steer cases into federal court in the hope of obtaining a greater settlement based upon this greater "nuisance value."

The Evolution Of Rule 11 At The National Level

The United States Supreme Court's Advisory Committee on Civil Rules addressed this issue with the 1983 revision to Rule 11's certification requirement. This amendment sought to increase the incentive for litigants and their attorneys not to file frivolous lawsuits by, among other things, tightening Rule 11's requirements in the following ways:

1. While the previous version of Rule 11 required only that the signer have a subjective "good faith" basis for the claims made in a pleading or filing, the 1983 version of Rule 11 imposed an objective requirement that the legal and factual basis of the pleading or filing be reasonable under the circumstances;

2. While courts had discretion whether to impose sanctions under the previous version of Rule 11, the 1983 version made sanctions mandatory; and

3. While the preferred remedy under the previous version of Rule 11 was the striking of the frivolous pleading or filing, the 1983 revision of Rule 11 emphasized the remedy of ordering the violator to pay his or her opponent the reasonable attorney's fees that were caused by the violation (including those resulting from the bringing of the Rule 11 motion).

The 1983 amendments to Rule 11 resulted in a nationwide increase in sanctions litigation.(fn19) While some of this litigation had the salutary effect of creating precedents that would deter future frivolous lawsuits, experience in other jurisdictions led to criticism of the 1983 version of Rule 11. The Advisory Committee on Civil Rules summarized these criticisms as follows:

(1) Rule 11, in conjunction with other rules, had tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.(fn20)

Based upon these observations, the advisory committee proposed, and the Supreme Court adopted, the 1993 amendment to Rule 11. Among other things, the 1993 amendments changed Rule 11 in the following ways:

1. Parties seeking Rule 11 sanctions must now provide their opponents with 21 days' notice, creating a "safe harbor" during which the opponent can rectify the challenged conduct and render moot the sanctions motion;

2. Sanctions are no longer mandatory, but instead are

imposed based upon the court's discretion; and

3. The sanction of awarding attorney's fees to the moving party is curtailed, as courts must limit the sanction to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Also, the amended rule encourages the imposition of non-monetary sanctions, or fines paid into the court.

The 1993 amendments to Rule 11 generated further controversy, leading the United States House of Representatives to address the rule as part of the Attorney Accountability Act of 1995 that it passed in that session.(fn21) Section 4 of that legislation called for Rule 11 to be revised in ways that would substantially reinstate the 1983 version of the rule. The act did not become law, but the controversy surrounding Rule 11 continues to this day.

The Experience In Rhode Island's Federal District Court during the 1990s

Over the past seven years, Rhode Island Lawyer's Weekly has reported decisions in a total of 13 Rhode Island federal court cases in which the defendant moved for sanctions and/or an award of attorney's fees based upon a contention that the plaintiff's action was frivolous in whole or in part.(fn22) Most, but not all, of these sanctions cases were based upon Rule 11. Several of these reported cases included civil rights claims. In these cases, the court considered motions under 42 U.S.C. § 1988, under which prevailing defendants can recover attorney's fees from the plaintiff (but not plaintiff's counsel) for actions judged to be frivolous under a standard similar to Rule 11.23

Of the 13 case decisions, motions for sanctions and/or reverse attorney's fees were granted on five occasions (fn24) and denied in eight.(fn25) Of the five cases in which the court imposed sanctions, three resulted in awards of $50,000 or more, while the sanctions imposed in the other two cases were in less severe amounts.(fn26)

Given that more than 4,000 civil cases were filed during these seven years, it is clear that Rule 11 litigation has not created a significant burden upon the court. Also, a review of these case decisions reveals that Rhode Island's federal district court has not experienced the other problems with sanctions litigation that have been encountered in other jurisdictions.(fn27)

The three cases in which substantial sanctions were imposed are significant in that they involved rare and extreme conduct. The cases are as follows:

In Pontarelli v. Stone, 781 F.Supp. 114 (D.R.I.), app. dismissed, 978 F.2d 773 (1st Cir. 1992), the district court considered reverse attorney's fees petitions brought under 42 U.S.C. § 1988 (but not Rule 11) following the trial of a massive action involving allegations of discrimination in the operation of the Rhode Island State Police Training Academy.

The original complaint, brought on behalf of six plaintiffs, contained eight counts and named five defendants.(fn28) Before trial, one plaintiff dismissed her claims with prejudice, and judgment on the pleadings was entered in favor of one defendant (the Attorney General).(fn29) The court held a trial of the claims of one plaintiff (Mary Nunes), who prevailed against three of the remaining four defendants. The remaining plaintiffs settled their claims with the remaining defendants, agreeing to dismiss their claims with prejudice, preserving only their claims as a "prevailing party" under 42 U.S.C. § 1988.(fn30) After the appeal of Plaintiff Nunes was dismissed on technical grounds and the defendants' appeals were denied,(fn31) the plaintiffs and the two prevailing defendants filed cross- motions for attorney's fees under 42 U.S.C. § 1988. In addition to denying the plaintiffs' fee petition in full due to certain discrepancies and denying the petition for reverse attorney's fees by the defendant who prevailed at trial, the court granted the motion for reverse attorney's fees brought by defendant Attorney General, awarding the entire $54,168.50 requested.(fn32)

