

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: COOTER & GELL, Petitioner

V. HARTMARX CORPORATION, ET AL.

CASE NO: 89-275

PLACE: Washington, D.C.

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1 before you this morning may have an enormous impact on the
2 availability of legal services to clients throughout this
3 country who bring to lawyers every day cases and ask them
4 to carry those cases to court and the lawyers are
5 confronted with the responsibility of doing justice to the
6 clients and meeting their duties to the court,
7 particularly duties imposed now by the current state of
8 Federal Rules of Civil Procedure 11.

9 The briefs of the parties in this case, as well
10 as the briefs of the amici curiae, have addressed the
11 facts at some length and I choose not to do that this
12 morning unless the Court wishes. I would like to spend a
13 moment or two on the facts because they lay the groundwork
14 for the three issues that I would like to address.

15 Briefly, the facts are as follows. The
16 litigation that resulted in sanctions began as a suit on a
17 contract brought by a subsidiary of the Hartmarx Company
18 against a client of Petitioner -- Petitioner's law firm
19 Cooter & Gell.

20 This suit was met with a counterclaim, a
21 Robinson-Patman counterclaim, and thus began the
22 litigation that ended up in this Court with the sanctions
23 issue.

24 As the investigation into the counterclaim took
25 place and facts were gathered, Petitioner discovered what

1 it believed to be serious antitrust violations, broad
2 Robinson-Patman violations in a number of cities around
3 the United States. And allegations by its client, a
4 clothing company, distributor of men's clothing that had
5 done business at various locations since 1969 in
6 Washington, D.C., that Hartmarx Company and two of its
7 principle subsidiaries had engaged not only in Robinson-
8 Patman violations, but it engaged in price fixing that was
9 supported by an exclusive dealer arrangement.

10 QUESTION: Is it clear that both the attorneys
11 and the client here brought forth these allegations?

12 MR. SALTZBURG: Mr. Chief Justice, what's clear
13 is -- is the following. That the Petitioner represented
14 to the district court that its investigation was based
15 upon allegations made by its client. And if I might
16 elaborate, the -- the -- on that little bit because the
17 record in this case is not the record that I would like to
18 have before you, and I --

19 QUESTION: But I take it it is the record you're
20 going to deal with.

21 MR. SALTZBURG: It is the record we must deal
22 with and -- and the reason for that is Rule 11 had just
23 taken effect in its revised form in August of 1983. The
24 complaint in this case, the class action complaint which
25 gave rise to sanctions, was filed barely three months

1 thereafter and this was one of the early sanctions cases.

2 When the complaint was filed in this case, it
3 was met with a Rule 12(b)(6) motion to dismiss and almost
4 immediately thereafter a request for sanctions. Almost
5 immediately after the request for sanctions was filed, Mr.
6 Chief Justice -- gets to the point about who made the
7 allegations -- request was made by the defendant in the
8 case to depose one of the principals, the leading
9 shareholder and the president of the client company.

10 Petitioner opposed the deposition at that time,
11 which was focused only on Rule 11, because the district
12 court hadn't addressed the 12(b)(6) motion, hadn't
13 considered the merits, and enormous clients -- enormous
14 questions of attorney/client privilege and the difficulty
15 of dealing with privilege questions and Rule 11 issues at
16 a time when this case was in its infancy and there was the
17 previously filed Robinson-Patman claim pending.

18 And they opposed the deposition and the district
19 court ordered that the deposition take place. And it did.
20 During the course of that deposition, which is in the
21 Joint Appendix before this Court, this Court can see that
22 counsel essentially instructed its -- the principal of its
23 client not to answer any questions with respect to what
24 the client said to the law firm.

25 Instead, Petitioner offered to make available

1 any member or the law firm to explain the origins of the
2 complaint, the information that was relied upon, anything
3 else, without waiving the attorney/client privilege.

4 Well, if I might jump ahead in the law for a
5 moment, if we had the benefit of all the cases, if we had
6 -- had had in 1984 -- in 1983 the benefit of all the cases
7 decided in the next four or five years, one could say,
8 well, didn't they know that procedures would be developed
9 whereby in camera you could go before the district court
10 and make certain representations that wouldn't be
11 disclosed, that there wouldn't be a waiver of privilege.

12 And there are ways to deal with attorney/client
13 privilege problems that might have enabled the deposition
14 to take place, information to be provided to the judge,
15 without waiver of the privilege and the answer is yes.

16 With the benefit of what came afterwards, it
17 might have been possible to do things differently. But
18 this was early 1984. It was early in Rule 11. And, in
19 fact, the record indicates that the client basically said,
20 I relied on the law firm and was instructed not to answer
21 any questions about what the client in fact told the law
22 firm.

23 The Petitioner represented to the district court
24 and represented to the court of appeals, and represents to
25 this Court, that its investigation was at all times based

1 upon the information and belief provided by this
2 experienced client, a client that had been in the men's
3 clothing business for 14 years prior to the filing of the
4 complaint, that it had experience in the industry and that
5 one of the difficulties with this record was the
6 difficulty of dealing with attorney/client privilege
7 questions and an early sanctions motion -- early in the
8 case -- before the merits were even to be addressed.

9 QUESTION: We don't have before us, do we, the
10 question of whether it was appropriate for the district
11 court to impose sanctions?

12 MR. SALTZBURG: No, sir. The -- the issue
13 before the Court is whether -- you don't have before you
14 the question of the amount of sanctions or whether the
15 district court abused its discretion. The Court denied
16 review of both those questions.

17 It did grant review on the issue of what the
18 standard of review should be, whether it should be a
19 clearly erroneous standard and, to some extent, the
20 propriety of imposing sanctions would, of course, depend
21 on the scope of review that the appellate court should
22 have used.

23 If the Court decides that a higher standard
24 should have been used than the court of appeals, the Court
25 would, under the question granted, be justified in

1 remanding this case for further consideration by the court
2 of appeals on whether --

3 QUESTION: What standard do -- do you think the
4 court of appeals used, Mr. Saltzman? It isn't real clear
5 to me from the court's opinion what the standard was?

6 MR. SALTZBURG: Justice O'Connor, I think that's
7 a very fair conclusion. Without criticizing the court of
8 appeals in any way, I think the fairest statement that one
9 can make is that it's very difficult to tell from the
10 opinion of the court of appeals exactly what standard it
11 used.

12 There are prior opinions of the District of
13 Columbia Court of Appeals which would bind that panel,
14 unless the court were to go on en banc and of course
15 overrule the prior decisions which suggest that an abuse
16 of discretion standard was used in the circuit.

17 QUESTION: A moment ago, Mr. Saltzburg, I asked
18 you do we have here the question of the propriety of the
19 district court imposing sanctions. We don't have the
20 question of the propriety of imposing on those facts, but
21 we do have the question of the authority, really, after a
22 voluntary dismissal, don't we?

23 MR. SALTZBURG: Yes, Mr. Chief Justice. That is
24 -- that is the first question granted and there are,
25 however, additional questions we believe that fall

1 appropriately within the -- what the court of appeals
2 scope of review is.

3 QUESTION: Well, that may be so but you win if
4 the -- if there shouldn't have been any sanctions at all.

5 MR. SALTZBURG: Justice White, you're correct
6 and I suggest that --

7 QUESTION: And that's what you're going to
8 argue, I take it.

9 MR. SALTZBURG: Immediately.

10 (Laughter.)

11 MR. SALTZBURG: The first argument that the
12 Petitioner makes to this Court is that Rule 41(a)(1)(i),
13 which, if the Court permits, I'll refer as Rule 41 to
14 avoid being tongue-tied and each time meaning that
15 particularly -- particular subsection of the Rule.

