

Winter 1991-92



The Federal Bar Association's

## Federal Litigation Section

### Dear Section Members:

This is the first edition of *Sidebar* for the 1991-92 Fiscal Year. I want to take this opportunity to inform you of the new Committee Chairs. If you are interested in being on one of the Committees or if you have suggestions for the Committees, please contact the following individuals:

#### Federal Circuit and Claims Court

Mr. David N. Kragseth  
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### Claims Court/Federal Circuit Committee

David N. Kragseth and John K. Lapiana have been appointed Co-Chairpersons of the Claims Court/Federal Circuit Committee. They are currently seeking interested attorneys or students to serve on the Committee and to design a substantive program of interest to both Committee and Association members in general.

Both the claims court and the federal circuit are courts of specialized, but national jurisdiction. However, their decisions have far-reaching effects on the federal judiciary. For example, the claims court, which often holds hearings and trials throughout the country, is an important forum for resolution of government contract, constitutional takings, tax, federal government employee disputes, and, as its name indicates, a variety of money claims against the United States. The federal circuit, which recently has been holding oral arguments in different cities, but generally hears cases in Washington, D.C., possesses national jurisdiction over patent cases, Tucker Act cases (non-tort claims against the United States), appeals from all federal boards of contract appeals, the Claims Court, the Court of International Trade, the Merit Systems Protection Board, the Court of Veterans Appeals, and the Patent and Trademark Office, among others.

In light of the broad jurisdiction of these two federal courts, the Committee Chairpersons are hoping to put together a program early next year that will involve both general federal practice issues as well as substantive presentations on the court's areas of exclusive jurisdiction. Also being planned are receptions to introduce the Committee and the courts to interested FBA members.

Members who are interested in participating on the Committee or have program suggestions, please contact either David N. Kragseth, Zelle & Larson, Suite 4400, 33 S. 6th St., Minneapolis, MN 55402, or John Lapiana, Commercial Litigation, Civil Division, U.S. Department of Justice, 550 11th St., NW, Washington, D.C. 20530.

*Chair's Message*, continued from page 1

### Appellate Law and Practice

Amy Weil

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I expect this to be a very exciting year for our Section. As you are aware Proposed Amendments to the Federal Rules of Civil Procedure are being considered. Each FBA Chapter President has been contacted about submitting comments regarding the changes. You or your Chapter may also submit comments to our Federal Rules of Procedure Committee. The Section will submit written comments regarding the proposed amendments. Additionally, I have requested that we be allowed to present comments at the second public hearing.

As usual, I am requesting your suggestions regarding any specific programs or projects which would be of interest to any section members. The Section will co-sponsor projects with any of the local Chapters or present its own program.

Anyone that would like to submit an article to *Sidebar* should contact our Newsletter Editor, Mark Lee Hogge, Fisher, Christen & Sabol, Suite 590, 2000 M Street, NW, Washington, D.C., 20036, (202) 659-2000. You choose the topic.

Sincerely,

Adrienne A. Berry  
Chair, Federal Litigation Section  
Segal, Isenberg, Sales, Stewart & Cutler,  
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## Mediation: The Star in ADR's Crown

By Garry D. Woodward\*

As a lawyer, if you are not interested in the contents of this article you are ensuring your opportunity to fall behind in the practice of law. On the other hand, you could be on the cutting edge of the newest legal developments of what is collectively called alternative dispute resolution, or simply ADR.

As I write this article, the current issue of *The National Law Journal*, dated Monday, October 28, 1991 (Vol. 14, No. 8) relates that more than 150 law firms—including the nation's ten largest—have pledged in a "signathon" to educate their attorneys as well as their clients about alternative dispute resolution.