In reaching this holding, the district court first ruled that the claims against the Attorney General were "frivolous," as they consisted of sexual harassment claims based upon the premise that the Attorney General was the plaintiffs' "employer," while the facts were that the Attorney General "plays no role in the hiring or firing of state troopers."(fn33) The court also found that the claims against the Attorney General were made with an improper purpose, as part of "an effort to accomplish a goal completely unrelated to the stated purpose of litigation by making unsupportable claims against third persons [that] constitutes the kind of bad faith that warrants an award of attorneys' fees."(fn34)

Although the court's findings could arguably have supported a finding of Rule 11 violations against either the plaintiffs or their attorney, the court did not have a Rule 11 motion before it, thus the attorney's fee award was made against the clients and not their counsel.(fn35) However, after the district court's decision was announced, the Attorney General and the plaintiffs reached a settlement. The Attorney General dismissed its claim (now a judgment) for reverse attorney's fees against the plaintiffs in exchange for an assignment to the Attorney General of the plaintiffs' malpractice claim against their attorney, based upon (among other things) the attorney's failure to obtain a court-awarded attorney's fee for the prevailing plaintiffs, due to the above-mentioned discrepancies.(fn36) This settlement mooted the controversy, causing the dismissal of the former counsel's attempted appeal on behalf of her former clients.(fn37) The Attorney General's claim against plaintiffs' counsel for malpractice (which the plaintiffs assigned to the Attorney General in return for settlement)

is still pending.(fn38)

Pontarelli v. Stone was an instructive case in several ways. First, the district court documented several different types of sanctionable behavior, finding not only that the action against the Attorney General was frivolous, but also that it was brought for an improper purpose. Also, the district court found that plaintiffs' fee petition was brought in bad faith, and warranted referral to the Supreme Court Disciplinary Counsel.(fn39)

Second, Pontarelli illustrates the fallacy of the position of some that an effective Rule 11 would have a "chilling effect" upon the bringing of civil rights actions. As Pontarelli's outcome makes clear, defendants who have been subject to frivolous civil rights lawsuits always retain a remedy against the plaintiff through 42 U.S.C. § 1988, which remedy can be converted, through settlement negotiations, into a malpractice claim against the plaintiffs' attorney.

Finally, although it is true that the reverse attorney's fees imposed in Pontarelli required a large expenditure of resources on behalf of both the parties and the court, it is also true that numerous other portions of the litigation (most notably plaintiffs' attorney's fee petition) consumed even larger amounts of time. Thus, there is no reason to believe that the imposition of reverse attorney's fees created a significant additional burden for the court system.

The next significant sanctions case in the Rhode Island federal district court was Silva v. Witschen,(fn40) an action brought on behalf of several East Providence policemen who claimed that the city government and individual officials had improperly favored the successful candidate in a recent examination for police chief, thereby violating the plaintiffs' constitutional right to due process. Specifically, the plaintiffs alleged that government officials had assisted the newly named chief in locating a test preparation course which he attended, giving him (in the plaintiffs' view) an unfair advantage going into the examination. The district court granted the defendants' motion for summary judgment, finding that the plaintiffs did not have a constitutional property interest in promotion to the position of police chief.

At the conclusion of its written decision on the summary judgment motions, the court noted that the defendants also had filed a request for reverse attorney's fees and costs under 42 U.S.C. § 1988.(fn41) The court declined to rule on that request as the prevailing defendants had not submitted contemporaneous time records. Also, noting the First Circuit's recent decision in Lancellotti v. Fay,(fn42) the court suggested that "defendants should be given an opportunity to amend their motions in order to make a claim for attorneys' fees against plaintiffs' counsel under Rule 11.(fn43)

The experience that followed was a lesson in some of the complexities of Rule 11 motions.(fn44) The plaintiffs and their former attorney retained separate counsel in defense of the sanctions motions, while most of the individual prevailing defendants continued to be represented by separate counsel, each making their own argument for sanctions.(fn45) The court conducted a bench trial on the issue of liability under Rule 11 (for counsel and/or the clients) and/or 42 U.S.C. § 1988 (for the clients only) which required 13 days of hearings in a proceeding that had "taken on a life of its own."(fn46) The court held that counsel was liable for having filed a frivolous complaint, but that his clients were not.(fn47) On this basis, the Silva court concluded that plaintiff's counsel was liable for all reasonable attorney's fees that resulted from the lawsuit.(fn48) The Silva court then considered argument on the proper amount of the sanction, which required an additional hearing.(fn49) At that hearing, counsel for the victorious defendants submitted billing records documenting more than $250,000 in attorney's fees for nearly 2,000 hours of work.(fn50) Collectively, counsel spent a total of less than 500 hours litigating the merits of the action (which was dismissed with prejudice) and then, following that dismissal, more than 1,500 hours litigating the issue of sanctions.(fn51) Put another way, the Silva defense attorneys collectively spent three hours on sanctions litigation for every hour spent litigating the action's merits.

