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Civil Rights Conundrum

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CIVIL RIGHTS CONUNDRUM

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PROLOGUE: ROBESON COUNTY, NORTH CAROLINA

The Native Americans and African Americans comprising nearly two-thirds of the residents in Robeson County, North Carolina have experienced racism for all of their lives.¹ Interstate 95, a major route for drug traffickers, intersects this poor rural county. According to court documents, many residents believe that some local law enforcement officials participate in the substantial drug trade there.²

William Webb, a former Assistant United States Attorney, re-

* Professor of Law, University of Montana. I wish to thank Peggy Hesse, Sally Johnson, and Peggy Sanner for valuable suggestions, Cecelia Palmer and Beverly Stevenson for processing this piece, and the Harris Trust for generous, continuing support. Any errors that remain are mine.

¹ Petition for a Writ of Certiorari on Behalf of Lewis Pitts at 2, *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991) (No. 90-807) [hereinafter Pitts Petition].

² See Pitts Petition, *supra* note 1, at 2-3 (discussing "general climate of fear" among Robeson residents due to drug trafficking and noting law enforcement officials' involvement in drug trade).

cently led a joint investigation by the United States Attorney for the Eastern District of North Carolina and the North Carolina State Bureau of Investigation (SBI) into cocaine trafficking in eastern North Carolina.³ In February 1987, Mr. Webb informed the *Raleigh News and Observer* that Robeson County was "one of the largest areas for cocaine sales I've seen."⁴ One year later, Webb told the Raleigh newspaper that there had been no change: "It's true—Robeson County is awash in cocaine."⁵

On February 1, 1988, Eddie Hatcher and Timothy Jacobs, two members of the Tuscarora Tribe, staged an armed takeover in the offices of *The Robesonian*, a newspaper published in Robeson County.⁶ Hatcher and Jacobs held twenty hostages for ten hours, in order, they said, to protest and to publicize their previously ignored charges of widespread corruption and criminal conduct in local government. This alleged government wrongdoing particularly threatened the well-being of Native Americans and African Americans living in Robeson County, because their lack of economic resources and of political power makes them especially vulnerable to the improper exercise of governmental authority.⁷

The two men later specifically asserted that they intended the takeover to serve as a forum for charging Robeson County Sheriff Hubert Stone and the local District Attorney with corruption and official misbehavior.⁸ Hatcher and Jacobs said that they also acted out of concern for their personal safety and that of a Native American inmate in the county jail who had given them information that implicated the Sheriff's Department in activities involving il-

³ See Memorandum of Appellant Barry Nakell Responding More Completely to Questions at Oral Argument at 4 n.3, *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) (No. 89-2815), cert. denied, 111 S. Ct. 1607 (1991) [hereinafter Memorandum of Nakell].

⁴ Lee Freeland Hancock, *Cocaine Trade Rich in Robeson, Officials Say*, RALEIGH NEWS AND OBSERVER, Feb. 9, 1987, at 1A, 9A.

⁵ Joe Dew & Jane Ruffin, *Drug Money a Powerful Lure in Robeson*, RALEIGH NEWS AND OBSERVER, Feb. 14, 1988, at 1A.

⁶ *In re Kunstler*, 914 F.2d 505, 510 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991); Petition for a Writ of Certiorari on Behalf of William Kunstler at 1, *Kunstler* (No. 90-802) [hereinafter Kunstler Petition]; Pitts Petition, *supra* note 1, at 3, 7.

⁷ *Kunstler*, 914 F.2d at 510; Pitts Petition, *supra* note 1, at 3-5; Memorandum of Nakell, *supra* note 3, at 3-5 & n.3; see, e.g., *infra* text accompanying notes 9-10 (providing examples of improper governmental behavior toward these minorities).

