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# Rule 11 and Civil Rights Litigation

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# Rule 11 And Civil Rights Litigation

CARL TOBIAS\*

## I. INTRODUCTION

THE recent amendment of rule 11 may well have engendered more controversy than any other revision since the Federal Rules of Civil Procedure were first promulgated one-half century ago. The new version essentially requires that judges impose sanctions on lawyers and parties who fail to conduct reasonable inquiries before filing court papers.<sup>1</sup> The amendment's adoption was prompted by increasing concern about abuse of the litigation process and about the "litigation explosion"—the perception that unprecedented numbers of civil cases were being filed and that too many lacked merit. Proponents have hailed the revised rule as the savior of the civil justice system for limiting litigation abuse. Critics have denounced the new provision for chilling valid claims and for generating excessive litigation which is unrelated to the merits of lawsuits, such as that seeking attorney's fees for alleged rule 11 violations. Controversy has raged unabated since the August 1983 effective date of the amendment. Confusion and inconsistency have attended the rule's implementation in approximately one thousand reported opinions and in

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\* Professor of Law, University of Montana. Thanks to Bob Bone, George Cochran, Rich Freer, Bill Luneburg, Michael Risinger, and Peggy Sanner for their valuable suggestions, to Brenda Numerof and Pat Seddon for their valuable research, to the Harris Trust for generous, continuing support, and to Brenda Smith for processing this piece.

1. Rule 11 provides in pertinent part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

This piece, like Judge Schwarzer's Commentary to which it essentially responds, does not treat the rule's proscription against papers filed for an improper purpose, because few judges have relied on that ground in imposing sanctions and doing so has less potential for chilling legitimate advocacy. See Schwarzer, *Commentary Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 n.7 (1988). I consider only federal rule 11. For analysis of application of an analogous state rule which reaches certain conclusions similar to mine, see Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C.L. REV. 111 (1988).

countless additional unreported decisions,<sup>2</sup> while secondary writing about rule 11 comprises a cottage industry.<sup>3</sup>

Given these circumstances, United States District Judge William Schwarzer's suggestions for improving the amendment's application in his recent Commentary appear so responsive to what has been considered problematic that the recommendations could well defuse the controversy or at least dictate the terms of much relevant debate in the foreseeable future.<sup>4</sup> Many of the suggestions in the Commentary are cogent and warrant implementation and, if heeded by federal courts, should have salutary effects which even vociferous critics of the rule's prior enforcement can applaud. Judge Schwarzer also is careful to observe that his central prescription—that the federal judiciary shift its focus from the merits of disputes to the reasonableness of parties' prefiling inquiries in ascertaining whether rule 11 has been violated—“will not necessarily make a difference in every case, nor will it solve every problem.”<sup>5</sup>

I am concerned that Judge Schwarzer's suggestions will neither make *sufficient* difference nor solve *enough* problems in civil rights cases.<sup>6</sup> The attractive features of his recommendations may distract at-

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2. See Ripple & Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 789 (1988); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988); cf. Whittington v. Ohio River Co., 115 F.R.D. 201, 205 (E.D. Ky. 1987) (hundreds of reported opinions and undoubtedly “hundreds of unpublished” ones); S. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 59 (American Judicature Soc'y, 1989) (survey of one year of rule 11 activity in Third Circuit showed “approximately sixty percent of the total Rule 11 iceberg and two-thirds of the sanctions iceberg do not appear on the screen”).

3. For a recent and thorough compilation of secondary writing, see LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 332 n.2 (1988).

4. See Schwarzer, *supra* note 1.

5. See *id.* at 1025.

6. Civil rights litigation is a lawsuit that seeks to vindicate the interests of individuals and groups in enforcing values and commands relating to civil rights included in federal civil rights legislation and in the federal constitution. A prominent example is litigation filed pursuant to 42 U.S.C. § 1983 (1982). For cogent discussion, characterizing “civil rights [as] an elusive, or at least capacious category,” acknowledging that “any taxonomy departing formal criteria will import subjective judgments about the Rule 11 issue,” and urging “greater discrimination in the evaluation of Rule 11's impact on civil rights cases, as for instance by discretely identifying prisoner cases,” see S. BURBANK, *supra* note 2, at 69-70, 72.

Much said in this piece about rule 11's enforcement in civil rights cases applies to some additional forms of public law litigation, such as employment discrimination suits. See Vairo, *supra* note 2, at 200. Although this is less true of other types of public law litigation, such as challenges to agency decisionmaking in areas like environmental quality, different rules, such as rule 24 governing intervention, do adversely affect litigants who pursue these actions. For analysis of how judicial application of a number of federal rules has adversely affected those who bring public law litigation, see Tobias, *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure* (forthcoming publication in 74 CORNELL L. REV. (issue no. 2, 1989)).

tention from recently compiled information indicating that the rule's application has adversely affected the individuals and attorneys who pursue civil rights actions. Judge Schwarzer also undervalues the amendment's detrimental and chilling effects on these parties and litigants, so that his proposals are insufficiently attentive to the realities of civil rights litigation. Moreover, the assumptions made throughout his Commentary and the tone in which it is cast can leave the impression that any difficulties which have attended rule 11's enforcement to date can be remedied by implementing Judge Schwarzer's suggestions. Furthermore, I fear that certain of the significant prescriptions will be responsive in ways most important to civil rights plaintiffs and practitioners only if augmented.<sup>7</sup>

I first describe briefly Judge Schwarzer's recent Commentary. Because his paper resembles much writing on, and judicial enforcement of, the amendment by failing to focus on its significance in civil rights cases, I critically analyze how implementation has disadvantaged civil rights litigants and attorneys during the initial half-decade of experience. That review helps to illuminate difficulties in the descriptive and prescriptive aspects of Judge Schwarzer's account, which are then evaluated through the prism of civil rights litigation. This assessment shows that numerous suggestions for change, if followed by the federal courts, will be solicitous of the needs of civil rights plaintiffs and lawyers but that important prescriptions will not afford significant improvement unless supplemented by considering integral to rule 11 decisionmaking factors, such as the resource constraints of civil rights litigants and the inherent characteristics of civil rights suits. Accordingly, I analyze the risks and costs of attaining judicial application that would be sufficiently responsive to them, finding both more substantial than the benefits of rule 11's continued broad implementation in civil rights cases. I conclude, therefore, that

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7. This piece is neither a criticism of Judge Schwarzer, whose Commentary significantly advances the very problematic rule 11 inquiry by narrowing the possibilities for error, nor a criticism of other federal judges who have labored mightily to implement properly a rule that has proved quite difficult to apply. I also realize that district judges "have a somewhat different perspective from that of lawyers [and writers], formed by daily exposure to a constant flow of poorly prepared, ill-considered, and often misleading [court] papers." Schwarzer, *supra* note 1, at 1014. Were Judge Schwarzer's suggestions applied efficaciously, even if supplemented, however, the risks and costs for civil rights plaintiffs and lawyers would remain too substantial, particularly because plaintiffs often act as private attorneys general seeking to vindicate important social values of persons not involved in the litigation. For analyses of the private attorney general, see Garth, Nagel & Plager, *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); *Symposium on Class Actions*, 62 IND. L. J. 497-700 (1987); *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1-354 (1984).

severely curtailed enforcement or repeal or amendment of the rule would be preferable.

## II. DESCRIPTION OF THE COMMENTARY

Judge Schwarzer, of the Northern District of California, was an early champion of rule 11's 1983 amendment and has been a vigorous, outspoken advocate of the provision's application ever since, rigorously enforcing it.<sup>8</sup> In 1985, he wrote a frequently cited article urging that the federal courts not permit the revised version to lapse into desuetude, the fate of its predecessor.<sup>9</sup>

The introduction to the more recent Commentary accurately observes that controversy over rule 11 is increasing and that the "intensity of the ongoing debate warrants an examination of what we know about the rule and its effects."<sup>10</sup> The first section then explores the amendment and its impacts without mentioning civil rights cases and states that the question whether rule 11's enforcement has chilled the enthusiasm of litigants and lawyers is unclear and "probably can never be resolved other than on an intuitive level."<sup>11</sup> In the second part, Judge Schwarzer examines what he considers the two principal difficulties with the amendment's implementation since 1983: inconsistency and unpredictability in the standard applied to determine if rule 11 has been violated and the substantial amount of unwarranted litigation involving the rule. The Judge, acknowledging that these are cause for concern but finding unnecessary either repeal or additional amendment of rule 11, recommends rethinking its enforcement. Thus, in the third section, he suggests that federal courts "shift their focus from assessing the merits to assessing the

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8. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986) (providing a controversial example of such enforcement).

9. Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985). Case law citations to it are legion. The Commentary promises to be as widely cited, if recent references to it are accurate indicators. See, e.g., *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988). It remains much too early, however, to discern what effect the Commentary ultimately will have. I assume judicial familiarity with certain aspects of the 1985 piece, such as its call for rule 11 enforcement early in litigation, and for imposition of the least severe sanctions necessary, and perhaps some effort to integrate it with the Commentary, although that may be too much to ask of an overburdened federal judiciary. Because others may be unfamiliar with the earlier article and because the Commentary is clearer when read in conjunction with it, I mention the prior work when appropriate. The classic treatment of the fate of the amendment's predecessor is Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

10. Schwarzer, *supra* note 1, at 1013.

11. *Id.* at 1017.

adequacy of the prefling inquiry"<sup>12</sup> when deciding whether the rule has been contravened. He also recommends that they employ the amendment as a mechanism for deterring abuse of the litigation process, rather than for reimbursing parties' litigation expenses or for managing cases.<sup>13</sup> Judge Schwarzer concludes that implementation of these proposals would enhance predictability and reduce the quantity of rule 11 litigation while more effectively deterring abuse and protecting the judicial process.<sup>14</sup>

Although a number of Judge Schwarzer's descriptions are accurate, and much that he espouses merits adoption, certain descriptive and prescriptive dimensions of the Commentary are troubling. Most important is Judge Schwarzer's failure to mention rule 11's implementation in civil rights cases. Accordingly, a critical analysis of its application in these suits since August 1983 follows.

### III. CRITICAL ANALYSIS OF RULE 11'S APPLICATION IN CIVIL RIGHTS CASES

It is too soon to discern all of the implications of judicial enforcement for civil rights litigants and attorneys, while caution should be exercised in relying primarily on reported decisions. Nevertheless, the reported opinions issued thus far, considerable unreported activity, and some anecdotal evidence relating to rule 11 reveal certain ways in which its application has adversely affected civil rights litigants and their lawyers.<sup>15</sup>

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12. *Id.* at 1021.

13. *Id.* at 1019-21. "Some courts have [read into the rule] straightforward fee-shifting" so as to "compensate parties for the costs of unmeritorious claims." *Id.* at 1020. Case management means efforts to resolve cases expeditiously, especially by enhancing judicial control over litigation's pre-trial stage with measures such as scheduling and discovery orders in the other 1983 amendments, those to rules 16 and 26. For classic treatment of case management, see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

14. See Schwarzer, *supra* note 1, at 1025.

15. Cases available through the LEXIS system are the principal source of unreported activity. Important reasons for exercising caution in relying too greatly on reported opinions, especially to detect chilling, are that considerable judicial activity implicating rule 11, including orders that impose sanctions, may go unreported, while judges who author opinions calling for sanctions will assemble the facts in ways that support their determinations. See Tobias, *supra* note 6, at sec. II.B.2. Indeed, the Third Circuit Task Force, which assembled information on rule 11 activity in its geographic jurisdiction for the period from July 1, 1987 through June 30, 1988, cautioned that published decisions are a "hazardous basis for inferring effects" because the law is developing and being articulated differently nationwide and because the law on computer and in the books is such a small percentage of the total activity that it may not be representative. See S. BURBANK, *supra* note 2, at 4-6, 59. For more discussion of these issues, see Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 516 (1986); Nelken, *Sanctions*

### A. *Data On Rule 11 And Civil Rights Cases*

Recently assembled information derived from reported decisions shows that an inordinate number of sanctions has been sought in civil rights cases, that rule 11 motions have been filed and granted against civil rights plaintiffs much more frequently than civil rights defendants, and that such plaintiffs have been sanctioned at a considerably higher rate than those who pursue any other type of federal civil litigation.<sup>16</sup> Professor Nelken, who conducted one early survey, determined that 22.4 percent of the cases in which rule 11 motions were lodged from 1983 to 1985 involved civil rights, although civil rights claims comprised only 7.65 percent of the civil docket, and that defendants invoked the amendment substantially more often than plaintiffs, while remarking that the "disproportionate number of civil rights cases in which rule 11 sanctions have been considered . . . must give pause to the civil rights bar."<sup>17</sup> Professor Vairo who undertook a study of all the reported opinions between August 1983 and December 15, 1987 has offered more disconcerting data.<sup>18</sup> She found that "amended Rule 11 is being used disproportionately against [civil rights] plaintiffs," that they were being sanctioned at a rate 17 percent greater than plaintiffs in all other lawsuits, and that the

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*Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J. 1313, 1339-40 (1986).

16. See S. BURBANK, *supra* note 2; Nelken, *supra* note 15; Vairo, *supra* note 2. But cf. S. BURBANK, *supra* at 60-61 (rule 11 motions not routine in Third Circuit and rule 11 activity "appears in only two-thirds of one percent" of civil rights cases.) Professor Nelken essentially analyzed reported rule 11 cases issued from August 1983 to August 1985, while Professor Vairo assessed them from August 1983 to December 1987. The Third Circuit Task Force assessed all rule 11 activity between July 1, 1987 and June 30, 1988 within its geographic area. The authors offer much helpful data in addition to that reported here and valuable observations about rule 11's enforcement. Moreover, "efforts are underway by groups as diverse as the American Bar Association's Litigation Section Task Force on Rule 11, The Federal Judicial Center, and the Center for Constitutional Rights to study empirically the experience of attorneys throughout the country to determine the impact of the rule." Vairo, *supra* at 201 n.61. The Federal Judicial Center recently completed one such study. T. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (1988) (based principally on interviews with 36 federal judges and 60 lawyers). Cf. *id.* at 57, 68 (Federal Judicial Center conducting time study that should build database including national data on incidence of sanctions in district courts and allow further research on exact nature of satellite litigation); *infra* note 151 (status of study by Center for Constitutional Rights). See also *SANCTIONS: RULE 11 AND OTHER POWERS* (G. Joseph, P. Sandler & C. Shaffer 2d ed. 1988) [hereinafter *SANCTIONS*] (ABA publication surveying sanctions case law as it has developed since 1983).

