

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BUSINESS GUIDES, INC., Petitioner
v. CHROMATIC COMMUNICATIONS ENTERPRISES,
INC. AND MICHAEL SHIPP

CASE NO: 89-1500
PLACE: Washington, D.C.
DATE: November 26, 1990
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IN THE SUPREME COURT OF THE UNITED STATES

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BUSINESS GUIDES, INC., :
Petitioner :
v. : No. 89-1500
CHROMATIC COMMUNICATIONS ENTER- :
PRISES, INC. AND MICHAEL SHIPP :
----- X

Washington, D.C.
Monday, November 26, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

STEPHEN V. BOMSE, ESQ., San Francisco, California; on behalf of the Petitioner.
NEIL L. SHAPIRO, ESQ., San Francisco, California; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear now in No.
4 89-1500, Business Guides, Inc. v. Chromatic Communications
5 Enterprises, Inc.

6 Mr. Bomse, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF STEPHEN V. BOMSE

8 . ON BEHALF OF THE PETITIONER

9 MR. BOMSE: Mr. Chief Justice, and may it please
10 the Court:

11 This action began as a suit for copyright
12 infringement. It was filed after the plaintiff below,
13 Business Guides, that it had detected copying of entries in
14 several of its published directories put out by the
15 defendant, Chromatic Communications.

16 Unfortunately much of the evidence of defendant's
17 copying turned out to be in error. When that became
18 apparent to the district court, judge called a halt to the
19 proceedings and referred the matter to the chief magistrate
20 to determine whether sanctions were appropriate against both
21 Business Guides and its attorneys under Rule 11.

22 The magistrate initially concluded that Business
23 Guides and its counsel were guilty of deliberate
24 misrepresentations and recommended not only sanctions, but
25 disciplinary proceedings against plaintiff's attorneys. At

1 that point both the client and its lawyers retained new
2 counsel, who were able to demonstrate in a subsequent
3 hearing to the satisfaction of the chief magistrate that the
4 erroneous filings were in fact a product of error, not any
5 intended desire to mislead the court or misuse the judicial
6 process.

7 QUESTION: What does the term chief magistrate
8 mean, Mr. Bomse? Is that the senior magistrate in the
9 northern district of California?

10 MR. BOMSE: Yes, Mr. Chief Justice.

11 QUESTION: Pretty impressive title.

12 (Laughter.)

13 MR. BOMSE: I'm sure he appreciates it.

14 Nonetheless, while the magistrate explicitly found
15 that neither Business Guides nor its counsel had engaged in
16 any intended misrepresentation or acted for any improper
17 purpose, nonetheless, he recommended that both the plaintiff
18 and the its attorney be sanctioned for their carelessness.

19 That order was then affirmed first by the district
20 court and then by the court of appeals over Business Guide's
21 contention that Rule 11 does not permit the imposition of
22 sanctions against a represented party for good-faith errors.
23 It is that question which is now before this Court.

24 As to that matter, it is our submission that while
25 there is no doubt that Rule 11, properly applied, serves not

1 only a salutary but a necessary purpose, in the case of
2 represented parties we believe that purpose can be fully
3 satisfied by limiting that application of the rule to
4 intentional abuse or recklessness that is substantially its
5 equivalent.

6 It is our view that construing Rule 11 in that
7 fashion is not only consistent with its history and language
8 but that it will strike an appropriate balance between
9 maintaining the efficiency and integrity of the litigation
10 process while no overly deterring resort to that process and
11 will as well strike an appropriate balance between the
12 different roles and responsibilities of counsel and of
13 representative parties.

14 QUESTION: Well, Mr. Bomse, why isn't it
15 consistent with the rule and with the deterrent purpose of
16 the Rule 11 to impose a reasonable inquiry standard on
17 parties when they have occasion to file with the court, for
18 example, factual affidavits or declarations in support of
19 a motion for a preliminary restraining order or an
20 injunction? Why isn't that reasonable inquiry standard
21 applicable to parties?

22 MR. BOMSE: Well, I think there are several
23 reasons that we would suggest, Justice O'Connor. First of
24 all, we believe --

25 QUESTION: The rule itself doesn't draw a

1 distinction, does it?

2 MR. BOMSE: No, I think the rule itself is
3 actually silent on this particular point. Having in mind
4 what this Court observed in Pavelic and LeFlore, a recent
5 Rule 11 case, one does of course begin with the language of
6 the rule. But in this case I believe that language does not
7 help us or, at least in an dispositive way, permit us to
8 answer the question.

9 QUESTION: Well, I -- you know, it's possible I
10 think to conclude that what's reasonable for a party to make
11 an inquiry might be somewhat different for what's reasonable
12 for an attorney. But it would appear that the same standard
13 would apply.

14 MR. BOMSE: Well, I'm not sure, Justice O'Connor,
15 whether you're speaking now to the text of the rule or to
16 how this Court as a matter policy ought to interpret it.
17 If you were speaking to the text of the rule, I would
18 respectfully suggest that a parsing of its language would
19 lead to the conclusion that we are not in fact given the
20 answer to that question. And indeed, if you refer to the
21 advisory committee notes to the rules, they are quite clear
22 in saying that it is the signature of the attorney that
23 violates the rule. It then goes on in the same sentence to
24 say although it may be appropriate, in appropriate
25 circumstances, also to impose the sanction upon the client.

1 QUESTION: Well, Mr. Bomse, when you get to the
2 part that says the signature of any attorney or party
3 constitutes a certificate by the signer. The -- then it
4 goes on to talk about formed after a reasonable inquiry that
5 is well-grounded in fact and is warranted by existing law.
6 That sentence surely refers both the party and the attorney,
7 does it not?

8 MR. BOMSE: I believe it refers to a party, Mr.
9 Chief Justice, only in the context of a pro se party.

10 QUESTION: How do you -- certainly that's not
11 clear from the language I just read.

12 MR. BOMSE: No, but I believe that if you look at
13 the rule in its total context you will see that the
14 reference above to a signer is only to a pro se party. I
15 believe that the second sentence of the rule --

16 QUESTION: (Inaudible) that you left out in your
17 quotation in your brief unfortunately.

18 MR. BOMSE: I'm sorry. We certainly didn't --

19 QUESTION: No, no, but that -- it would have made
20 it clearer had you put it in there. It does -- the first
21 sentence says, every pleader shall be signed by an attorney,
22 and the second one says, a party who is not represented by
23 an attorney shall sign the pleading, blah, blah, blah, blah.

24 MR. BOMSE: Yes.

25 QUESTION: And then it said a signing by an

1 attorney or party, and what you're saying that reference to
2 party refers back to the sentence that you left out.

3 MR. BOMSE: You're surely right, both as to what
4 the rule says and that it would have been better if we had
5 put that sentence in.

