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Civil Rights Plaintiffs and the Proposed Revision of Rule 11

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The 1983 amendment of Federal Rule of Civil Procedure 11 has been the most controversial revision of the Federal Rules in their fifty-five-year history, and Rule 11's implementation has been most controversial in civil rights cases. Rule 11's application has disadvantaged civil rights plaintiffs more than any other category of civil litigant. Courts have found civil rights plaintiffs in violation of Rule 11 at a higher rate than other types of plaintiffs and have imposed substantial sanctions on them. Civil rights plaintiffs have been required to participate in expensive, unnecessary satellite litigation involving this provision. Indeed, a new study of Rule 11 activity in the Fifth, Seventh, and Ninth Circuits indicates that judges sanction civil rights plaintiffs as frequently as all other classifications of parties and that the Rule has led civil rights attorneys to advise clients to abandon potentially meritorious claims.[1]

These complications prompted the civil rights bar and public interest organizations to seek major changes in Rule 11. The Committee on Rules of Practice and Procedure of the United States Judicial Conference (Standing Committee) recently issued a proposal to modify Rule 11. Because that proposal probably will resemble the amendment which the Supreme Court and Congress ultimately adopt and because the 1983 revision has detrimentally affected civil rights plaintiffs, the proposal warrants close analysis. This Article undertakes that effort. Section I of this Article briefly explores the background of Rule 11 since 1983, when the provision was fundamentally changed by the Court and Congress. Section II assesses whether the aspects of the Standing Committee's proposal that most directly affect civil rights plaintiffs would improve the current Rule. This evaluation finds that these new features markedly improve the 1983 Rule and also are better than the proposal developed by the Advisory Committee on the Civil Rules (Advisory Committee) in May 1991. Because the new proposal may afford insufficient protection for civil rights plaintiffs, Section III offers suggestions which the remaining entities responsible for rule revision should adopt.[2]

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1. *See* Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943, 965-73 (1992).

2. Rule 11 also affects those who pursue litigation other than civil rights plaintiffs, but it has disadvantaged civil rights plaintiffs and attorneys the most since 1983. Therefore, they are the focus here. Insofar as the new proposal does not improve the 1983 Rule, it would disadvantage all parties and lawyers, but especially those who pursue civil rights cases. Much

I. History of Rule 11 Since 1983

The history of Rule 11 since its substantial modification in 1983 needs only cursory examination here, as that history has been recounted elsewhere.[3] Congress and the Supreme Court adopted Rule 11 as part of an integrated package of rule amendments that were intended to increase lawyers' responsibilities in, and judicial control over, civil litigation, particularly during the pretrial process.[4] The 1983 version requires that attorneys and parties conduct reasonable prefiling inquiries into the law and facts and that courts sanction counsel and litigants who fail to perform these duties.[5]

For at least the initial half-decade after Congress and the Court promulgated the 1983 provision, judges disagreed over many issues central to Rule 11's implementation.[6] The amended Rule led to considerable costly, unwarranted satellite litigation over, for instance, the meaning of the Rule's phrasing and the type and magnitude of sanctions imposed.[7] During this period, Rule 11 motions were filed and granted against civil rights plaintiffs more frequently than any other class of civil litigant,[8] and a number of

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about Rule 11's effects on civil rights plaintiffs equally applies to all who lack litigation resources. Civil rights plaintiffs, therefore, are a surrogate for them here. *See* Carl Tobias, Rule 11 and Civil Rights Litigation, 37 Buff. L. Rev. 485, 495-98 (1988-89). *See generally* Erik K. Yamamoto, Efficiency's Threat to the Value of Accessible Courts for Minorities, 25 Harv. C.R.-C.L. L. Rev. 341 (1990) (discussing the effects on minorities and resource-poor litigants of procedural reforms instituted to increase the efficiency, neutrality, and fairness of judicial proceedings).

In September, the Judicial Conference approved the proposal by voice vote and forwarded it to the Supreme Court. *See* The Judicial Conference Would Alter Rule 11, Nat'l L.J., Oct. 5, 1992, at 5.

3. *See, e.g.*, Marshall et al., supra note 1, at 946-49; Carl Tobias, Reconsidering Rule 11, 46 U. Miami L. Rev. 855, 858-64 (1992); Georgene M. Vairo, Rule 11: Where We Are and Where We Are Going, 60 Fordham L. Review 475, 478-92 (1991). *See generally* D. Michael Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1 (1976) (discussing history of Rule 11 prior to 1975).

4. *See* Arthur R. Miller, Fed. Judicial Ctr., The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility 2, 11-30 (1984); Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 Cornell L. Rev. 270, 291-92 (1989).

5. *See* Fed. R. Civ. P. 11, *reprinted in* 97 F.R.D. 165, 167-68 (1983).

6. *See* Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1930 (1989); Georgene M. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 207 (1988).

7. *See* Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) (satellite litigation over sanctions imposed), *cert. denied*, 484 U.S. 918 (1987); Burbank, supra note 6, at 1930-31; Tobias, supra note 2, at 514. *Compare* Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987) (holding Rule 11 imposes no continuing duty to amend pleadings based on subsequently ascertained knowledge) *with* Harris v. Marsh, 679 F. Supp. 1204, 1386-87 (E.D. N.C. 1987) (holding attorney's duty under Rule 11 continues after filing initial action), *aff'd sub nom.*, Blue v. U.S. Dep't of Army, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

8. *See* Melissa L. Nelken, Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1327, 1340 (1986); Vairo, supra note 6, at 200-01.

courts levied large sanctions on these plaintiffs.[9] Many civil rights plaintiffs have comparatively few resources, making them risk averse, and numerous observers have asserted that Rule 11 chilled their enthusiasm.[10]

Since approximately 1988, enforcement of Rule 11 has improved. Courts have interpreted and applied the provision more consistently, and satellite litigation has decreased.[11] Judges and attorneys seem to have invoked Rule 11 against civil rights plaintiffs less often,[12] while courts have shown growing solicitude for the needs of civil rights plaintiffs both in ascertaining whether they contravened Rule 11 and in imposing sanctions.[13]

Notwithstanding these apparent improvements, the Advisory Committee began studying the possibility of revising Rule 11 in 1989[14] and issued a Call for Comments on that prospect in August 1990.[15] The Committee heard testimony, primarily in opposition to the 1983 Rule, from sixteen experts at a public hearing held in February 1991.[16] The Committee then agreed on a preliminary draft proposal to amend the Rule at a May

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9. *See, e.g.*, Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1080-84 (7th Cir. 1987) (vigorously enforcing Rule 11), *cert. denied*, 485 U.S. 901 (1988); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 204-06 (7th Cir. 1985) (vigorously enforcing Rule 11); Avirgan v. Hull, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989) (imposing $1,000,000 sanction), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

10. *See* Nelken, supra note 8, at 1327, 1340 (chilling); Tobias, supra note 2, at 495-98, 503-06 (stating plaintiffs have few resources and can be risk averse and noting chilling effects); Vairo, supra note 6, at 200-01 (same). *Cf.* Judicial Conference of the U.S. Comm. on Rules of Practice and Procedure, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 344, 345-48 (1990) [hereinafter Call for Comments] (suggesting that whether Rule 11 actually has chilled plaintiffs is controversial).