The Silva court's resulting decision on the sanctions motions was Solomonic. With regard to the merits phase, the court granted the bulk of the fees requested, only denying fees for: (1) a minor amount of work that was not properly documented or justified, and (2) a request by outside counsel for compensation at an hourly rate that exceeded the terms contained in their contract of representation.(fn52) Thus, the Court awarded a total of $53,528.81 for attorney's fees and costs related to the litigation of the action on the merits. However, the court disallowed in full the petitions by counsel for the individual defendants for fees incurred litigating the issue of sanctions. And, the court reduced by 50% the petition of the city's counsel for fees incurred in the sanctions phase to reflect the fact that approximately half of the sanctions litigation effort was directed at the unsuccessful motion for reverse attorney's fees against the clients. Thus, from one point of view, the court's $75,349.96 sanction was the largest one of its kind imposed in this district to date; but from another point of view, the court set a different record by denying more than $175,000 in sanctions requested as part of the hearing.

In reaching this result, Silva took an important stand against the type of "satellite litigation" that, when encountered in other districts, led to the Rule 11 amendments. Through a series of rulings made on individual requests for attorney's fees incurred during the sanctions phase, Silva effectively limited the amount of "reasonable" sanctions litigation costs to an amount that was one third of the total, a proportion that is common elsewhere in litigation. If this standard is preserved (as it

was in Fusco v. Medeiros, described in further detail below), then counsel will have a strong incentive to limit the sanctions phase of litigation to an effort that is proportionate to the extent of the sanction at issue.(fn53)

Counsel for the plaintiffs appealed the ruling to the First Circuit Court of Appeals.(fn54) In upholding the decision of the district court, the First Circuit expressed a general deference to the district court's discretion to fashion appropriate procedures and relief with regard to sanctions.(fn55) Also, the First Circuit rejected the argument by plaintiffs' counsel that the sanctions had to be recalculated in light of the fact that amendments to Rule 11 came into effect on December 1, 1993, while the case was pending on appeal.(fn56) In reaching this conclusion, the First Circuit relied both on both legal considerations (that the sanctioned conduct occurred prior to the amendment) and on practical ones (that it would cause "inordinate delay and expense to innocent parties" if the case were remanded for further proceedings).(fn57)

The third case in this trio, Fusco v. Medeiros,(fn58) arose from the termination of the plaintiff, a store clerk, by a security manager who claimed that the plaintiff had, without authorization, sold a $79.99 Guess jeans jacket to a friend of her brother's for $4.99.(fn59) The plaintiff and her counsel filed a seven-count, class action, federal court complaint that counsel signed and the plaintiff verified.(fn60) Among other things, the complaint alleged claims: (1) against the store detective for sexually harassing the clerk; (2) against the Warwick Police Department because the store detective had arrest powers; (3) on behalf of all women who had shopped in the store (or in any other store in the city of Warwick) during the past several years, who had been the victim of false arrest and/or sexual harassment and (4) on behalf of the terminated clerk against her supervisors, on the theory that they had conspired to violate her civil rights by failing to take appropriate action against the store detective.(fn61) Over the course of the following two years, the court dismissed the action against the store and its employees in stages, first denying class certification, then dismissing five of the nine counts due to legal deficiencies, and finally dismissing the remaining counts due to discovery violations.(fn62) At this point, plaintiff's counsel withdrew, and successor counsel stipulated to the dismissal of the remaining counts against the remaining defendants.(fn63)

The store defendants moved for sanctions and/or attorney's fees under three provisions, 42 U.S.C. § 1988 (against the plaintiff), Rule 11 (against the plaintiff and her former counsel) and 28 U.S.C. § 1927 (against former counsel only). 28 U.S.C. § 1927, which dates back to 1948 but which is not as well-known as Rule 11, provides as follows:

Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The court assigned the matter to the United States Magistrate Judge, who sought to streamline the procedures, thereby minimizing the extent of "satellite litigation."(fn64) Through his control over the discovery and hearing process, the magistrate judge limited sanctions phase discovery to the exchange of documents, and the sanctions hearing to a single day in which three witnesses testified.(fn65)

These efforts at economy proved to be successful. Despite such tactics as last-minute requests that the magistrate judge recuse himself (a tactic that the court later characterized as an example of the attorney's "arrogant behavior, which has persisted through even the sanctions phase of this matter"),(fn66) the attorney's fees requested for the sanctions phase of the case were limited to $30,664.70 (or one less than one third of the total recovery), in contrast to the more than $150,000 requested in Silva v. Witschen.(fn67)

In his report and recommendation, the magistrate judge recommended that a Rule 11 sanction of $95,834.86 be imposed against the attorney, representing nearly the total cost of the litigation plus the complete cost of bringing the motion for sanctions.(fn68) However, similar to the Court's finding in Silva v. Witschen, the magistrate judge recommended that no reverse § 1988 attorney's fees be imposed against the plaintiff based upon his finding that she reasonably relied upon her attorney's advice.(fn69) The magistrate judge also recommended that the sanction against the attorney be based upon the alternate ground of 28 U.S.C. § 1927.(fn70) The district court adopted the report and recommendation in full, and the sanctioned attorney did not appeal what is now a final judgment.(fn71)