6 QUESTION: Right.

7 MR. BOMSE: But I think, Mr. Chief Justice, that
8 in fact if you think about the way in which the process
9 operates in the Federal courts, pleadings, motions, and
10 other papers are not signed by parties at all, with the
11 single exception of affidavits. We do not indeed require
12 a verification. In fact, the rule specifically so provides.

13 So I think that it would be straining the context
14 of the rule to suggest that although it would have been
15 better if the rule had said "or pro se party," I don't
16 believe that the rule can fairly be read to say that a party
17 is under the obligation that is the same as a --

18 QUESTION: Well, but you concede that affidavits
19 are filed by parties.

20 MR. BOMSE: Yes.

21 QUESTION: -- represented parties.

22 MR. BOMSE: I do concede that. And in fact
23 affidavits, at least in the context of a summary judgment
24 motion, are specifically dealt with by Rule 56(g).

25 QUESTION: Yes, but this wasn't a summary judgment

1 motion.

2 MR. BOMSE: No, although I must say I cannot
3 understand why the policy would be any different for an
4 affidavit in support of an injunction on the one hand or an
5 affidavit in support of a motion for summary judgment.

6 QUESTION: Well, the Rule 56 was in existence at
7 the time that Rule 11 was modified to its present form.
8 And it seems to -- Rule 11 seems to cover a lot of things
9 that Rule 56 obviously didn't.

10 MR. BOMSE: Yes, although again, if one looks to
11 the advisory committee note, you will find a reference to
12 the fact -- I think it's the very conclusion of those notes
13 -- that Rule 11 literally read would apply as well to
14 discovery motions, although the advisory committee suggested
15 that it was not intended to and rather that one should look
16 to a different rule.

17 So by its literal terms this rule does apply to
18 an affidavit not submitted in support of a motion for
19 summary judgment. Indeed, I suppose it literally applies
20 even to a motion submitted in support of a motion for
21 summary judgment or opposing a motion for summary judgment,
22 but I think it would difficult to square an application of
23 a negligence standard to such a summary judgment affidavit
24 in the face of the explicit language of Rule 56(g) which
25 indicates that it is only affidavits submitted in effect for

1 bad faith or an improper purpose. That ought to be so
2 sanctioned.

3 QUESTION: Why isn't it possible to interpret Rule
4 11 as covering -- it says pleading motion or other paper.
5 Why, why shouldn't other paper be interpreted to mean
6 another paper that deals with the conduct of the litigation.
7 I mean, the rule talks -- makes a distinction between when
8 you're represented by counsel and when you're not
9 represented by counsel. That distinction makes no sense
10 except with respect to control of the litigation. Isn't
11 that correct?

12 MR. BOMSE: I think that is correct.

13 QUESTION: And not with respect to general
14 affidavits about any factual matters.

15 MR. BOMSE: I would think that is correct. Yes.

16 QUESTION: Have you argued that here?

17 MR. BOMSE: I'm not -- no, I don't think we have
18 argued that here. But I'm not sure that we need to argue
19 that in order to prevail.

20 QUESTION: Well, on that point, it seems to me
21 that your argument concedes the proposition that there can
22 be a Rule 11 violation by the client and not by the
23 attorney.

24 MR. BOMSE: I believe there can be a Rule 11
25 violation by the client and not by the attorney.

1 QUESTION: It would seem to me that based on your
2 reading of the rule you could take the argument a step
3 further and say that a predicate to a Rule 11 violation is
4 a violation by the attorney when the party's represented.
5 But there must be an attorney violation before you can even
6 consider imposing sanctions on the attorney. Yet you don't
7 seem to argue that -- on the client. Yet you don't seem to
8 argue that.

9 MR. BOMSE: We don't, Justice Kennedy, and I'm
10 not sure why that would necessarily follow. It seems to me
11 there can be circumstances --

12 QUESTION: Well, it seems to me it would necessary
13 follow if you say that the purpose of Rule 11 is to control
14 the conduct of attorneys as they control litigation.

15 MR. BOMSE: Well, it is certainly the purpose of
16 Rule 11, as the first sentence of the advisory committee
17 notes say, to control abuses in the signing of pleadings,
18 which ordinarily will be by counsel. But I think you can
19 -- one can readily envision a situation in which the client,
20 set on some illicit purpose, misleads his or her counsel and
21 thereby commits a violation of Rule 11.

22 In those circumstances I see no reason why
23 although* counsel becomes the agent through which the
24 violation occurs, just as the advisory committee notes say,
25 I see no reason why it would not be entirely appropriate to

1 sanction the client rather than instead of in addition to
2 counsel under those circumstances. I think that would be
3 a relatively unusual circumstance, but I think the rule
4 specifically provides that can be done, and I think that the
5 hypothetical I've suggested is not unreasonable situation.

6 QUESTION: Oh, I think it might be quite usual
7 that clients might often mislead attorneys deliberately.

8 MR. BOMSE: I think -- I hope not.

9 QUESTION: But it seems to me that there are
10 sanctions in 28 U.S.C. and in the law of malicious
11 prosecution that cover that base without extending Rule 11
12 to do so. But you don't seem to argue that.

13 MR. BOMSE: Well, I'm not -- I'm not sure that we
14 have to -- in Rule 11 surely covers situations in which
15 malicious prosecution or abuse of process actions could be
16 brought. One of our concerns is that as interpreted by the
17 Ninth Circuit it would appear to go beyond that and permit
18 a client to be punished by the payment of fees, and hereby
19 the dismissal of its action, even where a malicious
20 prosecution or an abusive process action could not be
21 brought. And we do have some question about the propriety
22 of that.

23 But I don't think we need to reach the question
24 of whether or not there would be any inhibition upon the
25 rule establishing such a Rule 11 tort as we've called it in

1 our brief, because I believe that the rule, properly
2 interpreted, simply doesn't reach that issue.

3 And I believe that if one accepts my view of the
4 language of the rule, as leading us in effect agnostic as
5 to this particular question, then what one needs to do is
6 to turn to the purpose of the rule which, Justice O'Connor,
7 you observed both in your question to me and in your opinion
8 in Cooter & Gell is deterrence. But if I may, in that very
9 opinion, in the same paragraph in which you announced that
10 deterrence is the central purpose of Rule 11, you also made
11 clear to caveat the fact that it must read with two other
12 concerns in mind.

13 First of all that it will lead to satellite
14 litigation, something that the bar is very concerned with
15 and which we think is implicated by this case. And second,
16 that it will tend to chill the enthusiasm or willingness,
17 if you will, of clients to be willing to bring litigation
18 if they are concerned that their carelessness in the best
19 of faith, their mistakes as in this case, will lead them to
20 be sanctioned by a court.