⁸ *Kunstler*, 914 F.2d at 510; Pitts Petition, *supra* note 1, at 3-4; Kunstler Petition, *supra* note 6, at 1; Petition for a Writ of Certiorari on Behalf of Barry Nakell at 1, *Kunstler* (No. 90-1094) [hereinafter Nakell Petition].

licit drugs.⁹ Hatcher and Jacobs explained that they sought to encourage North Carolina Governor James Martin to investigate these alleged improprieties, including the Sheriff's possible participation in the illegal drug trade and his responsibility for the death of an African American inmate who had died in the county jail while in the Sheriff's custody.¹⁰

The episode ended peacefully when the two men "surrendered to federal authorities in exchange for a promise that a Governor's Task Force would investigate their complaints" about the offices of the District Attorney and the Sheriff and the SBI local and district offices.¹¹ Crucial to the hostage negotiations was the opportunity that Hatcher and Jacobs had to surrender to federal, not state or county, officers because the two men feared the county officials who had been the focus of their charges.¹² Hatcher and Jacobs believed that there was an agreement between the Governor, the North Carolina Attorney General, the United States Attorney, and the Sheriff that federal, rather than state, authorities would prosecute the two men.¹³

The armed takeover of the newspaper office in February 1988 triggered many developments, which have not yet run their course. This brief description of that event, however, narrates this story nearer its conclusion than its beginning. The tale actually has its origins in developments that began in the mid-1970s. Those developments led to changes to Federal Rule of Civil Procedure 11 prescribing the imposition of sanctions against litigants and lawyers who fail to conduct reasonable legal and factual inquiries before

⁹ Pitts Petition, *supra* note 1, at 3-5; Memorandum of Nakell, *supra* note 3, at 5.

¹⁰ Pitts Petition, *supra* note 1, at 3-4; Memorandum of Nakell, *supra* note 3, at 4 n.3; Nakell Petition, *supra* note 8, at 1.

¹¹ *Kunstler*, 914 F.2d at 510-11; Consolidated Brief in Opposition to Petition for Writs of Certiorari on Behalf of William Kunstler, Barry Nakell and Lewis Pitts at 3, *Kunstler* [hereinafter Consolidated Brief]; Pitts Petition, *supra* note 1, at 3; *Kunstler Petition*, *supra* note 6, at 1; Nakell Petition, *supra* note 8, at 1.

¹² Pitts Petition, *supra* note 1, at 3; *Kunstler Petition*, *supra* note 6, at 1-2; Memorandum of Nakell, *supra* note 3, at 5-6.

¹³ *Kunstler Petition*, *supra* note 6, at 2; *see also* Nakell Petition, *supra* note 8, at 6-7 (noting petitioners' conclusion that prosecution was brought in "bad faith"). *But see* Consolidated Brief, *supra* note 11, at 3 (noting federal prosecutor's lack of knowledge about "no state prosecution" agreement). The Governor arranged for federal, rather than state, prosecution, but he did not coordinate that arrangement with the Attorney General or the United States Attorney. Letter from Barry Nakell, counsel for plaintiff Hatcher, to Carl Tobias (June 18, 1992) (on file with author).

filing suit or who pursue litigation for improper purposes.¹⁴ Hatcher and Jacobs, and especially their attorneys, became very familiar with the 1983 amendment of Rule 11.

I. THE LITIGATION EXPLOSION AND AMENDMENT OF RULE 11

A. THE LITIGATION EXPLOSION

In the mid-1970s, the federal judiciary, led by Chief Justice Warren Burger, began to perceive that there was a litigation explosion in the federal courts.¹⁵ Many judges and commentators claimed that the number of federal civil lawsuits was increasing substantially and that too many of these cases were meritless.¹⁶ Some observers argued that specific kinds of litigation, particularly civil rights cases, contributed significantly to expanding caseloads and that a disproportionate number of the lawsuits lacked validity.¹⁷ Numerous judges and writers criticized the 1938 Federal Rules of Civil Procedure, which permitted flexible pleading and open-ended discovery while according litigants and attorneys substantial control over cases.¹⁸ Some of these judges and commentators contended that the Rules allowed parties and lawyers to abuse

¹⁴ See *infra* notes 15-23 and accompanying text (discussing background and content of Rule 11 amendment).