In the federal area, Congress, in enacting the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), shows an intent to experiment in ADR after finding:

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(D) Utilization of alternative dispute resolution programs in appropriate cases." (Sec. 102)

Further, the beginning of an era of more consensual resolution of agency disputes was commenced by the passage of the Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

As a litigation attorney, you will be involved in alternative dispute resolution (ADR) if you are not already involved. Whether you look favorably on the prospect is almost irrelevant if you want to be a litigator. This is a prediction, and the prospect is not all bad; indeed, you may like it. I have particular reference to mediation. If ADR were symbolized by a lady of justice wearing

\*Garry D. Woodward is an attorney and litigator practicing in Des Moines, Iowa, who is now active in mediation. He is President of the Iowa Chapter of the Federal Bar Association.

a crown, surely she would have crown with a large star sapphire front and center depicting mediation.

### I. Litigation Alone Inadequate

Lawyers today are confronted with an age-old problem—lack of esteem. Not only have lawyers suffered barbs and distrust, law is not all that popular. Of course, esteem as well as respect for lawyers may vary from time to time. In the Bible, in reproaching a lawyer, Christ said "Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne and ye [y]ourselves touch not the burdens with one of your fingers."<sup>1</sup> By the seventeenth century it apparently had not become any better for lawyers when it was said:

To go to law, is for two persons to kindle a fire at their own cost, to warm others, and single themselves to cinders; and because they cannot agree, to what is truth and equity, they will both agree to unplume themselves, that others may be decorated with their feathers.<sup>2</sup>

Early in this century Roscoe Pound upset the American Bar Association in his address at their convention when he pointed out failings, but offered hopes for courts to become "swift and certain agents of justice" but noted that "[A]s long as there have been laws and lawyers, conscientious and well meaning men have believed that laws were mere arbitrary technicalities and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice."<sup>3</sup>

A decade past the middle of this century attorneys were at a comparative high. Attorneys, although not necessarily popular, dominated the state legislatures and were active in community leadership. They thought of themselves as being in a "gentlemen's profession," even though not everyone was a gentleman and ladies were starting, although slowly, to join the profession.<sup>4</sup>

It is beyond the scope of this article to consider reasons for change. Needless to say, right or wrong, esteem for the profession today is at a low. The number of cases and the costs of litigation have risen steadily. Such costs, as

well as many judgments, have been greatly in excess of inflation. These trends have become overwhelming in the eyes of the public, particularly in the last few years. Lawyers and lawsuits have become more and more the object of scorn by the press, and the standard fare of our comedians include jokes about lawyers.

Small wonder that an alternative way to resolve disputes and hasten the conclusion of litigation has been sought. It is not enough just to defend attorneys and to argue that much good to society is dependent upon the legal profession. The public will act upon what they think is true even though it is at least partly false. Also, attorneys cannot deny that a need to ease frictions between people is a better social goal than more litigation and huge verdicts; nor can lawyers deny that costs of litigation and the time required to resolve disputes is a problem. This contributes to the present low esteem for the profession. Litigation improvements alone are inadequate; thus the need for ADR. ADR can provide appreciable relief and reform for the system.

Fed. R. Civ. P. 11 targets the lawyers' failings with sanctions to be imposed upon them to make the system work when most of the focus should be on altering and improving the dispute resolution system.<sup>5</sup> By analogy, these sanctions on lawyers are like trying to get a small dog to pull a large car by employing a bigger whip. Clearly, ADR offers a substantial solution to the problem. A timely settled case by ADR not only clears the cases from the docket, but also avoids sanctions under Rule 11.

## II. Kinds of ADR—The Whole Crown

It would be presumptuous to assert a finite list of ADR possibilities. Certain kinds of ADR are apparent, but variations and combinations have been devised and others will, no doubt, be devised with time.

One major consideration is that any kind of ADR need not be binding upon the parties, assuming they have not or do not contract to the contrary. There is a constitutional question as to whether a

statute or rule making involuntary ADR binding might offend due process.