21 It seems to me that when one asks about
22 deterrence, one is not asking a question either about an
23 absolute nor are you asking a question in a vacuum. Rather
24 it seems that deterrence first of all can be perfectly
25 properly achieved by reading Rule 11 as we would have it

1 read, that is, to apply to counsel who are professionals
2 after all. We do expect of counsel competence as well as
3 good faith. And indeed there can be no question that the
4 rule was amended in 1983 precisely to make that point
5 explicit and to make the rule more robust when it came to
6 counsel.

7 But just as we expect certain things from our
8 counsel, also we expect and tolerate certain things from
9 parties. We certainly expect them not to proceed in bad
10 faith. We do not expect them to harass, to use litigation,
11 to impose costs or delays upon opposing parties, and that
12 is surely a properly subject for the sanctioning of a party
13 who engages in that kind of behavior.

14 At the same time it does not seem to me that we
15 either should nor need to achieve the purposes of the rule
16 impose a sanction upon a client who is proceeding after all
17 in good faith, who wishes to prevail in its case. It avails
18 such a party nothing to file a law suit based upon a
19 mistake. If a mistake in fact is so obvious that a
20 reasonable investigation would promptly reveal it, then it
21 seems to me that mistake will be very quickly revealed as
22 well to the court. And at that point the client will have
23 expended his or her resources in vain. I see --

24 QUESTION: Well, in this -- \$13,000 worth of
25 counsel fees on the other side to reveal it. I mean that

1 isn't all that simple, is it?

2 MR. BOMSE: Well, first of all, Justice Souter,
3 of the 13,000, although I don't have a specific breakdown,
4 most of it was expended actually in pursuing the sanctions.
5 Almost nothing happened in this litigation itself. Indeed,
6 there was never an appearance at all by Chromatics, the
7 defendant, until after the sanctions proceedings and all
8 three of the hearings and the magistrate's recommendations
9 had already been made.

10 QUESTION: Well, isn't that only because they were
11 all inextricably bound up with the request for temporary
12 orders?

13 MR. BOMSE: Well, if the temporary restraining
14 order had been heard on its merits, there would have been
15 an opportunity for counsel to appear and oppose. Actually,
16 they would have appeared and opposed in response to a
17 preliminary injunction. But the temporary restraining order
18 was never even issued. When the judge's law clerk
19 discovered that there were errors, it was at that point
20 before Chromatics had ever filed a piece of paper, if my
21 recollection serves, that the case was brought to a halt and
22 the sanction proceedings began.

23 But I think -- I'm a little bit unfair to your
24 question if I suggest that because in this case that
25 occurred that there may not be circumstances in which people

1 will incur expenses as the result of a mistake. The answer
2 is they will, whether this is a good illustration of that
3 or not.

4 QUESTION: Mr. Bomse, it isn't just expenses.
5 Certainly the judge is at its very weakest so far as
6 separating truth from error and so -- on application for a
7 temporary restraining order where there's no factual record
8 developed, it's often heard largely ex parte. And that's
9 the very place where a negligent statement by a client can
10 really do damage, because there isn't -- you don't have
11 discovery in that sort of thing before you get a temporary
12 restraining order.

13 QUESTION: I will concede that. But I am not
14 aware of virtually any other Rule 11 case, and we are after
15 all, at least as we would argue it, arguing for a rule of
16 interpretation as to Rule 11. This is a very unique set of
17 circumstances. And it seems to me that we have to take into
18 account that we are willing to tolerate mistakes. We are
19 willing indeed to tolerate the very essence of the American
20 rule as to attorneys' fees is that we tolerate burdens being
21 placed on people who are found sometimes, Justice Souter,
22 after the expenditure of hundreds of thousands or millions
23 of dollars and years in discovery before a summary judgment
24 motion is granted.

25 We do not in this country, as a matter of policy,

1 and other countries draw the policy line differently, but
2 we do not elect to impose those kind of burdens. Just as
3 we are tolerate, indeed tolerant beyond anything that
4 remotely appears in this case, of clients in the form of
5 witnesses or nonparty witnesses not merely being mistaken
6 but actually getting on a witness stand and lying.

7 It seems to me the court's decision in Briscoe
8 against LaHue in which a police officer had testified in an
9 admittedly perjured fashion was the nonetheless held to be
10 absolutely immune specifically because of the concern that
11 to have any different rule would unduly chill the adversary
12 process.

13 QUESTION: Mr. Bomse -- am I saying your name
14 right?

15 MR. BOMSE: You are.

16 QUESTION: You might have a different rule for a
17 person appearing as a witness than you have for a person
18 who manages the litigation before the court, who is the
19 attorney or acting as the attorney on his own behalf. I
20 don't think that what you do on the one situation indicates
21 what you do on the other. So, if Rule 11 is only limited
22 to persons managing the litigation, that explanation would
23 be quite reasonable.

24 MR. BOMSE: I quite agree. And, and I think that
25 the distinction that I am drawing is between those persons

1 who manage the litigation, that is, attorneys or pro se
2 parties and that when somebody comes forth to attempt to
3 explain the facts whether on a witness stand or here in it
4 equivalent -- I mean, one could envision a TRO hearing with
5 a witness appearing, Chief Justice Rehnquist, and there we
6 would have a rule of absolutely immunity. And it seems to
7 me that the policies which lead the court to that kind of
8 rule as to witnesses certainly are instructive when the
9 question here is whether or not we are prepared --

10 QUESTION: To say that there's a policy that
11 witnesses may lie, I think misconceives it. There's
12 certainly nothing in our opinion in Briscoe against Lahue
13 that suggests witnesses are not subject to prosecution for
14 perjury. That was an action by an individual against
15 another individual in Briscoe against Lahue.

16 MR. BOMSE: Yes, that's correct.

17 QUESTION: So I don't think it's correct to say
18 that we have a policy that tolerates witnesses lying on the
19 --

20 MR. BOMSE: No, we -- in fact we would have a
21 policy that would be very strongly against that. But
22 because of the policy that we do have of not chilling the
23 adversary function, we are willing to tolerate perjured
24 testimony by --

25 QUESTION: To say we are willing to tolerate it

1 suggests that prosecutions are not available against
2 witnesses who perjure themselves, and that simply isn't the
3 case. We all know in cases we've tried probably people have
4 taken the stand on various occasions and lied and weren't
5 prosecuted, but that doesn't mean that the remedy isn't
6 available.

7 MR. BOMSE: No, there is a remedy in the form of
8 criminal sanctions, albeit there for intentional misconduct.
9 And I'm not suggesting --

10 QUESTION: That lying is intentional misconduct.

11 MR. BOMSE: So do I. And indeed if we having
12 lying in this case, we would say that Rule 11 should apply.
13 There is no question. I merely cite the decision in Briscoe
14 against Lahue in order to indicate. Because the court did
15 explain the reason for the decision in that case as being
16 based in large part upon this policy of not chilling
17 advocacy, a policy which is then echoed in the course of
18 Justice O'Connor's opinion in Cooter & Gell.