11. *See* Carl Tobias, Rule 11 Recalibrated in Civil Rights Cases, 36 Vill. L. Rev. 105, 110-22 (1991). *See generally* Jeffrey W. Stempel, Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices, 60 Fordham L. Review 257, 266-67 (1991) (suspecting that application more consistent).

12. This assertion is premised on an informal survey of reported opinions, and unreported opinions available on computerized services, since January 1, 1991. *See generally* Tobias, supra note 3, at 860-61.

13. *See, e.g.*, Prochotsky v. Baker & McKenzie, 966 F.2d 333, 335 (7th Cir. 1992); Foster v. Mydas Assoc., 943 F.2d 139, 145-46 (1st Cir. 1991); Adams v. Perloff Bros., 784 F. Supp. 1195, 1199-200 (E.D. Pa. 1992).

14. *See* Linda S. Mullenix, Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 854 (1991). The Advisory Committee is a twelve-member entity consisting of judges, law professors, and attorneys, which Congress has authorized to study the Federal Rules and to formulate proposals for change as warranted. *See* 28 U.S.C. § 2073 (1988); Mullenix, supra, at 797 n.2. *See generally* Harold S. Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 Mich. L. Rev. 1507 (1987) (arguing that rules may be revised in more efficient ways than through litigation).

15. *See* Call for Comments, supra note 10, at 344; Vairo, supra note 3, at 492-93. *See generally* Mullenix, supra note 14, at 854 (discussing Call for Comments).

16. *See generally* Call for Comments, supra note 10, at 345. Rule 11's controversial character prompted the Committee to reverse the normal sequence of seeking public comment after developing a proposal. The Committee intentionally listened to a disproportionate number of opponents, because it wished to hear criticisms of the Rule. *See* Vairo, supra note 3, at 492-93.

1991 meeting.[17]

The Standing Committee reviewed that draft and made a few small changes to it in July.[18] The Standing Committee held a public hearing on the proposal in November 1991, solicited public input on the proposal, which was due in February 1992, and conducted a second hearing that month.[19] The Advisory Committee significantly altered the proposal at an April 1992 meeting and then forwarded it to the Standing Committee.[20] During a mid-June meeting, the Standing Committee reconsidered the proposal, included several minor modifications, and instituted the major change of making judicial imposition of sanctions discretionary.[21]

The Judicial Conference approved the Standing Committee's draft without change in September 1992. If Rule 11 is to be amended in 1993, the Supreme Court must transmit a proposal to Congress before May 1, 1993, which will become effective seven months thereafter, unless Congress alters it.[22] The Court and Congress frequently have deferred to the entities below them in the rule revision hierarchy.[23] Because neither the Court nor the Congress is likely to alter the proposal substantially, Section II of this Article evaluates the proposal's most important constituents, primarily from the perspective of civil rights plaintiffs and attorneys.[24]

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17. *See* Tobias, supra note 3, at 863-97 (discussing the draft proposal and Committee's work at the meeting).

18. *See* Judicial Conference of the U.S. Comm. on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendment to Federal Rule of Civil Procedure 11, *reprinted in* 137 F.R.D. 53, 74-82 (1991) [hereinafter Preliminary Draft]. The Standing Committee is comprised similarly to the Advisory Committee and must approve its proposals before forwarding them to others in the rule revision hierarchy. *See* supra note 14.

19. *See* Preliminary Draft, supra note 18, at 53. *See generally* Randall Samborn, U.S. Civil Procedure Revisited, Nat'l L.J., May 4, 1992, at 1 (analyzing Committee action at February hearing).

20. *See* Attachment B to letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee to Judge Robert E. Keeton, Chairman, Standing Committee 2-5 (May 1, 1992) [hereinafter Pointer Letter] (copy on file with author); *see also* Randall Samborn, Key Panel Votes Shift in Rule 11, Nat'l L.J., July 6, 1992, at 13.

21. *See* Judicial Conference of the U.S. Comm. on Rules of Practice and Procedure, Proposed Amendment to Federal Rule of Civil Procedure 11, at 46 (July 1992) [hereinafter Proposed Amendment]; *see also* Samborn, supra note 20, at 13.

22. *See* 28 U.S.C. § 2074 (1988); *see also* Judicial Conference of the U.S. Comm. on Rules of Practice and Procedure, Amendment of Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, *reprinted in* 134 F.R.D. 315 (1991).

23. *See* Carl Tobias, Judicial Discretion and the 1983 Amendments to the Federal Civil Rules, 43 Rutgers L. Rev. 933, 961 (1991); *see also* Tobias, supra note 4, at 293, 337-40. *But cf.* Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1018-20 (1982) (discussing increased congressional willingness since 1973 to intercept proposed rule changes governing evidence and criminal, civil, and appellate procedure). *See generally* Jack Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673 (1975) (discussing problems with Supreme Court rulemaking).

24. *See also* Tobias, supra note 3 (analyzing May 1991 Advisory Committee proposal primarily from perspective of civil rights plaintiffs and attorneys).

II. THE STANDING COMMITTEE PROPOSAL

A. Descriptive Assessment

The Standing Committee made few changes to the draft produced by the Advisory Committee in April 1992.[25] The Advisory Committee draft differed somewhat from the Advisory Committee's May 1991 proposal, which has been analyzed elsewhere.[26] Nonetheless, the May 1991 proposal warrants considerable treatment here, because it was the major source of the new proposal.

This subsection descriptively analyzes numerous specific components of the new proposal. It first examines how the Advisory Committee addressed particular issues in May 1991 and how the Standing Committee altered that treatment. This Section then evaluates whether the Standing Committee's changes are responsive to the concerns of civil rights plaintiffs and offers suggestions for improving those aspects of the proposal that are not.

