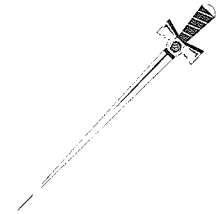




# Sidebar



The Federal Bar Association



Federal Litigation Section

## Federal Litigation Section Officers

### Chair

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SEGAL, ISENBURG, SALES, STEWART,  
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(Not yet filled)

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(703) 696-1610

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Washington, D.C. 20004-1109  
(202) 857-7887  
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## Dear Members

The Federal Litigation Section's Officers for FY 1993 are:

### Chair

Adrienne A. Berry  
SEGAL, ISENBURG, SALES,  
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2100 Waterfront Plaza  
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I am pleased to announce that Lt. Col. Bill Trivette has agreed to chair the Military Law Committee and Greg Orland has agreed to chair the Appellate Law and Practice Committee. Anyone who wishes to suggest projects or to volunteer for either Committee should contact the following:

### Military Law Committee

Lt. Col. Bill Trivette  
Deputy Chief Army Litigation Division  
901 N. Stuart Street  
Arlington, VA 22203-1837  
(703) 696-1610

### Appellate Law and Practice Committee

Greg Orland  
1800 City Hall East  
200 N. Main Street  
Los Angeles, CA 90012  
(213) 485-0733

## Rule 11 Comments From District Judges

In May 1991, the FBA Federal Litigation Section sent out questionnaires on Rule 11, F.R.Civ.P. to all United States District Judges. The following is a collection of their comments on Rule 11.

This is the fourth or fifth Rule 11 survey I have answered.

I do not give serious consideration to Rule 11 motions unless a lot of court time has been spent on non-meritorious matters.

The main problem . . . is a lawyer may not be sanctionable in one court for conduct that results in severe sanctions in another court next door.

Rule 11 litigation is not extensive in this district [5th], so we do not have great antagonism towards it as in other districts.

Used sparingly, Rule 11 can deter frivolous litigation. . . .Used routinely, it becomes a fee-shifting device."

Rule 11 is achieving part of its goal in slowing down frivolous litigation.

Rule 11 is necessary to prevent litigation abuse and should be used by the court. Rule 11 should be used liberally.

Rule 11 needs to be used more often. Rule 11 "proceedings have a tendency to subsume the litigation."

It is impossible to uniformly apply Rule 11. Rule 11 is definitely not achieving its goals. Rule 11 is not perfect but should be retained.

Someone should send a copy of Rule 11 to the Ninth Circuit Court of Appeals.

Sanctions should be awarded only when there is a clear violation of the Rule.

An award of sanctions above the expenses incurred by opposing counsel should be paid to the court.

Sanctions should only be awarded where there is no factual investigation or legal research or 'scienter.'

On the Case

By Mark Lee Hogge

**Clarence Darrow's Oral Pleading**

What would have happened had Clarence Darrow presented the closing arguments for Julius and Ethel Rosenberg? He represented over a hundred defendants facing execution and not one was executed. Clarence Darrow's oral presentation was so extraordinary that H. L. Mencken described Darrow's motion to quash the Scopes indictment in these terms: "It blew up like a wind and finished with a flourish of bugles." The following are excerpts from Darrow's closing argument in the three-month long sentencing hearing of the Loeb-Leopold case.

\* \* \* \* \*

It has been almost three months since the great responsibility of this case was assumed by my associates and myself. I am willing to confess that it has been three months of great anxiety; a burden which I gladly would have been spared excepting for my feelings of affection toward some of the members of one of these troubled families.

\* \* \* \* \*

Lawyers stand here by the day and read cases from the Dark Ages, where judges have said that if a man had a grain of sense left, and a child if he was barely out of his cradle, could be hanged because he knew the difference between right and wrong. Death sentences for as low as fourteen years have been cited. I have heard in the last six weeks nothing but the cry for blood. I have heard from the office of the State's Attorney only ugly hate. I have seen a court urged almost to the point of threats to hang two boys, in the face of science, in the face of philosophy, in the face of humanity, in the face of experience, and all the better and more humane thought of the age.