19 Now, we draw this line between intentional
20 misconduct and negligent misconduct rather frequently. It's
21 drawn sometimes as a statutory matter, as in 1927. It's
22 been drawn by this Court in terms of the inherent power
23 which the judiciary has to sanction misconduct. It's been
24 drawn in the course of interpreting Rule 10(b)(5) in
25 Hochfelder. We do it for all sorts of reasons, and we

1 suggest that it ought to be done here for even stronger
2 reasons.

3 I submit to the court that we are not very much
4 threatened by a party's innocent errors. Innocent errors
5 do happen all the time. Witnesses are on the stand in
6 courts all the time, and they testify on direct examination
7 with a great deal of certainty about the contents of a
8 critical meeting only to be met on cross-examination by a
9 memorandum that they had written a year earlier --

10 QUESTION: Yes, by of course, this rule deals with
11 written submissions where presumably the person has time to
12 check the facts and so forth, so it's a special -- specially
13 limitative context.

14 Would you tell me precisely what written papers
15 form the basis of the sanction in this case -- just --

16 MR. BOMSE: Yes, there are two. The first is the
17 filing of the initial TRO application itself.

18 QUESTION: Which was signed of course by the
19 attorney and not by the client?

20 MR. BOMSE: Which was signed by the attorney,
21 although as, as it turned out there was a signature never
22 referred to in any of the proceedings below. But there was
23 in fact unneedless verification submitted by the president
24 of the corporation.

25 QUESTION: So it's the motion to TRO is one.

1 MR. BOMSE: And then second was the supplemental
2 declaration and papers accompanying it, signed by Mr. Lamb,
3 who was an employee of --

4 QUESTION: And that's the -- that's the affidavit.

5 MR. BOMSE: That's the affidavit that we're
6 concerned with here.

7 QUESTION: Excuse me, with respect to both of
8 these was the signature the company by somebody or -- the
9 verification on the complaint, was that verification by an
10 individual or was it by literally a party? Was it by the
11 company?

12 MR. BOMSE: A verification is always an
13 individual, but the form of verification that is used in
14 Federal court where you have a corporate party does not
15 state and is not required to state that I know the facts to
16 be true, because that would be very difficult in many cases.
17 It states rather that I am informed and believe that the
18 information is correct. And --

19 QUESTION: But I want to know was it signed
20 Business Guides by somebody -- it was signed -- the
21 individual's name?

22 MR. BOMSE: It's my recollection that it was
23 signed -- I'm wrong. Page 31 of the Joint Appendix says
24 that, "I, J. Roger Friedman, President of Business Guides,
25 being first duly sworn say that the foregoing complaint is

1 true and correct. Business Guides, Inc., by" --

2 QUESTION: By --

3 MR. BOMSE: By J. Roger --

4 QUESTION: So it was signed -- it was verified by
5 the party --

6 MR. BOMSE: Yes, although that --

7 QUESTION: -- which is what this rule refers to,
8 the party, not an employee of the party, which is the party.

9 MR. BOMSE: That is -- that is true. It refers
10 to that, although I must --

11 QUESTION: Now, this latter affidavit --

12 MR. BOMSE: Yes.

13 QUESTION: -- was not signed by Business Guides.

14 MR. BOMSE: No.

15 QUESTION: It was just signed by the individual.

16 MR. BOMSE: Of course.

17 QUESTION: So it was not signed by the party.

18 MR. BOMSE: It could not be.

19 QUESTION: But if a party is a corporate party,
20 a corporate party can't verify. That has to be verified by
21 an individual on behalf of the party.

22 MR. BOMSE: Of course. Of course.

23 It seems to me that what we need to do or ought
24 to do in interpreting Rule 11 --

25 QUESTION: May I just -- I'm sorry, but --

1 MR. BOMSE: Of course.

2 QUESTION: The sanction against the corporation
3 as opposed to the original sanction against the law firm,
4 which I know is later, was for signing for both the motion
5 and supporting papers or just the latter?

6 MR. BOMSE: No, it was for both.

7 QUESTION: Both, yeah.

8 MR. BOMSE: It was for both.

9 We submit that the nature of the obligation
10 imposed by Rule 11 should be related to the harm that we are
11 trying to rectify and the problems we foresee. We suggest
12 that for the lawyer that problem is not making sure that a
13 claim is well grounded as well proceeding for an improper
14 purpose. However, for a client we suggest it is simply the
15 misuse of the process.

16 Mr. Chief Justice, I would like to reserve my
17 remaining time.

18 QUESTION: Very well, Mr. Bomse.

19 Mr. Shapiro, we'll hear now from you.

20 ORAL ARGUMENT OF NEIL L. SHAPIRO

21 ON BEHALF OF THE RESPONDENTS

22 MR. SHAPIRO: Mr. Chief Justice, and may it please
23 the Court:

24 The key question before the Court today is whether
25 a represented party who authorizes and participates directly

1 in the filing of a meritless action without performing
2 anything that even comes close to a reasonable inquiry into
3 the facts of the case can be held accountable for the direct
4 economic consequences which flow from his actions. We
5 respectfully submit that the factual hypothesis of that
6 question is in fact in the record before you and that the
7 answer to the question itself is most assuredly in the
8 affirmative. .

9 Raised by petitioner, and in fact the focus of
10 petitioner's petition and argument today, is the issue of
11 whether the conduct of such a represented party should be
12 judged by an objective standard or by a subjective one.
13 For reasons which I will discuss, we urge that the proper
14 interpretation of Rule 11 leads to the application of an
15 objective standard to such a party when viewed from the
16 bench mark perspectives of statutory or rule construction,
17 public policy, or judicial case management.

18 As I believe Business Guides agrees, we should
19 start the interpretive process with the words of the rule
20 or statute at issue. In fact, this Court said last term in
21 the Pavelic case, we give the Federal rules of civil
22 procedure their plain meaning and generally with them as
23 with the statute, when we find the terms unambiguous,
24 judicial inquiry is complete.

25 We submit that the words themselves of Rule 11

1 are substantially unambiguous as they apply to the facts
2 now before the Court.

3 QUESTION: Mr. Shapiro, can I raise with you the
4 question that Justice Scalia has been raising? The first
5 sentence of the rule requires certain papers to be signed
6 by a lawyer, if the party is represented by a lawyer. In
7 this case the -- your opponent was represented by a lawyer
8 at all times..

9 MR. SHAPIRO: Correct.

10 QUESTION: So does the rule encompass any other
11 papers than those which a lawyer must sign?

12 MR. SHAPIRO: I believe by its very terms it must
13 be read as incorporating other papers.

14 QUESTION: It must be read as, but the plain
15 language --

16 MR. SHAPIRO: Well, I believe the words of the
17 rule when it speaks of "pleading, motion, or other paper,"
18 intends to encompass within its reach all papers filed with
19 the court.