¹⁵ See, e.g., Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975) (discussing concerns over potential for vexatious litigation); Warren E. Burger, *Agenda for 2000 A.D.—A Need For Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23 (A. Leo Levin & Russell R. Wheeler eds., 1979) (discussing litigation explosion).

¹⁶ See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (expressing concern over "heavy litigation burden" of civil suits on federal courts); Thomas B. Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 160 (1987) (concluding that civil filings in federal courts doubled between 1976 and 1986). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing trend toward greater judicial involvement in pretrial aspects of cases to expedite increased caseload).

¹⁷ See, e.g., *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976) (citing *Negrich v. Hahn*, 379 F.2d 213 (3d Cir. 1967), for proposition that civil rights cases are disproportionately frivolous). *But see id.* at 927 (Gibbons, J., dissenting) (stating that civil rights cases are not disproportionately frivolous); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-43 (1987) (finding that image of litigation explosion in civil rights area is overstated).

¹⁸ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-43 (1986) (chronicling problems caused by open-ended pleading under 1938 Federal Rules); Arthur R. Miller, *The Adversary System: Dinosaurs or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984) (arguing that burden of litigation on courts is caused by inefficient pretrial procedures).

the process of litigation by using procedural devices for tactical benefit. For instance, litigants and lawyers allegedly employed the threat of protracted discovery or litigation to extract settlements from their opponents.

B. AMENDED RULE 11

Many of these ideas were controversial during the mid-1970s, and a number remain so today.¹⁹ It is nearly impossible, for example, to define, much less to quantify, litigation abuse. Judges and writers encounter similar difficulties identifying what would constitute a litigation explosion and ascertaining whether courts actually have experienced such a phenomenon. Despite these problems and a dearth of relevant data, the Advisory Committee on the Civil Rules and the Supreme Court considered and then proposed major changes in Federal Rules 11, 16, and 26 during the early 1980s.²⁰ Because Congress did not oppose the Court's recommendations, the revised provisions became effective in August 1983.²¹

The drafters of the amendments intended to transform the nature of federal civil lawsuits.²² The revisions assigned litigants and

¹⁹ See Tobias, *supra* note 15, at 288-89 (citing pertinent literature and discussing efforts to resolve some of controversy); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFF. L. REV.* 485, 522-23 (1988-89) (same). Compare Miller, *supra* note 18 (presenting case for existence of litigation explosion) with Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 *WIS. L. REV.* 921 (challenging idea that there has been litigation explosion).

²⁰ See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 *U. PA. L. REV.* 1925, 1927-28 (1989) (noting Advisory Committee's lack of data concerning application of Rule 11); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 *U. PA. L. REV.* 2197, 2198-202 (1989) (same). The Advisory Committee is comprised of judges, law professors, and practicing attorneys. Congress has charged the Committee with responsibility for studying the Rules and developing proposals for change as indicated. See 28 *U.S.C.A.* §§ 2071-2074 (West 1982 & Supp. 1991). See generally Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 *MICH. L. REV.* 1507, 1509-11 (1987) (surveying distribution of responsibility for rulemaking shared between Congress and Supreme Court).

²¹ See Order Amending the Federal Rules of Civil Procedure, 461 *U.S.* 1097 (1983) (amending, *inter alia*, Federal Rules 11, 16, and 26). See generally ARTHUR R. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (Federal Judicial Center 1984) (discussing background and objectives of amendments).