\* \* \* \* \*

Why, Mr. Savage says age makes no difference, and that if this court should do what every other court in Illinois has done since its foundation, and refuse to sentence these boys to death, no one else would ever be hanged in Illinois. Well, I can imagine some results worse than that. So long as this terrible tool is to be used for a plaything, without thought or consideration, we ought to get rid of it for the protection of human life.

Mr. Savage—did you pick him for his name or his ability or his learning? In as cruel a speech as he knew how to make, said to this court that we plead guilty because we were afraid to do anything else. Well, it certainly was not done to help the State. I hope we have made no mistake.

We did plead guilty before your Honor, because we were afraid to submit our cause to a jury. I would not for a moment deny to this court or to this community a realization of the serious danger we were in and how perplexed we were before we took this step. But I have found that experience with life tempers one's emotions and makes him more understanding of his fellow man. When my friend Savage is my age, or even yours, he will read his address to this court with horror.

\* \* \* \* \*

Now, your Honor, I have been practicing law a good deal longer than I should have, anyhow, for forty-five or forty-six years, and during a part of that time I have tried a good many criminal cases, always defending. It does not mean that I am better. It probably means that I am more squeamish than the other fellows. It means neither that I am better nor worse. It means the way I am made. I can not help it. And I have never yet tried a case where the State's Attorney did not say that it was the most cold-blooded, inexcusable, premeditated case that ever occurred. If it was murder, there never was such a murder. If it was a robbery there never was such a robbery. If it was a conspiracy, it was the most terrible conspiracy that had happened since the Star Chamber passed into oblivion. I am speaking moderately. All of them are the worst. Why? Well, it adds to the credit of the State's Attorneys to be

connected with a big case. That is one thing. They can say, "Well, I tried the most cold-blooded murder case that ever was tried, and I convicted them, and they are dead." "I tried the worst forgery case that ever was tried, and I won that. I never did anything that was not big." Lawyers are apt to say that.

\* \* \* \* \*

They say that this was a cruel murder, the worst that ever happened. I say that very few murders ever occurred that were as free from cruelty as this under all fair rules of measurement.

Of course, your Honor, I admit that, I hate killing and I hate it no matter how it is done, whether you shoot a man through the heart, or cut his head off with an axe, or kill him with a chisel, or tie a rope around his neck. I hate it. I always did. I always shall.

But there are degrees, and if I might be permitted to make my own rules I would say that if I were estimating what was the most cruel murder, I might first consider the suffering of the victim. Now, probably the State would not take that rule. They would say the one that had the most attention in the newspapers. In that way they have got me beaten at the start.

Bobby Franks suffered very little. There is no excuse for his killing. If to hang these two boys would bring him back to life, I would say let them go, and I believe their parents would say so, too. But:

The moving finger writes, and having writ,  
Moves on; nor all your piety nor wit  
Shall lure it back to cancel half a line,  
Nor all your tears wash out a word of it.

Robert Franks is dead, and we cannot call him back to life. It was all over in fifteen minutes after he got into the car, and he probably never knew it or thought of it. That does not justify it. It is the last thing I would do. I am sorry for the poor boy. I am sorry for his parents. But, it is done.

\* \* \* \* \*

That is what this case rests on. It could not stand up a minute without motive. Without it, it was the senseless act of



Nathan Leopold, Jr. (left), and Richard Loeb (right) are shown with their attorney, Clarence Darrow (center), as they receive the Judge's sentence, life for murder and 99 years for kidnapping. Darrow saved their lives by pleading them guilty and making an impassioned plea for mercy for the two gifted and tortured minds. (Photo courtesy of UPI and Bettman Archives.)

immature and diseased children, as it was; a senseless act of children, wandering around in the dark and moved by some emotion that we still perhaps have not the knowledge or the insight into life to thoroughly understand.

