OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: PAVELIC & LeFLORE, Petitioner V. MARVEL ENTERTAINMENT GROUP, ET AL.

CASE NO: 88-791

PLACE: WASHINGTON, D.C.

DATE: October 2, 1989

PAGES: 1 thru 41

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -x

PAVELIC & LeFLORE, :

Petitioner :

v. : No. 88-791

MARVEL ENTERTAINMENT GROUP, :

ET AL. :

- - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, October 2, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

JACOB LAUFER, ESQ., New York, New York; on behalf of the Petitioner.

NORMAN B. ARNOFF, ESQ., New York, New York; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 88-791, Pavelic & LeFlore v. Marvel Entertainment Group.

Mr. Laufer, you may proceed whenever you're ready.

ORAL ARGUMENT OF JACOB LAUFER

ON BEHALF OF THE PETITIONER

MR. LAUFER: Thank you, Mr. Chief Justice, and may it please the Court:

This case is before the court on a petition of certiorari through a view of decision of the U.S. Court of appeals for the Second Circuit. At issue in this case is the interpretation of Rule 11 of the Federal Rules of Civil Procedure and more, specifically, whether under Rule 11 a district court is empowered to impose sanctions not only upon the attorney who signs a paper or pleading that offends the rule, but the district court -- whether the district court may also impose sanctions upon the law firm or law partnership or employer of such an attorney who has signed such a pleading.

Now, the context in which this has arisen is a case in which, after trial, the district court imposed significant monetary sanctions. The sanctions were predicated upon a factual claim. That factual claim is referred throughout as the facsimile claim. That claim appeared very early in the litigation in the amended complaint. It was used -- it was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

used at, at another point in the litigation to defeat a motion for summary judgment that the Respondents had filed, and that claim was ultimately abandoned and withdrawn immediately prior to the trial. The district court found that while that claim had not been interposed in bad faith, that claim had not been researched adequately in terms of its factual foundation by the attorney, and accordingly determined that sanctions were appropriate.

The district court, in terms of the attorney sanctions, created basically two categories of attorney sanction. The first attorney sanction was against the signer himself, and that was for the first half, this is after -- finally after a hearing on -- or an argument under Rule 60(b). The Court found that during the first half of the litigation, the signer basically stood alone, and, and imposed those sanctions against him. The Court found that thereafter, during the approximate midpoint of the litigation, the signer of the pleading had formed a firm, which is now the Petitioner before this Court of Pavelic & LeFlore, and according -- accordingly apportioned half of the sanctions, the latter half of the sanctions, against both Mr. LeFlore, who had signed each of the offending papers, insofar as attorneys are concerned, and against his law firm, Pavelic & LeFlore.

The issue came up before the U.S. Court of appeals for the Second Circuit and that court determined, based upon

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

its view of the purpose of Rule 11, that it was appropriate that sanctions could be imposed by the district court, presumptively it, it indicated, because that would, in the view of the Second Circuit Court of appeals, promote the purpose of Rule 11 in the sense, the court felt, that law firms and employers would be motivated by this presumption that the Second Circuit was creating to monitor more, more specifically and with, with greater vigor the pleadings that were signed by all of its attorneys.

And accordingly, the Court of appeals for the Second Circuit created this rule, which we submit is without textural foundation. We claim that the district court did not have the power under this case to impose sanctions upon Pavelic & LeFlore, upon the Petitioner.

In order to reach that conclusion, Your Honors, we go first and principally to the words of Rule 11. The words of Rule 11 indicate, first, that insofar as attorneys are concerned in the case of represented parties, a, a pleading or any paper that is to be considered by a district court must be signed by at least one attorney of record in his individual name, and that attorney must give his address. And it go -- goes on from there. But the, the, the rule itself specifically requires that an attorney who signs the pleading sign in his individual name.

Incidentally, Your Honors, this has been the course

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

of Rule 11 since the very inception of Rule 11, when it was first promulgated in 1938. There was a very early district court decision in which there was a United States against American Surety, where a, a signature appeared, a, a firm of attorneys by so and so, a member of the firm, and there was actually a motion to strike that motion. And the district court, in, in reading Rule 11 back 50 years ago, said we know this, this is a signature of an individual attorney, we know who this attorney is, he is front and center before us and he is strictly responsible, and he has therefore complied with Rule 11 as it was then created and as it now exists, I would submit, Your Honors.

Following this requirement within the rule, that an attorney in his individual name sign such a pleading, the, the rule explains what that signature means. That rule is a certificate, a certificate being a written assurance, a written representation by the signer of the pleading, that the signer has read the pleading, that the signer warrants that the pleading meets the factual and legal requirements that are set out in the rule, meaning a factual, a factual inquiry that is reasonable under all of the circumstances, a legal inquiry that is reasonable under all of the circumstances. The signer further warrants that the, the pleading is not interposed for any improper purpose and some of those purposes, improper purposes, are articulated within the rule.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And then we come to the operative language of the rule itself, and the operative language of the rule says that upon finding a violation, if a violation is found, the district court shall impose upon the person who signed it, that is the person, the attorney of record in his individual name who has signed it, who has given his address --

QUESTION: Doesn't the signer also say that he is authorized to put the name down?