17. Nelken, *supra* note 15, at 1327, 1340. Professor Nelken also cautioned that the "chilling aspects of sanctions need to be carefully analyzed" and that "rule 11's potential threat to novel or unpopular causes of action—and to ones that are difficult to prove without access to information in the hands of the defendant—must be carefully evaluated." *Id.* at 1339-40.

18. Vairo, *supra* note 2. Professor Vairo includes employment discrimination cases with civil rights litigation in her "disfavored" lawsuits category.

quantity of rule 11 litigation involving them was "extremely troubling," partly because of its potential for chilling, which led her to suggest application of a less stringent standard.<sup>19</sup> The Third Circuit Task Force which examined all rule 11 activity within its geographic scope from July 1, 1987 until June 30, 1988 determined that civil rights plaintiffs and/or their lawyers were sanctioned "at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases," leading it to "urge that more attention be given to the possibility that the amended rule has a disproportionately adverse impact on the poor."<sup>20</sup>

Central to this statistical information and to the developments observed has been judicial application of the amendment. In determining

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19. *Id.* at 200-01. Professor Vairo specifically states:

Civil rights and employment discrimination cases are the subject of 28.1% of the rule 11 cases (19% of the 680 requests). Plaintiffs are the target of the sanction requests in 165 of these cases, 86.4%, which is somewhat higher than average (78.8%). Plaintiffs are sanctioned in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%). Defendants are targeted in 13.6% of the cases, and sanctioned in 50% of these cases, but this represents only 6.8% of all civil rights and employment discrimination cases.

*Id.* Professor Vairo recently stated that she thought "nothing substantially different has happened" since she completed her study. Telephone conversation with Professor Georgene Vairo, Fordham University, School of Law (Mar. 14, 1989). *Cf.* S. BURBANK, *supra* note 2, at 56 (Vairo's statistics "highly problematic" because of "under-inclusiveness and double-counting" and because of "possible biases in publication practices and possible differential rates of appeal"); T. WILLGING, *supra* note 16, at 10, 161-2 (criticizing unnamed writers who detect disproportionate sanctioning of plaintiff attorneys in civil rights cases because analyses suffer from lack of baseline data and fail to take into account comparative complexity of cases).

20. *See* S. BURBANK, *supra* note 2, at 69, 72. The Task Force found that neither the amount of rule 11 activity in civil rights cases nor the potential chilling effect of rule 11 applications warranted serious concern in the Third Circuit. *See supra* note 16; *cf.* S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 38 (1985) (1985 Federal Judicial Center empirical study of hypothetical cases finding that judges who imposed sanctions frequently were more likely to do so in civil rights cases and differences were statistically significant); T. WILLGING, *supra* note 16, at 8-10, 163 (finding little evidence of chilling generally or in civil rights cases specifically and observing that unlikely to be susceptible to statistical testing). My research assistants and I have conducted an impressionistic survey premised principally on reported opinions and those available on LEXIS since December 15, 1987 (the end date of Professor Vairo's study). That survey indicates that there was a level of rule 11 activity involving civil rights cases similar to that which Professors Nelken and Vairo found but that plaintiffs apparently were being sanctioned at a somewhat lower rate. It bears emphasizing that there are at least three difficulties of asymmetrical application involving rule 11. Plaintiffs are the target of sanctions more than defendants and are sanctioned at a higher rate, while civil rights plaintiffs are sanctioned at a much higher percentage than plaintiffs in RICO, securities fraud, and antitrust trade regulation cases who are targeted nearly as often for rule 11 motions. Moreover, strict enforcement can have asymmetrical impact as between plaintiffs and defendants in civil rights cases, because the defendants' generally superior resources enable them to manage the risks more effectively. *See infra* notes 39-44 and accompanying text.

whether rule 11 has been violated, courts have rigorously enforced against civil rights plaintiffs and lawyers its two requirements that reasonable inquiries into the law and investigations of the facts precede the filing of court papers.<sup>21</sup>

B. *Judicial Determinations That Rule 11's Requirements Have Been Violated*

1. *Rule 11's Requirement Regarding the Law.* Judges have vigorously applied the command as to reasonable prefiling legal inquiry against plaintiffs and their attorneys in civil rights suits, a number of which were described as "very close cases."<sup>22</sup> Courts have enforced this mandate more strictly against plaintiffs in civil rights actions than in others, even though in most types of litigation judges have applied the requirement less stringently than that governing facts because of concern about chilling, while numerous civil rights plaintiffs have been found in violation because they were considered to be asserting frivolous legal theories.<sup>23</sup>

Helpful illustrations of these ideas are provided by a Seventh Circuit opinion reversing a trial judge's determination that the amendment had not been contravened and remanding to a *different* district court for addi-

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21. Not all courts have rigorously enforced the requirements. *See, e.g., infra* notes 78-83 and accompanying text. Rule 11's requirements of reasonable prefiling legal and factual inquiries are shorthand for the fuller version, *see supra* note 1, and comprise the first part of the rule, which when violated, leads to the second part, the mandatory imposition of sanctions. It is also important to remember that defense counsel are responsible for some of what has happened with rule 11, such as the large number of sanctions motions filed against civil rights plaintiffs. Nonetheless, judicial application is the focus of this piece, because courts ultimately can control an attorney's use of the rule.

22. Vairo, *supra* note 2, at 217; *cf. Shaffer, Rule 11: Bright Light, Dim Future*, in SANCTIONS, *supra* note 16, at 1, 18-19 (many sanctions cases are fact intensive close calls). For examples, see *Jennings v. Joshua Indep. School Dist.*, 869 F.2d 870, 879 (5th Cir. 1989); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194 (7th Cir. 1985); *Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989). Professor Vairo also stated that a number of these suits were not close, in that they "appear to be frivolous." Vairo, *supra*, at 217. For an example, see *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986).

23. Professor Vairo found that civil rights cases have prompted the "courts to be relatively strict in enforcing Rule 11's strictures" governing legal inquiries. Vairo, *supra* note 2, at 205. She and I have said this, although judges generally have treated generously attorney responsibilities regarding the law. Tobias, *supra* note 6, at sec. II.B.2; *accord* Vairo, *supra*, at 213-14; *cf. T. WILLGING, supra* note 16, at 44 (judicial reformations of standards for testing of prefiling legal inquiry appear faithful to Advisory Committee's concern about chilling effects). For examples of cases in which courts considered plaintiffs to be asserting frivolous legal theories, see *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1091 (3d Cir. 1988); *Hale*, 786 F.2d 688; *Harris v. Marsh*, 679 F. Supp. 1204, 1384-93 (E.D.N.C. 1987).

tional rule 11 decisionmaking.<sup>24</sup> One panel member, who dissented in part, chided his colleagues for requiring five dense paragraphs and marshalling twenty cases to show that plaintiff's due process theory was "wacky," observing that due process was an area in which frivolity and creativity tended to coalesce.<sup>25</sup> The appellate judge criticized as even less supportable the majority's fact-finding remand on the discrimination count because it would open "new vistas for peripheral litigation,"<sup>26</sup> and he warned that excessively zealous or rigid application would chill equally the most, as well as the least, legitimate civil rights suit.<sup>27</sup>

2. *Rule 11's Requirement Regarding the Facts.* Judges have rigorously enforced against civil rights plaintiffs and practitioners rule 11's requirement that there be reasonable prefiling investigation into the facts.<sup>28</sup> The most significant illustration is afforded by courts which have found the amendment violated by civil rights lawyers who filed complaints in cases that were dismissed, even though much information important to stating a claim (and apparently to satisfying rule 11) seemed to be in the defendants' possession and available only through discovery to which plaintiffs traditionally have been entitled.<sup>29</sup> Indeed, a few courts have asserted that the 1983 amendment's principal function was to "add the requirement of adequate information before filing a complaint [so that] it is not permissible to file suit and use discovery as the sole means of finding out whether you have a case."<sup>30</sup> Another judge has similarly stated that the "day is past when our notice pleading practice . . . plus liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case."<sup>31</sup>

24. See *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988).

25. *Id.* at 1085. (Cudahy, J., dissenting).

26. *Id.* at 1086.

27. *Id.* at 1085-86. For a similar example, see *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987). Civil rights plaintiffs have been sanctioned much more often than those who pursue RICO, securities fraud, and related trade regulation litigation, although the law in those areas is no more "fast-changing" or unsettled. *Vairo*, *supra* note 2, at 201. For recent examples of RICO claims involving sanctions, see *Morda v. Klein*, 865 F.2d 782 (6th Cir. 1989); *Beeman v. Fiester*, 852 F.2d 206, 211-12 (7th Cir. 1988); *Creative Bath Prods., Inc. v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561 (2d Cir. 1988).

28. See *Vairo*, *supra* note 2, at 200-02; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 635-37 (1987).

29. For a helpful illustration of the problem, see *Rodgers*, 771 F.2d at 194, *aff'g*, 596 F. Supp. 13, 22 (N.D. Ill. 1984).

30. *Szabo*, 823 F.2d at 1083; *accord* *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1435 n.4 (7th Cir. 1987); *Harris*, 679 F. Supp. at 1388 n.276.

31. *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986).

That type of judicial implementation has meant that some civil rights plaintiffs, who before litigation had access to and could obtain the additional data needed and who could afford the increased cost, have had to plead with greater factual specificity to protect against possible sanction motions.<sup>32</sup> Concomitantly, potential litigants who did not possess, or have any means of acquiring, the requisite information probably have not pursued lawsuits they otherwise would have filed. These developments threaten the liberal pleading system instituted in the 1938 Rules and approved by the Supreme Court, which has permitted plaintiffs who give notice to take some discovery.<sup>33</sup>

One dissenting circuit judge aptly captured the disturbing implications of much of this by proclaiming "no information until litigation, but no litigation without information";<sup>34</sup> the majority had affirmed a trial court determination that plaintiff had violated rule 11 by failing to procure and plead information available only through compelled discovery, namely material in a government employee's personnel file.<sup>35</sup> Another appellate panel, reversing a district judge's imposition of sanctions, observed that those who challenge police violations of an individual's civil rights need not secure the detailed information required to prove

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32. That implementation implicates several other federal rules, especially rule 8 (governing pleading) and rule 12 (pertaining to motions to dismiss), and additional factors treated below.

33. The 1938 Rules, as interpreted by the Supreme Court, only required that pleadings give notice and did not require plaintiffs to adduce at that stage facts only available upon discovery. See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). The Eleventh Circuit has flatly stated that "rule 11 does not change the liberal notice pleading regime of the federal courts or the requirements of Fed. R. Civ. P. 8." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987); accord *Beeman*, 852 F.2d at 210-11; *Hookom v. Sensor*, 121 F.R.D. 63 (S.D. Ohio 1988); *Whittington v. Ohio River Co.*, 115 F.R.D. 205, 206 (E.D. Ky. 1987). Other courts have suggested ways of ameliorating these difficulties. See, e.g., *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1279-81 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). Indeed, the author of *Szabo* acknowledged that rule 11 does not modify the "'notice pleading' approach of the federal rules." *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1068 (7th Cir. 1987). Judge Schwarzer's views seem close to those in *Szabo* without the *Frantz* gloss, or perhaps *Hale*. See Schwarzer, *supra* note 1, at 1017 n.21, 1021. For the effect of demanding increased specificity under rule 8 in civil rights cases, see *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied sub nom.*, *Brennan v. Hobson*, 470 U.S. 1084 (1985); *Colburn*, 838 F.2d at 667 (providing a recent example); Tobias, *supra* note 6, at sec. II.B.1. For thorough analysis of the liberal pleading system, its apparent erosion, and rule 8's requirements in civil rights cases, see Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

34. *Johnson v. United States*, 788 F.2d 845, 856 (2d Cir.) (Pratt, J., dissenting), *cert. denied*, 107 S. Ct. 315 (1986). Although this was Federal Tort Claims Act litigation, rather than a civil rights case, the propositions for which it is cited are equally applicable.

35. *Id.*; accord *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011-12 (2d Cir. 1986); *cf.* *Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting) (violation of rule 11 where plaintiff faced with difficulty in uncovering facts to support civil rights action).

patterns of supervisory misconduct prior to filing, because citizens are "extremely unlikely" to have that data before formal discovery and remarked that were sanctions to "bar possible exploration of such claims, the agency would be effectively immunized even if it were" acting unconstitutionally.<sup>36</sup>

There have been general difficulties with judicial determinations that civil rights plaintiffs and attorneys have contravened rule 11's prefiling requirements in addition to the particular instances discussed. Some courts have enforced or interpreted the rule's commands in rarefied, academic, or technical ways,<sup>37</sup> while many judges have disagreed, even in substantially similar factual circumstances, over whether the amendment was violated.<sup>38</sup>

3. *Why Judicial Application Has Been Especially Troubling: Inherent Characteristics and Constraints.* Judicial enforcement has been particularly problematic because the inherent characteristics of civil rights suits as well as the resource and related constraints that encumber numerous civil rights plaintiffs and lawyers can make them appear in violation of the rule.<sup>39</sup> Civil rights actions, in comparison with private, two-

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36. See *Oliveri*, 803 F.2d at 1279; accord *Grant v. Pfizer, Inc.*, 683 F. Supp. 41, 45 (S.D.N.Y. 1988).

37. See, e.g., *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085-86 (7th Cir. 1987) (Cudahy, J., dissenting), cert. dismissed, 108 S. Ct. 1101 (1988). In *Szabo*, Judge Cudahy criticized the majority for its technical "nit-picking" approach which was "not unlike the grading of law school examinations." *Id.* Cf. *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir. 1987) (rule 11 not "panacea intended to remedy all manner of attorney misconduct"); *Golden Eagle Distrib. Corp. v. Burroughs*, 801 F.2d 1531, 1540 (9th Cir. 1986) ("asking judges to grade accuracy of advocacy" of every court paper multiplies judicial decisions and litigants' costs). Recently, some courts have stated that each claim in a case must satisfy Rule 11. See *Frantz*, 836 F.2d at 1067; *PaineWebber, Inc. v. Can. Am. Fin. Group, Ltd.*, 121 F.R.D. 324, 330 (N.D. Ill. 1988).