20 QUESTION: Even if they need not be signed by an
21 attorney?

22 MR. SHAPIRO: Correct, such as --

23 QUESTION: Because the first sentence just refers
24 to papers that shall be signed by an attorney?

25 MR. SHAPIRO: Yes.

1 QUESTION: So you're saying that the first
2 sentence is, is not as broad as the rest of the rule?

3 MR. SHAPIRO: I am saying that, yes. I believe
4 the rule expands its application as one reads it.

5 And I also think it important to note that nowhere
6 in the rule is there a statement that it applies to counsel
7 and pro se litigants only. It applies to any writing before
8 the court.

9 QUESTION: So that every affidavit must be signed
10 by the attorney?

11 MR. SHAPIRO: No, no. No, I'm saying the first
12 rule says that essentially every complaint must be signed
13 by the attorney. Affidavits are not signed by counsel, but
14 by, in this instance, parties, or it could be by --

15 QUESTION: Well, why, if other paper means every
16 document filed with the court?

17 MR. SHAPIRO: Because I believe when drafting the
18 rule the framers of the rule had in mind the fact that
19 certain documents initiating a legal proceeding such as a
20 complaint, certain other documents such as motions, must be
21 signed by counsel or by a party appearing without counsel.
22 But I believe that the drafters recognized that there were
23 other documents which can be signed by parties themselves.
24 And I believe it was the intention of the rule to apply to
25 those other documents and to the parties that signed them

1 the reasonable inquiry requirement.

2 And I suggest that --

3 QUESTION: Well, in any event -- in any event here
4 I gather they -- the documents in question were signed by
5 the attorney as well as by the party?

6 MR. SHAPIRO: The complaint itself was signed by
7 both. The declarations were not. The temporary restraining
8 order application was signed by counsel. It was supported
9 by an affidavit signed by a representative of the client.

10 QUESTION: And in your view the Rule 11 sanction
11 could be sustained based simply on the complaint?

12 MR. SHAPIRO: I think it clear from some of the
13 court's previous opinions that it is frequently loathe to
14 hold a party responsible for misconduct of a lawyer with
15 which it had no participation and that raises the
16 possibility of a complaint being signed by a lawyer in
17 violation of the rule but without any wrong on the part of
18 the client.

19 In this instance --

20 QUESTION: But in this -- in this action what do
21 you think constitute the gravamen of the Rule 11 violation,
22 which papers?

23 MR. SHAPIRO: The original complaint and the
24 temporary restraining order package if you will including
25 the moving papers and the affidavit, together with the

1 supplemental affidavit of Michael Lamb, and as I will get
2 to in a moment --

3 QUESTION: If any one of those papers were
4 admitted would they be -- were excluded from our discussion
5 would there still be a Rule 11 violation?

6 MR. SHAPIRO: I don't it would be possible to
7 exclude the complaint itself from the discussion, and that
8 was a document, signed both by the party and by the attorney
9 and it posited a case based on false, totally false
10 evidence. It would hard I think to carve that out of the
11 application of Rule 11.

12 QUESTION: I thought that it was found below that
13 the attorney was not -- was not guilty of a Rule 11
14 violation with respect to the filing of the complaint.

15 MR. SHAPIRO: With respect to the initial filing
16 of the complaint --

17 QUESTION: Right.

18 MR. SHAPIRO: -- yes.

19 QUESTION: The attorney was not -- was there a
20 finding that the client was?

21 MR. SHAPIRO: Yes, directly.

22 I think it's also helpful to look at the words of
23 Justice Stevens in a separate concurring and dissenting
24 opinion in Cooter & Gell. Justice Stevens noted if a
25 plaintiff files a false or frivolous affidavit in response

1 to motion to dismiss for lack of jurisdiction, I have no
2 doubt that he can be sanctioned for that filing. I find it
3 difficult if not impossible to draw a meaningful distinction
4 from a plaintiff who files a false or frivolous affidavit
5 in support of a motion to dismiss for lack of jurisdiction
6 and one who does so in support of an application for a
7 temporary restraining order.

8 Indeed I could posit the argument I think with
9 good, with good heart, that it is worse when seeking a
10 temporary restraining against a small competitor to file a
11 declaration that is based on false facts because, in the
12 case of a motion to dismiss, the worst that can happen is
13 that the matter will remain the Federal judicial system.

14 The other circumstance --

15 QUESTION: Of course, that's separate opinion --

16 MR. SHAPIRO: -- is the worse that could happen
17 is the economic death of the party against whom the
18 temporary restraining order is sought based on that false
19 declaration.

20 QUESTION: That separate opinion was not exactly
21 overwhelming indorsed by the rest of the Court.

22 (Laughter.)

23 MR. SHAPIRO: But I think its words still have
24 much wisdom to them --

25 (Laughter.)

1 MR. SHAPIRO: -- and much application to what's
2 before us.

3 QUESTION: Please, just so I'm sure about it.
4 What -- was -- because I have trouble with the latter
5 affidavit -- was the sanction based independently upon the
6 -- upon the party's signing of the originally complaint,
7 independently upon that?

8 MR. SHAPIRO: The district court found and the
9 Ninth Circuit affirmed two violations of Rule 11 on the part
10 of the party. The first was the filing of the initial
11 packet of papers, which include the complaint, the
12 application for temporary restraining order with the
13 affidavit as part of it.

14 The Court found a second violation, and that was
15 in the submission of a supplemental affidavit some 6 or 7
16 days later and on the eve of the temporary restraining order
17 hearing. For what it is worth, the court pointed out that
18 at the time of the filing of the second affidavit, it had
19 become abundantly clear that the sole corporate document,
20 the sole record, upon which plaintiff relied -- it relied
21 in bringing the action had been found to be terribly flawed,
22 yet there was no further inquiry.

23 The application of an objective standard, I submit
24 to you, not only has the support of the courts that have
25 considered what standard to apply for lawyers and for

1 unrepresented parties, but I think it draws some support
2 from an analysis of the rule itself and the purposes for
3 which it was adopted.

4 Now, I concede that neither the rule itself nor
5 the advisory committee note speaks directly to the standard
6 by which one shall judge the conduct of a represented party.
7 But I think there are certain things that we may look to to
8 aid us in interpreting whether that was the intention of the
9 rule.

10 I think first and foremost is the 1983 amendments
11 to the rule removed references to bad faith. Implicit in
12 that, I submit, was the intention to adopt an objective
13 standard. To the extent that one wishes to read the rule
14 as only allowing sanctioning of a party for subjective bad
15 faith, amending the rule at all as it related to parties,
16 and it was amended by speaking of represented parties, would
17 have been entirely unnecessary and a futile lack.

18 This Court has the inherent power and has always
19 had the inherent power to sanction a party for frivolous or
20 bad-faith conduct.