1. Representations to Court

a. Continuing Duty

Although the Advisory Committee and the Standing Committee retained the 1983 Rule's requirements that attorneys and pro se litigants not file papers for improper purposes and that they conduct reasonable prefiling legal and factual inquiries, both Committees substantially modified certain specifics of the 1983 provision for representations to the court. Perhaps the most important aspect of the Advisory Committee's proposal was the imposition of a continuing duty, requiring that lawyers and unrepresented parties withdraw any "claim, defense, request, demand, objection, contention, or argument in a pleading, written motion or other paper," once it becomes untenable.[27] The obligation would have placed onerous responsibilities on attorneys and litigants, particularly those with few resources or those who file nontraditional lawsuits or close cases. For example, the duty parses too finely the idea of a "paper," requiring scrutiny of tiny fragments rather than considering whether papers as a whole satisfy the Rule.[28] The obligation correspondingly demanded that counsel and parties identify and closely track all assertions throughout specific suits.[29]

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25. *See* supra note 21 and accompanying text. For purposes of consistency and convenience, I refer to the new proposal as the Standing Committee proposal, although the Advisory Committee made most of the changes in the May 1991 proposal.

26. *See* Tobias, supra note 3, at 863-97; Vairo, supra note 3, at 495-500.

27. Preliminary Draft, supra note 18, at 75.

28. Many courts have adopted the "paper as a whole" approach. *See, e.g.*, Burull v. First Nat'l Bank, 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); Brown v. Fed'n of State Medical Bds., 830 F.2d 1429, 1434 n.2 (7th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *But see* Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362-65 (9th Cir. 1990).

29. These difficulties may explain why most circuit courts have refused to recognize a continuing duty. *Compare* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1201 (7th Cir. 1990)

The Standing Committee significantly altered the continuing obligation to withdraw that the Advisory Committee developed. It imposed this duty on practitioners and pro se litigants only for advocating a position in a paper after they learned that it lacked merit.[30] Modifications in the proposal's text and the accompanying Advisory Committee Note show that courts are to parse the concept of a paper less finely.[31] The Standing Committee, however, rejected the "paper as a whole" notion on a nine-to-three vote.[32] In the final analysis, the most accurate indicator of how finely "paper" is to be parsed is the following statement in a letter transmitting to that Committee the Advisory Committee's final proposal:

> [T]he language of the [May 1991] draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a "claim, defense, request, demand, objection, contention, or argument" and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared—or threatened—for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the "safe harbor" provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.[33]

The new proposal significantly improves the May 1991 proposal. Nevertheless, there is little need to impose any form of continuing duty on practitioners because judges can reach the problematic behavior through other means, namely, Federal Rules of Civil Procedure 26[34] and

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(holding Rule 11 imposes no continuing duty) *and* Thomas v. Capital Sec. Servs., 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc) (no continuing duty) *with* Anderson v. Beatrice Foods Co., 900 F.2d 388, 393 (1st Cir. 1990) (holding Rule 11 does impose a continuing duty). For a thorough listing of relevant primary authority see Carl Tobias, Environmental Litigation and Rule 11, 33 Wm. & Mary L. Rev. 429, 442 n.65 (1992).

30. *Compare* Preliminary Draft, supra note 18, at 75 ("presenting or maintaining") *with* Proposed Amendment, supra note 21, at 45 ("presenting to . . . later advocating"). The party's duties regarding papers' content includes "reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." Id. at 52 (Advisory Committee Note). For a confirmation of these ideas see Pointer Letter, supra note 20, at 3.

31. *See* infra note 33 and accompanying text. Committee Notes both accompany and explain the text of rules changes.

32. Memorandum of John Frank, Esq., Lewis & Roca, Phoenix, Ariz. (June 19, 1992) [hereinafter Memorandum] (on file with author); *see also* supra note 28 and accompanying text.

33. Pointer Letter, supra note 20, at 4. Although Judge Pointer made this statement before the Standing Committee drafted its final proposal, the statement appears reliable because the Standing Committee changed none of its substance. This is true whenever this Article cites to this letter in support of specific propositions.

34. Fed. R. Civ. P. 26(g) (allowing the court, upon motion or upon its own initiative, to impose appropriate sanctions for abuse of discovery requests, responses, and objections, which may include the amount of the reasonable expenses incurred because of the abuse and a

37,[35] 28 U.S.C. § 1927,[36] civil contempt, and inherent judicial authority.[37] Accordingly, the rule revisors should eliminate the continuing obligation.

b. Certification Respecting Law

The most important change that the May 1991 proposal would have made in the certification respecting law required signers to certify that papers were warranted by a "nonfrivolous," rather than a "good faith," argument for the "extension, modification or reversal of existing law."[38] One problem with this wording is its rejection of phraseology that has acquired specific meaning to which courts, attorneys, and parties have become accustomed.[39] Moreover, many judges encountered considerable difficulty applying "frivolousness" to the 1983 Rule.[40] For instance, numerous courts that invoked the idea overemphasized the quality of the papers or the merits of the allegations (product), as opposed to the reasonableness of the prefiling inquiries performed (conduct).[41] A number of judges correspondingly experienced problems enunciating consistent standards for ascertaining frivolousness and affording adequate guidance to lawyers and litigants.[42]

Because the substitution of "nonfrivolous" for "good faith" would unnecessarily replace a familiar term with a word that numerous courts have had difficulty applying, the rule revisors should retain the "good faith" language. If, however, the decisionmakers choose to employ "nonfrivolous," they should use the following new material that the Advisory Committee included in the Committee Note: "[T]he extent to which a

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reasonable attorney's fee).

35. Fed. R. Civ. P. 37 (allowing the court to impose sanctions for failing to cooperate in discovery proceedings).

36. 28 U.S.C. § 1927 (1988) (allowing the court to satisfy excess costs, expenses, and attorney's fees reasonably incurred due to an attorney unreasonably and vexatiously multiplying the proceedings).

37. *See* infra notes 83-85 and accompanying text.

38. Preliminary Draft, supra note 18, at 76. The May 1991 proposal and the 1983 Rule first require that papers be warranted by existing law. *See* Fed. R. Civ. P. 11; Preliminary Draft, supra note 18, at 76. The Committee attempted to be responsive to parties who assert novel legal theories by permitting arguments for establishing new law. *See* id. at 76.

39. Several Committee members expressed this idea during Committee deliberations. *See* Tobias, supra note 3, at 871.

40. *See, e.g.*, VION Corp. v. United States, 906 F.2d 1564, 1566 (Fed. Cir. 1990); Romero v. City of Pomona, 883 F.2d 1418, 1429 (9th Cir. 1989); *see also* Burbank, supra note 6, at 1933-34, 1941-42.

41. *See, e.g.*, Gutierrez v. City of Hialeah, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989). Even relatively clear opinions emphasize the paper's quality or the litigation's merits. *See, e.g.*, Pulaski County Republican Comm'n v. Pulaski County Bd. of Election Comm'rs, 956 F.2d 172, 173-75 (8th Cir. 1992); Pierce v. F.R. Tripler & Co., 955 F.2d 820, 829-31 (2d Cir. 1992). Neither is irrelevant. However, judges first should attempt to ascertain whether counsel conducted reasonable prefiling inquiries. Only when that proves inconclusive should courts consider the papers or the merits to determine reasonableness. Tobias, supra note 11, at 108 n.11.