\* \* \* \* \*

Many a time has mercy come even from the State's Attorney's office. And yet, forsooth, for some reason here is a case of two immature boys of diseased mind, as plain as the light of day, and they say you can get justice only by shedding their last drop of blood!

Why? Why? It is unheard of, unprecedented in this court, unknown among civilized men. And yet this court is to make an example or civilization will fail. I suppose civilization will survive if your Honor hangs them. But your Honor will be turning back over the long, long road we have traveled. Your Honor would be turning back to the days which Brother Marshall seems to love, when they burned people thirteen years of age. You would be dealing a staggering blow to all that has been done in the city of Chicago in the last twenty years for the protection of infancy and childhood and youth.

\* \* \* \* \*

If a man could judge a fellow in coldness without taking account of his own life, without taking account of what he knows of human life, without some understanding, how long would we be a race of real human beings? It has taken the world a long time for man to get even where he is today. If the law was administered without any feeling of sympathy or humanity or kindness, we would begin our long, slow journey back to the jungle that was formerly our home.

Three hundred and forty murder cases in ten years with pleas of guilty in this county. One hanging on a plea of guilty, and that a man forty years of age. And yet they say we come here with a preposterous plea for mercy. When did any plea for mercy become preposterous in any tribunal in all the universe?

\* \* \* \* \*

For God's sake, are we crazy? In the face of history, of every line of philosophy, against the teaching of every religionist and seer and prophet the world has ever given us, we are still doing what our barbaric ancestors did when they came out of the caves and the woods.

\* \* \* \* \*

There is something else in this case, your Honor, that is stronger still. There is a large element of chance in life. I know I will die. I don't know when; I don't know how; I don't know where; and I don't want to know. I know it will come. I know that it depends on infinite chances. Do I live to myself? Did I make myself? And control my fate? Can I fix my death unless I suicide? I cannot do that because the will to live is too strong.

My death will depend upon chances. It may be by the taking in of a germ; it may be a pistol; it may be the decaying of my faculties, and all that makes life; it may be a cancer; it may be any one of an indefinite number of things, and where I am at a certain time, and whether I take in that germ, and the condition of my system when I breathe is an accident which is sealed up in the book of fate and which no human being can open.

\* \* \* \* \*

But, your Honor, what they shall ask may not count. I know the easy way. I know your Honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; for all of the young, and as far as possible, for all of the old. I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness and hatred with love. I know the future is on my side. You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other by who in ignorance and darkness must grope his way through the mazes which only childhood knows.

\* \* \* \* \*

So I be written in the Book of Love,  
I do not care about that Book above,  
Erase my name or write it as you will,  
So I be written in the Book of Love.

## Section Activities

At the Atlanta Chapter's December Meeting, the Federal Litigation Section presented a Recognition Award to Mr. Joe D. Whitley for his outstanding contribution to federal litigation.

The Federal Litigation Section has also co-sponsored the following seminars in FY 1993:

### **FBA/Montclair State Semi-Annual Seminar Series**

Co-sponsored with the New Jersey Chapter, November 19, 1992. The seminar was designed to bring together speakers on the topic of child abuse and to disseminate information and materials to all participants to benefit members of the FBA, the legal community, and the general public.

### **Federal Criminal Sentencing Guidelines Seminar**

Co-sponsored with the Hawaii Chapter, November 23, 1992.

### **Introduction to the Federal Courthouse**

Co-sponsored with the Kentucky Chapter, December 1, 1992. The seminar was designed to encourage new admittees to the Kentucky Bar to become active in the FBA.

### **U.S. Sentencing Commission Seminar**

Co-sponsored with the Los Angeles Chapter, December 17, 1992. New federal guidelines to sentencing presented by members of the U.S. Sentencing Commission. The seminar was designed for members of the Federal Indigent Panel, Federal Public Defenders, and Probation Officers.