MR. LAUFER: I assume that that is implicit. The, the signer has, is retained by a client. The signer is retained by a client --

QUESTION: No, that the signer is authorized to use the firm's name and to sign on behalf of the firm. Doesn't he say that?

MR. LAUFER: Implicitly, I believe he does, in the sense that anytime someone uses --

QUESTION: Well, what more do we need? What more do we need?

MR. LAUFER: Well, Your Honor, the rule rejects a firm's name. The rule rejects a firm's name. The rule does not permit the signing of a pleading in the name Smith & Jones, being the name of a law partnership. The rule requires that an individual person sign it. The rule --

QUESTION: Well, aren't most pleadings signed Smith & ones law firm by so-and-so attorney?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. LAUFER: They are indeed.

QUESTION: And you don't think that the attorney represents thereby that he represents, or she represents, that law firm and is authorized to sign it on behalf, not only of the attorney, but for the firm?

MR. LAUFER: That is surely implicit within an attorney's signature that, that -- that indicates that that attorney is --

QUESTION: So the rule could be interpreted, if you followed ordinary agency principles, I suppose, to bring the firm in as well.

MR. LAUFER: Your Honor, I believe that that is not so, because I believe, first, we have the language of the rule. An attorney of record, at least one of attorney of record, in his individual name, in that attorney's individual name. We come to the antecedent of the rule. We see how we come by this rule. The antecedent of this rule is Rule 11 of 1938. And Rule 11 of 1938 did not encompass an attorney and a party the way this rule structurally and grammatically must encompass. It encompassed an attorney. And it indicated that the attorney warranted that he read it, that he was, was, was satisfied and was making the certification to the court.

The Advisory Committee's notes indicate that it was the intention of the Advisory Committee that, that the rule continue in its application to anyone who signs a pleading.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The test that the district courts are exhorted by the Advisory Committee notes to, to use in ascertaining whether the tests of the rule have been met deal with the signer's conduct, the attorney who signed it, the person who signed it.

I believe that while it is indeed true that the law firm is or are the attorneys for a particular party, that is without question, but for purposes of the rule, that person who was called to task, who makes a written assurance to the court, a, a, a representation to the court for which that person is sanctioned or punished, is one particular person.

There are references in the Advisory Committee notes to other attorneys, but the only such reference has to do with testing the signer's conduct, meaning whether or not the signer -- what the signer did was reasonable under the circumstances may depend on whether that signed relied upon another member of the bar.

So I would submit, Your Honor, that the rule does not -- does not give, give, give latitude to be interpreted, I would submit, that the signature of the signer in his individual name is the signature of a law firm. I, I could not understand the rule under other circumstances. And frankly, if I might suggest, Your Honor, that that is not terribly distinct perhaps even from the rule of this Court, Rule 33.2, which, which requires that the counsel of record before this Court be an individual member of the bar of this

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Court, and that a, a, a law firm may not be the counsel of record. Now the law firm are the attorneys, without question. Many such lawyers who are counsel of record before this Court are members of, of law firms. But the law firm is not the counsel of record, nor, I, I, I submit, is the law firm the attorney of record, as contemplated by the plain language of Rule 11.

As I have indicated, the structure of Rule 11, the grammar of Rule 11, all militate very strongly in favor of this interpretation, and indeed I would submit they militate conclusively in favor of this interpretation that I am urging upon this Court.

Confirmation, of course, is, is found I believe if we go beyond the actual language of the rule itself, if we go to the Advisory Committee notes. Again, the entire focus is riveted, it's purely riveted to an individual attorney, who makes a promise to the court and who is held accountable.

Under the earlier version of the rule, under Rule 11 of 1938, the accountability was in terms purely of a disciplinary action. And as the Advisory Committee notes indicate, there was some reluctance on the part of courts to, to, to use disciplinary action. There was confusion regarding the circumstances that might trigger it, and, and, and, and as well --

QUESTION: And suppose you had an aggravated case in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

which two senior partners said well, this pleading is marginal, we might get in trouble with it, let's just have the junior associates sign it. That wasn't this case, but suppose you had that case? Would the district court be powerless under the rules to impose any sanctions on the law firm? Would it just have to resort to state disciplinary procedures?

MR. LAUFER: No, Your Honor, I believe that the district court would most surely not be powerless. I think those two attorneys, those two hypothetical partners that Your Honor has, has referred to, would be shocked to learn that the district court's arm reaches far beyond Rule 11, that conduct of that sort would be clearly, under any set of circumstances, bad-faith conduct, and the district court can surely discipline --

QUESTION: Under what -- under what rule?

MR. LAUFER: Under its inherent -- under its inherent powers, as was recognized by this Court in the Roadway Express case and a whole series of other cases. Rule 11 does not signify the outer boundaries of the reach and power of the district court to deal with abuses and to deal with -- to deal with bad faith conduct or wrong conduct that is directed at a district court --

QUESTION: Well, if you agree to that, why doesn't there inherent power here?

MR. LAUFER: There was no bad faith here, Justice

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Stevens.

QUESTION: Well, would you think the inherent power of a court is defined by bad faith? I believe the inherent power of the court is to give an appropriate sanction in an appropriate case, and that the only way to get an appropriate sanction is to -- is to -- is to impose it on the partnership. What's -- I don't see how this is different than Justice Kennedy's case.