42. *See* Stephen B. Burbank, Third Circuit Task Force, Rule 11 In Transition the Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, 20-21 (1989); Carl Tobias, Certification and Civil Rights, 136 F.R.D. 223, 226 (1991).

litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated."[43] The admonition is advisable, because it includes as constituents of Rule 11's prefiling legal inquiry both the nonfrivolous nature of the legal argument (product) and the reasonableness of the investigation that preceded it (conduct).[44]

c. *Certification Respecting Factual Assertions*

The May 1991 proposal would have required lawyers and pro se litigants to certify that "any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[45] The changes were an effort to accommodate parties who might "have good reason to believe that a fact is true or false but may need discovery" to gather and confirm evidentiary substantiation.[46] The changes were also an attempt to equalize plaintiffs' and defendants' responsibilities.[47]

This "duty of candor" would be too onerous, especially for litigants who lack access to information implicating their papers or who lack resources for collecting, evaluating, and synthesizing information that is more readily available.[48] For instance, if relevant material is in the defendants' minds, plaintiffs may be unable to identify assertions that probably will be supported by evidence after reasonable opportunity for more discovery or investigation.[49] Even were the plaintiffs not reduced to sheer speculation, they could have problems ascertaining which allegations are likely to be substantiated and what constitutes a reasonable opportunity.[50]

The Standing Committee made few changes in this provision, although it employed separate subdivisions to cover plaintiffs' and defen-

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43. Proposed Amendment, supra note 21, at 52-53.

44. *See generally* supra notes 40-42 and accompanying text.

45. Preliminary Draft, supra note 18, at 76. The 1983 version requires signers to certify that their papers are "well grounded in fact." Fed. R. Civ. P. 11.

46. Preliminary Draft, supra note 18, at 78 (Advisory Committee Note).

47. *See* id. at 79 (Advisory Committee Note).

48. The duty of candor requires litigants to specifically identify any assertions that may lack evidentiary support. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 127 (N.D. Cal. 1984) (imposing attorney sanctions for motions unwarranted by existing law and for not revealing that to the court), *rev'd on other grounds*, 801 F.2d 1531, 1539 (9th Cir. 1986); *see also* supra text accompanying note 38.

49. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 203-04 (7th Cir. 1985), *aff'g*, 596 F. Supp. 13, 22 (N.D. Ill. 1984). *See generally* Tobias, supra note 2, at 497-98 (arguing that civil rights litigants may be vulnerable to sanctions motions by the intrinsic nature of such litigation).

50. "Indeed, these are the very type of fact-specific inquiries that have engendered inconsistency, satellite litigation, and chilling since 1983." Tobias, supra note 3, at 874.

dants' assertions.[51] Insofar as the prescription recognizes that plaintiffs may need discovery to confirm allegations included in their papers and equalizes parties' obligations, it would be an improvement and should be retained. Nonetheless, the "duty of candor" would burden many plaintiffs who simply cannot satisfy the obligation.

The rule revisors, therefore, should not impose the duty on plaintiffs or even on defendants, although most defendants can more readily identify with specificity denials that "are reasonably based on a lack of information or belief."[52] The best approach may be to reduce the responsibilities of plaintiffs and defendants, rather than place similarly onerous obligations on each.[53]

Certain phrasing, especially the reasonableness concept, could foster disputes and unnecessary satellite litigation over its meaning and enforcement in particular situations.[54] Accordingly, the rule revisors should attempt to refine the wording, although "reasonableness" may be the most workable terminology that can apply to the plethora of fact-specific duties which attorneys and parties must discharge in individual cases.[55]

2. *Sanctions*

The Advisory Committee would have preserved the mandatory requirement in the 1983 Rule that judges levy an appropriate sanction, which may encompass financial awards, including attorney's fees, when courts find that lawyers or unrepresented parties violate the provision. That Committee also significantly changed the procedures governing sanctioning. The Standing Committee made several modifications, the most important of which was its decision to reinstitute discretionary sanctioning. The new proposal also includes changes that are principally intended to limit further monetary awards.

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51. *Compare* Preliminary Draft, supra note 18, at 76 (detailing changes in sanctionable actions and methods of initiating sanctions) *with* Proposed Amendment, supra note 21, at 46 (following the recommendations of the Preliminary Draft with only minor revisions).

52. Proposed Amendment, supra note 21, at 46. Rule 8(b) already permits defendants "without knowledge or information sufficient to form a belief as to the truth of an averment" to so plead. Fed. R. Civ. P. 8(b).

53. *See* Tobias, supra note 3, at 873. Neither Committee acknowledged that all of the circuits now impose elevated pleading requirements on civil rights plaintiffs. *See* Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *see also* Leatherman v. Tarrant County Narcotics Intelligence Unit, 954 F.2d 1054 (5th Cir. 1992), *cert. granted*, 112 S. Ct. 2989 (1992). *See generally* Tobias, supra note 4, at 296-301 (noting that placing more stringent pleading standards on civil rights plaintiffs violates fundamental concepts of fairness).

54. Courts will have to resolve nice questions of what constitutes a "reasonable opportunity for further investigation" and what denials are "reasonably based on a lack of information or belief." Proposed Amendment, supra note 21, at 46.

55. The imposition of any duty of candor on civil rights plaintiffs would burden them. Many lack resources, which complicates their compliance. Nevertheless, it would be less difficult for the plaintiffs to comply with that obligation as to the law because of the relative ease with which their counsel could identify potentially violative legal contentions. *Cf.* Tobias, supra note 3, at 873 n.105 (stating that the Advisory Committee proposed to impose duty only for legal assertions).

a. Sanctioning Procedures

One significant aspect of the May 1991 proposal was its prescription of additional, and more specific, procedural requirements for judicial imposition of sanctions. This contrasts markedly with the 1983 Rule which included virtually no procedures.[56] The dearth of procedures meant that numerous judges provided very few, and inconsistent, procedures, particularly for satisfying due process.[57] The Standing Committee left essentially intact the Advisory Committee's provision for independent sanctions motions, notice and opportunity to respond, courts' explanations of sanctions decisions, safe harbors, judicial discretion, and appellate review.