16 We submit that the second circuit was correct
17 when it said that when a voluntary dismissal is filed
18 under Rule 41, the case ends. And when the case ends,
19 Rule 11 sanctions may no longer be imposed.

20 QUESTION: Mr. Salzman, would a court, a
21 district court, have continued power to go after a lawyer
22 on a contempt sanction after a voluntary dismissal?

23 MR. SALTZBURG: In our view, Justice O'Connor,
24 yes.

25 QUESTION: Well, how is that different in any

1 way from a Rule 11 sanction which does seem to be one
2 designed to address what the attorney did, not what the
3 client did so much?

4 MR. SALTZBURG: Justice O'Connor, to give a full
5 answer to that, I want to be clear.

6 Our position is that with respect to criminal
7 contempt, 18 U.S.C. 401, as well as 28 U.S.C. 1927, the
8 penalty provision for lawyers who vexatiously multiply
9 proceedings, that the court's power to impose and to
10 consider contempt and penalties on the lawyer under that
11 statute are not -- are not ended when a Rule 41(a)(i)
12 dismissal is filed.

13 And the reason is that the Congress has provided
14 by statute for very particularized sanctions for the most
15 egregious forms of behavior and that prior to the
16 amendment in 1983 of Rule 11 there was no indication that
17 contempt or other sanctions for misbehavior, particular
18 affront to the court, couldn't be considered.

19 What we have today, and the reason this case we
20 submit is different than the issues presented from those
21 statutory provisions, particularly contempt, is that we
22 have your rules. We have your Rule 11, your Rule 41, and
23 a construction of those rules and what you intended.

24 And you rules provide two exceptions to Rule 41
25 -- 41(a)(1). They provide that that rule will be subject

1 to 23(e), the class action rule which requires the judge
2 consider notice to the class before the dismissal becomes
3 final, and 66, the receiver's rule.

4 No one suggested when -- in 1983 when the rule
5 was amended, that there ought to be an additional
6 exception for Rule 11. Now, this is also different --

7 QUESTION: Well, I don't see why you need an
8 exception. Rule 11, just like contempt proceedings, is
9 addressed to something else and the language is there, and
10 I fail to understand why a dismissal under Rule 41 should
11 have any effect on a sanction motion against the lawyer.

12 MR. SALTZBURG: Well, it's -- Justice O'Connor,
13 I would like to argue to you that the plain language of
14 Rule 41 requires the reading that we urge upon the Court,
15 but --

16 QUESTION: What's that?

17 MR. SALTZBURG: -- but we cannot do that.

18 QUESTION: Without prejudice?

19 MR. SALTZBURG: But part of --

20 QUESTION: The words "without prejudice"?

21 MR. SALTZBURG: The -- I think the words
22 "without prejudice" are important in --

23 QUESTION: But doesn't that just refer to the
24 right to file another lawsuit? I don't see what that has
25 to do with whether the attorney should be sanctioned.

1 MR. SALTZBURG: Well, perhaps I can add to -- to
2 that.

3 In this case, both the attorney and the client
4 were sanctioned. And, of course, Rule 11 requires that
5 the Court consider sanctions both upon the attorney and
6 the client, or both. And the question then becomes
7 whether or not a dismissal, as you -- as you so aptly put
8 it -- which Rule 41(a)(1) says will be without prejudice
9 can be in some instances with prejudice because the Court
10 will use that as the sanction it chooses for --

11 QUESTION: Well, but --

12 MR. SALTZBURG: -- Rule 11 violations.

13 QUESTION: But I practiced for 16 years in a
14 state which had the federal rules, as well in the federal
15 courts, and a voluntary dismissal under Rule 41 -- the
16 only benefit you thought you got from it was that it
17 wasn't res judicata.

18 MR. SALTZBURG: Well, Chief Justice Rehnquist,
19 let me perhaps answer that in two -- two ways.

20 The arguments that Respondents make to the Court
21 -- now, the Court, of course, can accept less of this
22 argument -- the arguments that Respondents make is that
23 indeed Rule 11 does give the federal district court the
24 power to dismiss the case with prejudice as a sanction,
25 notwithstanding Rule 41 saying dismissal will be without

1 prejudice.

2 They are -- and they are in effect forced to
3 that position because all of the cases decided in the
4 lower court say that the district judge has essentially a
5 whole array of sanctions, whatever the district judge
6 deems appropriate.

7 And their argument is that that is -- you can
8 square that reading of Rule 11 with Rule 41 by simply
9 saying that the with prejudice is a penalty imposed
10 because of a Rule 11 violation and that somehow that
11 doesn't interfere with Rule 41's guarantee to the client
12 that dismissal would be without prejudice.

13 QUESTION: Well, you could -- you could argue it
14 that way. But you could -- you could also argue that --
15 that prejudice is an available sanction where it's an
16 available sanction and that it's simply not available
17 where there's been a timely dismissal before an answer has
18 been filed.

19 Why can't you say it's simply not available
20 under Rule 11 where there's been a Rule 41 dismissal?

21 MR. SALTZBURG: The Court could say that,
22 Justice Scalia, and it --

23 QUESTION: Yeah. It would be logical. It would
24 be a --

25 MR. SALTZBURG: It would be. It would be, in

1 fact, in our judgment, required as a fair construction of
2 the two rules at a minimum. But beyond that, and this
3 goes back to the question that the Chief Justice put about
4 what the effect would be of a -- of a dismissal.

5 One of the things that Rule 11 does, at least if
6 our argument is accepted and the law, at least as it's
7 developing now, is that there are at least minimum
8 procedural requirements that must be employed before any
9 sanctions are imposed.

10 One of those requirements is, at least in some
11 instances where the sanction is severe, that there be
12 fact-finding by the court. And those facts may very well
13 give rise to collateral estoppel fact unless there is an
14 appeal and unless the appeal is -- produces a -- an
15 overturning of the lower court's decision.

16 What happens on Rule 11 is there are no
17 sanctions in the abstract. There are sanctions because
18 the district judge makes a decision that something was
19 wrong. And if the district judge decides that something
20 was wrong has to do with the merits of the case, we now
21 have a situation in which 41 says you can dismiss without
22 prejudice, but Rule 11's dismissal may in fact be, as a
23 practical matter, prejudicial not only in the sense of
24 economically prejudicial but prejudicial in the very legal
25 sense of making it more difficult, if not impossible, to

1 bring a subsequent suite based on those same facts.

2 QUESTION: What would it -- a sanction that made
3 it more difficult but not impossible to bring a subsequent
4 -- you would treat that as a dismissal with prejudice?

5 MR. SALTZBURG: To the extent that the difficult
6 but not impossible involved fact-finding and collateral
7 estoppel that might make the second action if not wholly
8 barred -- I mean, it may make the second action precluded
9 at least in part.

10 QUESTION: Well, what -- what do you interpret
11 the phrase "without prejudice" in Rule 41 to mean beyond
12 it not being res judicata?

13 MR. SALTZBURG: I think that it is a -- that the
14 with prejudice language, or without prejudice, means
15 without having any preclusive effects upon a subsequent
16 suit.

17 And in the case of Rule 11, there are two
18 possibilities, Justice Scalia, as you say. One is the
19 Court could say that you simply cannot dismiss with
20 prejudice totally so that the complaint therefore, at
21 least in theory, could be refiled.

22 But the other problem in Rule 11 sanctions is,
23 to the extent that there are findings which may have
24 preclusive effect either because they are imposed, as in
25 this case, directly against the client as well as the law

1 firm, or because they're imposed against the law firm and
2 the law firm and client are in privity.