21 QUESTION: Mr. Shapiro, are you suggesting that
22 the rule itself does not speak directly to whether or not
23 it should be a negligence or objective standard or a
24 subjective standard?

25 MR. SHAPIRO: I believe that the fair of the rule

1 and interpretation of the rule using standard methods of
2 interpretation leads to that conclusion. What I'm
3 suggesting or conceding is that the rule does not say that
4 a represented party shall only be responsible for sanctions
5 in the case of bad faith, nor does it expressly say that,
6 yes, we mean a represented party as judged by the same
7 objective standard as is applied to an unrepresented party.

8 QUESTION: So where the rule says if a pleading
9 motion or other papers signed in violation of this rule,
10 you don't think that says one way or the other whether it
11 should be subjective or objective?

12 MR. SHAPIRO: The inference I draw from the words
13 the Court has just read and the words of the rule in toto
14 is that the objective standard is the apt one for everyone.

15 QUESTION: Well, I would think so, too, because
16 the preceding sentence says "the signature of any attorney
17 or party formed after reasonable inquiry" -- I would think
18 that supports your position.

19 MR. SHAPIRO: I very definitely agree with Your
20 Honor, Mr. Chief Justice. As I was going to say earlier,
21 the wording of the rule, the signature of any attorney or
22 party constitutes a certificate by the signer that the
23 signer has read the pleading, motion, or other paper that
24 to the best of the signer's knowledge, information, and
25 belief, formed after reasonable inquiry, it is well grounded

1 in fact, et cetera.

2 I submit to you that a fair reading of that, and
3 using all proper methods of statutory rule interpretation
4 suggests, that when it says the signer, it means the signer,
5 whether an attorney or party. And if a party whether
6 represented or in pro per.

7 But I think if we go further and look at some of
8 the, the other factors as I was mentioning, I think they
9 simply bolster the conclusion that the objective standard
10 was intended and is appropriate.

11 QUESTION: When a civil litigant files an action
12 with the court is not an exercise of the right of petition
13 under the First Amendment, and if so, do you know of any
14 authority which holds a party monetarily liable based on an
15 objective standard for the exercise of a right of petition?
16 This is a very far-reaching rule you're making here.

17 MR. SHAPIRO: No, I don't, although I think I
18 could posit one. Certainly, standing outside this Court
19 and protesting a decision it has made or has failed to make
20 would constitute arguably petitioning one's Government for
21 redress of grievances. But I think it might also violate
22 various trespass laws or other laws regarding civil
23 behavior, which by their nature are not judged on a
24 subjective standard but by an objective standard. If I have
25 trespassed, I have trespassed, whether I intended to or not.

1 And if I have trespassed on government property to petition
2 that same government for redress of grievances, I will be
3 held accountable criminally based on an objective --

4 QUESTION: Yes, yes, but what you're doing is
5 you're saying that there's a liability based on an objective
6 standard judged by the content of what is spoken.

7 MR. SHAPIRO: No, I think --

8 QUESTION: And I think that's a far-reaching rule.

9 MR. SHAPIRO: In this -- in this instance, based
10 on the content, only if that content is characterized
11 properly as false as having been subscribed to --

12 QUESTION: Under an objective standard?

13 MR. SHAPIRO: Yes. Well, I think in this case
14 it's somewhat easy in that the facts are false. That has
15 been determined by the district court. It concluded on the
16 basis of the record before it that the action has absolutely
17 no factual basis whatsoever. That was a factor in its
18 decision to dismiss the action.

19 The review of --

20 QUESTION: You concede that filing a civil law
21 suit constitutes petitioning the Government for redress of
22 grievances?

23 MR. SHAPIRO: I believe an argument to that effect
24 could be made. I cannot honestly say that I've seen a case
25 that says that it does, although I can understand that kind

1 of argument being posited, yes.

2 QUESTION: You, you don't think grievances mean
3 grievances against the Government?

4 MR. SHAPIRO: I think that's the intent. I'm
5 simply saying --

6 QUESTION: You think it could be first to petition
7 of the Government for redress of your grievance against a
8 third party? .

9 MR. SHAPIRO: Normally, that's what I say, I don't
10 know of a single case that applies it in that context, but
11 I would concede that one could make that argument. I view
12 it as a constitutional right to petition my government for
13 a grievance of mine as to that government, not as to some
14 third party.

15 I would never foreclose the creativity of counsel
16 in making an argument to the contrary.

17 (Laughter.)

18 MR. SHAPIRO: I think in looking at Rule 11 also
19 and the question of whether the conduct of a represented
20 party and an unrepresented party should be judged by a
21 different standard, I think we have to ask ourselves whether
22 there is in fact any fundamental difference between the two.
23 Yes, one had taken on the burden, if you will, of
24 representing himself in a system somewhat alien to him. But
25 nevertheless he is a party. He is not trained as a lawyer.

1 In reviewing his conduct under the objective
2 standard, the courts will take into account his absence of
3 legal training and the fact that he will not be held to
4 perhaps precisely the same standards as I would expect this
5 Court would hold me or Mr. Bomse or anyone else before it.

6 Is a represented party that different? Both are
7 knowledgeable about the facts of their case. Both have as
8 their primary role in the litigation the presentation of
9 those facts, first to their counsel and then to the court.
10 To say that one who has the benefit for whatever reason of
11 having counsel is not held to the same standard of care, if
12 you will, as one who is not to me makes no sense and has no
13 basis in the rule.

14 Finally, I don't believe that there is any
15 inferential basis in the rule in reading its terms to
16 distinguish between parties who are represented and parties
17 who are not. The latter clearly are judged by the objective
18 standard. I submit that the former should be as well.

19 As a matter of public policy, I think that a
20 subjective standard brings with it some problems that
21 probably exceed in scope the value of the rule itself. They
22 argue by their discussion really for an objective standard.

23 As this Court said last term, the primary purpose
24 of Rule 11 is to deter frivolous litigation. Implicit in
25 that ruling, however, was the notion I believe that the

1 deterrence should be accomplished with as little burden on
2 the court as possible. The Court even noted that a
3 secondary consideration is the avoidance of unnecessary
4 satellite proceedings. It is hard to imagine how a
5 subjective standard would not cry out for satellite
6 proceedings, such as were held in this case even though the
7 Court was using an objective standard.

8 I think it takes no skilled practitioner of liable
9 law to know that in public official liable law perhaps more
10 attention is spent on the issue on the state of mind of the
11 defendant than on the truth or falsehood of the charges
12 made. Determining subjective state of mind is neither easy
13 nor quick, and if the rule is intended to deter abuse
14 without burdening the court, a subjective standard simply
15 will not do that.