MR. LAUFER: Justice Stevens, in, in the Roadway Express case, in my reading of it, I believe it is clear, at least to me, from the language of, of this Court, that before a court can, can invoke its inherent authorities to sanction, to sanction an attorney, there must be a finding of conduct that either constitutes or is tantamount to bad faith. That is my reading, and that is what the commentators have read, based upon Roadway Express.

QUESTION: Well, this sanction was imposed under Rule 11, wasn't it?

MR. LAUFER: Yes, it was, Your Honor.

QUESTION: And Rule 11 requires that a -- an individual sign.

MR. LAUFER: Yes, yes, it does, Your Honor.

QUESTION: And it says that the court may impose a sanction on the person who signed it.

MR. LAUFER: Yes, indeed, Your Honor. And that is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

really the core of our contention, because the law firm is not the person who signed it, is not the individual who signed it -

-

QUESTION: Could, could I ask -- let's assume we agree with you, and the sanction is limited to being imposed on the person who signed the -- under state law could the sanction be collected from the partnership?

MR. LAUFER: I would submit that it could not. I would contend --

QUESTION: Because of the rule or because of state law? Do you think the rule would say that it, that it preempts the liability of the partnership for the obligations of one of its partners?

MR. LAUFER: I believe that's so, and I believe it may do that in several different ways, if I may, Your Honor. I believe a sanction is a punishment, if I may respond. A sanction is a punishment. A person who is brought before a court on a, on a, on a Rule 11 violation is, is deserving of some sanction, is deserving of some punishment. It is within the district court's discretion to say that -- what that punishment is to be, whether it be a disciplinary referral to a bar committee, or whether it be this type of sanction, the imposition of a monetary fine or an order to pay the other attorney's, the other party's reasonable attorney's expenses.

A state law, a state law that would say that this

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

person who is deserving of sanction need not be sanctioned, and that the party who is entitled to recover this award is entitled merely to go against the partnership or to go against other partners within the firm --

QUESTION: Oh no, you can't go against the -- let's just assume the individual partner who is sanctioned is just -- is just judgment proof, which is true, I suppose, of some attorneys.

(Laughter)

QUESTION: And -- but then the -- then the resort is to the partnership.

MR. LAUFER: I would think that in a circumstance where the signing attorney is judgment proof, I would wonder whether this is an appropriate sanction. I would wonder whether a sanction that is illusory, in the sense o, off something that could not have an impact upon the person who needs to be punished or is deserving of being punished, I wonder whether in the circumstances that is an appropriate sanction.

QUESTION: Under ordinary state law, the partnership would be liable for an obligation of its limited partners incurred in the course of the partnership business.

MR. LAUFER: What Your Honor, I believe, is referring to malpractice and the like, yes, yes indeed, sir. Under -- under circumstances -- under, under circumstances where a third

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

party is suing a law firm or suing a partner, based upon some wrong doing that the partner has done or is determined to have done, in that sort of a circumstance the, the state goal, the operation of, of the rules of partnership are, are calculated to make whole, to make whole the person who has been harmed. That is the focus.

The focus of Rule 11, as the Advisory Committee notes indicate and as the language of the rule really indicates to me, the focus of Rule 11 is to punish and to deter, and, and, and --

QUESTION: But there is nothing in the rule that says it is a punishment or that is punitive, and in fact, the sanction is an objective one. The, the sanction, the test for whether or not the sanction should be imposed is objective.

MR. LAUFER: Yes, it is.

QUESTION: So the, the pure heart and the empty head are not a defense.

MR. LAUFER: That is so, Your Honor. The sanction --

QUESTION: I suppose no one would suggest that if an appearing lawyer before a court were held in contempt and ordered jailed, and he absconds, that one of his partners could be required to come in and serve the contempt sentence.

MR. LAUFER: That would be so, Your Honor. That would be so. It's a sanction, it, it, it's a sanction; it is a punishment. Now, the test, regarding the objective test, if,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

if -- is, is, is a function of, of the reality, is a function of the experience of 40 years under the old Rule 38 and under the old Rule 11 that was enacted or promulgated during 1938. And it was found that too many attorneys were escaping through just precisely that escape valve that was available, and too many judges I guess were willing to be forgiving in the circumstances. And it was determined that it was necessary, in order to make the rule more effective, to, to, to turn to an objective standing.

QUESTION: Which indicates to me that it is not a punishment, that it is a liability that we impose in order to make the party that is injured whole.

MR. LAUFER: Your Honor, the problem -- the problem that the rule was calculated to address, if one looks at the Advisory Committee notes, is the problem of frivolous pleadings, is the problem of dilatory practices and the like. The, the -- as a result of that certain, certain functional changes were, were inserted into the rule, among them this objective test.

But they were sanctions to begin with. The punishment under the old rule was a disciplinary action. The punishment under the new rule is a sanction. The, the Advisory Committee notes indicate that among the means that the Advisory Committee has used in order to promote the goal of the rule, which is deterrence and not fee shifting, was an, an

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

entitlement to the district court to impose fee shifting in appropriate circumstances.