3 QUESTION: That's kind of around Robin Hood's
4 barn, isn't it? If there's a hearing required and if
5 findings have to be made.

6 MR. SALTZBURG: Yes. The -- if -- it's true,
7 Mr. Chief Justice. Our argument is in -- that -- and this
8 is where the first issue and second issue do have some
9 overlap -- is that one of the functions of judicial review
10 in the courts of appeal is to assure that before sanctions
11 are imposed -- that before they are imposed that there are
12 careful fact-finding supporting the imposition of
13 sanctions and a clear statement of the rule.

14 It's the fact-finding, as you I think indicated
15 in your question, that has the possibility of preclusive
16 effects and --

17 QUESTION: Mr. Saltzburg, I thought that
18 collateral estoppel requires that the found facts have
19 been necessary to the -- to the earlier decision. The
20 Court cannot, in the course of an opinion, opine on facts
21 that are not essential to its decision and thereby
22 collaterally estop someone. Isn't that right?

23 MR. SALTZBURG: Yes, sir.

24 QUESTION: I don't see how any facts must be
25 found for a Rule 11 decision. No objective facts need be

1 found. All that need be found is whether the lawyer had
2 knowledge that certain facts were in existence and
3 conducted adequate investigation to acquire knowledge.

4 So, I don't see how there can be any collateral
5 effect --

6 MR. SALTZBURG: Justice Scalia --

7 QUESTION: -- as to what the objective facts
8 are.

9 MR. SALTZBURG: There is -- there is nothing
10 that is inherent in any case that says a judge in making
11 findings would necessarily make fact findings about the
12 merits of an issue or the case.

13 But in some cases that is part and parcel of the
14 fact-finding when the judge looks at what the lawyer did.

15 QUESTION: To the extent it is it does not have
16 any collateral estoppel effect because it's -- it's not
17 essential to the judgment.

18 MR. SALTZBURG: Well, it could be in a given
19 case, Justice Scalia. If in fact the district judge says
20 that in filing the complaint the lawyer alleged facts A, B
21 and C, A, B and C are untrue. Based on the record before
22 me, those facts in fact may be necessary to --

23 QUESTION: What Justice Scalia is saying, as I
24 understand it, is even if A, B and C are true, you can
25 nevertheless hold the lawyer -- sanction the lawyer

1 because he didn't really find out that they were true in
2 time.

3 MR. SALTZBURG: Justice Stevens, that's
4 theoretically possible, that the judge will say that in
5 some cases that A, B and C are true, the lawyer alleged
6 them to be true, but the lawyer didn't really know that
7 they were true, and could impose sanctions for that
8 reason.

9 In other cases, the judge may in fact say
10 they're not true. Now, --

11 QUESTION: In other words, he could be
12 sanctioned for filing a meritorious complaint if he didn't
13 investigate it thoroughly enough to begin with.

14 MR. SALTZBURG: That's possible.

15 QUESTION: Yeah.

16 MR. SALTZBURG: He may also be sanctioned -- and
17 this is a problem with the construction of Rule 11 that
18 allows sanctions to be imposed after a dismissal -- that
19 it may also be the case that the judge will say facts A, B
20 and C are untrue.

21 Now, Justice Scalia may be correct. He didn't
22 have to say that. And we could make an argument perhaps
23 down the line in some court that a judge who so found was
24 going beyond what that judge had to do, that he should
25 have focused simply on the theoretical, did the lawyer

1 investigate.

2 But there's no guarantee that argument in fact
3 will win and that it won't be a preclusive effect.

4 The other thing, if I might say, about -- Mrs.
5 O'Connor, back to the question you asked -- about the
6 Court's construction, why this is different from contempt,
7 is that if the Court decides that Rule 11 sanctions may be
8 imposed after a voluntary dismissal, the Court essentially
9 is -- is saying, because the rule allows that they can be
10 imposed sua sponte, any time without time limits.

11 The time limits this Court has provided in its
12 rules for various things -- for example, to reopen a
13 judgment -- would have no force in effect.

14 When this Court looked at the attorney's fees
15 question when an application for attorney's fees under
16 statute ought to be -- ought to have to be filed, the
17 Court struggled with whether that 59(3) time limit, the
18 10-day time limit should apply, and it ended up saying no
19 because this was a statutory creature.

20 But this is a rule creature and the -- it is --
21 it is the case which -- that if the Court decides that
22 Rule 11 sanctions remain available forever, that no time
23 limit otherwise provided in the law has any force and
24 effect.

25 Now, that might sound like a theoretical

1 problem, except this case demonstrates how real it is. In
2 this case, almost four years went by between the time that
3 the sanctions motion was filed, the voluntary dismissal
4 took place. And suddenly, at the conclusion of a wholly
5 unrelated case, the district court judge said, well, the
6 time is now right to consider the old Rule 11.

7 QUESTION: Well, that was certainly unfortunate
8 and perhaps the courts need to tighten up on additional
9 rules or times to act on things. But I don't know that
10 that answers the question you bring to us.

11 MR. SALTZBURG: I'm not sure, Justice O'Connor.
12 We would certainly urge that it was unfortunate. We would
13 certainly urge that there is a real appearance problem and
14 a practical problem if Rule 11 sanctions remain available
15 in any case, no matter when it ends, for any judge to
16 recreate at any time.

17 QUESTION: Is there a time limit on contempt
18 sanctions?

19 MR. SALTZBURG: I don't -- Mr. Chief Justice, I
20 don't know of a time limit on contempt sanctions. The --
21 there are other procedural protections, and criminal
22 contempt, of course, being the criminal sanctions, has the
23 Speedy Trial Act provisions that would -- that would
24 apply.

25 QUESTION: How about civil contempt?

1 MR. SALTZBURG: Civil contempt is -- is, to the
2 best of my knowledge, no -- I don't know of any sanctions.
3 But usually it's a contempt power that's invoked during a
4 case to produce certain forms of behavior, and when the
5 case is over rarely invoked thereafter. I can't think of
6 a case where it's invoked after the end of the case.

7 Now, if I might -- I mean, I certainly realize
8 that it's -- it's an unpopular position to stand here
9 before this Court to say that if a lawyer -- if a lawyer
10 were to file a plainly inadequate complaint and then move
11 to dismiss the complaint under Rule 41, that somehow the
12 lawyer should escape.

13 That offends almost everyone's basic sense of
14 what seems right, at least at the outset. But there is no
15 Rule 11 case -- there's no Rule 11 case that doesn't raise
16 this question, which is how are we going to know whether
17 or not there was an inadequacy unless we start the
18 procedural machine rolling to make the Rule 11
19 determinations?

20 And our submission is Rule 41 has always served
21 a very valid and important purpose. It allows people to
22 walk away. And in this case, to walk away before there's
23 any expense.

24 In this case if there's one fact that I hope
25 will be significant to this Court, it is this one. That

1 before this complaint was filed -- before this complaint
2 was filed, after the clients made their allegation to
3 Petitioner, this Petitioner gave a copy of the complaint
4 to the general counsel for Hartmarx, the parent company.
5 It gave a copy of the complaint to counsel who are before
6 you and gave then all the time they wanted to examine the
7 complaint and to talk about it before it was filed.

8 And these lawyers said, go ahead, file your
9 complaint. The complaint was filed. No one suggested
10 that the facts -- and in this case it was only one set of
11 facts that mattered, namely, there was price-fixing going
12 on -- price-fixing bolstered by an exclusive dealership.