Another consideration is that settlement in federal court is by rule not very regulated and thus an agreement can be reached by ADR acceptable to the court after suit is brought. Fed. R. Civ. P. 16. [Local rules should be consulted.] Settlement can be made prior to suit being brought without consideration of the court. Some ADR is being imposed by the courts, but most ADR is the voluntary act of the parties.

Most ADR kinds are a form of litigation, but not mediation. It should be clear that in this respect arbitration is litigation and mediation is not, although attorneys appearing in mediation employ some litigation techniques.

As has been implied, ADR proceedings, depending on the kind used, may be binding, non-binding, or partly binding; be court instituted or privately instituted; settle the entire controversy or only certain issues; be litigation; be potential litigation or nearly non-litigious; be more or less formal or informal; and be combinations of any two or more of the kinds available subject only to the limits of practicality and imagination. However, ADR does fall into certain proven categories, making up the jewels of the ADR crown.<sup>6</sup>

However flexible the ADR alternatives are, experience, interviews, study, and observation tell me that the following caveats apply in the two most prominent forms of ADR, namely, arbitration and mediation.

1. Except in therapeutic situations where the focus is on personal problem solving of the person involved, a lawyer with mediation training is usually best suited to act as mediator.
2. The person acting as mediator or arbitrator, particularly a mediator, should insist upon a lawyer (or insurance claims adjuster in some cases) to represent each party participating in mediation proceedings. The lawyer's presence is important, probably not only ethically, but also to protect the mediator or arbitrator who must maintain the appearance and actu-

ality of neutrality, so that it can be seen that each disputant is represented by a person presumed to be looking out for his or her client.

3. Arbitrators of technical cases usually serve best if specialized in the technical field in controversy.
4. The best mediators are legal generalists, not legal specialists, in the substantive law.
5. A mediator who thinks like a judge is not a good mediator.

These caveats or considerations will be further developed in this article.

The usual kinds of ADR proceedings are outlined following. Objection may be taken that some category of ADR should not have been included and another included. However, the object in this article is to outline ADR possibilities generally, not to define them precisely.

## Decisiveness can be a handicap to be substituted for patience and diplomacy.

Arbitration is litigation before an arbitrator who makes a decision which may be binding or non-binding. Arbitration may be imposed by a court, contract, or be voluntary. It may be private, confidential, and flexible. It uses a neutral, trained professional selected by a judge or one that the parties select on their own. Sometimes the selection is from a small panel. The arbitrator may decide a limited technical issue or the entire controversy. Arbitration is quicker and less costly than regular litigation. Since the arbitrator makes a decision, specialized knowledge is important in specialized areas of controversy. The arbitrator acts as a judge, although some argue that he may act a bit like a mediator after the hearing to get a settlement.<sup>7</sup>

A mini-trial is litigation condensed into a day or two with a goal toward settlement. It is usually consensual between the parties. It may settle some issues between the parties or narrow issues. A non-binding opinion likely to issue as to probable court resolution may provide the reality and data for

further negotiations and settlement. A private neutral advisor is the likely moderator or "judge."<sup>8</sup>

The **summary jury trial** is a creature of the court but otherwise the jury equivalent of a mini-trial. This proceedings has a judge or magistrate judge presiding and a mock jury of six. The jury's advisory verdict forms a new base for arriving at a mutually acceptable settlement or at least a more realistic regular trial.<sup>9</sup>

The ABA Standing Committee on Dispute Resolution, in its pamphlet *Alternative Dispute Resolution* (1987) includes a **moderated settlement conference** as a type of ADR. This appears to be a mini-trial before a panel that renders a non-binding opinion.

A **settlement conference** before a judge who will not hear or preside over the case can also be considered ADR. It is a kind of forced negotiation.

**Negotiation** in itself, which all litigators are familiar with, is a form of ADR in the view of some people.

**Mediation** is, in a way, expanded negotiation. The mediator works to bring the parties to a settlement. Mediation is highlighted in this article because it is believed usually to be the best of the alternatives. The exception would be where certain highly technical cases are involved and an arbitrator with expertise in the technical area is needed. Further consideration of mediation follows.