Each Committee proposal would mandate that lawyers and parties serve sanctions motions separately from other motions, which is intended to make the pursuit of sanctions more burdensome, thus curtailing Rule 11 activity.[58] This is an improvement and should remain. The Advisory Committee would also have required that judges provide sanctions targets "notice and a reasonable opportunity to respond" and that courts explain their sanctions decisionmaking when so requested.[59] The Standing Committee required that judges explain why sanctions have been imposed in a written order or on the record, unless targets waive that right.[60] This procedure removes the onus from sanctioned parties and warrants retention. Although the procedural protections afforded targets probably must be case specific, as the Committee Note advises, the Note or the Rule's text should expressly require that the procedures provided correspond to the gravity of the disputed activity and the potential severity of the sanction envisioned.[61]

Both Committees suggested the inclusion of a "safe harbor" provision, which would only permit litigants to file Rule 11 motions twenty-one days after giving the other parties a description of the allegedly violative conduct and an opportunity to withdraw or modify the offending paper.[62] If the safe harbor provision functions as intended, it could protect civil rights

56. *See* Fed. R. Civ. P. 11; *accord* Advisory Comm. on Civil Rules, Interim Report on Rule 11, at 12 (Apr. 9, 1991). *Cf.* Fed. R. Civ. P. 11 Advisory Committee Note, 97 F.R.D. at 200-01 (citing some procedural prescriptions).

57. For examples of inconsistent procedures that circuit courts prescribed for trial courts, *compare* Thomas v. Capital Sec. Servs., 836 F.2d 866, 871-75 (5th Cir. 1988) *with* Donaldson v. Clark, 819 F.2d 1551, 1558-59 (11th Cir. 1987). *Cf. In re* Kunstler, 914 F.2d 505, 521-22 (4th Cir. 1990) (recognizing few procedures), *cert. denied*, 111 S. Ct. 1607 (1991).

58. *See* Preliminary Draft, supra note 18, at 76; *see also* Tobias, supra note 3, at 877 (noting committee intent to curtail Rule 11 activity).

59. *See* Preliminary Draft, supra note 18, at 76-77.

60. *See* Proposed Amendment, supra note 21, at 49; *see also* id. at 55 (Advisory Committee Note).

61. *See* Proposed Amendment, supra note 21, at 55 (Advisory Committee Note) (recognizing the case-specific nature); *see also* Tobias, supra note 3, at 877-78 (suggesting tailored procedures); *cf.* Ninth Circuit Rule 11 Study Committee, Rule 11 in the Ninth Circuit 4 (May 1992) [hereinafter Ninth Circuit Report] (recommending that "due process in the form of notice and hearing should be provided before Rule 11 sanctions are imposed").

62. *See* Preliminary Draft, supra note 18, at 76; *cf.* id. at 77 (finding the safe harbor provision less important when courts sanction on their own initiative).

plaintiffs, especially those who lack resources or pursue nontraditional, political, or close lawsuits. A safe harbor provision may also reduce the chilling effects of Rule 11.[63]

Nevertheless, invocation of the safe harbor mechanism could afford some undesirable strategic advantages. For instance, lawyers may premise notice of possible Rule 11 violations on questionable bases; this would require that the targets unnecessarily invest significant resources to respond within twenty-one days.[64] The procedure might even exacerbate one of Rule 11's worst aspects: the "threat and retreat" feature, which distracts attention from the merits of cases to the capacities of attorneys, increasing both incivility and the amount of paper generated.[65] Because the safe harbor provision offers much needed protection from sanctions for civil rights plaintiffs, it should be retained. However, considerable potential remains for litigants to employ the mechanism for tactical benefit. The rule revisors, therefore, ought to consider the adoption of measures, such as a specific admonition against that practice in the Committee Note, which would minimize this possibility.[66]

The two Committees proposed that decisions on Rule 11 violations and appropriate sanctions be entrusted to the discretion of district court judges, with appellate review for abuses of discretion under the standard that the Supreme Court recently enunciated.[67] This approach would place too much discretion in trial courts and prescribe insufficiently demanding review. It simply lacks adequate rigor, especially for monitoring determinations of district judges who vigorously apply the Rule against civil rights plaintiffs. Indeed, overly deferential review of such decisions in recent high profile cases tellingly illustrates these problems.[68]

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63. The Advisory Committee relied substantially on the safe harbor provision to address criticisms of Rule 11 and acknowledged that the safe harbor provision may allow litigants to perform less prefiling investigation but believed the benefits outweighed that risk. Pointer Letter, supra note 20, at 3-4. *But cf.* Ninth Circuit Report, supra note 61, at 4-5 (noting that the Ninth Circuit Study Committee thought the safe harbor provision would encourage frivolous litigation and recommended its deletion). Should the rule revisors omit the safe harbor provision, an important protective mechanism will be lost.

64. Whenever parties received notice, they would have three weeks to participate in a variety of activities, such as evaluating the notification given, reexamining the challenged assertions, and performing more research, as warranted.

65. I am indebted to John Frank, Esq., Lewis & Roca, Phoenix, Ariz., for these ideas. *See also* Interim Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit 20-21 (Apr. 1991) (discussing Rule 11 and civility).

66. *See* supra notes 64-65 and accompanying text; *cf.* Proposed Amendment, supra note 21, at 56 (Advisory Committee Note) (enunciating similar admonitions). Judges should be alert to this practice and should sanction it.

67. Preliminary Draft, supra note 18, at 80 (Advisory Committee Note); Proposed Amendment, supra note 21, at 55-56 (Advisory Committee Note) (advocating and describing Supreme Court's abuse of discretion standard); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

68. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572, 1581-85 (11th Cir. 1991) (tersely reviewing district court's imposition of $1,000,000 sanction), *cert. denied*, 112 S. Ct. 913 (1992); Blue v. United States Dep't of Army, 914 F.2d 525, 538-39 (4th Cir. 1990) (articulating very deferential standard of appellate review), *cert. denied*, 111 S. Ct. 1580 (1991); *In re* Kunstler, 914 F.2d 505, 516-18 (4th Cir. 1990) (substantially deferring to district court's determinations

In addition, this approach would leave civil rights plaintiffs exposed to considerable liability for sanctions. The rule revisors, therefore, should restrict district courts' discretion by, for example, additionally circumscribing those situations in which they could levy monetary awards.[69] The revisors might also prescribe stricter review of trial judges' determinations of sanctions.[70]

These ideas illustrate why the decision to reinstate discretionary sanctioning may be less significant than numerous observers, including some Rule 11 critics, have suggested.[71] For instance, there is little reason to think that trial judges who impose substantial sanctions on civil rights plaintiffs under existing Rule 11 will exercise this discretion differently or that appellate courts will more closely review those lower court determinations.[72]

b. Appropriate Sanction

The Advisory Committee, in affording courts guidance for choosing an appropriate sanction, seemed to have four principal objectives. First, it wished to emphasize that judges could award nonmonetary sanctions. Second, the Committee wanted to stress that Rule 11's primary purpose is the deterrence of litigation abuse. Third, the Committee sought to discourage reliance on monetary sanctions, especially of attorney's fees. Finally, it desired to limit Rule 11's use for compensatory purposes. The Committee expressed this intent in the text of the May 1991 proposal, in the accompanying Advisory Committee Note, and during Committee deliberations.