13 Rather than say, hey, you've got this wrong, we
14 can help you with it, don't file it -- rather than that,
15 they waited. The moment the complaint was --

16 QUESTION: I -- I really can't understand this
17 argument that you've made in your brief. You -- you think
18 that -- that someone who is about to be sued in court has
19 an obligation to the other side to make sure that the
20 other side's complaint is accurate?

21 MR. SALTZBURG: Justice Scalia --

22 QUESTION: I think it's your obligation to make
23 sure it's accurate, and the other side is fully intended
24 to say: You want to file it? Take your chances. And you
25 did and you lost. That seems to me the way the system

1 ought to work.

2 MR. SALTZBURG: Justice Scalia, I'm glad you put
3 the question that way because I'd like to give you as
4 direct an answer as that question is.

5 That is exactly our argument. And the -- I'd
6 say this -- this to the Court about this entire case. You
7 have Rule 41, you've got Rule 11, and you have the lawyers
8 arguing to you both as amicus and as parties in this case.
9 You've got them arguing that what we're trying to do is to
10 deal with the system that is designed to provide speedy,
11 fair justice for all the parties.

12 Now, one way to do that is to take Rule 11 and
13 to say what Rule 11 does is it imposes some obligation on
14 Plaintiffs, who have no coercive power to force facts from
15 defendants at all, and to say to them, you take your
16 chances. And to defendants, play cat and mouse, hold back
17 the facts, run and use Rule 11 as a club.

18 QUESTION: Play cat and mouse. Just don't bring
19 a lawsuit unless you're sure that there are substantial
20 facts -- not necessarily true, but substantial facts to
21 support it. I don't call that cat and mouse.

22 MR. SALTZBURG: Well, in this case I would like
23 to remind the Court, Justice Scalia, there has been no
24 determination at all as to whether the facts alleged by
25 the clients of petitioner are true. We never reached that

1 issue. Petitioner's clients --

2 QUESTION: But didn't your client try to --
3 didn't your client succeed in publicizing the filing of
4 the complaint in this case?

5 MR. SALTZBURG: I don't believe -- I don't think
6 that that's a fair characterization, Justice Rehnquist.
7 There is a reference to a Washington Post article,
8 suggestions by Respondents that there was publicity in
9 this case.

10 But I think a fair statement of what happened in
11 this case is that the Petitioner, before it filed the
12 complaint, was trying to talk about it and use the
13 litigation when it was apparent that there was going to be
14 no discussion.

15 QUESTION: Well, of course, the complaint was
16 presented in the context of bargaining in an action on a
17 debt, was it not?

18 MR. SALTZBURG: That's correct, Justice Kennedy.
19 The -- the -- it was a follow-up to a Robinson-Patman Act
20 complaint which was filed as a counterclaim, probably a
21 compulsory counterclaim under the rules.

22 And it was an attempt to say to the defendants
23 in that case that we think we have a bigger antitrust
24 problem here. We're going to file a separate case. We
25 think we've got facts unless you tell us otherwise.

1 QUESTION: You say when a Plaintiff files a
2 claim for \$500,000 damages as a result of an accident and
3 he says to the other side, I think we have a tort problem
4 here -- I mean, that isn't what most people think the
5 filing of a complaint is, kind of a starting of a
6 discussion.

7 MR. SALTZBURG: I think that's correct, Mr.
8 Chief Justice. No one has suggested that the -- that a
9 filing of a complaint is the beginning of the discussion.

10 In this case, the complaint was drafted after
11 there had been extensive discovery in the -- with respect
12 to Robinson-Patman that led to the belief that there were
13 broader antitrust violations.

14 And the Court has a choice, and the lower courts
15 have a choice when they get into the standard of review.
16 And the choice is quite clear. The choice is do you want
17 litigants to avoid litigation where they can? Do you want
18 them to share information short of having to invoke the
19 compulsory process, or do you want them to run into court
20 and make Rule 11 motions?

21 If this Court said nothing else other than, the
22 lower courts ought to be clear that there's a duty to
23 mitigate. But you can't come in and invoke Rule 11. You
24 can't do it if you've had a chance to avoid all the
25 damages and you chose not to take that chance. There

1 would be no better principle for reducing the cost of
2 litigation and making it a more civilized place in which
3 to try cases.

4 There are lots of lawyers out there, whether
5 they're plaintiff's employment lawyers who've filed an
6 amicus brief -- lots of lawyers. Now, if they can't get
7 all the facts -- they have allegations, they do -- they
8 make efforts to corroborate, and when they do, they have
9 to decide what to do next.

10 And what to do next may be to run into court and
11 take your chances on Rule 11 or to say to the defendants,
12 here's what we think we have.

13 Now, Mr. Chief Justice, no one is suggesting
14 that the defendant should be obligated to go through every
15 line of a complaint and to review it for all the law and
16 all the little -- you know, intricacies. But where it's
17 one essential fact and they're saying, we think this is
18 what we've found out -- if they think there's something
19 wrong, they ought to say it.

20 In the court of appeals they said they had an
21 800 number -- never mentioned in the district court, never
22 mentioned it in this Court in any of the papers -- which
23 they said that the Plaintiffs could have called to find
24 out where these distributors were. Well, that 800 number
25 was never mentioned.

1 If it's easy to avoid litigation, this Court
2 ought to say to the courts of appeals: mitigation is an
3 important part of Rule 11. Some of the lower courts have
4 said that. That, we submit, is at the heart of what the
5 scope of appellate review here ought to be.

6 I have almost no time left, but I hope I might
7 reserve the minute or so that's left for rebuttal.

8 QUESTION: Very well, Mr. Saltzburg.

9 Mr. Favretto.

10 ORAL ARGUMENT OF RICHARD J. FAVRETTO

11 ON BEHALF OF THE RESPONDENT

12 MR. FAVRETTO: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 I believe the Court has put its finger on some
15 of the issues that are of concern and importance here
16 today. But in light of Mr. Saltzburg's comments about
17 significant facts, with the Court's indulgence, I'd just
18 like to review a few of the items that he made -- he made
19 some allusion to.

20 QUESTION: Please do it, Mr. Favretto, with a
21 mind to the three questions before the Court, will you?

22 MR. FAVRETTO: Yes, Mr. Chief Justice. I -- I
23 -- I accept and I agree with your observation that the
24 propriety of the award below -- the propriety of the Rule
25 11 decision below is not before this Court. Indeed, this

1 Court rejected review of that issue on Question 4.

2 But Mr. Saltzburg has folded these issues into
3 his -- the standard of review question perhaps before this
4 Court, and I'd just like to briefly get -- get at the
5 point -- get at the point in response.

6 These arguments about presenting us with a copy
7 of the complaint before filing the complaint were
8 presented to the district court, were debated during
9 argument and were referred to in affidavits filed by
10 Petitioner's senior partner before the district court.

11 The district court concluded that they never
12 asked us for our view of the facts, that if they had asked
13 us, they wouldn't have believed us, and the whole approach
14 was made in the context of trying to leverage a settlement
15 of the existing litigation as well as paying them more
16 money for these -- for these offenses.

17 We submit in that context that is hardly --
18 hardly -- the kind of practice that this Court wants to
19 encourage by endorsing a system where litigants talk to
20 one another before -- before filing a case.

21 Secondly, the idea that they rely --

22 QUESTION: May I just ask --

23 MR. FAVRETTO: -- upon their client --

24 QUESTION: -- one question since you've raised
25 that point? Isn't it customary for the Federal Trade

1 Commission before they file a complaint to give the
2 Respondents a copy and often they negotiate a settlement
3 which they file the same day as the complaint?