38. An early study sponsored by the Federal Judicial Center reached this conclusion on the basis of case analysis and judicial responses to hypothetical fact patterns (as to some of which judges were evenly divided). See generally S. KASSIN, *supra* note 20. The co-editor of a recent case law assessment found substantial "interjudge disagreement" which greatly outweighed rule 11's benefits. Shaffer, *supra* note 22, at 8-15. Professor Vairo stated that the reported cases demonstrate that the "circuit courts have been unable to develop a coherent set of Rule 11 standards thus far, and that they may be unable to do so in the future." Vairo, *supra* note 2, at 205. The Trial Practice Committee of the American Bar Association Section of Litigation recently issued *Rule 11 Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* principally out of concern over "uneven application of Rule 11 by the courts." 121 F.R.D. 101 (1988) [hereinafter *Rule 11 Standards*]. The co-editor, the ABA Committee and Professor Vairo were speaking to rule violations and sanctions' imposition. Cf. T. WILLGING, *supra* note 16, at 42-43 (consensus has evolved as to general framework for rule 11's application but challenges arise in defining conduct required to meet rule's objective certification requirements).

39. There are several reasons why this subsection is general. For instance, cause and effect are difficult to ascertain. The text speaks of civil rights litigants seeming to violate rule 11 without being

party contract suits, implicate public issues and involve many persons.<sup>40</sup> Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.<sup>41</sup>

The inherent characteristics of civil rights cases and the constraints on civil rights plaintiffs and lawyers, over most of which they have little control, can make them seem to contravene the amendment. This is true of rule 11's requirements regarding the law. Certain characteristics intrinsic to many civil rights actions can leave impressions that the legal inquiries which preceded their filing were insufficient. Instructive illustrations are afforded by the substantial number of civil rights suits that attempt to assert new or comparatively untested theories of law. These

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precise about whether they actually were in violation or were so found because of appearances, courts' stringent enforcement, or problematic judicial application (emphasizing the merits, the papers or frivolousness, rather than the reasonableness of prefiling inquiries), all of which have happened. Greater specificity will attend my analysis of the Commentary and my suggestions for the future below. I attempt here to familiarize readers with certain aspects of civil rights litigation that can make judicial application particularly troubling for those who pursue the cases.

40. For example, in civil rights litigation, many individuals may attempt to give meaning to general or vague constitutional or statutory commands by showing that employees of governmental units engaged in discriminatory practices over numerous years and seek to enjoin future, similar activity. In contracts litigation, one entity typically seeks to prove, under relatively well-established legal principles, that another failed to comply with the express terms of a written agreement and to recover damages that are comparatively specific. For contrasts between the salient characteristics of private and public law litigation, of which civil rights litigation comprises a major subset, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976); Tobias, *supra* note 6, at sec. III. This is a necessarily truncated, stylized account. All cases obviously cannot be sharply dichotomized into public or private categories. The universe of cases is more complex and may be envisioned best as a spectrum with the vast majority in a large middle range, partly public, partly private, albeit one with civil rights litigation at the public law end. For analysis of these issues, see Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U.L. REV. 1 (1984); Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647 (1988).

41. Individual civil rights plaintiffs may be relatively poor or uneducated and lack access to relevant information. The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income. Thus, they may have cash flow problems and difficulties diversifying litigation risks and handling large upfront costs. In contrast, their opponents can better manage litigation risks, may have large legal or technical and investigative staffs, and often possess or have unrestricted access to pertinent data with the capacity to generate additional information. For analysis of litigation financing from a plaintiff's perspective, see Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory For Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986). For discussion of public law litigation's costs, see N. ARON, *LIBERTY AND JUSTICE FOR ALL PUBLIC INTEREST LAW IN THE 1980S AND BEYOND*, at 39-44, 50-62, 106 (1989); Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 765 n.105 (1987).

concepts are at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate, that discovery can be essential to drafting a very specific complaint or to articulating a precise theory of the case, and that the concepts, once formulated, look non-traditional and even implausible—all of which can contribute to appearances of inadequacy. Indeed, the civil justice system and society depend on the common law process of growth and creativity in litigation to explore, discover, and enunciate an ever expanding panoply of civil rights, so that by definition the legal theories articulated in inquiries that precede numerous civil rights cases challenge conventional understandings of what is acceptable.<sup>42</sup> To a lesser degree, the constraints upon those who pursue civil rights cases can convey impressions of insufficiency. For instance, the lack of money and time, as well as access to relevant data that confront civil rights litigants and their attorneys, as compared to other civil litigants, can cause their legal research to appear cryptic and their theories of law to seem unrefined and, thus, deficient.<sup>43</sup>

These inherent characteristics and limitations also can make civil rights plaintiffs and practitioners appear to violate the rule's require-

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42. Recently, some courts appear to have recognized these ideas. See, e.g., *Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988); *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1127 (9th Cir. 1989). In the context of a rule 11 public law case which did not involve civil rights, the Third Circuit warned that "advocating new or novel legal theories" does not warrant sanctions and that the rule should not be employed to "inhibit imaginative legal or factual approaches to applicable law or to unduly harness good faith calls for reconsideration of settled doctrine." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); accord *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450 (9th Cir. 1987). Consider the implications of rule 11's rigorous enforcement in a case like *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For a discussion of closely related ideas and of *Brown* as the quintessential public law case, see Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). For more analysis of these inherent characteristics in the context of rule 11, see LaFrance, *supra* note 3, at 343-47. Finally the Advisory Committee Note which accompanies rule 11 seems to recognize some of this by stating that the amendment is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." 97 F.R.D. 198, 199 (1983).

43. Judge Cudahy recognized these resource constraints by stating that "ingenious and sophisticated (read expensive) rhetoric can salvage almost any position and avoid sanctions. But beware counsel, whose research (or resources) is not unlimited or whose skills in argumentation fall short of the most finely honed." *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., dissenting). Another judge in a civil rights case commented on certain temporal constraints: "Frequently attorneys must act quickly to meet statutory deadlines. Confronted with this pressure, they may not have time to seek further facts or hone their legal theories." *Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting); accord *Olesen v. Board of Educ.*, No. 87 C 7757 (N.D. Ill. March 3, 1988) (LEXIS, Genfed library, Dist file). The Advisory Committee Note states that what "constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available." 97 F.R.D. at 199. For a helpful analysis of many of the issues raised in this paragraph, see S. BURBANK, *supra* note 2, at 68-72.

ments respecting the facts. For example, because the factual inquiries in many civil rights cases are expensive, often requiring open-ended, extensive data collection, information analysis and factual development, and because civil rights lawyers and litigants have few resources, their factual investigations can seem inadequate. These parties rarely will possess or be able to obtain information pertinent to their cases, while they may be unaware of important data or fail to appreciate the significance of material that corresponds to the elements of a civil rights cause of action. Concomitantly, in numerous civil rights suits, considerable information important to the factual preparation of complaints that appear specific will be in the records or minds of government or corporate defendants and cannot be secured before these pleadings must be filed, becoming available only during discovery.<sup>44</sup> In sum, the intrinsic nature of much civil rights litigation and the constraints that hinder numerous civil rights plaintiffs and practitioners, combined with the judicial application of rule 11 discussed above, can make the litigants and lawyers very vulnerable to sanctions motions.

### C. *Judicial Determinations Imposing Sanctions*

Determinations that civil rights plaintiffs and attorneys were in violation of rule 11 apparently have been more detrimental than the resulting decisions imposing sanctions in that courts seem to have enforced the mandatory sanctions requirement with no special rigor against the parties and lawyers and have levied relatively few large awards upon them.<sup>45</sup> These factors do not necessarily mean that sanctions decisionmaking actually has been less burdensome for civil rights litigants and practitioners.

Rule 11 states that courts shall impose appropriate sanctions that

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44. See *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987) (valuable illustration); cf. *Kale v. Combined Ins. Co. at Amer.*, 861 F.2d 746, 760 (1st Cir. 1988) (because defendants' intent in age discrimination cases that turn on question of pretext are difficult to establish without discovery, sanctions risk chilling meritorious litigation); *Pickens v. Children's Mercy Hosp.*, 124 F.R.D. 209, 211 (W.D. Mo. 1989) (because racism is pervasive, little objective circumstantial proof is required to save good faith claim of racial discrimination from sanctions). Some ideas are not completely separable. A plaintiff's lack of information may be attributable to constraints (few resources to gather data) and to inherent characteristics (lack of access to information), while that lack may reflect the defendant's control of the pertinent material.

45. What is said below is more impressionistic than the "harder data" on sanctions motions filed and granted against civil rights plaintiffs, see *supra* notes 16-20 and accompanying text, and than analysis of decisionmaking on rule violations, see *supra* notes 21-38 and accompanying text. One reason is the relative difficulty of detecting how troubling this aspect of judicial application actually has been.

may include reasonable attorney's fees,<sup>46</sup> but the amendment provides no criteria for ascertaining precisely what type of sanction is proper or what amount is to be awarded, and there is little additional instruction regarding which of the rule's ostensible purposes—deterrence, compensation, or punishment—is to be achieved through the imposition of sanctions.<sup>47</sup> Notwithstanding this dearth of guidance, the overwhelming majority of judges has awarded monetary sanctions of attorney's fees.<sup>48</sup> Most courts have attempted to ascertain the actual attorney's fees and costs that were spent because the amendment was violated and to assess sums that are reasonable, equitable, and rationally related to the offender's responsibility and ability to pay.<sup>49</sup> Despite these efforts, the sanctions imposed have varied significantly, frequently in identical factual contexts. There have been sizeable awards in some cases, a few of which involved civil rights, while substantial time, money and effort have been devoted to the resolution of sanctions issues.

Illustrative of several troubling aspects of judicial application is a suit that alleged violations of civil rights statutes but was not primarily a civil rights case; disposition of sanctions questions required two district court decisions and three circuit court opinions in which the judges differed dramatically, principally over the purpose of the sanction and its magnitude.<sup>50</sup> The district court conducted a thorough analysis which in-

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46. The court "shall impose . . . an appropriate sanction, which may include . . . the reasonable expenses incurred because of the filing of the . . . paper, including a reasonable attorney's fee." FED. R. Civ. P. 11.

47. The rule is nearly devoid of guidance, although the Advisory Committee Note affords some, stating, for example, that the court has "discretion to tailor sanctions to the particular facts of the case" and should consider signers' knowledge when papers were filed in determining the "nature and severity of the sanctions to be imposed." 97 F.R.D. at 200. Moreover, the Note indicates, and many courts seem to believe, that deterrence is an important purpose. Judges have developed others, especially education and rehabilitation. *See, e.g.,* *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 877 (5th Cir. 1988); *Cabell*, 810 F.2d at 467; *cf. Barr Laboratories, Inc. v. Abbott Laboratories*, 867 F.2d 743, 747 (2d Cir. 1989) (imposition of sanctions designed to vindicate authority of court). For analysis of numerous purposes *see Thomas*, 836 F.2d at 876-81; *Donaldson v. Clark*, 819 F.2d 1551, 1556-58 (11th Cir. 1987); *Nelken*, *supra* note 15.

48. *See Vairo*, *supra* note 2, at 227; *see also Nelken*, *supra* note 15, at 1333 (attorney's fees sanction imposed in 96% of cases when motion granted); *cf. S. BURBANK*, *supra* note 2, at 36-7 (Third Circuit Task Force surprised that sanctions imposed in reported cases were usually monetary and required payment to another party because Third Circuit has repeatedly emphasized availability of non-monetary sanctions); *T. WILLGING*, *supra* note 16, at 5, 30 (in sample of 85 published opinions, non-monetary sanctions imposed twice, while fees and expenses were basis of sanctions awards in 66% of cases studied).

49. For these propositions and cases on which they are premised, *see Vairo*, *supra* note 2, at 229-32. *Cf. Thomas*, 836 F.2d at 876-83; *Donaldson*, 819 F.2d at 1556-58 (reviewing most factors in text and additional relevant ones).

50. *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985), *on remand*,

cluded consideration of \$53,000 in fees the defendant actually incurred, as well as numerous "mitigating factors," such as the quality of plaintiffs' papers (i.e., the "frivolousness of the complaint") and the factual and legal research they reflected, the defendant's need for compensation, the desirability of punishment and deterrence, the violators' ability to pay, the potential chilling effect, and the idea that the case was one of first impression, and concluded that a \$1000 award was appropriate.<sup>51</sup> Two circuit judges, relying on the punitive function of sanctions and the need for the trial court to exercise discretion in calculating the requisite severity, agreed with the district judge that significantly less than the amount in fact spent could be awarded but thought that the lower range of propriety began at \$10,000.<sup>52</sup> Their dissenting colleague insisted that \$53,000 was appropriate, arguing that the majority neglected the rule's "second purpose"—providing restitution to victims of sanctioned conduct—and promoted arbitrariness and discrepancies in sanction decision-making.<sup>53</sup> Typical of the substantial assessments that have been imposed<sup>54</sup> is another case in which a trial judge levied an \$84,000 award upon two individual civil rights plaintiffs and their legal counsel primarily for abusing the litigation and judicial processes by failing to "file, prepare and try only non-frivolous claims."<sup>55</sup>

In short, there has been considerable judicial disagreement about the appropriate purpose, amount, and type of sanctions as well as how to calculate the assessments granted. The lack of consensus is, in part, attributable to rule 11's lack of guidance on these issues. Moreover, large

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637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 269 (1987).

51. The court in *Eastway* stated:

Heavy sanctions would be unfair because *Eastway I* is a case of first impression . . . because the case was brought in good faith, because of the otherwise exemplary conduct of plaintiffs' counsel [and] because the pleading was only marginally frivolous . . .

637 F. Supp. at 584.

52. The panel majority offered little additional explanation. *Eastway*, 821 F.2d at 121.

53. *Eastway*, 821 F.2d at 124 (Pratt, J., dissenting). For other recent cases in which judges disagreed over appropriate sanctions, see *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1083, 1093-94 (3d Cir. 1988); *Johnson v. New York City Transit Auth.*, 823 F.2d 31, 33 (2d Cir. 1987); *Vairo*, *supra* note 2, at 227-32.

54. Most frequently cited is *Unioil, Inc. v. E. F. Hutton Co.*, 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 83 (1987), in which a \$294,000 assessment was affirmed. For lists of other cases, see *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 205 n.5 (E.D. Ky. 1987); *Vairo*, *supra* note 2, at 228.