Perhaps the most important way that the Committee sought to attain these objectives was by defining and elaborating "appropriate sanction" in the proposal's text. This text states that such sanctions "shall be limited to what is sufficient to deter comparable conduct by persons similarly situ-

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that complaint not well-grounded in law), *cert. denied*, 111 S. Ct. 1607 (1991).

69. I realize that the Committee has already circumscribed these situations quite narrowly. *See* infra notes 75-79 and accompanying text.

70. The Supreme Court may not want to modify the abuse of discretion standard that it recently articulated in *Cooter & Gell*, 496 U.S. at 405. This standard's selection also reflects certain trade-offs involving judicial economy and litigants' needs for appellate redecision. *See also* Pointer Letter, supra note 20, at 5 (stating arguments for different standard are insufficiently compelling to justify deviation from principle that rules ordinarily should not prescribe standards); Proposed Amendment, supra note 21, at 55-56 (prescribing the standard and describing the Court's articulation). *See generally* Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747 (1982) (discussing discretionary review); Judith Resnik, Tiers, 57 S. Cal. L. Rev. 840 (1984) (same).

71. If Rule 11 "has been violated, the court may . . . impose an appropriate sanction." Proposed Amendment, supra note 21, at 46; *see also* Pointer Letter, supra note 20, at 4 (listing reasons why Advisory Committee suggested retention of mandatory sanctioning).

72. *See* supra notes 67-68, 70 and accompanying text. *But see* infra notes 75-79 and accompanying text (discussing limits on judicial discretion to shift fees). For discussion of a miscellany of additional considerations primarily related to sanctions' imposition, which are insufficiently important to the issues in this paper to warrant treatment here, see Tobias, supra note 3, at 885-89.

ated." [73] It expands upon the definition by providing:

> [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.[74]

The Standing Committee made several changes in the text and the Committee Note which clarify the Advisory Committee's efforts to reduce the use of monetary sanctions and limit the Rule's compensatory purpose by even more severely circumscribing judicial discretion to impose financial awards. For instance, the Standing Committee voted against eliminating attorney fee shifting from the Rule[75] and retained fee shifts to opponents. Nonetheless, it included new textual language that authorized judges to shift fees only when "warranted for effective deterrence"[76] and inserted the following explanatory material in the Committee Note:

> Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party.[77]

The Advisory Committee's letter transmitting its final proposal elucidates the notions of unusual circumstances and effective deterrence. The letter also evinces solicitude for civil rights plaintiffs by employing resource-deficient litigants as an exemplar and by attempting to restrict fee shifting sharply:

> The Advisory Committee remains convinced that there are situations—particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources—in which cost-shifting may be needed for effective deterrence. The Committee has, however, made a further change in the text of subdivision (c)(2) to emphasize that cost-shifting awards should be the exception, rather than the norm, for sanctions.[78]

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73. Preliminary Draft, supra note 18, at 77.

74. Id. *Cf.* Tobias, supra note 3, at 880-85 (examining additional ways the Advisory Committee sought to attain the four objectives).

75. *See* Memorandum, supra note 32 (voting nine to three).

76. *See* Proposed Amendment, supra note 21, at 48.

77. Id. at 53-54 (emphasis added); *see also* Memorandum, supra note 32 (voting seven to one).

78. Pointer Letter, supra note 20, at 4. Of course, the letter preceded the Standing Committee's action. *See* supra note 33.

The Standing Committee's elaboration of the Advisory Committee's efforts should substantially reduce attorney fee shifting and ought to decrease monetary sanctions significantly. The new proposal should also limit the incentives to invoke Rule 11 for compensatory purposes, which have led to the provision's overuse since 1983.[79]

Nevertheless, some incentives for employing the Rule remain. Civil rights plaintiffs who would be exposed to less risk of being assessed attorney's fees may remain concerned about having to pay a monetary penalty into court, because they probably would be indifferent as to the assessment's recipient. The judge could also "award to the party prevailing on the [Rule 11] motion the reasonable expenses and attorney's fees incurred," thus making the filings cost free.[80] When these possibilities are combined with the significant tactical advantages accruing from the provision's use, such as the disruption of targets' pursuit of litigation, numerous lawyers and parties may find Rule 11 attractive. Many civil rights plaintiffs who lack resources will be both risk averse and vulnerable to such deployment of the Rule.[81] Accordingly, the rule revisors should consider ways of additionally reducing incentives to employ Rule 11, such as precluding fee shifting for Rule violations or for prevailing on sanctions motions.[82]

3. Rule 11 and Discovery

One additional feature of the Standing Committee's work that warrants discussion is the explicit textual instruction that Rule 11 does "not apply to disclosures and discovery requests, responses, objections and motions that are subject to the provisions of Rules 26 through 37."[83] The Advisory Committee sought public comment on the proposal in its May 1991 Committee Note,[84] and the Standing Committee apparently found the matter sufficiently important to insert it in the text. This resolution was warranted, because some evidence suggests that many lawyers and a few judges considered or employed Rule 11 as an all-purpose sanctioning provision, even when other, more appropriate sources of authority, namely

79. Numerous observers, including the Advisory Committee, agree that the possibility of recouping litigation costs stimulated much Rule 11 use. *See, e.g.*, Pointer Letter, supra note 20, at 3; William W. Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1015 (1988); Vairo, supra note 6, at 194-95.

80. Proposed Amendment, supra note 21, at 47; *see also* Pointer Letter, supra note 20, at 4-5 (recommending that courts need this discretion to "discourage non-meritorious Rule 11 motions without creating a disincentive to the presentation" of valid motions).

81. The Advisory Committee anticipated certain of these difficulties and admonished judges to guard against them. *See* Preliminary Draft, supra note 18, at 81 (Advisory Committee Note); *accord* Proposed Amendment, supra note 21, at 56 (Advisory Committee Note).

82. I realize that fee shifting to prevailing parties cuts two ways in that civil rights plaintiffs also could recover fees if they are successful. The plaintiffs remain less likely to invoke Rule 11, even under the new proposal which is meant to equalize the plaintiffs' and defendants' duties. *See* supra notes 47-53 and accompanying text. Moreover, civil rights defendants could gain tactical advantages by merely filing motions, which plaintiffs may be unable to resist vigorously.

83. Proposed Amendment, supra note 21, at 49.

84. *See* Preliminary Draft, supra note 18, at 82.