4 MR. FAVRETTO: That's --

5 QUESTION: That's fairly routine, huh?

6 MR. FAVRETTO: Mr. Justice Stevens, that's the
7 Federal Trade Commission. That's not a litigant who is
8 already in litigation with you with a major counterclaim
9 against you after you've filed a claim for a \$100,000
10 breach of contract who is coming to you saying, we're not
11 going to pay you that \$100,000.

12 QUESTION: Not, but assume they thought they had
13 a good case. Is there anything wrong with their telling
14 you about it in advance?

15 MR. FAVRETTO: Oh, absolutely not. Absolutely
16 not.

17 QUESTION: And isn't it an appropriate subject
18 for discussion during a settlement conference? I mean,
19 maybe it doesn't help them any, but I don't know how it
20 helps you either. That's what I --

21 MR. FAVRETTO: No, I was just clarifying the --

22 QUESTION: Like the Chief Justice, I'm more
23 interested in the issues than this particular --

24 MR. FAVRETTO: Okay. With respect to relying on
25 the -- relying on their client, I would just direct the

1 Court's attention to pages 34 and 35 of the Joint Appendix
2 where when I asked the client about the key allegation in
3 the complaint and asked him what he knew, what independent
4 basis he had for that information, Mr. Cooter interrupted
5 me and asked his client, "Did you know anything other than
6 what we told you?" The answer: "No."

7 Mr. Cooter, "He trusts us, as well he should.
8 Obviously Mr. Dashtara, the client, didn't make the
9 investigation. We did and now it's crystalline."

10 The attempt to shift the blame or shift some of
11 the blame to an absent client before this Court and also
12 before the court of appeals is -- is not -- does not
13 square with the record. The Court considered that
14 question, made findings in the district court on it, and I
15 think the record that we have before us has to form the
16 basis for this Court's -- for this Court's assessment of
17 the issues before it.

18 Moving to the -- the merits of the issues before
19 the Court, we believe that Petitioner's contention
20 essentially amounts to an argument on the voluntary
21 dismissal point that no matter how egregious the conduct,
22 no matter how much burden or pain that the -- that the
23 lawyer imposes on the system, Rule 41 -- the voluntary
24 dismissal aspect of Rule 41 is an absolutely escape hatch
25 from Rule 11 sanctions.

1 This cannot be correct. To state the principle
2 is to refute it.

3 The rules do not conflict. Nothing in the
4 wording of the rules makes them conflict with one another
5 necessarily. The rules serve different purposes, as
6 Justice O'Connor observed, and Rule 11 is a sanctioning
7 provision which protects independent court interests and
8 it is an authority which the district courts must retain
9 beyond their authority to rule on the merits of the claim.

10 QUESTION: Shouldn't the sanctions at least be
11 imposed within a reasonable time? Is there no time limit
12 there? That was a rather strange proceeding here?

13 MR. FAVRETTO: Well, Justice O'Connor, let me
14 just respond by giving you a little background about what
15 happened here and then responding to your question.

16 First, there was a series of litigation, related
17 litigation between the parties here -- various
18 subsidiaries and the Petitioner's client, various
19 subsidiaries of my client and the Petitioner's client.

20 The litigation was not finally resolved until
21 July of 1986. The Advisory Committee notes expect that --
22 suggest that Rule 11 sanctions should be imposed at the
23 end of the litigation. Well, the litigation didn't end
24 until July of '86.

25 Within two or three months thereafter, Mr.

1 Cooter, Petitioner's senior counsel, appeared before Judge
2 Gasch in another completely unrelated case, the Kuwait
3 Airlines v. American Security case that's referred to in
4 the Petitioner's brief.

5 When that case was completed in the district
6 court, as Petitioner has noted, Judge Gasch called the
7 motion up for -- for a decision. It could have been
8 complete -- it's completely equally plausible, is our
9 submission, that the -- we could speculate that Judge
10 Gasch was essentially giving the Petitioner and its senior
11 partner consideration in not ruling on the Rule 11 motion
12 that was pending before him in our litigation while Mr.
13 Cooter was before him in a -- in a completely separate
14 case.

15 Now, that's equally plausible speculation, I
16 say, but it's speculation and, in any event, it doesn't
17 have a jurisdictional foundation. It doesn't stop the
18 district court from -- from finally acting when it -- when
19 it did act.

20 But it seems clear to us that Rule 41 cannot
21 preempt or give a -- a lawyer an absolute immunity bath
22 for anything he does before the dismissal of the
23 complaint. And -- and -- and the facts of this case --

24 QUESTION: Well, of course, we're not really
25 talking about immunity baths. Contempt and bar

1 association disciplines still remain, don't they?

2 MR. FAVRETTO: That's true. That's true, your
3 Honor.

4 QUESTION: But, of course, no benefit to your
5 client. But at least there are sanctions for the --

6 MR. FAVRETTO: Well, Rule 11, I think, is the --
7 is the appropriate vehicle for dealing with this kind of
8 issue in the most efficient manner rather than to have
9 perhaps a separate proceeding that would call these
10 questions up in a -- in a completely different context.

11 I think Rule 11 was clearly intended to allow
12 the district courts to deal with the problem.

13 QUESTION: I don't disagree with that. I just
14 question your use of immunity bath.

15 MR. FAVRETTO: It's not a -- it's -- I -- I --

16 QUESTION: It's nothing like an immunity bath.

17 MR. FAVRETTO: I accept your -- your
18 modification.

19 But this case is a good example of why that
20 can't be the rule. The violation occurred with the
21 filing, the harm attached, the publicity attached. And we
22 invoked a rule. We filed our motions. The affidavits
23 were filed. Everything was done.

24 Indeed, the hearing on the motion occurred even
25 before the voluntarily dismissal was perfected because

1 this voluntary dismissal required a waiver of the notice
2 to the punitive class members.

3 So, the only unfairness in that scenario would
4 be to the system and to -- and to the victim of the -- of
5 the misconduct in this case.

6 On the standard of review, we believe that the
7 Petitioners got what they asked for below. They got a
8 fresh look. There is nothing in the court of appeals'
9 opinion that suggests deference to the district court on
10 the question of liability, Rule 11 liability. Indeed, the
11 court of appeals simply looked at their own affidavits and
12 said those affidavits do nothing more than confirm the
13 fact of a Rule 11 violation.

14 It was impossible to conclude, in the words of
15 the court of appeals, how no inquiry could be sufficient
16 inquiry or reasonable inquiry, and how an inquiry with
17 respect to four proximate markets could support an
18 allegation with respect to misconduct nationwide in all
19 major metropolitan areas.

20 QUESTION: Did the appellate court apply an
21 abuse of discretion standard, do you think?

22 MR. FAVRETTO: Explicitly as to the selection of
23 the sanction and the amount of the sanction, I'm not
24 certain of that, Justice O'Connor. I think that -- that
25 -- there's -- I wouldn't quarrel with -- with a -- with a

1 reading that said that the court of appeals was operating
2 under the circuit standard and that was the prevailing
3 standard that they were --

4 QUESTION: And what standard do you tell us
5 should be applied?

6 MR. FAVRETTO: We -- we are beyond -- going
7 beyond the application in this case because we don't think
8 it would make a difference in this case. But we believe
9 that the abuse of discretion standard is the appropriate
10 -- appropriate standard in Rule 11 cases.

11 QUESTION: Well, what if --

12 QUESTION: Go ahead. I'm sorry.

13 QUESTION: What if the question is whether the
14 filing of the complaint was warranted by a good faith
15 argument for the extension, modification or reversal of
16 existing law?