55. *Harris v. Marsh*, 679 F. Supp. 1204, 1392 (E.D.N.C. 1987). Particularly problematic for the public interest law community was the recent imposition of a one million dollar sanction on a non-profit legal organization. See *Giving Law Teeth (And Using Them on Lawyers)*, N.Y. Times, Mar. 17, 1989, at B4, col. 2.

awards in some suits, a small number of which were civil rights actions, combined with unwarranted and expensive satellite litigation over sanctions have been problematic for civil rights plaintiffs and attorneys. Thus, although courts appear to have applied the sanctions command with no particular stringency against civil rights litigants and their counsel and have imposed few significant assessments upon them, these considerations do not mean that judicial implementation has been without difficulty. For instance, some inherent characteristics of civil rights litigation and constraints upon civil rights plaintiffs and practitioners, which could make them seem to violate the rule, can also cause those parties and lawyers to look substantially responsible for the attorney's fees and expenses that defendants incur.<sup>56</sup> Correspondingly, sizeable awards in even a few cases, especially those involving civil rights, can discourage individuals and lawyers from commencing and continuing civil rights suits because their lack of resources makes them unusually vulnerable.<sup>57</sup> These problems are epitomized by the selection of monetary sanctions of attorney's fees as the sanction of choice—out of a myriad of less onerous possibilities—with the potential for chilling and other difficulties that the alternative entails.<sup>58</sup>

#### D. *Miscellaneous Implications Relating to Rule 11*

1. *Unreported and Less Formal Judicial Activity Involving Rule 11.* It is important to keep in mind that this review of rule 11 enforcement has been derived substantially from reported opinions and, therefore, may not depict with exacting precision the type or incidence of troubling judicial application involving civil rights litigation. Many courts certainly have found violations of the rule and have imposed sanctions without issuing reported opinions.<sup>59</sup> A number of judges have warned the parties

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56. This alludes to several factors mentioned in the text accompanying notes 39-44 *supra*. Thus, even absent strict judicial application, the characteristics and constraints mean that large sanctions could be imposed.

57. Indeed, their lack of resources means that the actual assessment of sizable sanctions may be only marginally more discouraging than the threat of imposition.

58. The crucial point is that selection of the sanction with the greatest potential to be financially burdensome is not neutral, because it disproportionately affects and may severely disadvantage those with relatively few resources. The substantial doubt that rule 11 actually authorizes broad fee shifting makes these difficulties worse. See *infra* note 133 and accompanying text. Finally, I am not saying that courts have failed to apply carefully the sanctions requirement. A number have attempted to ameliorate the potentially harsh impacts. For example, the Fifth Circuit recently recognized the potential effects that sanctions made payable during a lawsuit might have on court access and suggested a means of treating the possible impacts. See *Thomas*, 836 F.2d at 882-83 n.23. The results of these efforts do not yet appear sufficient, however, for civil rights litigants.

59. The Third Circuit Task Force found that "approximately sixty percent of the total Rule 11

and lawyers that they could be found in violation of the amendment,<sup>60</sup> and some courts have threatened to sanction them,<sup>61</sup> while the warnings and threats frequently have reflected judicial dissatisfaction with the plaintiffs' resolve to continue litigating certain aspects of the merits.

2. *Additional Unmentioned Implications.* The amended rule has also had numerous ramifications for civil rights litigation not explicitly considered above. The significant number of sanctions motions filed against plaintiffs in these actions and the high percentage which have been granted essentially have resurrected the archaic idea of "disfavored" claims.<sup>62</sup> This development is disconcerting, because Congress and the Supreme Court have declared that civil rights cases are to receive particularly solicitous judicial treatment.<sup>63</sup> Rule 11 could thus revive a serious

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iceberg and two-thirds of the sanctions iceberg do not appear on the screen." See S. BURBANK, *supra* note 2, at 59. For discussion of many implications of unreported rule 11 activity, see *id.* at 44-45, 58-59; Cavanaugh, *supra* note 15, at 516; Nelken, *supra* note 15, at 1339-40. For evaluation of factors relevant to determinations whether to issue reported decisions, such as concerns for the reputations of those sanctioned, see Schwarzer, *supra* note 9, at 202.

60. Of course, such warnings can be fairer for lawyers, litigants and judges, for instance, by affording notice and keeping to a minimum the sanctions ultimately imposed. Major problems with warnings include differentiating them from threats and their subtlety. For examples, see *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 613 (S.D.N.Y. 1988); *King v. Conde*, 121 F.R.D. 180 (E.D.N.Y. 1988). For instances in which courts suggested warnings were appropriate, see *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987); *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). Professor Vairo has found that a "great deal of anecdotal evidence exists that a large number of judges . . . are citing Rule 11 in pretrial conferences and other proceedings on and off the record to remind litigants of their obligations under Rule 11 and that monetary consequences will follow violations of the rule. Indeed, some courts are encouraging Rule 11 motions." Vairo, *supra* note 2, at 197-98 (citation omitted).

61. See, e.g., *Kinoy v. Mitchell*, 851 F.2d 591 (2d Cir. 1988); cf. *Webster v. Sowders*, 846 F.2d 1032, 1039-40 (6th Cir. 1988) (threats to civil rights defendant). In *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), such a threat would have been effectuated in the rule 16 context, when a district judge held a lawyer in criminal contempt for failing to submit his client's civil rights claim to a non-binding summary jury trial, had the appellate court not overturned that determination. Cf. *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988) (failure to compromise a case even pursuant to terms suggested by court does not constitute grounds for imposing sanctions). The assertion in the text also is premised on conversations with civil rights and public interest lawyers. Cf. *infra* note 73 and accompanying text (more discussion of informal threats); Vairo, *supra* note 2, at 197-98, 232-33 (general discussion of informal threats; specific idea that "fears . . . rule is being abused by particular judges . . . appear to be well-founded").

62. For example, courts viewed with suspicion and, thus, scrutinized more closely malicious prosecution "because of its tendency to cause litigation to proliferate." Marcus, *supra* note 33, at 471. For discussion of the notion's history, and criticism of it and the related ideas of disfavored litigants and lawyers, because they systematically and unjustifiably excluded or penalized entire categories of claims, parties, and attorneys. See *id.* at 471-79.

63. Congressional statutes include substantive civil rights legislation, such as the recently enacted Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), and fee-shifting statutes, such as the Civil Rights Attorneys Fees Awards Act of 1976, 90 Stat. 2641 (1976)

problem in American civil procedure that the 1938 Rules were intended to solve—the spectre of lawsuits proceeding with insufficient concern for their underlying merits—and even foster a similar difficulty, namely the prospect of litigation over what lawyers did or knew before they filed papers rather than suits devoted to the substance of controversies in which the documents were submitted.<sup>64</sup>

3. *Chilling Effects.* Much of what is recounted above implicates the controversial question whether implementation of the rule has had a chilling effect on the individuals and attorneys who institute and pursue civil rights cases. Opinions of knowledgeable observers, reasonable inferences drawn from experience with the rule to date, and increasing anecdotal evidence indicate that some chilling has occurred and that there is considerable potential for it.<sup>65</sup>

Perhaps the earliest explicit judicial treatment of the issue was Circuit Judge Cudahy's 1987 warning that the "chilling effect" of the amendment's overzealous or technical application in civil rights actions would "reach as tellingly to the most meritorious such claim as to the least."<sup>66</sup> Panels of the Sixth and Ninth Circuits recently have reversed district judges' imposition of sanctions upon civil rights plaintiffs out of fear that upholding the sanctions "would operate to chill the bringing of facially valid civil rights suits in federal court."<sup>67</sup> A number of other

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(codified at 42 U.S.C. § 1988 (1982)). For representative Supreme Court pronouncements, see *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

64. As to revival, see Vairo, *supra* note 2, at 232. The possibility of revival also is an implicit thesis of Marcus, *supra* note 33. As to introducing a similar difficulty, see Shaffer, *supra* note 22, at 24-25; Vairo, *supra* at 232. *Cf.* *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1086 (Cudahy, J., dissenting), *cert. dismissed*, 108 S. Ct. 1101 (1988) (criticizing fact-finding remand on technical rule 11 question because judges "seem almost at the point of saying that the main question before the court is not 'Are you right?' but 'Are you sanctionable?'"); *Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987) (not "surprised if shortly the Rule 11 tail were wagging the substantive law dog in many cases").

65. This is true, although the reasons why those who consider suit choose not to file or discontinue actions they commence are exceedingly difficult to ascertain. Therefore Judge Schwarzer may have been correct in observing that the issue can only be resolved intuitively. See Schwarzer, *supra* note 1, at 1017. Of course, there are many reasons for not pursuing litigation that are unrelated to rule 11, civil rights litigants' constraints, their cases' inherent characteristics, and their claims' validity. By chilling effects, I mean "improper" impacts that result from the rule's application in conjunction with the constraints or characteristics which discourage potentially legitimate cases.

66. See *Szabo*, 823 F.2d at 1086.

67. *Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988); *accord* *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1127 (9th Cir. 1989); *cf.* *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926 (2d Cir. 1989) (cautioning against vigorous rule 11 application in employment discrimination case because weak but potentially viable claims might be chilled).

judges have expressed similar sentiments, essentially evincing concern that the rule's enforcement would stifle the creativity and enthusiasm of lawyers in championing factual contentions and concepts of law.<sup>68</sup> Those responsible for three comprehensive rule 11 evaluations have echoed and elaborated upon these judicial pronouncements.<sup>69</sup> The author of one recent study found that the "statistics gleaned from the reported cases—which show a dramatic impact on plaintiffs in [civil rights] case—seem to justify" critics' fears that the "rule would 'chill' vigorous advocacy," adding that it is "impossible to determine how many meritorious cases have not been brought or will not be brought because of fears about Rule 11."<sup>70</sup> The co-editor of the 1988 second edition of an American Bar Association (ABA) assessment of rule 11 stated that "chilling [of] an attorney[s] enthusiasm or creativity in pursuing legal theories [had] unfortunately occurred" since the time of the August 1983 amendment.<sup>71</sup> Moreover, civil rights practitioners consider themselves to be the "pri-

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68. See, e.g., *Cabell v. Petty*, 810 F.2d 463, 468 (4th Cir. 1987) (Butzner, J., dissenting); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 836, 877 (5th Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987). Although these cases involved civil rights, the judges seemed to be tracking the Advisory Committee Note's general admonition that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." 97 F.R.D. 165, 199. Despite frequent allusion by courts to the quoted language, which only was inserted in the Note's final draft, the admonition apparently has done relatively little to ameliorate the disadvantageous application witnessed. Indeed Judge Bertelsman stated that the Committee's fears that rule 11 might chill vigorous advocacy are being realized in a public law case not involving civil rights and stated as much in the context of a civil rights case. *Compare* *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 205 (E.D. Ky. 1987) *with* *Yancey*, 674 F. Supp. at 575.

69. They are Professors Vairo, *supra* note 2, and Nelken, *supra* note 15, whose observations are more specific than the judicial pronouncements, and Shaffer, *supra* note 22, the co-editor of the new ABA study, which did not analyze specifically civil rights cases but included many such cases.

70. Vairo, *supra* note 2, at 200-201. *Cf.* Elson & Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1989) (impossible to measure extent to which rule 11 has chilled creativity or to count unfiled suits that would have been pursued if rule had not been amended, much less ascertain their merit); *Yancey*, 674 F. Supp. at 575 (important, "unanswerable question" is quantity of "meritorious litigation . . . being chilled"). Professor Vairo also observed that the "fears of some judges, litigants and commentators that the rule . . . is chilling meritorious litigation and effective advocacy . . . appear to be well-founded." *Id.* at 232-33. Professor Nelken, in her earlier study, offered similar remarks:

[Concerns about chilling effects] expressed before the rule was adopted were well-founded . . . . Even with a good faith belief in the merit of a claim, lawyers may be deterred from pursuing civil rights cases when they contemplate the possibility of being sanctioned for what a judge concludes is a frivolous suit.

Nelken, *supra* note 15, at 1339-40.

71. See Shaffer, *supra* note 22, at 2. Commentators also have strongly contended that rule 11 has had a chilling effect on civil rights litigation. See, e.g., LaFrance, *supra* note 3, at 353; Note, *supra* note 28, at 631.

mary victims of Rule 11,"<sup>72</sup> while there is considerable anecdotal evidence of threats to sanction the lawyers.<sup>73</sup>

These statements comport with what could reasonably be inferred from developments since the amendment became effective in August 1983. A number of factors can prevent those contemplating suit from commencing litigation or inhibit enthusiastic pursuit of that initiated, even triggering premature termination or the acceptance of inadequate settlements.<sup>74</sup> These factors include (1) the aggressiveness and success with which defense counsel have invoked the amendment; (2) uncertainty over what activity might warrant sanctions and the monetary amount of any sanctions that might be levied; (3) the concomitant cost of conducting sufficient prefling inquiries; and (4) concern about the expense of rule 11 litigation which has exceeded the amounts assessed.<sup>75</sup>

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72. See *Thomas*, 836 F.2d at 871 n.4 (statement in opinion derived from a memorandum prepared in conjunction with a proposed study by the Center for Constitutional Rights).

73. Anecdotal evidence comes from civil rights and public interest lawyers. The quantity and nature of threats are difficult to establish, because, for instance, judicial suggestions that sanctions might be imposed can be subtle. Cf. *supra* notes 60-61 (providing more discussion). The Third Circuit Task Force stated that it shared "some of the concerns of the plaintiffs' civil rights bar," observed that the "existence of a fee-shifting statute designed to ensure the availability of a pool of competent" civil rights counsel (42 U.S.C. § 1988) was an "independent reason to use Rule 11 sparingly" in civil rights cases, especially for compensatory purposes, and recommended that attention be accorded the possibility that rule 11 is having a disproportionately adverse effect on the poor. S. BURBANK, *supra* note 2, at 72, 100. Nonetheless, the Task Force concluded that the potential for chilling in the Third Circuit did "not warrant serious concern" principally because that Circuit has equated the rule with abuse and it is to be reserved for exceptional situations. *Id.* at 85. The author of the recent Federal Judicial Center study found little evidence of chilling generally or in civil rights cases specifically but acknowledged that the "impact on public interest litigation may be greater" and urged that federal judges not sanction attorneys handling pro bono cases or sanction indigent clients. See T. WILLGING, *supra* note 16, at 8-11, 157-68.