### III. Mediation: Supplement and Alternative

Mediation supplements litigation in progress. Mediation may be useful as a means of settlement of disputes before trial is commenced. It is at the same time an alternative to a regular trial in almost any kind of case.

If mediation is held before a court case is filed, it avoids court costs and publicity. It can be completely private. In some cases the matter of privacy is important, e.g., to avoid news media sensationalism.

Mediation is supplemental to a case filed with the courts in that it may be instituted early to further discovery since an attorney will become better ac-

quainted with the facts generally without the technical rules of discovery being involved. Early mediation may be in furtherance of discovery in specific areas. If a case is settled early, the expense of preparation for litigation is clearly decreased. Sometimes mediation can be started (or tried again) later after discovery is completed and in reality is more likely to aid settlement at that time. Sometimes the time required for trial, stresses, uncertainty of results, and expenses in later mediation loom so heavily as to be more conducive to settlement.

### Part of mediation is not to overwhelm the parties with substantive legal expertise, but to be a good listener, absorb facts quickly, and bring out the issues.

Mediation employed at any time by a trained mediator can be a formidable tool for settlement. It is beyond the scope of this article to give mediation training or explain the detailed method and psychology employed by a mediator in the mediation process. A lawyer appearing for a client before a mediator should only need to be aware generally of how a mediator works, but should understand the mediation procedure.

Generally speaking, the complete successful mediation procedure can be broken into: (1) introduction and explanation of mediation by the mediator; (2) factual presentation of facts and issues by attorneys and clients; (3) initial caucuses (private meetings) with all sides; (4) subsequent caucuses; (5) closing caucuses; and (6) a closing all-party conference to detail the mechanics of settlement.

The attorneys representing clients in the factual presentation address the mediator in a way similar to an opening statement before a court or jury. Otherwise they perform the lawyering functions of advisor and negotiator.

In these proceedings the mediator must create a feeling of impartiality, ap-

peal to reasonableness and good faith participation, and help the parties come to a mutually acceptable decision. The mediator has no power to decide the case.

The proceedings are voluntary, terminable, and non-judgmental. The client is present and ordinarily should participate. Informal participation by the actual parties helps bring out reasons behind disputes and makes these clients feel less hostile and more amiable to the settlement.

### IV. Obtaining Quality Mediation

Courts may initiate mediation, but the task will normally fall on the parties. A number of private mediators exist. Highly trained and screened mediators are to be found through such national non-governmental entities as the United States Arbitration and Mediation (and affiliates), the American Arbitration Association, and Resolutes Systems, Inc. Others may be listed in the phone directory. United States Arbitration and Mediation provides lawyer mediators only, although a few of those lawyers have been judges. The American Arbitration Association has lawyers, judges, and some non-lawyers, mostly for specific kinds of specific kinds of arbitration. Resolutes Systems, Inc. furnishes only lawyers who have been judges.

Some independent mediators and smaller associations have, by reputation and expertise, become well established. The bar associations and various courts may be other sources of mediators.

A number of former judges have entered the mediation ranks successfully. Characteristics of a good mediator can be found among those who were considered good judges. A common view of a good judge is one with judicial temperament which has been largely explained as a polite and respectful bearing rooting out arrogance and overbearing behavior "without eliminating decisiveness."<sup>10</sup> However, even a good judge has to unlearn some attributes that made him or her a good judge to be a good mediator. Decisiveness can be a handicap to be substituted for patience and diplomacy. A knowledgeable, fully experienced general practitioner and litigator is the most likely candidate for

a successful mediator. He has already had to practice diplomacy and has little to unlearn. Part of mediation is not to overwhelm the parties with substantive legal expertise, but to be a good listener, absorb facts quickly, and bring out the issues. A legal generalist mediator sees issues (particularly collateral issues) that the more specialized attorneys for the parties may miss. He can bring out issues missed without appearing patronizing. A generalist can do this by asking innocent questions. He must not lecture, or he loses necessary rapport, even credibility, with one side or the other. He must by all means remain, in the eyes of both sides, neutral. Regardless of background, an effective mediator is one trained in mediation and is adaptable to the requirements of mediation.