But I would submit, Your Honor, that it is not a fee-shifting rule. It is not a rule that changes the substance of American law. It is a rule that is calculated to deter conduct.

QUESTION: Well, what happens, as a practical matter, if a judge says you did wrong and I am going to penalize you, and I am going to fine you 11,000. Or, the judge says I find you, the same problem and all, and I am going to fine you 1,000 and the firm 1 -- 10,000. Now, what is the practical difference?

MR. LAUFER: The practical difference, Your Honor, is, I would submit, that the court is without power to impose that sanction upon the firm, under the rule and under its inherent powers. The practical difference is that that firm is accepting a sanction; that firm is now rebuked, is now sanctioned, which in itself carries a stigma, which the rule doesn't impose upon the firm, in fairness.

QUESTION: But the, the firm usually pays the debts of the partner, don't they, if it is incurred in litigation?

MR. LAUFER: The firm could do that. I think it would be inappropriate for a firm --

QUESTION: They usually do, don't they?

MR. LAUFER: I, I wonder. I don't -- happily, I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

don't have first hand experience, Your Honor, and, and I, I suppose that on occasions it happens, yes. But that is not because that firm is rebuked; that is not because that firm is sanctioned. If the firm wishes to come forward on behalf of one of its members it may do so. Frankly, I think it -- I think it is ill advised for a firm to do that.

QUESTION: Is the firm in the litigation or not?

MR. LAUFER: The firm represents a party, but the firm is not attorney of record for purposes of Rule 11.

QUESTION: But is -- my question was is the firm in the litigation?

MR. LAUFER: Justice Marshall, that is a difficult -- question for me to answer in the abstract. Without question, the client --

QUESTION: Not for me.

MR. LAUFER: Without question, if I might try to answer it, Justice Marshall, without question the firm is involved in the litigation. Without question the firm's resources are being used, the firm's partner, the partner's time is indeed the firm's time, arguably; but it is not the firm that has made a representation to the court. It is not the firm that is wrong in court --

QUESTION: The firm -- the firm authorized the partner to sign its name to the firm. The firm authorized that. And you say the firm has no responsibility for that.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. LAUFER: Yes, because the rule rejects -- the rule rejects that partnership responsibility. As a matter of fact, if I might say, there is a memorandum -- there is a memorandum which I submit makes very clear what it would seem to me would be obvious in the other circumstance, even in the absence of such a memorandum, and that is the memorandum from, Judge Mansfield and, and Professor Miller which is quoted in our brief, and that makes very plain what, what otherwise appears within the rule itself.

The rule has, has been intended, has been promulgated to deal in a certain way with a certain problem. The way the dual -- rule deals with that problem is by turning each, each litigation paper into an oath, an oath of an individual. By, by requiring that that attorney make a promise to the court, even if that attorney is a junior attorney, and the problem that is posited in that memorandum, what if a senior attorney and a junior attorney are both involved in the preparation of a paper or of a pleading -- QUESTION: I suppose the tougher case is the one that the court below referred to. We have a national law firm that employs local counsel and the national law firm spends many, many, many hours on some elaborate document, has local counsel file it and sign it. It would generally be a waste of time for that lawyer to do all the research and so forth. But yet the local counsel takes full responsibility under your view?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. LAUFER: And that is -- that is the system of the rule, and I think it is appropriate. I think it is appropriate. The, the promulgators of the rule, the, the Advisory Committee felt that the most appropriate way to deal with this problem of dilatory pleadings, of avoiding diffusion of responsibility, which has been referred to in connection with the 1938 rule, to take one human being and put that one human being forward, and make that one human being responsible. Lower courts have, have rejected --

QUESTION: Do you know if this sort of payment is covered by most malpractice policies?

MR. LAUFER: I think this is an evolving issue. The record reflects that the insurer in our case has rejected coverage, has disclaimed coverage. I think in, in the first instance that would be the instinct of many insurers, because the sanction is a penalty, is a punishment, and it would be against public policy, really, to buy insurance that in the event you do wrong, and wrong a court and misrepresent to a court, that you will be held harmless by an insurance carrier. That is, that is the state of the situation insofar as I, I know it. It could evolve, and I don't know where it would evolve.

The partnership theory -- the partnership theory that the court of appeals has espoused is not even in and of itself a pure partnership theory. The court of appeals has indicated

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that in its view, given general traditional partnership principles, in the ordinary circumstance, an attorney who is a member of a firm who signs on behalf of that firm is thereby binding its -- his firm or her firm to sanctions. But it said, it left open the unusual circumstance, where perhaps partnership principles might not apply in a given set of circumstances.

I would submit, Your Honors, that this is legislation, really. It -- it's pure legislation. It is a policy determination. It is a determination by the court of appeals that more is to be gained by promoting the incentive of firms to monitor their attorneys. I would submit that an equally cogent argument could be made that firms have every incentive, nevertheless, to monitor the pleadings of their parties -- of, of their attorneys who sign pleadings. After all, it is a shame, and notwithstanding that, a firm we submit ought not and is not sanctioned when the newspaper coverage, as inevitably is there within the legal community and sometimes within the general press, the law firm's name inevitably appears, that if so and so of this firm who has been sanctioned -- and I think that what is being given up.