Lessons From Rhode Island's Experience

Through the trio of major sanctions cases decided in the Rhode Island federal district court, the court has taken a firm stand against the filing of frivolous lawsuits. Unfortunately, the body of law that the court has developed is now in question, as a result of the 1993 amendments to Rule 11. Those amendments, as described above, steer a court toward non-monetary sanctions or payments into the court, rather than the award of attorney's fees to the party harmed by the sanctionable conduct in an amount commensurate to the harm caused. This change increases the cost and reduces the possible benefit to parties considering whether to bring a motion for sanctions. It is therefore no surprise that Rule 11 motions have decreased nationwide since the institution of the amendments.(fn72)

It is too soon to tell how the amendments to Rule 11 will affect practice in the district of Rhode Island, but personal experience supports the conclusion that the Rule

11 amendments will dilute the enforcement of Rule 11. This writer represented the successful defendants in Fusco v. Medeiros, and before bringing the motion on their behalf, advised them as to the likely outcome of what promised (and proved) to be contentious sanctions litigation. If those defendants had been advised that any sanction imposed by the court likely would not have resulted in any recovery to them (other than the reasonable costs of bringing the motion), it would have been much more difficult, if not impossible to justify bringing the motion.(fn73) More generally, the amended Rule 11's penalty provisions (which stress deterrence over compensation) will likely provide a basis for future "first offenders" to argue that a non-monetary sanction, or a fine payable to the court in an amount much less than attorney's fees will serve to deter similar conduct in the future. However, in the long run, amended Rule 11's standard of limiting sanctions to the minimum amount sufficient to deter future misconduct may weaken the deterrent effect of Rule 11 upon other attorneys, to whom the sanction will no longer seem as prohibitive in the unlikely event that a violator becomes subject to a sanctions motion. Thus, sanctions may become more rare, less onerous and consequently less of a deterrent.

Post-Amendment Options

While the change in Rule 11 potentially weakens the court's primary tool to deter frivolous litigation, litigants and the court retain other options to control the filing of frivolous lawsuits, two of which appeared in the trio of significant sanctions cases described above.

a.

Reverse Attorney's Fees Under 42 U.S.C. § 1988

The first tool, for civil rights cases, is the award of reverse attorney's fees against the party under 42 U.S.C. § 1988. Because all three of the major sanctions cases decided in the district to date have had a civil rights component, one can expect that there will be future Rule 11 cases in which defense motions for attorney's fees under 42 U.S.C. § 1988 will be available. In the three major sanctions cases described in the district of Rhode Island, the court considered 42 U.S.C. § 1988 each time, imposing reverse fees in Pontarelli v. Stone, (see supra p. 9) while rejecting it in Silva v. Witschen, (see supra p. 32) and Fusco v. Medeiros, (see supra p. 7). In the two cases in which the court rejected the option of reverse fees against the represented party, the court reasoned that the client had the right to rely upon the attorney's advice about whether to bring a lawsuit, and that only the attorney should be responsible for the consequences of that advice.(fn74)

While the Silva and Fusco decisions express a reasonable allocation of responsibility between attorney and client, there are alternatives that, while equally fair to represented parties, would probably better accomplish the goal of deterrence under Rule 11. 42 U.S.C. § 1988 does not, by its language, provide an "advice of counsel" defense to a represented party bringing a frivolous lawsuit. Also, when a represented party is ordered to pay reverse attorney's fees under 42 U.S.C. § 1988, that party may acquire a malpractice claim against its attorney. In this second action, the party may obtain full compensation, not only for the sanction, but also probably for some or all ofthe fees paid to counsel through the course of representation. And, this cause of action against the attorney can prove to be the basis for a settlement between the sanctioned party and the party prevailing on the reverse attorney's fees motion. This is exactly what occurred in Pontarelli v. Stone.(fn75) From this writer's standpoint, these additional avenues of relief properly address any concerns that a court may have about imposing reverse attorney's fees upon a represented client.(fn76)

B. 28 U.S.C. §1927

A second enforcement tool that courts retain after the amendment to Rule 11 is the sanction power under 28 U.S.C. § 1927. As is true for Rule 11, sanctions under § 1927 are based upon an objective standard of conduct; therefore, the defense of a "good heart, but an empty head" is not applicable.(fn77) As a result, courts in the past have viewed 28 U.S.C. § 1927 to apply quite similarly,if not identically to Rule 11.(fn78) To date, this section has proven less popular than Rule 11. However, that may change with the procedural and substantive amendments to Rule 11 that do not apply to 28 U.S.C. § 1927.

C.