16 To the extent this Court believes there is value
17 in the attorney-client relationship, I would submit that a
18 subjective standard does more damage to that relationship
19 than could an objective standard. First, it impinges on
20 the attorney-client privileged communications because it is
21 important in a subjective standard to determine what the
22 party knew and what it thought and when. It also I think
23 creates a greater prospect of client and attorney blaming
24 each other and pointing fingers at each other, thus
25 destroying whatever might remain of that relationship. All

1 of that of course would occur in satellite proceedings,
2 which I think are largely unnecessary under an objective
3 standard.

4 It also would allow, as in this case, a party to
5 say, well, I got all my facts wrong, I didn't check them,
6 but I subjectively believed in my case and be absolutely
7 immune from any sanction under Rule 11. The attorney in
8 that same case can say, well, the client was the expert, as
9 it did in this case. We relied on the client for the facts,
10 and that was not unreasonable. So on an objective standard,
11 we're immune as well. I don't think the purpose of the rule
12 is well served by creating such a distinction.

13 Finally, I think that use of an objective standard
14 creates an even application of the rule as to all who come
15 before it: attorney, client, or unrepresented party.

16 QUESTION: Excuse me. As I understand it,
17 however, you can't get to the client even if the client
18 doesn't have a -- reasonable belief. You can't even get to
19 the client unless the attorney that represents him is in
20 violation of the rule. If you have a paper that need only
21 be signed by the attorney, it's clear that unless the
22 attorney is in violation, you can -- cannot impose a
23 sanction upon the client under Rule 11, isn't that so?

24 MR. SHAPIRO: I would agree, yes.

25 QUESTION: And would that apply for complaints?

1 Is there any requirement in the rules that a complaint must
2 be verified by the party?

3 MR. SHAPIRO: No, there is not, but I do believe
4 that the rule itself in its application, as articulated by
5 various courts, has said that where the rule is violated
6 because the attorney signed the complaint and the attorney
7 did not make a reasonable inquiry -- nor did his client --
8 sanctions may be imposed on the attorney or the client or
9 both.

10 QUESTION: Quite so. But if the attorney did make
11 a reasonable inquiry --

12 MR. SHAPIRO: Yes.

13 QUESTION: -- but the client didn't, and thereby
14 misled the attorney, there's no problem. You can't -- you
15 can't reach either one. Isn't that right?

16 MR. SHAPIRO: Assuming -- yes, assuming an
17 objective standard for the client and no subjective bad
18 faith client to implicate the court's inherent power, yes.

19 QUESTION: And assuming the client didn't sign
20 the paper?

21 MR. SHAPIRO: Correct.

22 QUESTION: So, in this case if the court --
23 district court, were wrong and we stipulate that there was
24 no Rule 11 violation for filing the complaint and signing
25 the complaint, then case has to fail?

1 MR. SHAPIRO: No, I don't agree that that's
2 necessary.

3 QUESTION: Well, why isn't that so, because what,
4 what paper did the attorney sign other than the complaint?

5 MR. SHAPIRO: Well, the attorney signed the
6 complaint and all the other moving papers in connection with
7 the temporary restraining application, save and except the
8 affidavit.

9 The question as posited by Justice Scalia I
10 believe was aimed at the initial filing of a complaint, no
11 other papers filed, can the party be sanctioned for the
12 lawyer's violation of Rule 11 in connection with that
13 complaint. That I think is a fair and accurate statement
14 of the law. But I don't think that it necessarily follows
15 that if the client signs either the same paper or
16 subsequently signs other papers that are filed with court,
17 that the client cannot be held in violation of Rule 11 and
18 sanctioned accordingly.

19 QUESTION: Well, what were the papers, other than
20 the complaint, that the attorney signed?

21 MR. SHAPIRO: Other than the complaint, the
22 application for temporary restraining order of which the
23 affidavit was a supporting piece, the legal memorandum, the
24 application itself, the order for sealing of these records
25 so that the defendant could not see them.

1 QUESTION: All right.

2 QUESTION: You -- I take it that you say if only
3 the attorney signs a complaint and he commits a violation,
4 the party -- I mean, the client -- may never be sanctioned?

5 MR. SHAPIRO: I don't agree with that, Justice
6 White, no.

7 QUESTION: You don't suggest that?

8 MR. SHAPIRO: No, I don't. I don't.

9 QUESTION: Even if the -- even if the -- even if
10 only the attorney is blameworthy?

11 MR. SHAPIRO: If only the attorney is at all
12 blameworthy, then I would suggest that it is only the
13 attorney who should be sanctioned.

14 QUESTION: Well, it should be, but the rule seems
15 to say that the court can impose a -- whenever there is a
16 violation by the attorney, can impose an appropriate
17 sanction on the attorney or his client.

18 MR. SHAPIRO: Well, I think that the court --

19 QUESTION: Maybe -- maybe the sanctions could be
20 different for the two.

21 MR. SHAPIRO: They certainly could be different
22 for the two and I think the drafters also contemplated the
23 circumstances in which the attorney's signature violates
24 the rule because the complaint is frivolous, but the client
25 provided the facts, and the court may determine that it is

1 those facts which make it a frivolous complaint. The
2 attorney should have checked further. Had he done so he
3 would not have violated the rule. The case would not have
4 been filed.

5 QUESTION: Well, Mr. Shapiro, the rule, though,
6 speaks in terms of imposing sanctions only on people who
7 have signed the relevant papers. If the client does not
8 sign, how is it the client could ever be held liable under
9 the terms of the rule?

10 MR. SHAPIRO: As I read the rule, Justice
11 O'Connor, it is without doubt that the signer can be
12 sanctioned. But as I read the rule, if a violation occurs
13 because of the signing of the paper in violation of Rule 11,
14 the signer himself, which normally would be the attorney,
15 may be sanctioned, but so may the party he represents
16 depending upon the circumstances.

17 QUESTION: Well, that's a curious interpretation
18 of the language of the rule, isn't it, which speaks only in
19 terms of if a paper is signed in violation of the rule, then
20 the court may impose upon the person who signed it, a
21 represented party or both -- or both -- an appropriate
22 sanction? So apparently it speaks in terms only people who
23 have signed.

24 MR. SHAPIRO: I think that in that sense that the
25 rule may be somewhat ambiguous. I think it certainly can

1 be read as suggesting that whoever signs the paper, whether
2 an attorney or represented party, can be held liable for
3 sanctions for the violation of the rule occasioned by that
4 signing. I don't think it forecloses the possibility. And
5 I think some courts have said that it in fact honors the
6 possibility that the Rule 11 violation occurring when the
7 attorney signs the complaint may be attributable to
8 misconduct, if you will, on the part of the party; and the
9 court in that circumstance say both the attorney and the
10 party are sanctioned for the violation.

11 QUESTION: In any event, both have signed.

12 MR. SHAPIRO: Yes, I was going to say, here,
13 fortunately we do not have to resolve that apparent
14 ambiguity or question in the rule, because here it was the
15 party who signed some of the key documents.