And this is a legislative toss up, it is a give up in, in terms of the Second Circuit's determination, which I think is almost a legislative one. I think it is a legislative one. What is being given up is that precision, is that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

precision of responsibility that is called for by the rule, that recognition by that person who is, who is sitting with a pen, who is -- who the rule seeks to deter, and the knowledge of that person, that person's individual assets, that person's individual reputation, individual standing at the bar, are what -- are, are what are responsible here and what are called into question. And that person is thereby chastened, that person is thereby made to think twice or three times before that person signs such a piece of paper, and that is what would be given up in the, in the legislative toss up, really, that the Second Circuit has, has accomplished by, by rewriting the rule, I would submit.

With the Court's permission, I would -- I would ask to reserve the balance of my time for rebuttal.

QUESTION: Thank you, Mr. Laufer. Mr. Arnoff, we will hear now from you.

ORAL ARGUMENT OF NORMAN B. ARNOFF

ON BEHALF OF THE RESPONDENTS

MR. ARNOFF: Mr. Chief Justice, and may it please the Court:

I would like to address the question put by Justice White to my colleague at the New York bar and my adversary. And in essence, the question was doesn't the language of the rule precisely and specifically talk about the person who signed the pleadings, motions or other paper?

Title 28, the United States Code 1691, says that all writs of the court must be signed by the clerk. It is my understanding of the practice in the southern and eastern district of New York, and I believe in this Court, that writs of the court may be signed by deputies under the authorization of the clerk, and that that does not undermine the official nature of the document.

QUESTION: Well, of course, it is under seal of the court that -- the statute also says it shall be under seal of the court.

MR. ARNOFF: But analogously, Justice Kennedy, when a law partner in the course of partnership activity, with the authority of his partners, in a litigation such as this, which was a four-year litigation involving substantial discovery, a very serious allegation of forgery against another lawyer who served honorably a client for 13 years, when he signs his name, in essence, his signature is the act of the partnership. And all the more so when the signature on the pleading reads Pavelic & LeFlore, by Ray L. LeFlore.

QUESTION: If you are going to apply agency principles to the second half of the rule, why don't you apply it to the first half? So, when it says that every pleading shall be signed by at least one attorney of record in the attorney's individual name, I suppose I could have somebody else sign it for me in my individual name, right? Could I do

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that? You apply the same agency principle, right, qui, qui, qui facet per allium facet per se, you know.

MR. ARNOFF: Justice Scalia, --

QUESTION: You, you wouldn't allow that to happen for the first section, would you? Doesn't that mean I have to sign it?

MR. ARNOFF: I don't believe so.

QUESTION: Is that right?

MR. ARNOFF: Justice Scalia, I believe that the attorney of record, and by custom and usage in the southern and eastern district of New York is the law firm, can only sign through a member of the firm --

QUESTION: So, so you --

MR. ARNOFF: -- as was done in this particular case. There was an explicit --

QUESTION: You think when the rule says in the attorney's individual name, that means the law firm's name?

MR. ARNOFF: It requires strict accountability. But that doesn't say sole accountability or sole liability.

QUESTION: Doesn't a lawyer have to sign a federal pleading in his individual name?

MR. ARNOFF: Yes.

QUESTION: All right. Can he have someone else do it for him?

MR. ARNOFF: In the firm, yes.

QUESTION: But that can be an associate as well as a partner, I take it?

MR. ARNOFF: Yes. And that specifically -- that was specifically addressed by the court of appeals. And Your Honor alighted on the potential sharp practice that could develop by a silent, unscrupulous senior partner directing a junior partner or a junior associate to sign a frivolous pleading and destroy the vitality and the deterrent orientation of the rule.

QUESTION: No, but you've got to assume though that the person who signs it is a lawyer, even if he's just out of law school and just passed the bar, takes responsibility if he or she puts his name on that paper. And you, you cannot, it seems to me, persuade me that, because a senior partner told him to do it, that that is a defense. Because he has got individual responsibilities.

MR. ARNOFF: And that's, and that's what the advisors' comments noted. That if the junior is most knowledgeable about the case he should sign the pleading. If the senior is most knowledgeable about the case, he should sign the pleading.

QUESTION: Well, the point of the rule is that whoever signs it better be knowledgeable about the case.

MR. ARNOFF: Yes, and has strict accountability. But that does not mean, as the Petitioner suggests, that the law firm is relieved of its obligation to supervise, to check, or

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

to --

QUESTION: Yes, but does Rule 11 impose any supervisory obligations on anyone who does not sign the pleading? Does the rule impose any such -- maybe good practice does, all sorts of reasons why they should supervise, but does rule --

MR. ARNOFF: The text -- the text does not. But the Petitioner in this case is contending for a blanket rule that under any set of facts, under any set of circumstances, there would not be law firm liability.

QUESTION: Well, I thought he suggested there could be, but under the inherent authority of the court, just not under the terms of Rule 11 as it is presently written.

MR. ARNOFF: Yes, Your Honor, but we suggest that Rule 11 is a development, is an incremental development of the inherent powers of the court, including the power to regulate practice, including the disciplining of attorneys.

QUESTION: In order to decide this case, do we have to reach the question of whether you can get the law firm under some other basis than Rule 11?

MR. ARNOFF: No.