74. Especially troubling has been inconsistent judicial application, which has led to excessive, expensive, satellite litigation involving the rule's interpretation. For elaboration of these ideas, see *Thomas*, 836 F.2d at 871 n.4; *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., dissenting), *cert. dismissed*, 108 S. Ct. 1101 (1988); *Yancey*, 674 F. Supp. at 575; *supra* note 38 and accompanying text. The Third Circuit Task Force concluded that "satellite litigation on Rule 11 issues" did not seem to be a "serious problem for either litigants or district judges" and although the "costs of single issue Rule 11 appeals are troublesome" their incidence should decline in the future. See S. BURBANK, *supra* note 2, at 83; cf. T. WILLGING, *supra* note 16, at 112 (satellite litigation not the problem suggested by the literature or by published opinions). The prospect of such litigation and fear of large sanctions can lead to premature termination and inadequate settlements, as can the effect of rule 68, governing settlement offers, as observed by Justice Brennan. See *Marek v. Chesny*, 473 U.S. 1, 31-32 (1985). See also Tobias, *supra* note 6, at sec. II B.4.

75. In *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986), the Ninth Circuit lamented that the "litigation expenses already [had] exceeded, many times over, the few thousand dollars of sanctions imposed." See also Vairo, *supra* note 2, at 217 (rule being used aggressively against civil rights plaintiffs). But cf. S. BURBANK, *supra* note 2, at 60 (rule 11 not cottage industry and rule 11 motions not routine in Third Circuit).

These problems and others may discourage civil rights attorneys from advocating novel or untested theories of law or from vigorously championing their clients' causes, while lawyers might reject cases that require more factual or legal development than before to resist potential sanctions motions.<sup>76</sup> In sum, insights of informed observers, reasonable inferences derived from the rule 11 experience thus far, and accumulating anecdotal information show that there has been some chilling and considerable likelihood of its recurrence.

E. *Courts' Explanations for Rule 11's Application in Civil Rights Cases and a Look at Alternative Approaches to Enforcement*

The federal courts have provided comparatively little explanation for their implementation of the rule in civil rights cases. Insofar as judges have afforded any insights into such application, most state that they are attempting to enforce what they consider the amendment's purposes, such as the deterrence of attorney abuse, the prevention of frivolous litigation, or the reimbursement of costs expended.<sup>77</sup>

An expanding number of courts, however, has evinced concern about the troubling aspects of the judicial implementation discussed above, especially its potential impact on civil rights cases.<sup>78</sup> Some courts have rejected approaches to the rule's enforcement that limit judicial access for civil rights litigants, even reversing lower court decisions imposing sanctions because of potential chilling effects.<sup>79</sup> Several members of

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76. Sanctions also can discourage attorneys by threatening their standing in the legal and broader communities. Several courts have stated that sanctions ought not to be "lightly imposed" because of their impact on lawyers' careers and personal well-being. *See, e.g.,* Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987). Illustrative is *Oliveri v. Thompson*, in which an attorney who reasonably relied on his client spent significant resources to vindicate his original decision in filing and to remove the burden of, and the professional stigma attached by, an incorrectly imposed \$5000 sanction. 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). Judge Schwarzer recognizes more generally these problems. *See* Schwarzer, *supra* note 1, at 1017.

77. *See, e.g.,* Szabo, 823 F.2d at 1079, 1082; Harris v. Marsh, 679 F. Supp. 1204, 1384-93 (E.D.N.C. 1987); O'Rourke v. City of Norman, 640 F. Supp. 1458, 1469 (W.D. Okla. 1986); Schaffer v. Chicago Police Officers, 120 F.R.D. 514 (N.D. Ill. 1988). Most courts also seem relatively unaware of or unselfconscious about the adverse effects of judicial application in civil rights cases.

78. For examples not yet mentioned, see Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 986-89 (5th Cir. 1987), *modified*, 836 F.2d 866 (5th Cir. 1988); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986). The focus here, as in opinions, is decisionmaking on rule violations, although sanctions determinations are becoming increasingly important.

79. *See* Davis v. Crush, 862 F.2d 84, 92 (6th Cir. 1988); Woodrum v. Woodward County, Okla., 866 F.2d 1121, 1127 (9th Cir. 1989); Kale v. Combined Ins. Co. of Amer., 861 F.2d 746, 760 (1st Cir. 1988). Judge Butzner would not have sanctioned a civil rights lawyer who had little time to gather complicated facts. *See* Cabell v. Petty, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissent-

the federal judiciary have admonished their colleagues to apply rule 11 carefully in civil rights litigation<sup>80</sup> while others have exhibited special solicitude for civil rights plaintiffs and attorneys.<sup>81</sup> Moreover, a slowly increasing number of courts has developed or implemented practical and flexible ways of enforcing the amendment, which may be improvements for the litigants and lawyers. For example, in one civil rights case, a Second Circuit panel suggested that there could be "technical violations" of rule 11 which ought not warrant sanctions.<sup>82</sup> Even that court rejected "out of hand" the idea that in considering sanctions, "special treatment . . . should be given to attorneys who handle unpopular civil rights claims, particularly those representing indigents and minority clients."<sup>83</sup> It is important to emphasize that these approaches typically have been suggestions for, rather than actual, application and occasionally are in cases that do not involve civil rights. They may become improvements if and when the concepts in fact are applied carefully in a significant number of civil rights cases. In sum, most judges implementing rule 11 have expressed little explicit concern for civil rights plaintiffs or lawyers, although a growing contingent of courts has applied the amendment or

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ing); *cf. Szabo*, 823 F.2d at 1085-86 (Cudahy, J., dissenting) (rejecting overzealous, technical application); *Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989) (reluctance to sanction pro se civil rights plaintiff because of possible chilling effects).

80. For example, Judge Cudahy would have been "more restrained than my brethren in handing out sanctions for civil rights claims." *Szabo*, 823 F.2d at 1085-86 (Cudahy, J., dissenting). *Cf. Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) ("rule should not be used to deter potentially controversial or unpopular suits" in context of civil rights case); *Thomas v. Capital Servs., Inc.*, 836 F.2d 866, 877 (5th Cir. 1988) (same).

81. Special solicitude is particularly evident in very recent cases. *See, e.g., New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989); *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988); *O'Neal v. DeKalb County, Ga.*, 850 F.2d 653, 658 (11th Cir. 1988); *Rolleston v. Eldridge*, 848 F.2d 163 (11th Cir. 1988); *Doe v. Smith*, 704 F. Supp. 1177, 1189 (S.D.N.Y. 1988); *Olesen v. Board of Educ.*, No. 87 C 7757 (N.D. Ill. Mar. 3, 1988) (LEXIS, Genfed Library, Dist file); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479, 484 (E.D. Pa. 1988).

82. *See Oliveri*, 803 F.2d at 1279-81; *accord Greenberg v. Sala*, 822 F.2d 882, 886-87 (9th Cir. 1987). However, the Fifth Circuit stated that there are no "free passes" because rule 11 is mandatory. That court and others have tempered the rule's compulsory aspect by recognizing broad trial court discretion to select sanctions as a safety valve or to impose sanctions that are the "least severe" necessary. *See Thomas*, 836 F.2d at 878; *Cabell*, 810 F.2d at 466-67; *cf. Schwarzer, supra* note 9, at 201 (in choosing a sanction the "basic principle is least severe sanction adequate to serve the purpose").

83. *See Oliveri*, 803 F.2d at 1280; *accord Burgos v. Murphy*, 692 F. Supp. 1571, 1578 (S.D.N.Y. 1988). I have found no case explicitly adopting special standards for civil rights litigation, although *Pickens v. Children's Mercy Hosp.*, 124 F.R.D. 209, 211 (W.D. Mo. 1989) comes close to doing so. For more discussion of these practical, flexible approaches and for additional recommendations as to such application, which do not suggest special standards, see *infra* notes 126-138 and accompanying text.

suggested that it be enforced in ways that could be more responsive to the special needs of many civil rights litigants.

#### IV. ANALYSIS OF THE DESCRIPTIVE AND PRESCRIPTIVE ASPECTS OF THE COMMENTARY

##### A. *Descriptive Aspects*

This critical analysis of the initial half-decade of experience with rule 11 and civil rights suits helps to clarify the most important descriptive and prescriptive difficulties in Judge Schwarzer's Commentary. He correctly observes that inconsistent application has fostered unpredictability, while that lack of predictability and the willingness of lawyers to employ rule 11 for strategic purposes and to recoup attorney's fees have led to excessive litigation and corresponding delay and waste.<sup>84</sup> Indeed, these observations resemble those in the critical analysis of civil rights cases and of a mounting chorus of judges and writers.<sup>85</sup> However, the Commentary's descriptive account conveys inaccurate impressions by including ideas that are understated or are less clear than they might be and by leaving much unsaid.

For example, Judge Schwarzer remarks that, while rule 11's unpredictability could have a chilling effect, "lawyers should have little to fear in light of the type of conduct that courts have punished [and my] own experience has disclosed no anecdotal evidence of chilling."<sup>86</sup> It is easy enough for federal judges to say that lawyers have little to fear, but civil rights practitioners justifiably remain concerned about precisely what activity could be held to contravene the amendment and about the size of awards that might be imposed, especially given the significant disagreement among courts to date over exactly what constitutes a violation of

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84. Schwarzer, *supra* note 1, at 1015-18. He also correctly observes that courts have focused more on the merits (or frivolousness) of cases or on the quality of the litigants' papers than on the reasonableness of their prefilings inquiries. The foregoing observations underlie his central prescription.

85. See *supra* notes 15-83 and accompanying text. See, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 877 (5th Cir. 1988); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987); *Yancey v. Carroll County*, 674 F. Supp. 572 (E.D. Ky. 1987). See generally *SANCTIONS*, *supra* note 16; *Vairo*, *supra* note 2. The author of the recent Federal Judicial Center study concurs as to problems engendered by attorneys attempting to recoup fees. See T. WILLGING, *supra* note 16, at 122-23.

86. Schwarzer, *supra* note 1, at 1017. One problem with the Commentary is lack of clarity, which is compounded because the rule is unclear and affords so little guidance. When the Commentary is unclear, I try to say so or make clarifying assumptions. For instance, because use of the word "punish" in the text seems to seize the high ground, I assume it means deter or found in violation of rule 11.

the rule and which sanctions are appropriate.<sup>87</sup>

As to Judge Schwarzer's second contention that he has observed no evidence of chilling, there is little reason why the experience of a federal judge who rigorously applies rule 11 would reveal a chilling effect. Thus, his failure to detect any is unremarkable, if not irrelevant, yet evidence of chilling has been reported, appears to be increasing, and is being collected.<sup>88</sup> Moreover, as to both of the Commentary's assertions, it is important to remember that the resource constraints of civil rights lawyers make them peculiarly susceptible to the rule's potential chilling effects; the prospects of spending large sums to complete prefilings inquiries that will be deemed sufficient, to appeal adverse rule 11 decisions, or to litigate nice questions of the amendment's interpretation, can be nearly as discouraging as the threat that sanctions will be imposed.<sup>89</sup>

Another illustration is Judge Schwarzer's statement that the "vast majority of courts agree that the rule's purpose is to deter abuse, with fee-shifting simply one of several methods of achieving deterrence."<sup>90</sup> Although a number of judges seem to believe that deterrence is important, the "overwhelming majority of judges has awarded monetary sanctions of attorney's fees."<sup>91</sup> This means that the Commentary's observation may permit readers to reach the conclusion that few courts have actually shifted fees, which is erroneous.<sup>92</sup> Both examples, therefore, can leave similar impressions that there has been minimal chilling or fee shifting and that any of either which has occurred is not very significant.

In short, Judge Schwarzer's descriptions are troubling. Beyond the obvious difficulties that these examples illustrate, the Commentary's descriptive account implicates a spectrum of issues that are addressed with varying clarity.<sup>93</sup> Finally, the assumptions that underlie numerous de-

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87. See *supra* notes 22-58 and accompanying text.

88. See *supra* notes 65-76; *infra* notes 150-152 and accompanying text.

89. Much of this is illustrated by *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (described *supra* note 76). For more analysis, see *supra* notes 65-76 and accompanying text.

90. See Schwarzer, *supra* note 1, at 1020. The author of the Federal Judicial Center study found that deterrence was clearly the primary purpose in imposing sanctions for a majority of the 60 federal judges he interviewed. T. WILLGING, *supra* note 16, at 24.

91. See *supra* text accompanying note 48.

92. In fairness, Judge Schwarzer criticizes courts that have read a broad fee-shifting rationale into rule 11 and offers prescriptions aimed at limiting that practice. See Schwarzer, *supra* note 1, at 1020.

93. If an additional example is needed, I offer Judge Schwarzer's observation that the "question is where to draw the line between inadequate lawyering and litigation abuse." Schwarzer, *supra* note 1 at 1024. For analysis, see *infra* notes 103-105 and accompanying text. One troubling aspect of the

scriptions and the manner in which they are phrased can convey the sense that rule 11's future application is not cause for concern, provided Judge Schwarzer's prescriptions are implemented.

### B. *Prescriptive Aspects*

Although some of the Commentary's descriptive material is less clear than it might be, this does not necessarily mean that the prescriptions are unresponsive to civil rights plaintiffs and lawyers. To the extent the federal judiciary can enforce effectively many of Judge Schwarzer's recommendations and assuming those suggestions have the desired consequences, the proposed prescriptions would improve rule 11's application and warrant institution. For example, insofar as courts efficaciously implement the recommendations that they not employ the rule to reimburse parties for expenses incurred in defending against unmeritorious lawsuits or to manage cases, the proposals would have salutary ramifications, such as reducing the quantity of rule 11 motions filed against civil rights plaintiffs and attorneys, making them worthy of adoption. It is important to understand that two crucial assumptions are being made: that federal judges can effectively institute the prescriptions and that, if the courts do so, the intended consequences will actually benefit civil rights litigants and lawyers. These assumptions, however, are not warranted as to certain of Judge Schwarzer's recommendations which will be responsive in ways most beneficial to the parties and attorneys only if augmented.

The most significant illustration is the Commentary's centerpiece—the prescription that the federal judiciary shift its focus from analyzing the merits of cases to scrutinizing the reasonableness of litigants' prefiling inquiries when ascertaining whether rule 11 has been violated.<sup>94</sup> Although Judge Schwarzer properly redirects attention to the reasonableness of prefiling inquiries and away from many courts' emphasis on the merits, the suggestion will not suffice unless the concept of reasona-

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Commentary is its apparent lack of appreciation for certain realities of civil rights lawyering, which may explain why its prescriptions seem insufficiently attentive.