Alternative Remedies Under Rule 11

The last alternative is for the court to change its current practice of deferring Rule 11 issues with frivolous lawsuits to the disposition of the action on other grounds. While there may be good reasons for this practice (which follows from the above-described policy underlying Rules 12 and 56 to encourage the resolution of disputes on their merits), the result is to encourage the less scrupulous to file frivolous lawsuits on the hope or prayer that either (i) the opponent will agree to settle the case early, given the prohibitive cost of federal litigation, (ii) discovery will generate some information, unrelated to the claims stated in the complaint, that will give the case a new basis for going forward and/or for settling on terms favorable to the plaintiff or (iii) even if the case ultimately results in a judgment for the defense, that the defendant will not seek sanctions because of the expense and burden involved. Also, Rule 11's deterrence may not work for certain parties and/or their attorneys, who believe themselves to be judgment-proof in the event that sanctions are eventually imposed.(fn79)

For this type of case, the court's current reluctance to act

until final judgment prevents the possibility of effective relief. Instead, the court should consider whether the lawsuit is frivolous before the damage is inflicted. Under this proposal, the court would use its broad discretion to fashion appropriate Rule 11 remedies earlier in the litigation. This proposal has the potential to accomplish the goal of protecting parties and the court from frivolous lawsuits more effectively and at less expense than the current tool of post-judgment sanctions hearings.

There are three precedents for this proposal. The first is in the area of prisoners' lawsuits. Prisoners also are practically immune from the conventional sanctions available under Rule 11, and will not be deterred from filing frivolous lawsuits by the risk of monetary sanctions that they cannot afford to pay. As a result, the Eighth Circuit has developed a doctrine of considering, through a Rule 11 motion, whether a prisoner's lawsuit is frivolous, and dismissing it with prejudice if the prisoner is unable to demonstrate a reasonable basis for going forward.(fn80) This doctrine is analogous to rulings by the Rhode Island federal district court dismissing with prejudice actions brought by a pro se litigant based upon his failure to pay court-imposed sanctions from earlier, frivolous litigation.(fn81)

A second precedent is 28 U.S.C. § 1915, under which courts make a preliminary assessment of whether an action is frivolous before granting a plaintiff leave to proceed in forma pauperis.(fn82) (Congress recently has tightened these requirements in the Prison Litigation Reform Act of 1995, which was signed by the President on April 26, 1996.)(fn83) Thus, for plaintiffs who seek the court's assistance in paying filing fees and costs, their right to proceed is conditioned upon their ability to demonstrate, from the outset, that their action is not frivolous.

The third precedent is a practice that this court has developed with regard to lawsuits brought under RICO, 18 U.S.C. § 1961 et seq. RICO has proven in the past to be an area ripe for frivolous lawsuits. As the First Circuit stated, the mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect as those named as defendants. In fairness to innocent parties, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.(fn84)

The Rhode Island federal district court, along with other districts in the First Circuit,(fn85) has required parties filing civil RICO actions to submit a RICO case statement, under which plaintiffs must describe in some detail the factual basis upon which they base the lawsuit.(fn86) In the case with which this writer is familiar, the court that ordered the plaintiffs to submit a RICO case statement stated in its order that "[f]ailure to comply subjects the case to dismissal."(fn87) The First Circuit has upheld a Rule 11 sanction that a lower court imposed for filing a frivolous RICO case statement.(fn88) Following the argument just developed, the remedy of dismissal (with or without prejudice) should be available as well.

While such a requirement appears to conflict with the policy of Rules 8(a)(2) and 9(b) to eliminate intricate pleading requirements except when a plaintiff alleges fraud or mistake,(fn89) the RICO case statement requirement will help to deter the filing of frivolous lawsuits in an area of the law in which such suits are particularly harmful. However, it is not clear whether current law would permit a court to extend this sort of filing requirement to other lawsuits, especially in the civil rights area where frivolous lawsuits have previously been a problem.(fn90)

These three precedents present circumstances under which federal courts have considered the factual merits of a lawsuit at its inception. In each instance, courts are not asked to decide summarily a close case that deserves discovery and a trial. Instead, the court has made the more limited inquiry as to whether a case is so frivolous that a party should not be permitted to go forward. In light of weaknesses in amended Rule 11, such a remedy should be considered and used when appropriate. In those cases in which a defendant can, in good faith, question whether an action is frivolous at its outset, the court could consider whether the plaintiff has a non-frivolous factual basis for the lawsuit. If the court can determine in an early stage that the suit was frivolous, then it can fashion a remedy of a much smaller sanction, as well as dismissal. In the right circumstances, the court even could provide that the dismissal was without prejudice, thereby allowing the plaintiff the opportunity to refile at a later date if further inquiry provides an adequate basis for going forward at that time. Alternatively, the court could follow the model of Rule 62 as it applies to appellants seeking a stay of execution, and permit a party with a case apparently lacking a sufficient factual basis to proceed forward on the condition of posting a supersedeas bond sufficient to pay for any possible subsequent sanctions. In this way, the court would be able to prevent the harms of frivolous litigation without the costs involved with post-judgment sanctions motions.

One can anticipate certain objections to this type of remedy. Plaintiffs might complain that it would be too burdensome to assemble this type of information at the outset of a lawsuit. This complaint is not well-founded, however, as a plaintiff has a duty under Rule 11 to make exactly this sort of assessment prior to bringing suit. Also, plaintiffs in most federal jurisdictions other than Rhode Island (such as Massachusetts) are required, under the 1993 Amendments to Fed.R.Civ.P. 26, to disclose basic factual information known to them soon after initiating an action.