QUESTION: Wasn't it -- it rested below on Rule 11, didn't it?

MR. ARNOFF: Yes.

QUESTION: So, if we think you can't do it under Rule

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

11, that is the end of the case.

MR. ARNOFF: Yes.

QUESTION: Mr. Arnoff, Rule 56 of course deals with summary judgments. And Rule 56(g) talks about affidavits and summary judgment proceedings that are filed for the purpose of delay. And at the end of it, it says that when the court finds that is the case, any offending party or attorney may be adjudged guilty of contempt. Now. would you say that rule allowed the firm for which the attorney worked to be judged guilty of contempt?

MR. ARNOFF: No, Your Honor.

QUESTION: Well, why wouldn't partnership principles apply there, the way the Second Circuit saw to apply them in this case?

MR. ARNOFF: Your Honor, I think there is a material difference between shifting the reasonable litigation expenses caused by abusive litigation practices and holding a law firm -- a lawyer in contempt and then holding the rest of his law firm vicariously in contempt. The amendment to the rule in 1983 specifically talked about a broad range of sanctions. All that is before the Court in this particular case is whether the law firm, in an appropriate case as this one was, should absorb the reasonable litigation expenses that were incurred as a result of the defense against these frivolous papers and the forgery claim against the respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, what if the district court in a Rule 56 summary judgment action says I hold you in contempt and fine you $1,000, and I fine the law firm $1,000, too. That wouldn't do, I take it?

MR. ARNOFF: I don't believe so.

QUESTION: Why is that different from this case?

MR. ARNOFF: Because we are specifically focused on the reasonable litigation expenses, one of the range of circumstances, one of the range of sanctions -- contemplated by Rule 11.

QUESTION: What if the district court in the Rule 56(g) proceedings said I, I find these, these -- delaying tactics have incurred $1,000 of attorneys fees unwarranted for the other side, and so I am fining -- I'm fining you $1,000 and holding you in contempt.

MR. ARNOFF: Well, does, does the funds go into the court or to the Treasury, or does it -- is it shifted from the -- one litigant to another?

QUESTION: No, it is not shifted from one litigant to another in my hypothesis.

MR. ARNOFF: Well, I think due process considerations would apply, and the due process, the format of due process is suited for the particular case. I think there is a material difference between the exercise of the contempt power or referring an attorney to disciplinary grievance committee, and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the shifting of reasonable litigation expenses, which is the specific and limited focus of this particular case.

This Court, in 1958, in the case of Societe International v. Rogers. In a specific sanction context dealing with the casual use of the words refusal and failure in Rule 37, held that the language of the Federal Rules of Civil Procedure should not be interpreted with too fine a literalism so as to preclude a district court from doing, from framing an order to the particular case.

We contend that the sanctions in this case, the reasonable litigation sanctions, were within the Court's discretion to fit to the particular case. The rule provides that sanctions, economic sanctions, may be allocated between client and lawyer to fit the particular case. So may they under the -- within the contemplation and in the intent of the advisors, be allocated between the law firm and the wrongful -- the wronged -- the party that committed the wrong. The advisors talk about giving consideration to the actual and presumed knowledge of the violator.

Rather than the two questions presented by the Petitioner law firm, the issue before this Court, I believe, should be better stated as follows: Should this Court adopt a blanket rule of national practice for the United States district courts that, on any set of facts, a law firm will not be held liable for the reasonable litigation expenses caused by

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the Rule 11 violation of one of its members or associates. We say definitively no.

The uniform rule pressed by the Petitioner in this case would frustrate the rule's deterrent purposes and tie the district court's hands in tailoring sanctions. Petitioner law firm's interpretation will not dispel apprehensions that efforts to obtain enforcement will be fruitless by ensuring that the rule will be applied when properly invoked.

The case comes before Your Honors as a result of a conflict between the Fifth Circuit's holding in Robinson versus National Cash Register and the Second Circuit's holding. I believe a comparative analysis of those two specific cases will justify Your Honors in affirming the judgment below, that in this case, sanctions were appropriate to be imposed upon the law firm.

There is no direct conflict in one sense between the two cases. Both cases stand for the proposition that liability under Rule 11 derives from the signature. The difference is in Robinson the signature limited liability, and the law firm was held that it could not place its signature on a piece -- on a court paper to constitute a Rule 11 certificate. The Robinson case interpreted signature literally to mean only the lawyer who manually wrote his name.

The Second Circuit in the Calloway case, recognized that the law firm could sign a pleading by one of its members

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

and that the signature of the individual member was a partnership act.

QUESTION: Do you say it is mandatory that the court impose the fine on the law -- law firm?

MR. ARNOFF: No. In, in appropriate cases the --

QUESTION: Well, but the rule is phrased in mandatory language.

MR. ARNOFF: Yes, Your Honor.

QUESTION: What , what is there in the rule that gives discretion?

MR. ARNOFF: It is mandatory once a violation is found that a sanction be imposed. But the district courts have the discretion to deal flexibly with a violation, to tailor the sanctions to the particular case. And the rule -- the advisors notes goes on to say that consideration should be given as to the state of the presumed knowledge of the, of the, of the violators, their actual knowledge, and other circumstances.