²² See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 *F.2d* 1007, 1011-13 (1st Cir. 1988) (discussing effects drafters intended 1983 amendments to have on pretrial phase of litigation); MILLER, *supra* note 21, at 9-10 (discussing "themes," or goals, of various amendments); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 *A.B.A. J.*

attorneys important, novel responsibilities, requiring, for instance, that they conduct reasonable inquiries before filing pleadings or certain discovery requests. The changes also enhanced trial courts' discretion and their control over litigation, especially during its pretrial phase, allowing judges, for example, to set the pace of discovery. Amended Rule 11 required judges to sanction parties or lawyers who do not perform reasonable inquiries before they submit papers or who tender them for improper purposes.²³

C. JUDICIAL APPLICATION OF THE AMENDED RULE

From the time that revised Rule 11 became effective in August 1983 until 1988, the federal judiciary applied the Rule's provisions in ways that disadvantaged many civil rights plaintiffs and their attorneys.²⁴ Rule 11 sanctions were sought from, and granted against, these plaintiffs more frequently than any other type of federal civil litigant.²⁵ Many courts vigorously enforced the Rule's prefiling inquiry requirements against civil rights plaintiffs,²⁶ and

1648, 1650-52 (1981) (criticizing proposal that became 1983 amendment as substantial departure from original Rules).

²³ 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, and that it is not interposed for any improper purpose 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, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

²⁴ Carl Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 *How. L.J.* 161, 163 (1990); Tobias, *supra* note 19, at 490-507; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 *F.R.D.* 189 (1988); cf. Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 *N.C. L. REV.* 1023, 1052-61 (1989) (providing positive view of Rule 11's efficacy).

²⁵ See Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L.J.* 1313, 1327, 1340 (1986) (noting disproportionate number of civil rights cases in which Rule 11 sanctions are applied); Vairo, *supra* note 24, at 200-01 (same).

²⁶ See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080-85 (7th Cir. 1987) (remanding case for more "serious" inquiry into Rule 11 violations), *cert. dismissed*,

some judges imposed onerous sanctions on plaintiffs who contravened the provision.²⁷ A significant number of courts inconsistently applied Rule 11 to similar factual circumstances or inconsistently interpreted the provision's phraseology, and there was much expensive satellite litigation principally involving the Rule's meaning.²⁸ This implementation disadvantaged, and perhaps disproportionately affected, civil rights plaintiffs and their counsel. Many civil rights litigants and practitioners have limited resources, a consideration that can make them risk-averse.²⁹ These developments discouraged the parties and attorneys.³⁰

In early 1988, around the time when Eddie Hatcher and Timothy Jacobs occupied *The Robesonian* newspaper offices, for-

485 U.S. 901 (1988); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194 (7th Cir. 1985) (upholding imposition of sanctions for inadequate prefiling inquiry although important facts apparently were available to plaintiff only upon discovery).

²⁷ See, e.g., *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) (imposing more than \$1 million in sanctions), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992); *Harris v. Marsh*, 679 F. Supp. 1204, 1384-93 (E.D.N.C. 1987) (imposing \$84,000 sanction), *vacated in part on reconsideration*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff'd in part and rev'd in part sub nom.* *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

²⁸ See, e.g., *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200 (7th Cir. 1990) (noting division among courts and writers over whether Rule 11 imposes "continuing duty" on attorneys); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir.) (showing district and circuit judges retained three different views of appropriate amount of sanctions even after issuing five opinions), *cert. denied*, 484 U.S. 918 (1987); see *Burbank*, *supra* note 20, at 1930 ("[T]here is a conflict between or among circuits on practically every important question of interpretation or policy under the Rule . . ."); *Tobias*, *supra* note 19, at 514 (recognizing problem of satellite litigation, litigation unrelated to merits of dispute).

²⁹ See *Tobias*, *supra* note 19, at 495-98 (describing heightened risk of sanctions placed on civil rights practitioners and litigants and noting that lack of resources makes it difficult to overcome intrinsic problems in meeting Rule 11 requirements). See generally *Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 923-35 (1985) (discussing litigation costs and incentives in citizen suits for environmental regulation and resource deficiencies of plaintiffs); *John L. 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) (discussing costs and incentives to litigate in class and derivative actions).