One can also criticize this proposal on the ground that defendants may use this "early Rule 11" option too aggressively, burdening both courts and plaintiffs with an additional requirement. There are good reasons to believe

that such a criticism is not appropriate in this district. As noted before, this district has differed from the rest of the country in its relative absence of Rule 11 motions, as well as in its relative lack of the discovery problems that led the United States Supreme Court to promulgate amended Rule 26, and led other districts to adopt it. Further, Rule 11 itself provides a remedy for frivolous Rule 11 motions. For these reasons, there seems to be much more to gain than there is to lose by allowing courts, in rare cases, to consider Rule 11 issues before a defendant is required to suffer the full damage resulting from a frivolous complaint.

Conclusion

Rhode Island's federal district court did not have the serious problems with Rule 11 motions experienced elsewhere that led to the rule's amendment in 1993. Unfortunately, Rhode Island was not given the opportunity to "opt out" of the amendment in the same way as it chose to "opt out" of the discovery rules amendments that solved problems encountered elsewhere, but not in Rhode Island. It is too early to tell whether the amended Rule 11 will lead to an increase in frivolous suits in the district. One can hope, however, that the court will make use of the deterrence tools that it retains to keep control over its docket.

Footnotes:

1 E.g., Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980).

2 E.g.,Weisman v. Lee, 728 F.Supp. 68 (D.R.I.), aff'd, 908 F.2d 1090 (1st Cir. 1990), aff'd, 505 U.S. 577 (1992).

3 Fed.R.Civ.P. 26(a).

4 See, e.g., Issacchoroff & Loewenstein, "Unintended Consequences of Mandatory Disclosure," 73 Tex. L. Rev. 753 (1995).

5 See Fed.R.Civ.P. 26(a)(1) (allowing districts to opt out); General Order, In the Matter of the Local Rules of Civil Procedure, (D.R.I. May 9, 1994).

6 Fed.R.Civ.P. 11 is not limited to frivolous actions, but is a basis for sanctioning any frivolous pleading or any other document filed in federal court. As a result, courts can impose Rule 11 sanctions upon individual pleadings, motions, etc. that have been filed as part of an otherwise meritorious lawsuit. And, in the Rhode Island federal court, Rule 11 sanctions have been imposed under these circumstances. See supra note 22. Also, courts have the power to impose sanctions under other federal rules, such as for discovery abuse under Fed.R.Civ.P. 26(g). However, the focus of this article will be the imposition of sanctions to deter frivolous lawsuits, under Rule 11, as well as 28 U.S.C. § 1927 and 42 U.S.C. § 1988.

7 It goes without saying that Rhode Island's federal district court is actually a combination of several judges, and that decisions by one judge do not create a binding precedent for any other. The opportunity for variation among judges is particularly broad in the area of sanctions, in which the discretion of the judge plays a significant role. This article does not seek to discern differences between individual judges of the U.S. District Court of Rhode Island; however, the reader will have the opportunity to undertake such a review by researching the citations provided below.

8 Model Rules of Professional Conduct, Rule 3.1 (prohibiting lawyers from advancing frivolous claims or defenses); Preamble,

9 Fed.R.Civ.P. 8(a)(2). For a more detailed discussion of these provisions of the 1938 Rules, see generally 5A Wright, Miller and Cooper, Federal Practice and Procedure, § 1331.

10 Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957).

11 No. 91-333-L (D.R.I.).

12 Fusco v. Medeiros, No. 91-333-L, slip op. (D.R.I. March 11, 1996) (referred to below as "Fusco Report"), adopted by the district court in memorandum and order, August 6, 1996.

13 Id. at 6.

14 Id. at 7-9.

15 Id. at 7.

16 Id. at 17-18 (emphasis in original).

17 Id.

18 See Local Rule of U.S.Dist.Ct. for Dist. of R.I. 12(1) (requiring legal memoranda for all motions except those brought under Fed.R.Civ.P. 36 and 37(a)).

19 Tobias, The 1993 Revisions of Rule 11, 70 Indiana Law Journal 171, 173 (1994).

20 Letter from Sam. C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, att. B, at 3 (May 1, 1992), reprinted in 146 F.R.D. 519, 523 (1993), and discussed in Leiferman, The Rule 11 Amendments: The Transformation Of The Venomous Viper Into The Toothless Tiger, XXIX Tort & Insurance Law Journal 498 (1994).

21 H.R. 988, 104th Cong., 1st Sess. (1995), discussed in Tobias, Why Congress Should Reject Revision Of Rule

11, 160 F.R.D. 275 (1995).

22 This analysis in this article is limited to cases in which the court imposed sanctions for frivolous lawsuits. There have been other instances in which the court has considered motions for sanctions for other frivolous papers filed in court, e.g., In re Anderson, 128 B.R. 850 (D.R.I. 1991) (imposing sanction for frivolous claim by bankruptcy debtor that asset was not part of estate); R.I. Hosp. Trust Nat. Bank v. Dube, 136 F.R.D. 37 (D.R.I. 1990) (denying motion for sanctions for frivolous defense); Fashion House v. K Mart Corp., 124 F.R.D. 15 (D.R.I. 1988) (imposing sanction for frivolous motion for contempt and/or sanctions).