QUESTION: Mr. Arnoff, is it your contention that Judge Sweet in the district court fixed the amount of these sanctions in terms of attorneys' fees that the conduct had caused other parties to occur?

MR. ARNOFF: Yes, Your Honor. He, one, assessed the total amount of the sanctions predicated on one share of what was caused to one of the litigants in terms of counsel fees; the aggregate litigation expenses were $900,000. He assessed

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that to be $200,000. He did not shift the entire cost of $900,000. He operated within the appropriate discretion and I think the intent of the advisors that the least-onerous sanction under the circumstances should be appropriated to, to satisfy the deterrent orientation of the, of the rule.

QUESTION: May I ask you a factual question? I know in your brief that -- describing the case you point out, that some of the critical papers were filed -- signed by the firm's name by the individual lawyer. Is that true of all of the papers that gave rise to the sanctions?

MR. ARNOFF: The partnership, Justice Stevens, was formed in October 1984. A number of frivolous papers were signed individually prior to that by Ray LeFlore and by a previous law firm, LeFlore & Eagan. Subsequent to October 1984, all papers, including those found by the district court and the court of appeals to have been in violation of the rule, were signed Pavelic & LeFlore by Ray LeFlore.

QUESTION: So are you -- are you in effect arguing that maybe the rule required an individual's signature, but in fact the person who signed the pleadings, in this case, the person was the firm, signing by the individual partner, and therefore, the language of the rule reads on -- the discipline can be imposed on the person who signs the pleadings, and that is the partnership.

MR. ARNOFF: Yes.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Even though it didn't -- the partnership didn't have to do it that way.

MR. ARNOFF: Well, I --

QUESTION: You know, it seems to me there are two different arguments you might make. That in all cases an individual -- when an individual signs you can impose liability on the principal or the firm. Or, more narrowly, you might be arguing that in those cases in which the person who signs the pleading is the firm, signing by an individual, then the firm is itself liable.

MR. ARNOFF: Justice Stevens, we are arguing here that the firm explicitly signed by the appearance of the signature, Pavelic & LeFlore by Ray LeFlore. Equally, if the signature was merely Ray L. LeFlore, as it was in the Fifth Circuit where it was by David Black in the Robinson case, the signature of the individual is a partnership act.

QUESTION: Well, I understand that, but that's a harder argument to make in the terms of the language of the rule than the other argument when you say, in fact, the person who signed -- because the court upon motion shall impose upon the person who signed it sanctions. And if you are saying the person who signed it is the firm, because it says A and B by A, then it seems to me you, you fit into the language of the rule more nicely.

MR. ARNOFF: Justice Stevens, I know of no way that a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

legal entity, a corporation or a partnership can sign a document other than through an agent. And I would respectfully suggest that the terminology --

QUESTION: Well, that is true, but it doesn't mean that --

MR. ARNOFF: -- the person who signed, would mean a legal person as well as a natural person, a human being.

QUESTION: But that might not be true if they hadn't said Pavelic and whatever it was by so and so. Well, anyway, go ahead. I, I understand your position.

MR. ARNOFF: We, we, we would argue in support of both propositions. I believe I have the easier case because of the explicit signature. The principal challenge --

QUESTION: Excuse me, you know, elsewhere the rule reads the signature of an attorney or party. It doesn't say person. The signature of an attorney or party constitutes a certificate by the signer. I mean, the whole rule seems to be focussing on the individual. Now, there is no way to say -- you could say the firm is a person, right, a juridical person, but you could not -- hardly say it is a juridical attorney. It says the signature of an attorney or party constitutes a --

MR. ARNOFF: Justice Scalia, later on in the language of the rule, and I believe that portion that deals with the imposition of sanctions, the specific terminology is the person who signed.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, that is so, but I am talking about the rule as a whole seems to be focusing on an individual attorney.

MR. ARNOFF: We would also argue that this rule should be interpreted in the light and consistent with Federal Rules of Civil Procedure 1. Not strictly, not too literally, not semantically, but in order to secure the just, inexpensive and -- determination of every action.

QUESTION: This certainly wasn't inexpensive for the partnership.

MR. ARNOFF: No, but it was -- and it certainly wasn't inexpensive for the Defendants in this case, and particularly, my client who was a lawyer of good standing who was accused of forging a document and who went through four years of, of, of litigation, in respect to -- and not only was his name involved but also his potential -- economic liability.

The principal challenge to the interpretation of the Second Circuit by the Petitioner in reliance on the Fifth Circuit case of Robinson versus National Cash Register is that the Second Circuit violated the plain meaning of the rule and thereby legislated. But both courts, Your Honors, could not discern a plain meaning to the -- rule. Both courts had to resort to policy considerations. The Second Circuit at, at the -- in the petition, page 60a, makes a reference that the -- of a lack of plain meaning, and specifically, the Fifth Circuit at

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

808 Fed Second 1128 held it is unclear, however, whether Rule 11 sanctions can only be imposed on an attorney who actually signs a document or whether sanctions can also be imposed on an attorney who did not sign the document deemed to violate Rule 11 but who made an appearance in the suit.