17 MR. FAVRETTO: I think --

18 QUESTION: Now, does that pose some kind of
19 mixed law of fact question?

20 MR. FAVRETTO: It may well be a mixed question
21 of fact and law. I think it's the kind of -- the kind of
22 question that appellate courts customarily deferred to the
23 district court's judgment in deciding --

24 QUESTION: And you think even there an abuse of
25 discretion standard --

1 MR. FAVRETTO: I do because I -- I think the
2 preamble to that -- to that provision in the rule suggests
3 that after a reasonable inquiry -- after a reasonable
4 inquiry that it is based upon the good faith.

5 So I think it really comes back to what was
6 done. We're not talking about being wrong. Rule 11 is
7 not about being wrong. Rule 11 is about what did you do
8 before you filed.

9 QUESTION: Well, that sounds like there would be
10 just some historical facts at issue. Who did what and
11 what did they do. And if -- if there's a dispute about
12 that, why shouldn't it be reviewed by a clearly erroneous
13 standard?

14 MR. FAVRETTO: If there is -- if there is -- if
15 there are historical facts at issue, a clearly erroneous
16 standard may be appropriate as to those disputed facts.

17 Frankly, I believe that a clearly standard is --

18 QUESTION: Well, what about the --

19 MR. FAVRETTO: -- an abuse of discretion
20 standard in a factual context.

21 QUESTION: All right. What if -- what if you
22 have the facts before you and the question is was there a
23 violation?

24 MR. FAVRETTO: That's the application of the
25 facts to the standard or the standard to the facts.

1 QUESTION: Yes. And the -- the district court
2 has made a decision that yes, there was a violation. Now,
3 what should the court of appeals ask?

4 MR. FAVRETTO: I think under an abuse of
5 discretion standard if there was a clear --

6 QUESTION: That shouldn't be de novo?

7 MR. FAVRETTO: No. No, no, Justice White, it
8 should not. If there is a clear error in -- in -- in
9 assessing any relevant fact or consideration, or there's
10 some clear error of judgment, I think that's reachable
11 under an abuse of discretion standard.

12 QUESTION: Are you saying there's no difference
13 in the clearly erroneous standard and the abuse of
14 discretion standard?

15 MR. FAVRETTO: Well, it's hard for me to -- I --
16 I -- I -- it's not clear to me --

17 QUESTION: Because if there isn't, then we can
18 say clearly erroneous and you don't care.

19 MR. FAVRETTO: Well, I -- I -- I think the two
20 are very close. The two are very close. I think the
21 traditional standard that has been -- that has been
22 applied in similar situations talks in terms of abuse of
23 discretion or deferential.

24 QUESTION: Well, I -- I liked the way you put it
25 earlier. You said that clearly erroneous is abuse of

1 discretion as applied to factual determinations.

2 MR. FAVRETTO: That's right.

3 QUESTION: But most of these abuse of discretion
4 things have some factual judgments, they have some
5 discretion as to remedy, which are not factual.

6 But insofar as it's factual, you -- you wouldn't
7 say that discretion has been abused unless there's a clear
8 error, would you?

9 MR. FAVRETTO: That's where I come out, Justice
10 Scalia.

11 QUESTION: But may I ask this? Do you conceive
12 it to be part of the trial judge's duty to make findings
13 of fact on the relevant factual issues?

14 MR. FAVRETTO: I think the trial judge should
15 make clear his basis for his judgment.

16 QUESTION: Well, that's not an answer to my
17 question.

18 MR. FAVRETTO: Well -- but if that amounts to
19 findings, then there should be findings. I think -- I --
20 I think --

21 QUESTION: See, what I'm concerned about is that
22 -- as I read your brief, that your abuse of discretion
23 standard might not require any factual findings. It's
24 just sort of a general statement of a conclusion about the
25 overall problem.

1 Whereas if you would agree that the judge at
2 least had a duty to make some specific factual findings
3 that were the predicate for the action, then I don't see
4 how you could escape the fact that the standard of review
5 of those facts would be clearly erroneous.

6 MR. FAVRETTO: I -- I think if there -- again,
7 if there are --

8 QUESTION: It seems to me the argument for an
9 abuse of discretion standard is an argument for not being
10 required to make specific factual findings.

11 MR. FAVRETTO: I -- I would -- I would -- I
12 would think that a -- that a district court should be --
13 should be required to state the reasons, the factual
14 basis, whether they are disputed or undisputed. And if
15 they are disputed, perhaps a clearly erroneous standard
16 could be applied on review to his judgment about where the
17 facts come out.

18 But I think if a court of appeals saw a record
19 or a decision that didn't allow it to understand what the
20 basis for the district court's judgment was, then that
21 would be of itself an abuse of discretion and it would
22 send the case back for a clearer statement of the factual
23 underpinnings of the -- of the holding.

24 QUESTION: Well, if one were to compare
25 different standards of review and if you were to say

1 clearly erroneous on facts and de novo on law, as opposed
2 to just abusive discussion generally, certainly the
3 abusive discussion standard would spawn less litigation
4 over this subject than this trifurcated type of thing,
5 wouldn't it?

6 MR. FAVRETTO: No question about that. No
7 question about that. And I think giving appellants two
8 full bites at the apple in the -- in the court of appeals
9 just would foster additional litigation over sanctions.

10 And it -- it's -- oh, and abusive -- not
11 reviewing under an abusive discretion standard is also
12 completely inconsistent with the purposes of the 1983
13 amendments.

14 As I -- as I have read the background of the --
15 of the amendments, and the Advisory Committee notes, the
16 whole purpose here was to kind of invest district courts
17 with stronger sanctioning authority and with the weapons
18 necessary, if you will, to administer the practice of
19 attorneys before those courts.

20 And to -- to give them the flexibility necessary
21 to deal with a variety of factual situations, but yet
22 applying an -- a -- an objective standard of
23 reasonableness under the circumstances. Not the judges
24 own feelings about the frivolity of something, but an
25 objective standard that would allow the reviewing courts

1 to measure the exercise of the district court's
2 discretion.

3 The --

4 QUESTION: Are you going to talk about the award
5 of fees for the appellate litigation?

6 MR. FAVRETTO: Oh, yeah. I'm about -- I'm about
7 to move on to that, Justice Scalia.

8 The Petitioner's position on appellate fees is
9 simply that the district court cannot -- cannot -- include
10 in its sanction the costs of successfully defending a Rule
11 11 award on appeal.

12 Their view, more elaborated, is that this
13 represents a kind of punishment for taking a non-frivolous
14 appeal, and only Rule 38 of the appellate rules governs
15 conduct on appeal.

16 Our position is that that argument misses the
17 point. This is not a matter of punishing anyone for
18 conduct on the appeal. This is simply an exercise of
19 delineating the proper scope of the sanctions attaching to
20 misconduct in a district court.

21 The violation occurs in the district court, but
22 the injury lingers on. Injury caused by the district
23 court misconduct is simply not limited to what happens to
24 an adversary in the district court. Therefore, the
25 sanction should not -- should similarly not be limited.

1 QUESTION: Well, did the court below hold that
2 appellate expenses must be awarded in a reasonable amount
3 if the sanction is affirmed?

4 MR. FAVRETTO: The court of appeals sent the
5 case back to the district court for -- for an award of
6 reasonable appellate expenses, that's correct.

7 QUESTION: As an automatic sort of thing?

8 MR. FAVRETTO: As a necessary component of the
9 -- of the sanction which was invoked in this case, which
10 was a fee should be sanctioned.

11 QUESTION: Well, that certainly is kind of a
12 disincentive to non-frivolous appeals, isn't it?

13 MR. FAVRETTO: Well --

14 QUESTION: I mean, certainly we saw fit to take
15 the case here. It poses issues that need to be resolved.
16 And I'm not sure that I understand why there should be
17 some automatic rule in any event.