Rules 26 and 37, were available.[85]

B. Critical Assessment

1. A Word About Assessment

Analysis of the Standing Committee's proposal remains somewhat problematic. The proposal is an intermediate step, which could effectively become the final phase, of a three-year process of rule amendment. It attempts to correct or ameliorate numerous difficulties the highly controversial 1983 revision has posed. These complications have been attributed more to judicial application than to the wording of the Rule, and this is a conundrum which few amendments, no matter how carefully drafted, can fully address.[86]

Predicting exactly how courts will implement clear, much less ambiguous, phraseology is difficult. There will inevitably be some slippage between what the Standing Committee intended, insofar as judges can accurately ascertain that intent,[87] and how courts will effectuate the Rule which is ultimately promulgated. These problems could attend several untested ideas, such as safe harbors and the continuing duty. Certain complications analogous to the difficulties encountered since 1983, and new, unforeseeable ones will accompany application.

The difficulty in choosing and applying effective criteria also makes predictions problematic. For example, should the most significant parameter be whether the proposal will decrease frivolous lawsuits, chilling effects, or satellite litigation? Should the proposal's prospective benefits and disadvantages be evaluated from the viewpoint of the civil justice system, federal judges, parties, or attorneys?

Despite these difficulties, some tentative conclusions can and should be formulated, primarily by assessing how the proposal will address the principal problems that the current Rule has created for civil rights plaintiffs. The descriptive assessment in the previous subsection and the following summary indicate that the proposal ought to be responsive in numerous ways, yet could fail to respond or be partially responsive to the

85. *See, e.g.*, Marshall et al., supra note 1, at 953-54 (evidence suggesting Rule 11 employed as all-purpose sanctioning provision). The Advisory Committee discussed this possibility during the meeting in which it drafted the May 1991 proposal; *cf.* Ninth Circuit Report, supra note 61, at 3 (recommending consolidation of sanctioning provisions).

86. *See* Tobias, supra note 4, at 335 (application of numerous other federal rules has chilling effects for public interest); Tobias, supra note 2, at 513-26 (civil rights plaintiffs' problems with 1983 Rule attributable more to Rule as applied). *See generally* Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65 (1983) (describing the imprecision and variance inherent in the courts' application of administrative rules and the difficulty of drafting precise rules).

87. *See* Tobias, supra note 3 (detailing an attempt to record the drafters' intent by attending Advisory Committee meeting at which it formulated the May 1991 proposal). *Cf.* Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 498-99, 508 (1986) (recognizing limitations that restrict effort to document intent of drafters of 1938 Rules); Tobias, supra note 3, at 857 n.2 (recognizing limitations that restrict effort to document such intent). Of course, the rule revisors' proposal has undergone several transformations since May 1991 and may undergo several more before being finalized.

difficulties that judicial discretion, ambiguity, inconsistency, satellite litigation, overuse, and chilling, each pose.[88]

2. *Summary by Way of Overall Assessment*

The Standing Committee's new proposal significantly improves the 1983 Rule and is considerably better than the May 1991 proposal. Nonetheless, it may be insufficient to protect civil rights plaintiffs adequately. Perhaps most important is whether the changes that respond to the problems created by the 1983 Rule outweigh those aspects that do not respond or are only partly responsive.

One way of addressing the question, which was only implicitly treated in the preceding subsection, is to consider certain balances that the Standing Committee apparently struck among the affected interests. This shows that the Committee could have adopted different, and arguably preferable, trade-offs. The Committee might have evinced greater concern for the needs of civil rights plaintiffs and less solicitude for the federal courts and for other litigants and lawyers.[89] Several specific examples illustrate these propositions.

The new proposal may be insufficiently responsive to civil rights plaintiffs in numerous ways. The proposal may leave too much discretion in trial courts with overly deferential appellate review. Concepts such as the continuing duty and the duty of candor, remain rather ambiguous, and this lack of clarity could burden civil rights plaintiffs, complicating their compliance. This judicial discretion and ambiguity, and closely related problems inherent in the use of terms such as "nonfrivolous," mean that considerable potential remains for inconsistent interpretation and application, and concomitantly for satellite litigation.

Most important, many lawyers will continue to overuse the Rule, because there are significant incentives to invoke it. For example, the possibility that courts will award attorney's fees for successful pursuit of motions, when conjoined with the prospect, albeit reduced, that judges will impose monetary penalties and even shift fees for rule violations, may encourage Rule 11's excessive invocation. A number of litigants and practitioners will also be tempted to capitalize on the strategic benefits that may result from simply filing a motion for sanctions, particularly against civil rights plaintiffs. These possibilities alone, but especially in combination, will motivate numerous litigants and attorneys to invoke Rule 11.[90]

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88. This is not an exhaustive enumeration. These difficulties will not be comprehensively explored here, because they are treated throughout this piece. *See* Tobias, supra note 3, at 894-97 (evaluation of May 1991 Committee proposal in light of difficulties). Moreover, some of the difficulties and the complications they create are closely related. For example, the use of ambiguous terms, such as "appropriate sanction," gives courts wide discretion which could be exercised inconsistently. This might lead to satellite litigation, overuse, and chilling.

89. The descriptive assessment indicates that the proposal is quite solicitous of the plaintiffs. However, difficulties with judicial application of the 1983 Rule and uncertainties that will attend implementation of the new Rule, indicate that the proposal may need to be more solicitous. *See* infra notes 96-97 and accompanying text.

90. *See* supra notes 80-82 and accompanying text.

Based on the aforementioned considerations, the proposal could chill civil rights plaintiffs. For instance, the comparatively onerous nature of the requirements that small parts of papers conform to the Rule and that every legal contention be nonfrivolous and the exposure, however minimal, to liability for monetary sanctions, may discourage impecunious litigants.

In fairness, the new proposal would vastly improve the 1983 Rule and is much better than the May 1991 proposal, particularly in terms of the balances struck and its solicitude for civil rights plaintiffs. The inclusion of mechanisms such as safe harbors, the restriction of some requirements, such as the continuing duty, the limitation and clarification of certain requirements, such as the specification of papers' components that are within Rule 11's purview, and the deletion of still others, such as the exclusion of discovery papers from the Rule, will be less burdensome for resource-poor litigants and facilitate their compliance. Reduced judicial discretion and decreased ambiguity limit inconsistency and satellite litigation.

The proposal is an improvement in other ways. Use of Rule 11 should decline, because there are fewer incentives to invoke it. For instance, the proposal sharply decreases the prospect that courts will award sanctions of attorney's fees. Numerous factors already examined could reduce the possibility of chilling. For example, to the extent that the proposal limits ambiguity, inconsistency, satellite litigation, and overuse, chilling should decrease.