The Fifth Circuit emphasized the -- their concern about satellite litigation, and that if a non-signer was held liable they would have to enquire into the relative culpability of attorneys. The Second Circuit emphasized deterrence and the internal monitoring that was necessary and should be necessary to avoid frivolous filings.

We respectfully contend that the Fifth Circuit interpretation weakened the prime objective and orientation of the rule deterrence. The example I gave before, which I believe should be restated and restated, is the silent partner instructing the junior or associate to sign the frivolous paper. It is a potential for sharp practice. The Fifth Circuit, moreover, was unrealistic in encouraging multiple participants in preparation of one legal document all to sign. I don't think that will happen.

The Second Circuit applied the advisors' comments: the district court retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case with which it should be well acquainted. This was a built-in

safeguard. And I would respectfully suggest, contrary to the argument of the Petitioner, that the Second Circuit legislated the adoption of partnership law. That there is a material difference between the -- the traditional application of partnership law and the formulation, the flexible formulation in the Second -- of the Second Circuit in this particular case.

As I understand partnership law, in the course of the partnership and with the authority of the partners, if a fraudulent misrepresentation is made upon a third party, the partnership is liable. In terms of the, the formulation of the Second Circuit, the exceptional circumstances, if there was a fraud on the partnership, if there was a showing of an internal monitoring system, and if the partnership could not reasonably detect by its supervisory mechanisms the, the fraud, the, the frivolous filing, then it would be appropriate to relieve the partnership and impose the full weight of the sanction on the individual wrongdoer.

QUESTION: Why is that? The individual wrongdoer doesn't get off if it's -- if he could show the same thing. Right? Rule 11 will be imposed upon the individual, even if he comes forward with such excuses as that, right? It doesn't require bad faith on his part.

MR. ARNOFF: True.

QUESTION: So why should you -- why should you come out any differently for the partnership, if the partnership is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

covered by the rule?

MR. ARNOFF: You should come out differently for the partnership.

QUESTION: Why?

MR. ARNOFF: Because the, the prime purpose of the rule is deterrence. It -- a secondary purpose is compensation. If the partnership can show that they had an internal monitoring system and they did their job, and they supervise, and they could not by reasonable means have discovered this, then the rule, which is basically an equitable rule, should relieve the partnership.

QUESTION: Although it wouldn't relieve the individual, even if he came forward and showed I had a monitoring system, I had the investigators who did all this check it out, my secretaries checked it out, it really wasn't my fault. And you would say hey, that is tough luck, Rule 11 is Rule 11. It is an absolute liability, isn't it, for him? But you're saying not for the partnership. Why? Why would you make a difference between an innocent partnership and an innocent individual lawyer?

MR. ARNOFF: Justice Scalia, if, if the individual lawyer could show that he conducted a pre-filing inquiry, that a reasonably competent lawyer could conclude the bonafides of the legal claim, he would be able to exonerate himself from the -- imposition of a Rule 11 finding.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But what I am saying in this particular case, assume that there was a violation. In the ordinary typical case, as this case was, traditional partnership principles should apply. But if the, the partnership came back, as they did not do in this case, and showed there were exceptional circumstances, showed they weren't -- that there -- that there was concealment or fraud, showed that they had a monitoring system, equitably, they should not have to incur a sanction.

We do not believe that the Second Circuit legislated, nor did they exercise in a raw fashion, the inherent power of the court which has always been a power to regulate attorneys who practice before it and to discipline attorneys. That power, I presume, was carried over by the enabling act in Rules 1, 7 and 11, and through the amendment of, of Rule 11, and through a new definition of bad faith on objective terms. And it was appropriate in this particular case because the partnership was a knowing participant in the law suit. Other lawyers appeared, attended depositions, attended trial days. Checks were written by Mr. Pavelic to satisfy discovery sanctions that were incurred by the firm long before trial. This was a major litigation and, of course, the linchpin charge of this litigation, the forgery allegation against Peter Shukat, was a conspicuous and not an incomprehensible allegation that the partnership had to be aware of, and that this was sustaining the life of the litigation.

If Your Honors would look at the two cases, the Robinson case and the Calloway case, as a -- as, as the -- as a snapshot, the way you would want Rule 11 to operate in the future, you would see that in the Robinson case, a client was sanctioned without discussion for bringing a second action after a defeat in federal court against the principles of res judicata. Neither the district judge in the Robinson case, nor the Fifth Circuit gave any explanation as to why sanctions should be imposed upon the client. The Fifth Circuit then went on to relieve the non-signing --

QUESTION: Mr. Arnoff, your time has expired. Do you have any rebuttal, Mr. Laufer?

REBUTTAL ARGUMENT BY JACOB LAUFER

ON BEHALF OF THE PETITIONER

MR. LAUFER: Thank you. Just one sentence, Your Honor, if I might.

QUESTION: Very well, speak it.

MR. LAUFER: The argument that Respondents are making is an argument for a different Rule 11, for the wisdom of a different Rule 11, and I submit that we must deal with the rule as it now exists, as it has been promulgated.

Nothing further, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you. The case is submitted.

(Whereupon, at 12:01 o'clock p.m., the case in the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-791 - PAVELIC & LeFLORE, Petitioner V. MARVEL ENTERTAINMENT GROUP, ET AL.

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lyona M. Mayo

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'89 OCT 11 A8:58