23 See Christiansburg Garment v. EEOC, 434 U.S. 412, 421 (1978) (stating standard for award of "reverse attorney's fees" under 42 U.S.C. § 1988 to prevailing defendants); Roadway Express, Inc. v. Piper, 447 U.S. 752, 760-63 (1980) (only parties, not their counsel, are liable for attorney's fees under 42 U.S.C. § 1988).

24 Silva v. Witschen, 745 F.Supp. 798 (D.R.I. 1990) (decision on merits, not appealed), No. 90-005-L, slip op. (D.R.I. Nov. 5, 1992) (decision on liability for sanctions), aff'd 19 F.3d 725 (1st Cir. 1994); D'Amario v. Russo, 750 F.Supp. 560 (D.RI. 1990) (dismissing on merits, inviting defendants to file motion for sanctions; $6,344.00 sanction imposed in memorandum and order, D'Amario v. Russo, C.A. No. 89-11-L (D.R.I. March 21, 1991) (slip op.)); Pontarelli v. Stone, 781 F.Supp. 114 (D.R.I.), app. dismissed, 978 F. 2d 773 (1st Cir. 1992); Keating v. State of R.I., 785 F.Supp. 1094 (D.R.I. 1992) (decision on merits inviting motion for Rule 11 sanctions; sanction of $5,625.00 ultimately imposed); Fusco Report, supra note 12.

25 Farone v. Sciarretta, 131 F.R.D. 29 (D.R.I. 1990); Vizvary v. Vignati, 134 F.R.D. 28 (D.R.I. 1990) (report and recommendation of magistrate judge recommending denial of motion for sanctions; adopted by district court); Stearn v. Pearson, 20 Fed.R.Serv. 3d 49, 1991 WL 236587 (D.R.I. Jan. 24, 1991) (denying motion for sanctions); Avnet, Inc. v. Allied-Signal, Inc., 825 F.Supp. 1132 (D.R.I. 1992) (declining to adopt report and recommendation of magistrate judge recommending imposition of sanctions); Dobson v. Aetna Life and Casualty Co., No. 93-571-B, R.I. Lawyer's Weekly July 4, 1994 (report and recommendation of magistrate judge to impose sanctions, not adopted by district court); U.S. v. Davis, No. 90-484-P, slip op. (D.R.I. August 5, 1991) (report of magistrate judge) (Adopted by district court); Roma Construction Co., Inc. v. aRusso, 906 F.Supp. 78 (D.R.I. 1995) (declining to adopt report and recommendation of magistrate judge recommending imposition of sanctions); Donnelly v. Board of Governors, 1996 WL 685736, 94-408-T (D.R.I. Nov. 26, 1996) (deny reverse attorney's fees under 42 U.S.C. § 1988).

26 Supra note 24.

27 By way of background, Rhode Island's federal district court encountered some initial difficulty in applying Rule 11. In Lancellotti v. Fay, 909 F.2d 15 (1st Cir. 1990), the First Circuit reversed and remanded a 1989 decision by the Rhode Island federal district court to deny sanctions based upon the district court's finding that the attorney had acted subjectively in good faith. The First Circuit held that the district court should have applied an objective, rather than a subjective, test, and on remand the district court did impose a sanction. From a conversation with one of the counsel to this action, this writer learned that the court's sanction was in a nominal amount.

28 781 F.Supp. at 117.

29 Id.

30 Id. at 118.

31 Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991).

32 Id.

33 781 F.Supp. at 126.

34 Id.

35 See Roadway Express supra note 23.

36 Schiff v. R.I. No. 96-116-P, slip op. at 3 (D.R.I. Aug. 8, 1996).

37 Pontarelli v. Stone, 978 F.2d 773(1st Cir. 1992).

38 That litigation has been complicated by, among other things, litigation over the effect of counsel's bankruptcy upon the claim. Schiff v. R.I., No. 96-116-P (D.R.I. Aug. 8, 1996) (reversing default judgment entered by bankruptcy court and remanding for further proceedings).

39 781 F.Supp. at 127. The Supreme Court ultimately suspended the attorney from practice due to conduct in this matter. Matter of Schiff, 677 A.2d 422 (1996).

40 Silva v. Witschen, 745 F.Supp. 798 (D.R.I. 1990).

41 Id. at 805.

42 909 F.2d 15 (1st Cir. 1990), discussed in further detail, supra note at 27.

43 745 F. Supp. at 806.

44 The commentary that follows is largely shaped by this writer's personal involvement in the Silva case. This writer assisted lead counsel in the defense of the plaintiffs' former attorney against the Rule 11 claim after the case had been dismissed on the merits, through the trial on Rule 11 liability.