94. This analysis draws substantially upon the explanation why judicial application has been especially troubling in civil rights cases, although the analysis replaces the concepts of inadequacy or "rule violation" with the idea of reasonableness. Reliance on that explanation also means analysis here can be briefer. See *supra* notes 39-44 and accompanying text. For instance, the textual discussion of why inquiries into the law can seem unreasonable treats only tersely inherent characteristics and mentions no constraints, because they are discussed thoroughly above and because the constraints are less important. I have attempted to integrate Judge Schwarzer's suggestions in his earlier article when appropriate. See Schwarzer, *supra* note 9.

bleness is elaborated and expansively applied. The recommendation may not have the effects that are most important to civil rights litigants and attorneys because the intrinsic characteristics and constraints examined above can make their prefilings inquiries appear to violate the rule's reasonableness requirements. Inquiries into the law may seem unreasonable due to the inherent characteristics of many civil rights cases, typified by the large number which are premised on novel or comparatively untested legal theories. Moreover, factual investigations can look unreasonable because most civil rights plaintiffs and lawyers have few resources for assembling or analyzing information and lack access to considerable pertinent data.<sup>95</sup>

The Commentary's central prescription will yield significant improvements only if supplemented. Future prefilings inquiries will appear no more reasonable, unless courts give greater substantive content to what constitutes "reasonableness," for example, by according serious consideration and substantial weight to the numerous constraints on these parties and practitioners and to the inherent characteristics of civil rights suits.<sup>96</sup> Without that type of judicial implementation, sanctions violations will be as easy for civil rights defense counsel to prove and no less appealing to the attorneys, while civil rights litigants and practitioners will remain equally vulnerable. In short, shifting the focus to the reasonableness of prefilings inquiries alone may not provide the protection that is most important to those who bring civil rights cases.<sup>97</sup>

Somewhat less troubling are the Commentary's suggestions that pertain to the sanctions that judges must impose.<sup>98</sup> Most of these prescriptions will afford improvements for civil rights litigants and lawyers. For example, insofar as courts efficaciously implement Judge Schwarzer's

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95. Thus, constraints and inherent characteristics have relatively similar significance for prefilings inquiries, which contrasts with legal inquiries in which the constraints are less important.

96. What is important is stressing reasonableness, by broadly defining the concept and fleshing it out, and de-emphasizing the merits (frivolousness of cases), the papers, and the legal theories or factual information included in those documents, which may be relevant in certain situations. For more suggestions on what should be considered and how it should be treated, see *infra* notes 116, 126-129 and accompanying text.

97. The prescription, even if not augmented as suggested, may afford some improvements, especially if combined with other suggestions of courts, writers, and Judge Schwarzer. Fewer sanctions motions probably would be filed even in civil rights cases, if the quantity of fee shifting were to decrease substantially, for instance, in response to the Judge's idea that courts ought not to compensate for unmeritorious claims.

98. This analysis is complicated, because the Commentary makes few very explicit suggestions regarding sanctions. Those pertaining to sanctions are less clear than they might be, and the rule affords little assistance, although Judge Schwarzer's earlier article is helpful. See Schwarzer, *supra* note 9.

recommendation that they not use the rule to "compensate parties for the costs of unmeritorious claims,"<sup>99</sup> that prescription would reduce the quantity of sanctions motions lodged against civil rights plaintiffs by limiting the situations in which fee-shifting would be appropriate and, thus, reduce the incentives for invoking rule 11.<sup>100</sup> Other suggestions will not be responsive in significant ways, such as reducing uncertainty over the size of sanctions that could be imposed, unless such recommendations are clarified.<sup>101</sup>

Helpful illustrations of the Commentary's failure to afford the clearest possible guidance relating to the rule's enforcement are Judge Schwarzer's statement that courts may employ the amendment to deter litigation abuse "with awards of fees and expenses in appropriate cases" and his recapitulation that the "rule's purpose is to deter abuse, with fee-shifting simply one of several methods of achieving deterrence"<sup>102</sup> as well as his observation that the "question is where to draw the line between inadequate lawyering and litigation abuse."<sup>103</sup> The Commentary's lack of clarity and specificity about what is abuse, how to identify activity that is sufficiently egregious to warrant shifting of fees, and how to calculate accurately awards that will deter abuse means that sanctions imposed to deter could be substantial, perhaps resembling the amounts levied to compensate.<sup>104</sup> For instance, would a judicial finding that a party's or lawyer's incompetence, carelessness, or gross negligence that led to an unreasonable prefilng inquiry constitute litigation abuse for which fee-shifting would be an appropriate sanction and, if so, how would the activities be differentiated for purposes of determining awards that best de-

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99. See Schwarzer, *supra* note 1, at 1020.

100. As will be seen, the prescriptions are not entirely clear and some judges have exhibited difficulties with the subtleties involved.

101. This implicates again the inherent characteristics and constraints examined above. The analysis, however, differs slightly from that respecting the shift to reasonableness, for instance, by emphasizing the need for clarity and specificity rather than supplementation of a relatively clear prescription.

102. Schwarzer, *supra* note 1, at 1020.

103. *Id.* at 1024. Of course, this can be the determinative question—both in ascertaining whether fee shifting is appropriate and perhaps whether the rule has been violated. Unfortunately, even Judge Schwarzer does not, and perhaps cannot, give clear or particular guidance, especially as to abuse, that will yield very certain case-specific answers. I realize that the quotation may not be a prescription and implicates rule violations, but it affords valuable insight into abuse which Judge Schwarzer makes integral to attorney's fees sanctions.

104. See Schwarzer, *supra* note 1, at 1020, 1024. The open-ended, unclear nature of abuse, the dearth of work devoted to correlating the amount of awards and their potential deterrent effect, and considerable judicial reliance to date on actual fees as the starting, and often the ending, point of sanctions determinations support the assertions in the text.

ter? Accordingly, uncertainty over the magnitude of awards will decrease only if courts define "abuse" with greater clarity and specificity, assuming that elusive concept can be more precisely described. Even if "abuse" can be more clearly defined, uncertainty over the amount of awards will remain problematic due to the difficulties in fashioning sanctions that effectively deter abuse and, simultaneously, consider factors such as the litigants' and lawyers' resources for conducting prefiling inquiries that do not seem abusive and their financial capacity for paying sanctions.<sup>105</sup> In short, certain prescriptions that relate to sanctions will not be responsive in ways important to civil rights plaintiffs and attorneys without clarification.

## V. SUGGESTIONS FOR THE FUTURE

### A. *Should Judicial Application Be Sharply Curtailed?*

The examination above has numerous implications for the future. As to judicial application, important questions are whether the rule's enforcement should be sharply curtailed in civil rights cases and perhaps generally.<sup>106</sup> Many factors counsel in favor of severely limiting application. The authors of three substantial rule 11 studies have stated that the amendment has helped to refocus the attention of the federal bench and bar on sanctions, making the judiciary and lawyers keenly aware of their importance,<sup>107</sup> while those authors and other writers, as well as some courts, have found that the "bright line of rule 11 has been timely and initially productive."<sup>108</sup> Judge Schwarzer has observed that "rule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law," that the amendment "has accomplished its drafters' purpose of causing lawyers to 'stop [and] think' before filing," and that an awareness of the rule's requirements "certainly has deterred some frivolous, wasteful or abusive litigation."<sup>109</sup>

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105. For more suggestions on what should be examined and how it should be considered, see *infra* notes 130-138 and accompanying text.

106. The suggestions for the future apply to civil rights cases, although many also apply in other litigation or are premised on more general experience with the rule.

107. T. WILLGING, *supra* note 16, at 55-65; see Shaffer, *supra* note 22, at 2, 16, 24; Vairo, *supra* note 2, at 233.

108. The quotation is in Shaffer, *supra* note 22, at 24. *Accord* Szabo Food Servs., Inc. v. Canteen Corp., 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., dissenting); Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D. Ky. 1987); T. WILLGING, *supra* note 16, at 11-12.

109. See Schwarzer, *supra* note 1, at 1014-15. Judge Schwarzer states that many district judges agree, see *id.* at 1014, and some cases so indicate. See, e.g., Harris v. Marsh, 679 F. Supp. 1204, 1385-87 (E.D.N.C. 1987); Yancey v. Carroll County, 674 F. Supp. 572, 575 (E.D. Ky. 1987); O'Rourke v. City of Norman, 640 F. Supp. 1451, 1469 (W.D. Okla. 1986). Cf. Gaiardo v. Ethyl Corp., 835 F.2d

Thus, certain of the revision's purposes have been attained and even the primary problem that prompted the 1983 amendment, the deterrence of abuse, has been ameliorated, while it and other difficulties, such as reducing frivolous claims, that have not been solved fully, can be treated as effectively with other measures that should involve less satellite litigation, including the federal judiciary's inherent power, civil contempt, case management, and counsel's potential liability for excessive costs under 28 U.S.C. § 1927.<sup>110</sup> In short, the reasons for the rule's continued broad application, especially deterring an indeterminate amount of future litigation abuse, are less compelling than the detrimental aspects of such implementation in civil rights cases.<sup>111</sup>

These disadvantages include numerous problems addressed already as well as others. Significant difficulties are the chilling of meritorious lawsuits and the generation of unwarranted derivative litigation. The rise of these two major complications, against which the Advisory Committee expressly warned when revising rule 11, has been exacerbated by evidence indicating that the rule, whose *raison d'être* was to curb litigation abuse, is increasingly being abused. For example, Circuit Judge Weis, who currently chairs the standing Committee on Rules of Practice and Procedure and was a member when it drafted the amendment, chastised those who abuse the rule by employing it as a "tactic of intimidation and harassment [as part of] so-called 'hardball' litigation techniques, [warning] that they invite retribution from courts [dis]enchanted with such abusive conduct," and evinced concern about the "growing tendency to

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479 (3d Cir. 1987); *Szabo*, 823 F.2d at 1086 (Cudahy, J., dissenting) (circuit judges). The author of the Federal Judicial Center study found that "rule 11 has begun to achieve its goal of deterring frivolous filings." T. WILLGING, *supra* note 16, at 11. The Third Circuit Task Force observed that rule 11 "has had an impact on pre-filing conduct of a kind that the rulemakers intended, although it could not ascertain the rule's effects 'in terms of 'lessening frivolous claims and defenses' or 'costly meritless maneuvers.' " See S. BURBANK, *supra* note 2, at 75-76.

110. I realize that much of this, especially the ideas regarding abuse and its effective deterrence, is controversial. For an analysis of the debate over litigation abuse, see T. WILLGING, *supra* note 16, at 67-69. For analyses of the measures mentioned in the text and others, such as ethical requirements, see *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 870 n.3 (5th Cir. 1988); *Rule 11 Standards and Guidelines*, *supra* note 38, 121 F.R.D. at 104; Shaffer, *supra* note 22, at 16, 24; Vairo, *supra* note 2, at 233; cf. *Gaiardo*, 835 F.2d at 484 (section 1927 requires counsel's bad faith for fee shifting and is not directed to parties).

111. I do not mean to understate the significance of litigation abuse, and I recognize that district judges have different perspectives on abuse than lawyers or writers. See *supra* note 7. Given the significant disadvantages analyzed above, with all due respect, Judge Schwarzer should provide more substantiation for his assertion that abuse "remains with us and requires ongoing remedial measures." Schwarzer, *supra* note 1, at 1018. As seen immediately below, those disadvantages now seem greater than the need to deter future litigation abuse. Efforts should be made, however, to define abuse, to establish its quantity, and to determine the most effective means of deterrence.

extend the Rule beyond its text and intent [and] the noticeable increase in unjustified requests for sanctions.”<sup>112</sup> The amendment has created additional problems not enumerated above, both anticipated and unforeseen, such as multiplying conflicts among courts, lawyers, and litigants, which can reduce the likelihood of settlement.<sup>113</sup>

Therefore, the rule 11 experience is replete with ironies: the two chief difficulties its drafters envisioned apparently have materialized, while the revision whose core purposes were to limit unnecessary litigation and to prevent abuse has fostered unwarranted litigation and is itself being abused. The import of much of this—particularly unnecessary satellite litigation and declining prospects for settlement—ought not to be lost on federal judges concerned about the litigation explosion and the efficacious management of substantial caseloads. Indeed, these disadvantages and other concerns have led Judge Weis and additional federal judges to suggest that the amendment be reserved for exceptional circumstances,<sup>114</sup> while those who conducted three important rule 11 evaluations have persuasively challenged future broad enforcement and urged that the rule be deemphasized.<sup>115</sup>

Of course, Judge Schwarzer's prescriptions should ameliorate certain of these difficulties, including some considered most problematic. Moreover, an expanding number of judges has offered suggestions for implementing, or actually applied, the amendment in ways that could be

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112. See *Gaiardo*, 835 F.2d at 483-85; accord *Shaffer*, *supra* note 22, at 2, 15, 24-25. For similar, but less explicit pronouncements, see *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1066 (7th Cir. 1987); *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 456 (9th Cir. 1987); *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 118 F.R.D. 45, 50 (S.D.N.Y. 1987).

113. See, e.g., *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 564 (E.D.N.Y. 1986); *Hot Locks, Inc. v. Ooh La La, Inc.*, 107 F.R.D. 751 (S.D.N.Y. 1985); *Cavanaugh*, *supra* note 15, at 534; *Elson & Rothschild*, *supra* note 70, at 365-66; *Vairo*, *supra* note 2, at 204. Judge Schwarzer candidly acknowledges this. *Schwarzer*, *supra* note 1, at 1018, 1025. The Third Circuit Task Force found that forty percent of those responding to its attorney questionnaire believed that rule 11 had aggravated relations between attorneys but that only sixteen percent thought it had aggravated relations with judges. See *S. BURBANK*, *supra* note 2, at 85-86. *But cf.* *T. WILLGING*, *supra* note 16, at 115-20 (finding generally beneficial effects relating to settlement).

114. See *Gaiardo*, 835 F.2d at 483; accord *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988); *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988); *Szabo*, 823 F.2d at 1085-86 (Cudahy, J., dissenting); *Tabrizi v. Village of Glen Ellyn*, 684 F. Supp. 207, 209 (N.D. Ill. 1988); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479 (E.D. Pa. 1988); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D. Ky. 1987); *cf. Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (sanctions against lawyers "play a limited but necessary role").