The mediator's expertise is in the mediation process. It is helpful to have a good general background in substantive and procedural law, but the good mediator never flaunts it. While an arbitrator acting like a judge has some of the direct power of a regular judge, a mediator is, above all, a diplomat and a leader who brings out the best in others.

**As a litigation attorney, you will be involved in Alternative Dispute Resolution (ADR) if you are not already involved. . . .**

Forum shopping does not apply to a mediator, as it could with an arbitrator. An arbitrator builds a win-loss record and his background is important. Probably the insurance industry, having many cases and the resources for gathering information on arbitrators and their decisions, is at a distinct advantage in the arbitrator selection or rejection process, but not so much so in mediation since mediation is a win-win situation on successful completion of its process.

Some attorneys, particularly the defense bar firms, may fear financial loss through mediation. But stalled cases do not make for happy clients. There is nothing that keeps companies from mediating with their own house counsel if unhappy with their outside counsel.

The faster cases are moved at lower costs, the more cases a lawyer or firm will receive. Satisfied clients breed new business.

Some attorneys may fear disclosure at mediation, but nothing about mediation requires disclosure of trial strategy. Further, an advantageous, successful mediation avoids trial.

Finally, it is very gratifying for a mediator to see all parties leave the mediation table not only friendly to him or her, but also towards each other, as frictions have been erased.

**Conclusion**

ADR is happening. Time and money will be saved. All ADR is beneficial, particularly mediation. Mediation has much to be commended in settling disputes, not only as an alternative to suit, but even as an alternative to other ADR procedures. We have observed others not trained in the law filling the gaps and even intruding into areas lawyers had traditionally at least dominated largely because the bar did not fill the gaps. This should not happen in mediation. Lawyers who initiate mediation, appear as advocates in mediation proceedings, and serve as mediators serve the public interest. As a group, attorneys are the only occupational class in nearly all kinds of cases with the special experience and education to do it well.

When I was sworn in as a lawyer a number of years ago, I was told at the swearing-in ceremony by the speaker that our function as lawyers was to "oil the frictions of society." I have observed that in recent years the graduates have been litigation-oriented or cause-oriented to the extent that sometimes the cause or the litigation itself, propelled by their attorney's zeal, exceeded the best interests of the clients. Mediation places the emphasis back on easing frictions, and I believe both attorneys and the public will benefit therefrom. Mediation is truly the star in the ADR crown.

ADR is so important that it deserves at least a Subdivision Committee status within the Federal Litigation Section of the Federal Bar Association.

**Endnotes**

- <sup>1</sup> Luke 11:46 (King James Version)
- <sup>2</sup> Attributed to Feltham (1602-1668), Webster's Encyclopedia of Dictionaries, p. 809, 1981, Literary Press. Probably Owen Feltham [see Encyclopedia Britannica].
- <sup>3</sup> Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J.A.M.JUD.SOC'Y [No. 5] 178 (1937).
- <sup>4</sup> See Everett, *FBA Fourth Circuit Conference Keynote Address*, 35 FED. BAR NEWS & J. 356 (Oct. 1988).
- <sup>5</sup> See generally, Monroe, *Sanctions—A Special Problem for Federal Litigators*, 34 FED. BAR NEWS & J. 213 (June 1987).
- <sup>6</sup> See Riskin and Westbrook, *DISPUTE RESOLUTION AND LAWYERS*, at 1-8 (1987).
- <sup>7</sup> *Id.* at 253-58.
- <sup>8</sup> *Id.* at 368-74.
- <sup>9</sup> See Burnett, *An Advisory Summary "Trial" Procedure as a Useful Pretrial Method to Promote Settlement of Civil Cases*, 32 FED. BAR NEWS & J. 290-291 (Sept. 1985).
- <sup>10</sup> Peterson, *How to Be a Good Judge*, 93 CASE AND COMMENT 16 (1988).