### **Federal Practice Seminar**

Co-sponsored with the Memphis Mid-South Chapter, January 19, 1993. The seminar presented such issues as employment discrimination, sexual harassment, jury trial, the Americans with Disabilities Act, the Civil Rights Act of 1991, and recent developments in employment discrimination cases.

*Chair, continued from page 1*

Kent Hofmeister, the Section's Deputy Chair, has kindly agreed to chair the Federal Rules of Procedure Committee again this year. You may contact Kent at the address listed on page one.

I hope you will take this opportunity to become active in the Federal Litigation Section. If you have any suggestions for activities or programs, please contact me. If you would like to submit an article for publication in *Sidebar*, the Section newsletter, please contact our Editor, Mark Lee Hogge, at:

MORGAN & FINNEGAN  
555 13th Street, NW,  
Suite 480 West  
Washington, D.C. 20004-1109  
(202) 857-7887; (202) 857-7929 fax

I look forward to a productive and successful 1993. I am sure that the Federal Litigation Section will continue to be an active Section serving the professional interests of its membership.

Sincerely,  
*Adrienne A. Berry,*  
*Chair, Federal Litigation Section*

## Volunteers Wanted

### **For these Committees:**

### **Federal Circuit and Claims Court**

### **Federal Tort Claims**

Anyone interested in serving on either Committee should contact the Section Chair:

Adrienne A. Berry,  
SEGAL, ISENBERG, SALES,  
STEWART, CUTLER & TILLMAN  
2100 Waterfront Plaza  
325 West Main Street  
Louisville, KY 40202  
(502) 568-5600  
(502) 581-1437 fax

This is your opportunity to become active in the Federal Bar Association! To become acquainted with a cross-section of practitioners who share a common interest in a particular area of law!

## 1990 Census Info: Discounts of up to 70% for FBA Members

The Census Bureau recently released the EEO file of the 1990 Census. This data was developed for affirmative action plans and EEO litigation. As of January 1, 1993, its use is required by the OFCCP.

In order to make this information available to our members in usable form both quickly and inexpensively, the Labor Relations and Labor Law Section has obtained an agreement from Charles R. Mann Associates, Inc., a consulting firm, to provide it at a discount to FBA members.

Mann Associates has been active in the AA/EEO field since 1977, and has been a major supplier of 1980 Census Reports. They specialize in providing statistical and econometric services to the legal and human resource professions.

Under the agreement, members may order reports for the United States (as a whole) from the FBA for \$30, a reduction of 70 percent from the standard price of \$100. In addition, reports are available directly from Mann Associates for \$80, a reduction of 20 percent from their standard price, with mention of the FBA discount.

Geographic areas for which data are available include states, counties, Metropolitan Statistical Areas (MSA's, cities with a population of at least 50,000), and any combinations of these, including CMSA's and PMSA's.

The Mann Associates reports were designed by Dr. Charles R. Mann, a nationally-known statistician who has worked with attorneys in writing AAP's for both large and small corporations, as well as local governments and federal agencies, for over twenty years.

Dr. Mann's concept of underutilization was used by both Firestone and Koppers in landmark litigation which led to the elimination of OFCCP requiring use of the "any difference" rule to determine underutilization.

Each report contains all 512 occupation groups used in the 1990 Census, as well as EEO-1 categories and summary lines. Counts and percentages are dis-

*Census, continued on the next page*

Upcoming Seminars

**March 12, 1993**

“The Challenges Facing Local Governments”  
 Dallas Central Public Library, Dallas, TX 5.5 CLE hrs.  
 Contact: Robert Brown (214) 712-4628

**March 13**

12th Annual “Taking the Step to the Federal Court”  
 Unocal Auditorium, Los Angeles, CA 5.75 CLE hrs.  
 Contact: Robert Hess (213) 625-1666

**March 23**

Trial Masters  
 Saint Thomas University, Miami FL 7.5 CLE hrs.  
 Contact: Ed Wimmers (305) 623-2395

**March 25-26**

FBA Federal Civil Practice Seminar  
 Dallas, TX 11.75 CLE hrs.  
 Contact: Robert Brown (214) 712-4628

*Census*, continued from the previous page  
 played by race, sex, and Hispanic origin.