³⁰ See *Tobias*, *supra* note 19, at 503-06 (noting evidence of "chilling effects" of Rule 11 on civil rights litigation); *Tobias*, *supra* note 24, at 169-70 (same). These contentions are, however, controversial. See *Advisory Committee on the Civil Rules of the Judicial Conference of the United States, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 *F.R.D.* 344, 345 (1990) [hereinafter *Call for Comments*] (seeking opinions of members of bar to discuss possible "chilling effect" of sanctions because controversial).

mal judicial application of Rule 11 in civil rights cases began to improve.³¹ A substantial number of appellate and district court judges enforced the provision in ways that were more responsive to the needs of civil rights plaintiffs and lawyers.³²

The national developments between August 1983 and early 1988 were similar to those in the Fourth Circuit, although that appellate court evinced greater concern for civil rights plaintiffs in enunciating a Rule 11 jurisprudence. The Fourth Circuit issued considerably fewer Rule 11 opinions than other appellate courts, such as the Second, Seventh, and Ninth Circuits.³³ Those circuits are responsible for reviewing appeals from district courts that have experienced intensive Rule 11 activity, such as the Southern District of New York, the Northern District of Illinois, and the Northern District of California.³⁴ By contrast, no judges who are members of the Fourth Circuit showed the type of enthusiasm for the Rule exhibited by several Seventh Circuit judges, who proclaimed their intention to enforce Rule 11 to the hilt.³⁵

The Fourth Circuit expressed particular concern about the imposition of large sanctions. For example, in one civil rights case, a panel of the court held that parties who win Rule 11 motions are

³¹ See Tobias, *supra* note 24, at 166-71 (discussing judicial application of Rule 11 since mid-1988); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 110-22 (1991) (discussing improvements in judicial use of Rule 11).

³² See, e.g., *Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988) (reversing imposition of sanctions and recognizing chilling effect on civil rights cases); *Thomas v. Capital Sec. Servs.*, 836 F.2d 866 (5th Cir. 1988) (providing guidelines for imposing Rule 11 sanctions and recognizing possibility of chilling effect); see *infra* notes 122-140 and accompanying text (discussing judicial development of Rule 11 application between 1988 and 1990). See generally Tobias, *supra* note 24, at 166-71; Tobias *supra* note 31, at 110-22 (noting recent judicial concern about imposing sanctions in civil rights cases).

³³ A LEXIS search revealed that the Fourth Circuit issued approximately 30 Rule 11 opinions between August 1983 and December 31, 1987. In contrast, the Seventh Circuit issued as many as 70 opinions in one year during that period.

³⁴ See Vairo, *supra* note 24, at 200 (stating that between August 1983 and December 15, 1987, nearly one-third of reported cases arose out of districts including New York City and Chicago); Nelken, *supra* note 25, at 1326-28 (stating that "one-half of the Rule 11 opinions in the first two years came from [New York and Chicago]"); cf. FEDERAL JUDICIAL CTR., FINAL REPORT TO THE ADVISORY COMM. ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES § 1D, at 1-2 (1991) [hereinafter FJC REPORT] (noting that between 1984 and 1989, district courts in Northern District of Illinois and Southern District of New York issued 38% of reported opinions).

³⁵ *Dreis & Krump Mfg. v. International Ass'n of Machinists & Aerospace Workers*, Dist. No. 8, 802 F.2d 247, 255 (7th Cir. 1986); accord *Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988).

not "automatically entitled" to attorney's fees and that trial judges should choose the "least severe" sanction that serves the Rule's purpose.³⁶ Another Fourth Circuit panel observed that in the Rule 11 context reasonable attorney's fees need not be those actually incurred.³⁷ Few district judges in the Fourth Circuit applied the provision's reasonable prefiling inquiry requirement vigorously against civil rights plaintiffs. This Rule 11 jurisprudence, especially the relative infrequency with which sanctions motions are filed, may reflect the gentility prevalent in the region and in the local legal culture.³⁸

II. ROBESON COUNTY REVISITED

A. FEDERAL CRIMINAL PROSECUTION

Soon after Hatcher and Jacobs surrendered on February 1, 1988, the federal grand jury for the Eastern District of North Carolina returned indictments, which included weapons and hostage-taking charges, against the two men.³⁹ The Robeson County District Attorney, Joe Freeman Britt, then dismissed state kidnapping charges against Hatcher and Jacobs, apparently because the federal authorities had preempted those charges.⁴⁰