115. See *Shaffer*, *supra* note 22, at 2, 16, 24-25; *Nelken*, *supra* note 15, at 1352-53; *Vairo*, *supra* note 2, at 233; see also *La France*, *supra* note 3; *Note*, *supra* note 28 (writers who concur).

responsive to civil rights litigants and lawyers. Quite a few courts have recommended or adopted ideas similar to Judge Schwarzer's, such as shifting their focus to the reasonableness of prefiling inquiries or limiting the situations in which they award attorney's fees,<sup>116</sup> while other courts have suggested or applied concepts like those mentioned in this paper, such as making significant to sanctions assessments numerous equitable considerations, including a violator's ability to pay.<sup>117</sup> Thus, the federal judiciary could enforce rule 11 in light of Judge Schwarzer's prescriptions so as to improve application for civil rights litigants and practitioners.<sup>118</sup> More difficult to discern is precisely what would be required, especially in terms of risks and resource commitments, to achieve implementation that would be sufficiently responsive to these parties and lawyers.

Judges would have to be sensitive to the subtle nuances of rule 11 and of civil rights litigation. For example, the federal courts would have to resolve correctly those ambiguities in Judge Schwarzer's prescriptions,<sup>119</sup> to effectuate his clear suggestions,<sup>120</sup> to exercise with exceptional care the substantial discretion they retain, and to be attentive to the numerous inherent characteristics of civil rights cases and the constraints

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116. *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1012-14 (2d Cir. 1986), *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988), and *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875 (5th Cir. 1988), are helpful examples of the shift, although perceptive decisions speak in terms of and often emphasize the merits, rather than reasonableness. *See, e.g., Gaiardo*, 835 F.2d at 485; *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987); *Eastway*, 637 F. Supp. at 565. As is true of the rule's use for case management, "this approach finds implicit support in the Advisory Committee's unfortunate reference to 'streamlin[ing]' the litigation" by lessening frivolous claims and defenses. Schwarzer, *supra* note 1, at 1018-19. Such emphasis can increase inconsistency and unpredictability and even lead to erroneous resolution in those cases in which "implausible claims are asserted, but the lawyer's prefiling inquiry could not be faulted." *Id.* at 1025. *Cf. infra* note 126 (more discussion of the merit's relevance); *infra* notes 133-34, 129-38 and accompanying text (examples of limiting fee awards).

117. For helpful discussions of this particular equitable consideration and others, such as a movant's duty to mitigate expenses incurred, see *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir. 1988); *Thomas*, 836 F.2d at 876-81; *Brown v. Federation of State Medical Bds.*, 830 F.2d 1437, 1427-39 (7th Cir. 1987); *Harris v. Marsh*, 679 F. Supp. 1204, 1390-92 (E.D.N.C. 1987); *Eastway*, 637 F. Supp. at 572-76.

118. For instance, shifting the focus to reasonableness and not awarding expenses incurred in defending against unmeritorious claims should reduce the sanctions motions filed against them and, thus, represent improvement.

119. *See supra* notes 101-105 and accompanying text (especially text following note 104).

120. Much can be lost in the translation. This is exemplified by the courts which seem to subscribe to the proposition that the reasonableness of prefiling inquiries is the proper focus for ascertaining whether the rule is violated, yet emphasize the merits in resolving the question.

upon civil rights litigants and attorneys.<sup>121</sup> Even if that type of refined judicial implementation were easier to achieve, there still would be significant dangers, such as the possibilities for error and the potential for chilling meritorious suits, while the time, effort, and resources that federal judges, lawyers, and litigants would have to devote would be considerable, eclipsing the substantial "time, energy and money [that] have been spent in defining" rule 11's scope.<sup>122</sup> Accordingly, improvements sufficient for civil rights plaintiffs and practitioners can be secured only at considerable risk and great cost. In sum, because the disadvantages of continued broad enforcement would substantially exceed its benefits in civil rights cases, future implementation should be limited severely.

There are several ways that the federal judiciary might significantly circumscribe rule 11's application. For instance, the courts could implement the suggestions of a few judges that the amendment is meant for exceptional situations.<sup>123</sup> Courts might do so by entertaining rule 11 motions at their own instigation, by granting sanctions requests only when parties or lawyer clearly have failed to perform reasonable prefiling inquiries, or by restricting attorney fee awards to instances in which there has been egregious misconduct.<sup>124</sup>

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121. Considerably more judges would have to apply the rule with considerably greater care than has been the experience to date.

122. See Shaffer, *supra* note 22, at 2; *cf. supra* note 74 (sources find satellite litigation and its costs less problematic).

123. See *supra* note 114.

124. For the suggestion as to entertaining motions, see *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987). Some courts require that claims be patently unmeritorious. See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *cf. Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988) (sanctions appropriate regarding initiation of lawsuit only if filing of complaint constituted abusive litigation or misuse of court process); *Hussain v. Carteret Savings Bank*, 704 F. Supp. 567, 569 (D.N.J. 1989) (same). For an approach, employing "clearly unreasonable zones," which is rather similar to the idea in the text, see Cavanaugh, *supra* note 15, at 536-46. The suggestions in the text are within the authority of the federal judiciary under the rule. Less clear is whether a "reckless indifference" standard can be applied to rule 11 motions, as several courts apparently have done. See, e.g., *Tabrizi v. Village of Glen Ellyn*, 684 F. Supp. 207, 209 (N.D. Ill. 1988); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479, 484 (E.D. Pa. 1988). Moreover, some have suggested that rule 11 be "put on the shelf" or be limited to "unthinkable claims" and that judges use other rules, such as 12 and 56, to dispose of frivolous litigation on the merits. See Shaffer, *supra* note 22, at 24; Note, *supra* note 28, at 642. When frivolous claims result from failure to perform reasonable prefiling inquiries, those approaches may be inconsistent with rule 11's mandatory sanctions requirement. In an attempt to limit piecemeal appeals, the Third Circuit recently adopted a supervisory rule that requires attorneys to file sanctions motions before final judgment has been entered by district courts. See *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 92 (3d Cir. 1988).

## B. *Suggestions For Continued Broad Application*

1. *Generally.* For federal judges who consider inadvisable the amendment's serious curtailment because they believe that there is substantial need to deter abuse and that it can be fulfilled most satisfactorily with the rule, I offer the following suggestions. The courts ought to implement Judge Schwarzer's prescriptions, particularly that the focus shift to the reasonableness of prefiling inquiries and that deterrence be considered the amendment's principal purpose, supplementing them with guidance of some courts and commentators and keeping in mind the ideas mentioned above, especially the inherent characteristics of civil rights suits and the constraints upon those who pursue them. Moreover, judges should always be alert to the possibility that the rule can be used to harass civil rights plaintiffs and attorneys, and when courts detect that type of abuse, they may want to sanction it.<sup>125</sup>

2. *Rule 11 Violations.* In ascertaining whether rule 11 has been contravened, courts should flexibly and pragmatically implement its reasonable prefiling inquiry requirements.<sup>126</sup> Judges ought to define broadly and flesh out the concept of reasonableness, by, for instance, considering what is reasonable under all of the relevant circumstances. The idea of reasonableness should encompass many factors, a number of which have been examined above and have been compiled by courts and writers.<sup>127</sup>

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125. These ideas are stated most explicitly in public law cases that did not involve civil rights. See *Gaiardo*, 835 F.2d at 484-85; *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 456 (9th Cir. 1987). But the recent civil rights case of *Hunt v. Jaglowski*, 665 F. Supp. 681, 685 (N.D. Ill. 1987), is nearly as explicit, while opinions such as *Szabo*, *Cabell*, *Frantz* and *Nassau-Suffolk*, leave similar impressions. Harassment also may be suggested by the high rate at which defense counsel have invoked rule 11 in civil rights cases, see *supra* notes 16-20, 75 and accompanying text, and by much anecdotal evidence of the threats to do so, especially by entities, such as the offices of the state attorneys-general.

126. It is difficult to afford guidance that will facilitate efficacious resolution of the myriad factual situations federal judges will confront, partly because it is impossible to predict the variables that will be present in specific circumstances or to be very specific about how they should be considered, for example, by valuing and balancing them. Nonetheless, numerous factors that will be relevant in most situations and a sense of how they should be applied are provided.

In determining the reasonableness of prefiling inquiries, courts first should consider what lawyers and litigants actually did before filing, to the extent that can be ascertained. Thus, judges only should rely on the merits when it is impossible to ascertain from evidence relating to the prefiling inquiries performed whether they were reasonable. For helpful ideas suggesting that a conduct rather than product approach be followed, see S. BURBANK, *supra* note 2, at 27-28, 96-97.

127. The Advisory Committee contemplated the considered weighing of relevant factors, because its Note stresses the variety of considerations that influence the reasonableness of prefiling inquiries, by expressly stating that the "standard is one of reasonableness under the circumstances" and that "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available" and numerous others. 97 F.R.D. at 198-99. The Third Circuit, in at-

Factors that will be significant in much civil rights litigation, and which could be dispositive of case-specific reasonableness determinations, are plaintiffs' resources for, and defendants' control of information important to, completing prefiling inquiries that appear reasonable.<sup>128</sup> For example, when plaintiffs have little money and defendants possess much of the data plaintiffs need, these considerations can make prefiling inquiries look unreasonable and would outweigh other considerations, such as the time available for inquiring into facts, and lead to the conclusion that rule 11's factual investigation requirement was not violated. Correspondingly, in closer cases, judges may want to assign values to all of the pertinent considerations and balance them against each other. Because many civil rights litigants and lawyers possess relatively meager resources, have comparatively limited access to significant information, and rely on novel or untested legal theories, their prefiling inquiries can seem unreasonable, so that courts should be certain that they actually have contravened the amendment's reasonableness commands before so finding.<sup>129</sup>

3. *Sanctions Determinations.* If judges determine that rule 11 has been violated, they should take into account many considerations when selecting appropriate sanctions. As general propositions, courts ought to

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tempting to ameliorate civil rights plaintiffs' difficulty in complying with rule 11, observed that the Committee has explained that the "standard is one of reasonableness under the circumstances. . . . One of the circumstances to be considered is whether the plaintiff is in a position to know or acquire the relevant factual details." *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988); *accord Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1435 (7th Cir. 1987); *Cabell v. Petty*, 810 F.2d 463, 467-68 (4th Cir. 1987) (Butzner, J., dissenting). Many of these factors appear in *supra* notes 39-44, 94-96 and accompanying text, especially inherent characteristics and constraints. Thorough compilations of factors are in *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875-76 (5th Cir. 1988); *Brown*, 830 F.2d at 1435; *Shaffer*, *supra* note 22, at 3-5, 24; *Vairo*, *supra* note 2, at 214-20.

Judges will be familiar with the reasonableness concept because of its application in contexts ranging from constitutional law to torts. Some courts do speak of the "reasonable man" and even analogize rule 11 violations to legal malpractice. *See, e.g., Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986); *Hays v. Sony Corp.*, 847 F.2d 412, 418 (7th Cir. 1988); *Brandt v. Schal Assocs. Inc.*, 121 F.R.D. 368, 378 (N.D. Ill. 1988). Although these ideas are creative, they are not mentioned in the rule or the Advisory Committee Note.

128. This and the next two sentences in the text are attempts to afford a sense of the factors likely to be most significant and how relevant ones should be applied in particular cases, especially by valuing and balancing them.

129. When courts refuse to find plaintiffs in violation, because they lack access to, or defendants control, important evidence, judges should discourage motions to dismiss and should use rule 56 to afford plaintiffs discovery and to grant summary judgment when warranted. For more discussion and examples of cases applying these ideas, see *supra* note 33 and accompanying text; *Vairo*, *supra* note 2, at 220. *See also Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988); *Boone v. Elrod*, 706 F. Supp. 636, 638 (N.D. Ill. 1989) (defendant's pursuit of summary judgment against civil rights plaintiff after learning of material factual dispute is sanctionable).

follow Judge Schwarzer's admonition that deterrence is the rule's primary purpose<sup>130</sup> while consulting numerous equitable factors.<sup>131</sup>

In addressing specifically the type of sanction that might be levied, judges should seriously consider restricting monetary sanctions, especially of attorney's fees, to violative activity that is much worse than carelessness, incompetence, or inadequate lawyering<sup>132</sup> and to circumstances in which there is little danger of chilling potentially valid claims. Courts that disagree with these suggestions ought to heed the recommendations of Judge Weis and a small but growing contingent of courts that "rule 11 sanctions should not be viewed as a general fee-shifting device"<sup>133</sup> and that successful movants are not "automatically entitled to

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130. They, like many courts, also should follow the least severe sanction concept, articulated in Judge Schwarzer's earlier article, which is so important that it appears in the specific guidance relating to the type of sanction and to the amount below. See *supra* note 82.

131. Particularly important are the potential chilling effects of sanctions, and civil rights litigants' and lawyers' limited resources for performing prefiling inquiries and for paying awards. This lack of resources means their inquiries may look less reasonable and that larger awards will have greater chilling effects. The specific guidance as to the type of sanction and amount mentions these effects because of their significance, a significance which is recognized in the Advisory Committee Note. See 97 F.R.D. at 199. In analyzing sanctions, I focus primarily on their type and amount, consulting equitable factors as to both. Other observers have differed substantively and organizationally, especially as to what factors, apart from violators' ability to pay and movants' duty to mitigate, are equitable ones, which lack of consensus is attributable principally to their characterizations and to the way that rule 11 decisions are resolved. For instance, the gravity of the offender's conduct was an equitable factor pertinent to appropriate sanctions for the *Thomas* court. See 836 F.2d at 881. Judge Schwarzer found the violator's behavior and concepts, such as a lawyer's experience and resources (inexperienced solo practitioner or well-equipped large law firm), relevant to rule violations and to appropriate sanctions in his earlier article. See Schwarzer, *supra* note 9, at 200-01; accord *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 605 (1st Cir. 1988) (rule violations); *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 573, 583 (E.D.N.Y. 1986) (sanction). A Third Circuit panel recently provided a comprehensive analysis of many equitable considerations or mitigating factors that should govern district judges' exercise of discretion both in deciding to impose monetary sanctions and in determining the type and amount of the sanction. See *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir. 1988). Perhaps all that these discrepancies, like those seen in the critical analysis above, show is that no definitive organizational scheme exists and that there is confusion over which factors are equitable ones and the determinations for which they have relevance.

132. Because it is difficult to pinpoint the applicable activity, I have defined it by negative inference. Abuse as employed by Judge Schwarzer seems to capture what I have in mind, so that if abuse can be defined more clearly, it may be appropriate. Indeed, the situations in which fees should be shifted appear substantially similar to those Judge Schwarzer suggests. See *infra* note 135 and accompanying text. For ideas similar to the suggestions in the text, see *Tabrizi v. Village of Glen Ellyn*, 684 F. Supp. 207, 209 (N.D. Ill. 1988); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479, 484 (E.D. Pa. 1988) (reckless indifference standard); *Vairo*, *supra* note 2, at 233; cf. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987) (amendment "designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence").