It is important to be realistic about certain practicalities which restrain any rule revision effort. For instance, the Committee employed some words, such as "reasonable" and "appropriate," that resist consistent application, yet that may be the fairest or clearest phrasing available, or that are the only terms which can describe a broad range of activity.[91] Intrinsic restrictions similarly attend attempts to limit judicial discretion. Efforts to cabin discretion can be counterproductive, when, for example, they become overly rigid or when the English language will not accommodate less discretion to address infinitely varied factual situations. In these circumstances, therefore, rule drafters have to trust judicial discretion by using words such as "reasonable" and "appropriate."[92]

The Standing Committee and the Advisory Committee must also be responsive to the needs of all litigants and lawyers, the federal bench, and the civil justice system.[93] The rule revisors' proposals are efforts to satisfy

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91. *See, e.g.*, supra notes 49-50, 54 (reasonableness may be most felicitous phrasing applicable to fact-specific situations); *cf.* supra notes 40-44 and accompanying text ("nonfrivolous" resistant to consistent application but "good faith" more felicitous and should be retained).

92. *See* Stephen B. Burbank, The Costs of Complexity, 85 Mich. L. Rev. 1463, 1469-71, 1474 (1987) (book review of Richard Marcus & Edward Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure (1985)). *See generally* Diver, supra note 86 (arguing for increased judicial supervision of administrative rules which are not subject to effective political discipline and noting the difficulty of precise rules). Limitations inhere in any effort to write rules that judges can implement as precisely as the drafters intended.

93. *See* 28 U.S.C. § 2073 (1988) (prescribing procedures for rule revision); *see also* Lewis, supra note 14, at 1564-72 (arguing that Federal Rules promulgation can be improved);

diverse, politically disparate constituencies, which include the plaintiffs, defense, and civil rights bars, the Supreme Court, and Congress.[94] Both Committees may have prescribed requirements, such as the continuing duty and the duty of candor, to enlarge parties' and attorneys' responsibilities to the courts, thereby hoping to limit litigation abuse and to improve the process of civil justice. Moreover, the revisors could have considered the systemic advantages that might accrue from imposing these duties to be an equitable trade-off for the provision of certain procedures, such as safe harbors, which would protect civil rights plaintiffs.

In sum, the factors examined in Section II indicate that the Standing Committee's proposal would be an improvement for civil rights plaintiffs. Nevertheless, the proposal would only partially respond, or be wholly unresponsive, to certain difficulties that the 1983 Rule has presented, and the proposal could have been more solicitous of the litigants. Because the new proposal is a significant improvement, yet remains problematic in certain respects, Section III affords recommendations for the future.

III. Suggestions for the Future

The Standing Committee proposal was approved by the Judicial Conference in autumn, 1992.[95] The Supreme Court is now evaluating the proposal and must transmit a recommendation to Congress before May 1, 1993, if amended Rule 11 is to become effective that year. The forwarded proposal will take effect 210 days thereafter, unless Congress modifies it. Therefore, opportunities remain to improve the Committee's proposal.

I recently suggested that the May 1991 draft was sufficiently problematic that the rule revisors should consider jettisoning or substantially changing it.[96] The two Committees have significantly modified the draft, so that the new one may be solicitous enough of civil rights plaintiffs to warrant adoption, especially if the rule revisors implement certain changes intended to remedy or ameliorate its most troubling aspects.

The major reason that it is difficult to conclude definitively whether the new proposal is adequate is that this determination depends substantially on how the judiciary will exercise its discretion to implement Rule 11. Although both Committees have significantly limited this discretion, the revisors should restrict it even further. For example, they could proscribe monetary penalties and preclude fee shifting for Rule 11 violations. The

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Mullenix, supra note 14, at 854-55 (detailing the various inputs in the rule revision process).

94. *See* Mullenix, supra note 14, at 851-55 (analyzing the politics of rule revision); *see also* Paul D. Carrington, The New Order in Judicial Rulemaking, 75 Judicature 161 (1991) (response to assertion that rule revision is political from present Advisory Committee Reporter). *See generally* Lewis, supra note 14, at 1571-72 (discussing the different constituencies involved in the rule revision process).

95. I rely in this paragraph on information in the Preliminary Draft, supra note 18, at 53. *See also* supra notes 22-24 and accompanying text.

96. *See* Tobias, supra note 3, at 898-903; *see also* Stempel, supra note 11, at 261 (arguing that courts should "expressly recognize a strong presumption that any claim that has survived the pre-verdict stages of litigation be immune from Rule 11 sanctions"); Vairo, supra note 3, at 500-02 (advocating adoption of "Bench-bar" proposal of several federal judges, attorneys, and commentators).

revisors could also limit judicial discretion to make such awards or require stricter appellate scrutiny of sanctions determinations.

The decisionmakers should eliminate the remaining ambiguity in the proposal. For instance, they may want to specify how finely courts are to parse papers while more precisely identifying how to comply with the continuing duty and the duty of candor. The rule revisors should also seek to limit inconsistent interpretation and application of the new proposal and the corresponding problem of satellite litigation. Because "nonfrivolous" is the term most likely to foster conflicting judicial construction and enforcement, the revisors should retain the notion of good faith.

A number of the proposal's precepts, especially making small portions of papers sanctionable, requiring every legal argument to be nonfrivolous, and imposing the continuing duty and the duty of candor, will burden many litigants and attorneys, particularly those with few resources. The revisors, therefore, should delete or refine the requirements so they are less onerous. For example, they should adopt the paper as a whole notion or an intermediate position comprised of multiple assertions.[97] The revisors might concomitantly omit the continuing duty or eliminate the duty of candor or apply it only to legal arguments.

The rule revisors also must further restrict the prospects for Rule 11's overuse by limiting incentives to invoke it. To this end, they could effectuate suggestions already offered, such as prohibiting courts from awarding monetary penalties. If implemented, the recommendations should significantly reduce chilling of civil rights plaintiffs. Because resource deficiencies can make them risk averse, the rule revisors should additionally limit potential chilling by, for example, proscribing all fee shifting.[98]

CONCLUSION

The Standing Committee's new proposal to revise Rule 11 greatly improves the 1983 version and is much better than the May 1991 proposal. However, the new proposal may be inadequate for civil rights plaintiffs and lawyers. If the Supreme Court and Congress implement the suggestions above for clarifying and refining this proposal, amendment of Rule 11 should suffice and would warrant adoption.

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97. *See* Tobias, supra note 3, at 903-04.

98. Judicial application led to the principal complications that the 1983 Rule created for civil rights plaintiffs. However, because the remaining rule revision entities could modify the proposal, it would be premature to offer anything other than highly generalized recommendations for application. The most important suggestion is that courts implement the new Rule in ways which are solicitous of civil rights plaintiffs and lawyers, especially ones who lack resources. A number of judges and writers have offered instructive guidance for so applying the Rule. *See, e.g.*, Kizer v. Children's Learning Ctr., 962 F.2d 608, 613 (7th Cir. 1992); Foster v. Mydas Assoc., 943 F.2d 139, 141 n.4 (1st Cir. 1991); Moore v. Western Sur. Co., 140 F.R.D. 340, 344-49 (N.D. Miss. 1991); Stempel, supra note 11, at 291-95; Tobias, supra note 2, at 518-22.