16 QUESTION: Unless -- excuse me.

17 QUESTION: The supplemental affidavit was signed
18 only by the party?

19 MR. SHAPIRO: Correct. But it was -- I would
20 submit to the Court it was in further of and part of the
21 application for a temporary restraining order. It was
22 required only because the original application is too vague.

23 QUESTION: Well, it really -- it really was signed
24 by the party technically, absolutely technically. It was
25 signed by an employee of the party.

1 MR. SHAPIRO: That is absolutely correct.

2 QUESTION: If you have a corporation everything
3 is done by the party will be done by some employee of the
4 corporation.

5 MR. SHAPIRO: It has to be. A corporation simply
6 cannot sign things on its own.

7 QUESTION: Where you say -- you just said a moment
8 ago that there's no problem since the party did sign the
9 complaint. Well, that depends upon whether you read Rule
10 11 as applying to all signatures, whether they're required
11 or not. In other words, if the certification was not
12 required by Rule 11 you might argue that the mere fact that
13 it was there does not justify imposing a sanction because
14 of it.

15 MR. SHAPIRO: Well, one might view it that way,
16 but I read that rule as saying that anyone who signs a
17 document which is going to be filed with the Federal court
18 must make the reasonable inquiry called for by the rule,
19 even if that document needn't be signed by that party. Now
20 in this case an affidavit would have to be sworn by a party
21 or a party representative.

22 There is no question, and I think it was the Third
23 Circuit that spoke to this in Gaiardo, that a Rule 11
24 violation creates multiple victims. Certainly the judicial
25 system and all those who come before it or who attempt to

1 come before it but must wait are victims. But the judicial
2 system has its own mechanisms for resolving that problem and
3 for attempting to assert its own rights against counsel who
4 would violate the rule or against parties who would violate
5 the rule.

6 But there are other victims whenever Rule 11 is
7 violated. And in this case another such victim is Michael
8 Shipp and his small company. Mr. Shipp has had to incur
9 fees and cost in this case from the inception to the moment
10 and presumably beyond. His business has been damaged. He's
11 been under a cloud of the accusation of a plagiarist for
12 over 4 years. The action was dismissed, but that is still
13 on appeal.

14 The district court recognized that under Rule 11
15 it could not do complete justice, but what it could do is
16 dismiss the case both as a sanction for the violation of
17 the rule and because it determined on the basis of the
18 record before it that the case had absolutely no factual
19 merit whatsoever.

20 It also recognized that it could at least as some
21 recompense give the wrongfully accused defendant those
22 limited expenses incurred before the trial court itself.
23 It did that. That justice was all it could do or at least
24 all it believed it could do at the time and was limited.
25 And we would simply ask this Court to affirm that limited

1 grant of justice.

2 QUESTION: Thank you, Mr. Shapiro.

3 Mr. Bomse, do you have rebuttal?

4 MR. BOMSE: Yes, Mr. Chief Justice.

5 REBUTTAL ARGUMENT OF STEPHEN V. BOMSE

6 ON BEHALF OF THE PETITIONER

7 MR. BOMSE: Yes, Mr. Chief Justice.

8 My reading of the rule is both narrower and
9 broader than that suggested by opposing counsel and indeed
10 by some of the Court's questions. I believe that the
11 language of the second sentence of the rule, which in an
12 attempt to redeem myself, Justice Scalia, we did cite at --
13 in our discussion of the language at page 4 of our reply
14 brief, that the language of the rule makes clear that it is
15 intended to apply when it uses the term "or party to a pro
16 se party."

17 Beyond that, however, it seems to me that the rule
18 which will be the situation in the vast majority of cases
19 and I realize this Court sits to decided cases or
20 controversies, but in the vast majority of Rule 11 cases,
21 the courts are going to be confronted with cases in which
22 the represented party has signed nothing. Thus, the rule
23 which talks later about a represented party being sanctioned
24 would not under the literal interpretation, which only would
25 permit sanctions against a signer, have any application in

1 that circumstance.

2 QUESTION: How do you -- how do you deal with the
3 language, "the rule and sanction that can be imposed against
4 the person who signed it, the party or both," even only one
5 person signed it?

6 MR. BOMSE: It is precisely what I'm trying --
7 trying to do, Justice Stevens. I am suggesting that that
8 sentence is there to tell the district court that in an
9 appropriate circumstance somebody who did not sign, namely
10 a represented party, may be sanctioned. And indeed that is
11 precisely what the rules advisory committee said. Let me
12 read, "Even though it is the attorney whose signature
13 violates the rule, it may be appropriate under the
14 circumstance of the case to impose a sanction on the
15 client." I believe this rule can be read in an integrated,
16 sensible fashion and I believe we are left when we do that
17 with the question of what rule is it that will best
18 accommodate the competing policy considerations.

19 On the one hand, the desire to deter the filing
20 of frivolous litigation. Sanctioning an attorney who does
21 not make a reasonable inquiry will do that. The only reason
22 that the sanction cannot be collected in this particular
23 case is the unfortunate circumstance that Business Guides'
24 attorneys are in bankruptcy, although following Pavelic and
25 LeFlore, they could have sued -- and should indeed have only

1 sued -- the individual attorneys. So there is not a
2 situation where my interpretation will leave parties who
3 incur expenses without a remedy. They will have that remedy
4 against counsel.

5 As to the parties, we need not for any purpose of
6 deterrence, have a rule which deters the useless of filing
7 a law suit which they believed to be legitimate but is not
8 in fact because that will readily be revealed. It will, on
9 the other hand, chill the expression of people who are
10 concerned that a judge may someday view their actions as
11 objectionably unreasonable.

12 A subjective standard of bad faith is easy for a
13 client to know about. And clients come in all shapes,
14 sizes, and degrees of intelligence. I think we should not
15 permit them to be sanctioned under those circumstances. It
16 seems to me that a rule makes sense only when as the
17 economist would say, ex ante, it provides adequate guidance.
18 I suggest that the rule we propose does that.

19 QUESTION: And is that the case when client is
20 representing himself as well, so that you have nobody to go
21 against for simply no reasonable inquiry? Or are you
22 proposing this rule only when you're going behind the lawyer
23 to get the client?

24 MR. BOMSE: Only when you're going behind the
25 lawyer. The rule I think is quite clear. If you are a pro

1 se party, you have elected, perhaps unwisely, to take on
2 those burdens. And I think that that is clearly what the
3 rule has in mind. But I think that the rule plainly applies
4 as we suggest.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bomse.
6 The case is submitted.

7 (Whereupon, at 12:00 noon, the case in the above-
8 entitled matter was submitted.)

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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:

#89-1500 - BUSINESS GUIDES, INC., Petitioner v. CHROMATIC COMMUNICATIONS

ENTERPRISES, INC. AND MICHAEL SHIPP

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

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