133. *Gaiardo*, 835 F.2d at 483; accord *Doering*, 857 F.2d at 194; *Rich Art Sign Co., Inc.* 122 F.R.D. 472, 474 (E.D. Pa. 1988); *Eastway*, 637 F. Supp. at 563-65; S. BURBANK, *supra* note 2, at 37.

an award of attorney's fees."<sup>134</sup> Correspondingly, courts should remember the Commentary's similar assertions that ascribing a "broad fee-shifting rationale to rule 11 is contrary to the American Rule" and that the amendment "does not compensate parties for the costs of unmeritorious claims," while they may want to give definition to Judge Schwarzer's suggestion that "fee-shifting [is] simply one of several methods of achieving deterrence . . . in appropriate cases" by limiting those occasions to very serious instances of misbehavior.<sup>135</sup> Courts also should levy the kind of sanctions which are the least severe necessary, keeping in mind that there are many alternatives less onerous than attorney's fees, especially non-monetary ones, such as a "warm, friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education" and a host of other imaginative possibilities limited only by the creativity of the federal judiciary.<sup>136</sup>

If judges decide to levy monetary sanctions, particularly attorney's fees, the specific amounts assessed should be the least severe to achieve what is required with large awards reserved for egregious misconduct and for situations that pose minimal risk of discouraging possibly legitimate litigation. When determining exactly what size is appropriate, courts ought to implement the suggestions of numerous judges that "reasonable" fees and expenses need not be those actually incurred and that movants have a duty to mitigate costs as well as should attempt to tailor assessments in light of considerations like the seriousness of the offense and the violator's responsibility for the damage caused.<sup>137</sup> They should

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*But see* Hays v. Sony Corp., 847 F.2d 412, 419-20 (7th Cir. 1988) ("Rule 11 is a fee-shifting statute . . .").

134. See Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); accord *Gaiardo*, 835 F.2d at 483; Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157-58 (3d Cir. 1986).

135. Schwarzer, *supra* note 1, at 1020. I believe that this definition approximates what Judge Schwarzer intended. See *supra* note 102.

136. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988). For more alternatives, see *Gaiardo*, 835 F.2d at 482; *Doering*, 857 F.2d at 194; Donaldson v. Clark, 819 F.2d 1551, 1557 n.7 (11th Cir. 1987); T. WILLING, *supra* note 16, at 125-40. For valuable ideas as to their application, including a reminder about the "sting of public criticism delivered from the bench" and the suggestion that a reprimand especially for first violations generally will suffice, see Schwarzer, *supra* note 9, at 201-02. Although fee shifting to movants has been the monetary sanction of choice, courts increasingly consider payment to the Treasury for public injuries sustained. See, e.g., Harris v. Marsh, 679 F. Supp. 1204, 1391 (E.D.N.C. 1987); Cannon v. Loyola Univ. of Chicago, 116 F.R.D. 243 (N.D. Ill. 1987).

137. See *Gaiardo* v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987); *Fahrenz v. Meadows Farm Partnership*, 850 F.2d 207, 211 (4th Cir. 1988); *Thomas*, 836 F.2d at 879; *Invst. Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 404 (6th Cir.) *cert. denied*, 108 S. Ct. 291 (1987) (reasonable need not be actual); *supra* note 117 (duty to mitigate); *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1093-94 (3d Cir. 1988) (reasonable need not be actual and duty to mitigate);

also apply other approaches that courts and writers have employed or recommended while developing new techniques.<sup>138</sup> In sum, these factors, especially the potential chilling effects of sanctions and the limited resources available to civil rights plaintiffs and practitioners for paying such awards, mean that monetary sanctions, particularly of attorney's fees, should be infrequently imposed on them, and when they are, rarely in large amounts.

### C. General Suggestions

1. *Should Rule 11 be Repealed or Amended?* Suggestions for the future that pertain less directly to judicial enforcement also deserve consideration. Significant recommendations involve the question whether rule 11 should be revised as applied to civil rights litigation. Judge Schwarzer's Commentary asserts generally that neither repeal nor additional amendment is now warranted because of the continuing need to deter abuse and because changing the rule's phraseology will not cure what he perceives are its current deficiencies.<sup>139</sup> His ideas are difficult to evaluate, because they implicate a number of issues. The resolution of some might be facilitated with additional data, while that of others, such as how efficaciously the federal judiciary will implement the Commentary's prescriptions and whether they will have the desired effects, obviously depends on information not yet available.<sup>140</sup> Most complicated are questions that cannot be answered primarily with data, because they reduce to value or political judgments, such as the central purpose of the civil justice system in a complex society, and perhaps what constitutes litigation abuse, and, if definable, how much it must decrease before repeal would be considered appropriate.<sup>141</sup>

It is clear, however, that the factors that warrant severely curtailed

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Dubisky v. Owens, 849 F.2d 1034, 1037 (7th Cir. 1988) (same); *supra* notes 47, 49, 131 and accompanying text.

138. For approaches that courts have applied, see *supra* notes 43, 110 and accompanying text. For additional criteria, see *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 564-65 (E.D.N.Y. 1986); Schwarzer, *supra* note 9, at 200-03. For considered examination of monetary sanctions, see *Thomas*, 836 F.2d at 876-81; *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1066 (7th Cir. 1987); *Donaldson*, 819 F.2d at 1556-58. Much work is needed to define abuse, if that is possible, and how to calculate awards that will deter it. Relevant factors might be violations' seriousness, their effects on parties and litigation and judicial processes, and how much offenders and other lawyers and litigants might be deterred.

139. Schwarzer, *supra* note 1, at 1018.

140. For instance, more information on unreported rule 11 activity and anecdotal evidence of chilling could clarify certain issues. See *infra* note 151 and accompanying text. See also *supra* note 9 (too early to discern what effect the Commentary will ultimately have).

141. For the view that the civil justice system's central purpose is facilitating the vindication of

judicial enforcement also argue for the rule's repeal or amendment.<sup>142</sup> Indeed, certain of those considerations, especially the rule's chilling effects, the excessive derivative litigation generated, and the availability of measures that achieve rule 11's purposes with less peripheral litigation, were so important to the co-editor of the ABA study and additional observers that they have questioned whether there is any need for future application.<sup>143</sup> Other contextually specific reasons support repeal or amendment. Either alternative may be appropriate, because rule 11 has accomplished little more than focusing attorneys' attention on extant requirements governing the behavior of lawyers<sup>144</sup> and because there has been insufficient correlation between the assessment of sanctions and the legitimate purposes of the civil litigation system, such as expediting trials or improving lawyer conduct.<sup>145</sup> Concomitantly, the rule's almost complete lack of guidance regarding what sanctions are appropriate means that additional, specific instruction in the form of amendment would be helpful, while one writer has asserted that "sanctions decisions are more likely to be made without careful weighing of the [reasonableness] factors enumerated by the advisory committee, and the rule's chilling effect will increase,"<sup>146</sup> unless rule 11's mandatory requirement is modified. Thus, many factors show that rule 11's expeditious repeal or judicious amendment would better serve civil rights litigants and lawyers and provide benefits for the civil justice system, such as reducing satellite litigation, without compromising unduly important goals of that system, particularly the deterrence of abuse.<sup>147</sup>

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important social values, see Chayes, *supra* note 40; Fiss, *supra* note 42. The questions regarding litigation abuse constitute a recurring refrain in this piece.

142. See *supra* notes 106-124 and accompanying text.

143. See, e.g., Shaffer, *supra* note 22, at 16; LaFrance, *supra* note 3, at 354.

144. Shaffer, *supra* note 22, at 16. But cf. *supra* note 109 (sources finding rule 11 has accomplished more than focusing attorneys' attention).

145. See *supra* 61-64, 72-73 and accompanying text.

146. Nelken, *supra* note 15, at 1353. Judge Schwarzer's suggestions in the Commentary and his earlier article, *supra* note 9, and the recommendations offered above at notes 130-138 and accompanying text, should improve sanctions guidance, if adopted. For more controversial revisions, see *infra* note 148 and accompanying text. The rule also may have been flawed in the amending, given its multifarious purposes, lack of clarity as to violations, and dearth of guidance on sanctions.

147. I am not saying that Judge Schwarzer is wrong. Our differences ultimately reduce to questions of emphasis. My concern is that citizens vindicate their civil rights, while his concern is deterrence of abuse. Finally, some have seriously questioned whether there was a litigation explosion or sufficient abuse to warrant treatment with this federal rule. See, e.g., Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); cf. GALANTER, *THE LIFE AND TIMES OF THE BIG SIX; OR, THE FEDERAL COURTS SINCE THE GOOD OLD DAYS* 18-20 (1988) (on file with author) (business contract litigation contrib-

The Advisory Committee, the Supreme Court, and Congress should seriously consider repeal or amendment.<sup>148</sup> Repeal is preferable for many reasons elaborated already. Attention should focus on amendment, if repeal is politically infeasible or otherwise inadvisable, because systematic analysis clearly shows a compelling need to deter future litigation abuse which can be achieved most effectively with rule 11. Promising revisions include making discretionary the decision that the amendment has been contravened, restoring subjective bad faith as the prerequisite for such violations or employing it as the standard for awarding attorney's fees, and developing specific criteria for determining appropriate sanctions.<sup>149</sup>

2. *Additional Data on Rule 11 and Civil Rights Cases.* Convincing information on rule 11 and civil rights cases supports what has been said above. It would be advantageous to have more data, however, because neither repeal nor amendment appears politically realistic in the short term and because additional information could persuade those decisionmakers who are not yet convinced.<sup>150</sup> Numerous courts and commentators have stated, and considerable anecdotal evidence suggests, that judicial implementation has been cause for concern. Nonetheless, it would be beneficial to gather, assess, and synthesize data that identify as

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utes significantly to so-called litigation explosion); Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-43 (1987) (both national data and findings on important federal district suggest that image of civil rights litigation explosion overstated and borders on myth); Eisenberg & Schwab, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government As Defendant*, 73 CORNELL L. REV. 719, 721 (1988) (study of two other districts confirms most of earlier study's major findings); Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 812-13 (1981) (minimal data support allegations of abuse, particularly in discovery); Weinstein, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 439 (1988) (so-called "discovery abuse" quite limited in real world and Eastern District of New York). In sum, it may be preferable to treat any abuse that exists with other mechanisms or even to tolerate some abuse in light of the disadvantages rule 11's application entails.

148. Of course, an efficient solution would be to create an exception for civil rights cases, although that ignores problems for other public law litigation and for the judicial and litigation processes, such as satellite litigation. For analyses of the roles of the Committee, Congress, and the Supreme Court in rule revision, see Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1057 (1987).

149. A myriad of possibilities has been mentioned. Moreover, explicit inclusion of Judge Schwarzer's prescriptions, augmented with the suggestions above, would be improvements.

150. Neither the Congress nor the Advisory Committee has evinced much interest in the rule, although the Committee has sponsored several rule 11 studies, including the very recently completed work by Willging, *supra* note 16. For critical analysis of the amendment process, see Lewis, *supra* note 148.

accurately as possible how, and with what frequency, the rule's application has adversely affected civil rights litigants and attorneys and the ways in which such problems might be rectified or ameliorated. One important, lingering question is the extent to which judicial enforcement has chilled the enthusiasm of civil rights litigants and their attorneys. Others are whether it is possible to define litigation abuse and, if so, to ascertain how much of it has occurred in civil rights cases. Although these issues may defy definitive resolution, more thorough and reliable information can be collected and analyzed, while additional research should yield greater clarity. Efforts to assemble pertinent data, including material on unreported rule 11 activity and anecdotal evidence of difficulties with the amendment's application and chilling, are contemplated for the future or have been strongly recommended.<sup>151</sup> When that work is completed, it should be possible to reach more accurate determinations about much of this and about other significant questions, such as whether the conclusions gleaned from the reported opinions are representative.<sup>152</sup>

## VI. CONCLUSION

Judge Schwarzer's recent Commentary offers valuable suggestions for more effective implementation of rule 11; however, expeditious repeal or judicious amendment would be preferable for civil rights litigants and lawyers. Judicial application to date has disadvantaged these parties and practitioners, chilling their enthusiasm. The rule itself has created significant difficulties, namely unnecessary derivative litigation. Moreover, numerous purposes that prompted rule 11's amendment have been achieved. Correspondingly, the problems which the rule was meant to address that have not been remedied completely are amenable to amelioration or can be treated as effectively with other measures. For these rea-

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151. A study planned by the Center for Constitutional Rights was suspended with the January, 1988 issuance of *Thomas* and has not resumed, although the Center is now seriously considering the possibility of conducting a "full field review." Conversation with Professor George Cochran, University of Mississippi School of Law (April 4, 1989). The Third Circuit Task Force has warned of the dangers inherent in relying on reported opinions, of assessing national information when application may vary from district to district or of analyzing for a particular time period. It has urged that additional empirical data like that those collected be assembled and analyzed for other geographic areas and for longer time periods. See S. BURBANK, *supra* note 2, at 3-6, 59, 96; cf. T. WILLGING, *supra* note 16, at 168 (courts and policymakers must rely on systematically collected and documented anecdotal evidence for additional testing of chilling-effect hypothesis).

152. For helpful examination of some of the problems entailed in gathering and analyzing empirical data, see Marcus, *supra* note 40, at 686-91. For reflections on, and suggestions regarding, the collection of such information by one entity which recently did so, see S. BURBANK, *supra* note 2, at 3-6, 44-45, 55-59.

sons and because neither the Supreme Court nor Congress will repeal or amend rule 11 in the near future, the federal judiciary should severely circumscribe its enforcement.

For members of the federal bench who believe that this approach is inadvisable, as additional protection against abuse is needed and rule 11 is the best antidote, the Commentary affords helpful guidance. Those judges should carefully apply the amendment in civil rights cases by following Judge Schwarzer's prescriptions while augmenting and clarifying his recommendations with certain suggestions of their colleagues and of commentators and with the ideas offered above. If these concepts are implemented efficaciously, it may be possible at once to reduce the quantity of rule 11 litigation, to protect more effectively the civil litigation and judicial processes, and to improve application for civil rights litigants and lawyers. Should future enforcement adversely affect those parties and attorneys, rule 11 must be repealed or amended immediately.