**Military Law Committee**

The Military Law Committee is again functional with two Co-Chairs having been appointed by Adrienne Berry, Chair of the Section: James L. Hoffman (RADM JAGC USN Ret.) of Washington D.C., and Thomas S. Reavely (COL JAGC USAR) of Des Moines, Iowa. In addition, former Committee Chair Neil B. Kabatchnick has agreed to remain an active participant and will share his expertise and experience.

Committee projects are still in the planning stage and the Co-Chairs solicit your insights, interests, and suggestions (as well as recruits) to assist in planning the future for the Military Law Committee.

Please feel free to provide either or both Co-chairs with your input—the sooner the better. James L. Hoffman is with Fletcher, Heald & Hildreath, 1225 Connecticut Ave., NW, Suite 400, Washington, D.C., 20530 (202) 828-5700; and Thomas S. Reavely practices at 100 Court Avenue, Suite 203, Des Moines, IA 50309, (515) 224-6281.

## Proposed Changes in the Civil Rules Sanctions and Attorney's Fees

By David W. Hupp\*

Changes to Rule 11 are among the many proposed amendments to the civil rules now being considered by the Judicial Conference of the United States. The proposed changes in Rule 11 can be divided into three categories: (1) grounds for imposing sanctions; (2) the procedure for imposing sanctions; and (3) the nature of the sanctions. Even a cursory review of these changes reveals several items which should interest all federal practitioners. Related changes to Rule 54(d)(2), affecting claims for attorneys' fees, are also being considered.

### Grounds

Under the current rule, an attorney's (or party's) signature on a paper filed in court indicates that reasonable inquiry has been made, that there is a factual and legal basis for the paper, and that the paper is not being filed for any improper purpose.

The proposal would make an attorney (or party) responsible for "presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, . . . until it is withdrawn." The focus is changed from the paper being filed in court to the legal positions being asserted by the party. As the Committee Notes state, "the obligations [imposed by FRCP 11] are not measured solely as of the time a paper is filed with the court, but include the failure to withdraw or abandon a position after learning that it ceases to have any merit." Thus, the proposal would also "cover the continued maintenance in federal court of totally meritless claims or defenses that were raised in state court before removal."

The proposal would require that all "allegations or denials of fact have

\*David Hupp is an attorney with the firm of Segal, Isenberg, Sales, Stewart & Cutler of Louisville, KY.

evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." This is a much more concrete requirement than the existing demand that a party's position be "well grounded in fact." A party making a contention on "information and belief" would either have to obtain evidentiary support within a reasonable period of time or withdraw the contention.

The proposal would also eliminate a party's right to rely upon a "good faith" argument to extend, modify, or reverse existing law. Instead, a party would have to submit a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

### Procedure

The proposal would place a major restriction upon motions to impose sanctions. It requires that a motion for sanctions be served separately, that it describe the specific conduct which allegedly violates the rule, and that it "*shall not be filed with, or presented to, the court unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected with 21 days . . . after service of the motion.*" (Emphasis added). This last change may well be the most significant one proposed. It would, in effect, provide a grace period for the party accused of a Rule 11 violation to avoid liability.

However, it is also important to note that the proposal seemingly does not require the movant to provide legal authority when alleging that another party has offered a frivolous legal argument. Thus, the movant apparently may be aware of a dispositive case, yet not be obliged to tip its hand to an opponent who may not know of that dispositive case. In addition, this would apparently not prevent the court from awarding non-monetary sanctions on its own initiative.