45 Silva v. Witschen, No. 90-5-L, slip op. at 8 (D.R.I. May 6, 1993).

46 Silva v. Witschen, No. 90-5-L, slip op. at 3 (D.R.I. Nov. 5, 1992).

47 Id. at 15-19.

48 Id.

49 Silva v. Witschen, supra note 45 at 1.

50 Id. at 8.

51 Silva v. Witschen, 19 F.3d 725, 731-32 (1st Cir. 1994).

52 Silva v. Witschen, supra note 45 at 14-20.

53 The Silva court did not propose a rigid mathematical formula; nor would one be appropriate. For example, the costs of sanctions litigation are largely in the control of the respondent to the motion, who can choose to escalate those costs through, for example, additional frivolous motions to seek the recusal of the judge. See Fusco v. Medeiros (noting the sanctioned attorney's "arrogant behavior, which has persisted through even the sanctions phase of this matter").

54 Supra note 51.

55 Id. at 731-33.

56 Id. at 727-29.

57 Id. at 726-28.

58 D.R.I. No. 91-333-L. (None of the decisions in this matter are reported or published.)

59 Fusco v. Medeiros, No. 91-333-L, slip op. at 4 (D.R.I. March 11, 1996) (report of magistrate judge,referred to below as "Fusco Report") adopted by the district court in memorandum and order dated August 6, 1996.

60 Supra note 59 at 8.

61 Id.

62 Id. at 34-35, (describing denial of class certification) 12-13. (describing other case history).

63 Id. at 13.

64 See Advisory Committee Notes to 1983 Amendments to Rule 11 (stating concern about risk of "satellite litigation" on sanctions issues).

65 Supra note 59 at 1.

66 Fusco v. Medeiros, No. 91-333-L Memorandum and Order, slip op. at 12. (D.R.I. Aug. 6, 1996).

67 Supra note 59 at 40.

68 Id. at 41.

69 Id. at 33-36.

70 Id. at 31-33.

71 Fusco v. Medeiros, No. 91-333-L, Memorandum and Order, slip op. at 5 (D.R.I. Oct. 22, 1996).

72 ABA Journal (March, 1995) 11.

73 The district court in Fusco applied the pre-amendment version of Rule 11 because most of the sanctioned attorney's conduct in question had occurred prior to the amendments' December 1, 1993 effective date. Fusco v. Medeiros, supra note 66 at 3-5. The court also held that the amount and form of the sanction also could be justified under either the amended version of Rule 11 or under 28 U.S.C. § 1927. Id. at 9-10.

74 See Silva v. Witschen, No. 90-5-L, slip op. at 15-16 (D.R.I. November 5, 1992); Fusco Report supra note at 35-36.

75 Schiff v. R.I., No. 96-116-P, slip op. at 3 (D.R.I. Aug. 8, 1996).

76 Of course, this theory would fail in practice if the attorney were unable to satisfy a malpractice judgment. In this writer's opinion, this scenario provides a justification for requiring all attorneys to carry a minimum amount of malpractice insurance as a condition of licensure. See R.I. Gen. Laws § 42-14.1-2 (requiring physicians to carry malpractice insurance). This requirement could be adjusted for certain cases, such as for government attorneys, where the employer could provide adequate security for attorney employees.

77 Cruz v. Savage, 896 F.2d 626, 631-32 (1st Cir. 1990).

78 See, e.g., Cruz, supra note 77 at 74.

79 See supra note 38 (where award of reverse attorney's fees against party under 42 U.S.C. § 1988

led to malpractice action against attorney, attorney declared bankruptcy).

80 See Carmen v. Treat, 7 F.3d 1379 (8th Cir. 1993); Joiner v. Delo, 905 F.2d 206 (8th Cir.1990); American Inmate Paralegal Association v. Cline, 859 F.2d 59 (8th Cir.), cert. denied,109 S.Ct. 565 (1988).

81 D'Amario v. Pine, 96-327-ML, slip op. (D.R.I. Aug. 22, 1996) (report and recommendation of magistrate judge recommending dismissal based upon plaintiff's failure to pay prior sanction in D'Amario v. Russo, No. 89-11-L, supra note 24, adopted by district court).

82 E.g., Nelson v. Ellerthorpe, 94-593-ML (D.R.I.

December 1, 1994) (report of magistrate judge recommending denial of in forma pauperis request because merits of action are frivolous) (adopted by district court, Jan. 4, 1995).

83 Pub. L. 104-134, 110 Stat. 1321 (1996), Title VIII, § 804, codified as 28 U.S.C. § 1915.

84 Figueroa Ruiz v. Allegria, 896 F.2d 645, 650 (1st Cir. 1990); see also Ryan v. Clemente, 901F.2d 177 (1st Cir. 1990) (requiring that Rule 11 sanction be imposed in frivolous RICO action).

85 See, e.g., O'Ferral v. Trebol Motors Corp., 45 F.3d 561 (1st Cir. 1995) (upholding imposition of Rule 11 sanction for filing of frivolous RICO case statement).

86 See, e.g., Roma Construction Co. v. Russo, et al., No. 94-0448-B, Order Requiring Filing of RICO Case Statement, (D.R.I. Nov. 21, 1994).

87 Id.

88 See O'Ferral, supra note 82.

89 See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160 (1993). 82 Id.