Additional information may be obtained by contacting either the FBA Publications Department at (202) 638-0252; or Charles R. Mann Associates, Inc, at 1828 L Street, NW, Washington, D.C. 20036-5104; phone (202) 466-6161, or 1 (800) 669-7828 outside the Washington area.

**Membership Days  
 Are Here Again!  
 April 16-May 15, 1993**



Membership Day has expanded to fill an entire *month of activities* by the various Sections, Divisions, and Chapters around the nation. The FBA is the Bar Association which brings private and government practitioners together. Expand the benefits of your membership to your colleagues by getting at *least one* to fill out the application below and return it to FBA headquarters.

**FBA Membership Application**

Please print or type and fill out completely. Return form to: FBA, 1815 H St. NW, Suite 408, 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 \_\_\_\_\_ Suite No. \_\_\_\_\_

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

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

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

ABA Member: Yes  No

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

**Membership Eligibility**

Membership is open to any person admitted to the practice of law before a Federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of Federal law.

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 (Additional for Federal Litigation Section Membership)  
 Optional  \$50 Sustaining Membership (in addition to regular dues) for support of CLE programs and publications.
- Bill me for the total amount shown below.

\$ \_\_\_\_\_ Total Enclosed. Please make check payable to “Federal Bar Association,” or supply credit card information:  Visa,  Diners Club, or  Mastercard

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.

*Rule 11*, continued from page 1

In my opinion, [on] the rare occasions that the court feels the use of Rule 11 is appropriate, the same results could be obtained by other means.

Provides a useful means to shift costs of frivolous actions. "A Frenchman once said: I admire the English. Occasionally they shoot an Admiral to encourage the rest. Lawyers need an example once in a while too."

A sanction should not be awarded unless evidence of violation is "beyond a reasonable doubt."

Appellate Courts should defer to District Court judgment and stop nit picking. They don't have to put up with the conduct.

More trouble than it's worth.

District Judges do not believe the 9th Circuit has strong commitment to Rule 11 sanctions.

Is not used enough by District Judges and is not consistent[ly applied].

I am surprised that the Organized Bar

has tolerated some of the bad caselaw on Rule 11, especially the large figure awards and the idea that a trial judge should or can be the subject of any rule that says 'shall.' 'Shall' is inconsistent with judicial decision making.

I think that the parties should be barred from moving for sanctions. They should only be available *sua sponte*, after notice to the offending party or counsel and on opportunity to be heard.

Concerning the survey, this questionnaire needs to be expanded if you really want some accurate responses.

Poor example obviously written by an ex-Plaintiff's lawyer.

Need additional facts.

Would want to hear from opposing counsel before ruling.

Your question suggests that a court could find a violation and not impose sanctions. N.B. Rule 11 states that if the court finds a violation it shall (underlined) impose sanctions. As one of the draftsmen of Rule 11 I can assure you

that his language was a deliberate response to the perceived reluctance of judges to impose sanctions. *Judge W. Skinner*.

Was the good faith belief "reasonable?" The hypothetical is too abrupt to enable totally unqualified answers but that is the nature of the beast.

"How can you punish a 'party' for the actions of counsel?" Is the client "in cahoots" with his attorney?

This was not an easy questionnaire to answer.

Judges shouldn't be asked to speculate how they would rule."

General questions are too broad—sanctions must be tailored to the individual case."

I do not think it would be proper for me to offer an opinion on these situations. Many strike 'too close to home.'

Competent and honest lawyers do not need 'baselines' for conduct with regard to Rule 11.

*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 contributions you may have to the Editor, Mark Lee Hogge, at Morgan & Finnegan, 555 13th Street, NW, Suite 480 West, Washington, D.C. 20004-1109, (202) 857-7887, fax (202) 857-7929.

## *Sidebar*

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