Sanctions could also be imposed on the court's own initiative. It would do so by first issuing an order describing specific conduct that apparently vio-

lates the rule, and directing an attorney, law firm, or party to show cause why it has not violated the rule.

Whether a motion for sanctions is granted or denied, the court would have authority to award reasonable expenses and attorneys' fees to the prevailing party.

If sanctions are imposed, the court shall, if requested, recite the conduct or circumstances which constitute the violation, and explain the basis for the sanction imposed.

### Nature

The proposal specifically notes the possibility of a nonmonetary penalty, and specifies two circumstances in which monetary sanctions may not be awarded. Monetary sanctions may not be imposed against a represented party unless the party is responsible for presenting or maintaining a legal position for an improper purpose. Monetary sanctions may not be awarded on the court's initiative unless a show cause order is issued before the claims made by or against the party to be sanctioned have been settled or voluntarily dismissed. As noted above, this would seem not to affect the court's ability to impose nonmonetary sanctions.

The amount of monetary sanctions would be "limited to what is sufficient to deter comparable conduct by persons similarly situated."

Monetary sanctions could be payable to another party only if the other party has moved for sanctions. The amount payable to the movant could include "some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation." Monetary sanctions imposed on the court's own initiative would be paid to the court, and the court could even order that monetary sanctions imposed on motion be paid to the court rather than to the movant.

### Limitations

In addition to the changes in Rule 11, the proposals would also amend Rule 54(d)(2) to require that claims for attorneys' fees, including those sought

*Federal Rules*, continued on page 8

Videotapes are available of the December 5, 1991 seminar held by the Judiciary and Career Service Divisions:

### Federal Sector Equal Employment Opportunity—FY '91 Developments

Seminar instructors Bob Fabia and Raj Gupta provide information on overseas jurisdiction after Aramco, adequacy of investigation, failure to prosecute, AJ's authority, full relief, and mootness. CLE credit is available by watching the tape. Copies of the tape are \$60 for non-members, and \$40 for FBA members and Chapters. The course materials are also available from FBA headquarters. Contact Kristin Bell or Ginelle Brome at the Federal Bar Association National Office, (202) 638-0252.

A related seminar entitled "Civil Rights in the Federal Sector" will be held on February 13, 1992, in Washington. For more information, contact the National Office at the phone number listed above.

MEMO TO: All Attorneys  
 FROM: FBA Membership Day Committee  
 RE: MAY 20, 1992

May 20, 1992 is

# UNIVERSAL



Every Chapter, Section, and Division in the FBA is asked to hold an event to enhance and increase our membership. All are invited to participate. *Don't miss your local event!!*

## FBA Membership Application—Please Pass This to a Colleague!

The Federal Litigation Section is one of the largest and most dynamic Sections of the FBA. The Section is a forum for the concerns of litigators; members are invited to express their views on anything from federal rules to courtroom decorum. We offer CLE and other seminars to enhance the professional education of litigators. This quarterly newsletter contains useful articles for practicing litigators. Most importantly, we put you in touch with a broad network of fellow litigators. *Don't Hesitate—Join NOW!*

Please type or print and supply all information. Please return completed form to: FBA, 1815 H St., Suite 408, NW, Washington, D.C. 20006-3697.

Please indicate if application is for new or reinstated membership:

New  Reinstated

The undersigned applies for membership in the Federal Bar Association on the basis of eligibility described subsequently, and agrees to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its National Council.

Please supply both addresses and check preferred mailing address:

Home  
 Name \_\_\_\_\_ Phone \_\_\_\_\_

Street \_\_\_\_\_ Apt. No. \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Office  
 Title \_\_\_\_\_ Phone \_\_\_\_\_

Agency/Firm \_\_\_\_\_

Street \_\_\_\_\_ Apt. No. \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Date of Birth: \_\_\_\_/\_\_\_\_/\_\_\_\_ Gender:  Male  Female

First Bar Admission (State, Court, Date): \_\_\_\_\_

ABA Member: Yes  No

Type of Practice \_\_\_\_\_

### Membership Eligibility

Active membership is open to any person admitted to the practice of law who: (a) is or has been employed as an officer or employee of the Federal Government (in civilian or military service) or by the District of Columbia; or (b) has an interest in federal law as indicated by admission to a federal court, agency, or state court of record.