18 MR. FAVRETTO: Well, the -- the -- the inclusion
19 of appellate fees in the sanction award in our view turns
20 upon the invocation by the district court of the fee-
21 shifting aspect of the rule.

22 The district court says: I want to deter this
23 conduct. Among my -- among my options is a fee-shifting
24 option. I think that's the most appropriate sanction in
25 this case. I will invoke that -- invoke that authority.

1 Once that authority gets invoked, then we
2 believe Rule 11 should be treated as -- as other fee-
3 shifting provisions are customarily treated. Simply
4 provide -- fulfill the objective of the fee-shifting -- o
5 the fee-shifting award, make the adversary whole for the
6 costs imposed by the misconduct.

7 But here they can take the --

8 QUESTION: Excuse me. Why can't you leave that
9 up to the district judge? In these other situations you
10 have a statute and -- and you have to treat it uniformly.
11 Here you have a district judge who has made the fee-
12 shifting determination. Why may he not in some cases say,
13 I'll give you only the costs here in the district court,
14 and in other cases say, I'll give you the costs all the
15 way?

16 MR. FAVRETTO: He -- he may say that. Indeed,
17 he may impose a sanction that doesn't amount to your
18 reasonable costs.

19 QUESTION: That's right. Just as -- just as he
20 can do that, why can't he --

21 MR. FAVRETTO: Under the rule --

22 QUESTION: -- say just -- just costs in the
23 district court, not on appeal?

24 MR. FAVRETTO: But we believe that -- we believe
25 that Judge Gasch here in the district court explicitly

1 invoked the fee-shifting -- the fee-shifting provisions of
2 the rule.

3 And that carries with it, under the plain meaning
4 of the rule, the -- the full impact of the misconduct and
5 the full impact of that misconduct continues beyond the
6 district court. And that's why we believe that the --
7 that the appellate fees should be included -- a reasonable
8 amount of appellate fees.

9 Now, the court has wide discretion on remand as
10 to determine what is reasonable in -- in -- under the
11 circumstances of this case.

12 QUESTION: Suppose he said no -- no appellate
13 fees?

14 MR. FAVRETTO: We don't feel -- we don't feel he
15 has that discretion at this point, Justice Scalia. And,
16 certainly, if this Court were to rule that the desirable
17 -- the desirable rule in such cases was to include -- to
18 make adversaries whole once the fee-shifting aspect of the
19 rule was invoked, that -- that would be rule that would
20 govern future cases. And district courts would know, when
21 they invoking fee-shifting, that it was going completely
22 beyond.

23 QUESTION: But what -- what particular language
24 is it of Rule 11 that you think authorizes the automatic
25 imposition of attorney's fees on appeal?

1 MR. FAVRETTO: The language that entitles --
2 entitles the adversary, or the victim, to reasonable
3 expenses -- and it's including attorney's fees -- incurred
4 because of the filing, the improper filing. Incurred
5 because of, caused by, as a result of -- that's the
6 language.

7 QUESTION: And so -- and you say the appeal is
8 caused by that?

9 MR. FAVRETTO: Absolutely.

10 QUESTION: One -- one could equally well argue
11 the appeal was caused by the imposition of sanctions, I
12 suppose.

13 MR. FAVRETTO: Well, but -- but -- but the
14 imposition of sanctions is a mandatory -- is mandatory in
15 Rule 11. The imposition -- that's -- that's just -- the
16 imposition of sanctions was the logical consequence, the
17 intended consequence of the motion for sanctions, and it
18 flows from the Court's authority to discipline the
19 lawyers.

20 QUESTION: Do you think our client's attorneys
21 fees in -- in opposing the Rule 41 argument should be paid
22 by the other side?

23 MR. FAVRETTO: Absolutely, Justice White.

24 QUESTION: Well, why? Do you think that is a --

25 MR. FAVRETTO: Let me --

1 QUESTION: Was that a frivolous issue?

2 MR. FAVRETTO: No. Let me just -- the way we
3 look at it -- I'll back up a little bit -- why we don't
4 believe this is going to deter meritorious appeals.

5 First of all, you're dealing with a class of --
6 of litigants, lawyers, who aren't going to be easily
7 deterred. They are probably the best-informed group as to
8 making assessments about what the -- what their chances
9 are on appeal.

10 Take this case for example. When it went to the
11 court of appeals, it had two issues. One of which, the
12 Rule 41 issue, was never raised in the district court. It
13 was never -- never, ever raised in the district court.
14 And the circuit stood five to one, six to one, whatever it
15 was, against them on that issue.

16 The second issue was --

17 QUESTION: Suppose that this is -- suppose the
18 only issue that went to the court of appeals was the 41?

19 MR. FAVRETTO: And as well as the --

20 QUESTION: No.

21 MR. FAVRETTO: -- the district court abused its
22 discretion in --

23 QUESTION: No, no. Just rule -- all these --
24 they said --

25 MR. FAVRETTO: Okay.

1 QUESTION: They said sanctions shouldn't have
2 been imposed at all because of Rule 41. That's the only
3 issue it took up. What about then?

4 MR. FAVRETTO: We don't -- we think it would
5 have been equally beneficial for society as a whole if the
6 Petitioner here had assessed his chances and felt that his
7 chances were -- were a long-shot and had decided not to
8 appeal. I don't know why this Court would want to
9 encourage appeals from Rule 11 sanctions.

10 Now, the -- where the issues that were accepted
11 by this Court on review were all issues that resulted as a
12 consequence of the court of appeals decision --

13 QUESTION: Has -- had any other courts ever
14 held that the Rule 41 bars sanctions after a dismissal?

15 MR. FAVRETTO: When -- one court, the Second
16 Circuit. One out of, I think, ten --

17 QUESTION: One -- one --

18 MR. FAVRETTO: -- or eleven.

19 QUESTION: -- misinformed, badly misinformed
20 federal court?

21 (Laughter.)

22 MR. FAVRETTO: We -- we don't find the reasoning
23 persuasive.

24 QUESTION: Well, I know. But -- but wouldn't
25 you -- to get -- to get attorney's fees, if the only issue

1 were Rule 41, it seems to me you'd have to say it was
2 really a groundless, frivolous claim.

3 MR. FAVRETTO: Not at all. Not at all. It has
4 nothing to do with the frivolity of the -- of the claim or
5 the merits of the claim.

6 All we're saying is we're being swept along. We
7 didn't want to be here in the first place. As much as
8 I --

9 QUESTION: Yes, but suppose there are three
10 issues --

11 MR. FAVRETTO: -- value the -- value the
12 experience of being here, my client didn't want to be
13 here.

14 QUESTION: Yeah, but supposing there's three
15 issues on appeal and you win on two and lose on one, you
16 still get all your fees?

17 I think you do under your argument.

18 MR. FAVRETTO: If the sanction is sustained --

19 QUESTION: Sure.

20 MR. FAVRETTO: If the sanction is sustained,
21 would --

22 QUESTION: But they say you -- you charged too
23 much for your time or you put in your time from the time
24 they showed you the complaint to the time they filed, or
25 something like that, which shouldn't have been done. So

1 we cut that out.

2 But then you'd compensate for it by getting a
3 little more for having been required to defend an appeal.
4 You'd end up a net winner.

5 MR. FAVRETTO: Justice Stevens, we -- we just
6 want to come out the same place we came out when we went
7 in. We don't want to win anything. We're not trying to
8 make money on the deal.