Complete *one* of the following:

- Current Federal employee or officer of \_\_\_\_\_
- Former Federal employee or officer of \_\_\_\_\_
- Name of Federal Court, Agency, or State Court of Record and Date of Admission to Practice \_\_\_\_\_

### Dues for a 12 month period:

- \$70 (Admitted to Bar 5 years or more)
- \$35 (Admitted to Bar less than 5 years)
- \$10 (Federal Litigation Section Membership)
- Optional  \$50 Sustaining Membership (in addition to regular dues) for support of CLE programs and publications.

\$ \_\_\_\_\_ Total Enclosed. Please make check payable to "Federal Bar Association," or supply your credit card information:  Visa or  Mastercard  
 Bill me for the total amount indicated.

Card No. \_\_\_\_\_ Exp. Date \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

A complete list of Divisions, Sections, Committees, and Chapters will be mailed to you. You may join as many Committees as you desire; additional dues will be charged for the parent Division or Section(s).

NOTE: Dues to the FBA are not deductible as contributions for federal income tax purposes. However, dues may be deductible by members under other provisions of the IRS Code, such as an ordinary and necessary business expense.

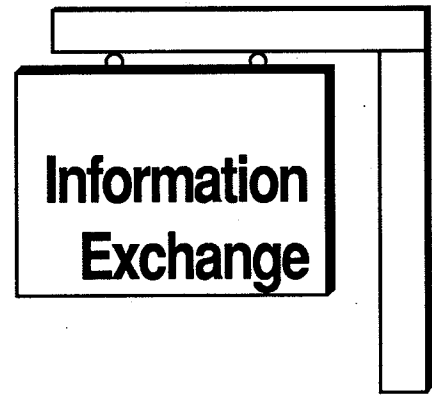
*Federal Rules*, continued from page 6 under Rule 11, must be made by a motion filed not later than fourteen days after entry of judgment, unless otherwise provided by statute or directed by the court.

It is not clear how this provision can be reconciled with the waiting period required by Rule 11. The waiting period gives a party the opportunity to avoid liability by withdrawing or correcting the challenged legal or factual representation. However, Rule 54 clearly contemplates that motions under Rule 11 may be filed after judgment has been entered, at which point the opposing party can't very well withdraw or correct the challenged representation.

Rule 54 would also affect the substance of the motion, because it requires that the movant "specify the

judgment and the statute, rule, or other grounds entitling the moving party to the award, and shall state the amount or provide a fair estimate of the fees sought." It would also give the court authority to require the disclosure of the fee agreement pertaining to the services for which the claim is made.

Finally, Rule 54 would also permit local rules to "establish (i) an appropriate schedule by which the value of legal services performed in the district is ordinarily to be measured, and (ii) special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings." It would also allow the courts to have a special master resolve issues relating to the value of services, and have a magistrate judge resolve motions for attorneys' fees.



**Attention! All Section Members**

This newsletter should provide the opportunity to share information and expertise with fellow Litigation Section members. We will be experimenting with formats to identify attorneys with cases similar to yours, or attorneys who will make themselves available for free consultation (within reason, of course). If you would like to hang your shingle here, please contact the editor at the address listed below.

*Sidebar* is published quarterly by the Federal Litigation Section of the Federal Bar Association. The views expressed herein do not necessarily represent those of the FBA. Send any and all articles or other contributions you may have to Mark Lee Hogge at Fisher, Christen, & Sabol, Suite 590, 2000 M Street, NW, Washington, D.C. 20036, (202) 659-2000.

Sidebar

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