9 My client doesn't -- didn't want to get involved
10 in this litigation. It's been swept along. It's like a
11 snowball rolling down a hill. Before it hits its victim
12 with its full impact, it's three times larger than it was
13 when it started.

14 QUESTION: May I ask in that regard, are you --
15 you entitled to compensation for your attorney's fees for
16 time spent between the time they showed you the complaint
17 and the time they filed it?

18 MR. FAVRETTO: We -- we didn't --

19 QUESTION: I suppose you went right to work on
20 the case as soon as --

21 MR. FAVRETTO: We didn't -- no, we didn't see --
22 I -- I -- I'm not familiar whether or not -- what -- what
23 those fees amounted to or whether or not -- well, what
24 they amounted to. I'm not -- I don't recall. But we
25 didn't seek those, in any event. We didn't seek those.

1 QUESTION: So, what you -- any work you did on
2 the complaint before it was filed was -- was gratis as far
3 as the plaintiff is concerned?

4 MR. FAVRETTO: Oh, absolutely. Absolutely.
5 Absolutely.

6 QUESTION: Why -- why did the district judge cut
7 your fees as badly as he did?

8 MR. FAVRETTO: He -- he just felt that we
9 shouldn't have prepared as much as we did for the ultimate
10 class action proceedings. We thought -- we thought this
11 was a major matter. If it didn't get dismissed, the
12 motion --

13 QUESTION: It's a major frivolous matter.

14 (Laughter.)

15 MR. FAVRETTO: The motion -- well, we thought we
16 were going to prevail. No, we thought we were going to
17 prevail ultimately. No question about it.

18 You know, the interesting thing about that about
19 that is they say, why didn't they tell us? Footnote 14 of
20 their Petitioner's -- of the Petitioner's brief is a
21 remarkable defense of the validity of their complaint to
22 this day.

23 They went out and they found out, after we filed
24 the motion, that, well, they don't have one retailer in
25 every area, they've got a couple. And this guy only

1 carries this size and this guy carries that size. And
2 they say they've still got the same case. They defend it
3 to this very day.

4 QUESTION: Well, how does that (inaudible) this
5 Court to allow sanctions? If you're going to -- do we
6 have to --

7 MR. FAVRETTO: The -- the reasonable amount of
8 the appellate fees incurred because of this original
9 filing should be awarded to us once the --

10 QUESTION: You really treat it as a fee-shifting
11 statute, --

12 MR. FAVRETTO: Absolutely.

13 QUESTION: -- don't you?

14 MR. FAVRETTO: Absolutely.

15 QUESTION: But it doesn't -- it doesn't say
16 that. It --

17 MR. FAVRETTO: It's a sanction.

18 QUESTION: You know, 1988 says the prevailing
19 party --

20 MR. FAVRETTO: Right.

21 QUESTION: -- gets attorney fees. But Rule 11
22 doesn't say the prevailing party gets attorney's fees.

23 MR. FAVRETTO: It doesn't have to do with
24 prevailing or not prevailing. It has to do with --

25 QUESTION: Well, it's the sanctions -- it's the

1 sanctions for someone --

2 MR. FAVRETTO: Absolutely.

3 QUESTION: -- and I -- I --

4 MR. FAVRETTO: It's a sanction.

5 QUESTION: Why should the other side be
6 sanctioned for pressing this Rule 41 problem that they've
7 had perfectly good authority for pressing?

8 MR. FAVRETTO: Don't do it with our money.
9 That's all we're saying. Don't do it with our money.

10 QUESTION: No.

11 MR. FAVRETTO: Let us come out as whole as we
12 were when we went in. It would pervert Rule 11 if --

13 QUESTION: Well, that's -- you are just talking
14 like -- like just because you win you get your fees.

15 MR. FAVRETTO: Absolutely not. Absolutely not.
16 The sanction -- it is a sanction, I would agree. That's
17 first and foremost.

18 QUESTION: Well, what are we sanctioning for?
19 What's this -- what's the basis for sanctioning your --
20 your opponent for pressing the Rule 41 issue --

21 QUESTION: On appeal.

22 QUESTION: -- on appeal?

23 MR. FAVRETTO: There's no -- there's no basis
24 for sanctioning and for taking that appeal, or for the
25 conduct of the appeal. The sanction here is a -- it's

1 simply giving effect to the award -- to the sanction
2 imposed in the district court.

3 The district court said that the --

4 QUESTION: Yeah, but you're --

5 MR. FAVRETTO: -- the appropriate --

6 QUESTION: But you're going to -- you want --
7 you want your fees, including fees for your arguing the
8 Rule 41 issue.

9 MR. FAVRETTO: My client wants to be no worse
10 off as a consequence of this misconduct --

11 QUESTION: I don't blame him.

12 MR. FAVRETTO: -- than -- than he was when the
13 frivolous filing was made. To -- to not allow for a
14 reasonable award of attorney's fees -- and the judge, the
15 district judge can -- can get into the issues of where and
16 when and how it's divided and cut, and all of that.

17 But to now allow a reasonable award of
18 attorney's fees on appeal would simply undercut --
19 undercut -- the deterrent effect of the sanction.

20 QUESTION: You made the argument in -- in your
21 brief that in the vast majority of cases the fees on
22 appealing these things would be greater than the fees to
23 be recovered from the --

24 MR. FAVRETTO: That's true.

25 QUESTION: -- especially in a Rule 41 situation,

1 I would assume.

2 MR. FAVRETTO: That's true. That's true,
3 Justice Scalia. We -- we --

4 QUESTION: In this particular case is that -- do
5 you have any idea whether that's so? Whether --

6 MR. FAVRETTO: It's true in this case as well.
7 It would be true in this case --

8 QUESTION: But if -- if you don't get your
9 appellate -- fees for the appellate litigation, you --
10 your client ends up -- ends up in the whole, or you do?

11 MR. FAVRETTO: Right.

12 QUESTION: Somebody does.

13 MR. FAVRETTO: That's correct. Now, we -- we --
14 we tried to contain our damage at every stage of this
15 litigation.

16 Thank you.

17 QUESTION: Thank you, Mr. Favretto.

18 Mr. Saltzburg, you have a minute remaining.

19 REBUTTAL ARGUMENT OF STEPHEN A. SALTZBURG

20 ON BEHALF OF THE PETITIONER

21 MR. SALTZBURG: Mr. Chief Justice:

22 We believe Rule 38 of the appellate rules and
23 Section 1912 of 28 U.S.C. govern the recovery of fees,
24 including attorney's fees on appeal, and they are the
25 exclusive rules.

1 Nothing the advisory committee notes on Rule 11
2 indicates that it was intended to be a fee-shifting
3 statute or rule for appeal.

4 With respect to the tripartite analysis that we
5 urge upon you in terms of scope of review, you're right,
6 Mr. Chief Justice, it's likely to produce more appeals.
7 It's likely to produce more careful appellate review, it's
8 like to have lawyers coming up to the courts of appeals
9 more often.

10 It's what this case is about. It really is
11 about where the lawyer is hamstrung with questions of
12 attorney/client privilege back at a time where they didn't
13 know how to deal with that question and put forth all the
14 facts before the district court -- whether they're
15 entitled to careful findings, the most careful kinds of
16 scrutiny before the district judge rules, and whether
17 before their reputations are impugned they're entitled to
18 careful appellate review. We submit that they are.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Saltzburg.

22 The case is submitted.

23 (Whereupon, at 12:03 p.m., the case in the
24 above-entitled matter was submitted.)

25

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:

#89-275 - COOTER & GELL, Petitioner V. HARTMARX CORPORATION, ET AL.

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

BY *Leona M. May*
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