In September 1988, the three-week criminal trial of Hatcher and Jacobs in federal court began. On October 14, 1988, a federal jury acquitted the two men of all federal criminal charges involving the takeover.⁴¹ The defendants claimed that their need for self-protection and for a forum in which to expose corruption in local government justified the takeover. William Kunstler, a nationally recog-

³⁶ *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). The panel did, however, find that there was a Rule 11 violation, admonishing the district judge to impose a sanction that would "serve the essential goal of education and deterrence underlying Rule 11." *Id.* at 467.

³⁷ *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 211 (4th Cir. 1988).

³⁸ For instance, judges of the Fourth Circuit always shake the hands of lawyers at the conclusion of oral argument. The absence of any large cities, such as New York, where there typically is more litigation abuse and members of the bar are relatively unlikely to know one another, may afford a partial explanation for the Rule 11 jurisprudence. See generally Lawrence C. Marshall, et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943 (1992) (discussing federal court legal culture); Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429 (1992) (same).

³⁹ *In re Kunstler*, 914 F.2d 505, 511 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991); Pitts Petition, *supra* note 1, at 4.

⁴⁰ Kunstler Petition, *supra* note 6, at 2.

⁴¹ Pitts Petition, *supra* note 1, at 4.

nized civil rights advocate, and Barry Nakell, a professor at the University of North Carolina School of Law, represented Hatcher.⁴² Jacobs's attorney was Lewis Pitts, Director of the Christic Institute South, a public interest law firm in Carrboro, North Carolina.⁴³ Hatcher and Jacobs presented a joint defense, although the lawyers represented them separately.⁴⁴

The *Charlotte Observer* published an editorial following the acquittal that stated:

Obviously the allegations that Mr. Hatcher and Mr. Jacobs made about conditions in their county were not only credible, but persuasive enough to convince the jury that they acted without criminal intent And jurors reached that conclusion without some of the most damaging testimony about the criminal justice system [by] Maurice Geiger, a lawyer and co-director of the Rural Justice Center He said there were pervasive local assertions that law enforcement officers are involved in drug dealing There are simply too many rumors and assertions of corruption and injustice there for state and federal officials to ignore.⁴⁵

B. ROBESON COUNTY AFTER ACQUITTAL

Eddie Hatcher returned to Robeson County after his acquittal and, according to court papers, participated actively in political efforts to prevent discrimination against Native Americans and African Americans, to expose the alleged official misconduct in the county, and to promote constructive change.⁴⁶ Hatcher and the Robeson Defense Committee, an organization formed to protect and promote the interests of Native Americans and African Americans, sponsored public meetings and began a campaign to remove from office both Sheriff Hubert Stone and his son, Deputy Sheriff

⁴² *Id.*

⁴³ *Id.*; Consolidated Brief, *supra* note 11, at 3-4.

⁴⁴ Pitts Petition, *supra* note 1, at 4.

⁴⁵ *Verdict Indicts Robeson-Shocking Decision Challenges Gov. Martin, Other Officials*, CHARLOTTE OBSERVER, Oct. 17, 1988, at A17, reprinted in Memorandum of Nakell, *supra* note 3, at 4-5 n.3.

⁴⁶ Pitts Petition, *supra* note 1, at 4-5; Kunstler Petition, *supra* note 6, at 2; accord Consolidated Brief, *supra* note 11, at 4.

Kevin Stone.⁴⁷

The petition drive to oust the Sheriff initially enjoyed considerable success.⁴⁸ According to some sources, certain officials of the SBI, the Sheriff's office, and the District Attorney's office began to speak publicly and behave in ways that interfered with the campaign, intimidated its potential supporters, and suppressed opposing political discussion.⁴⁹ In November 1988, newspaper accounts reported that the SBI and the District Attorney had revived and broadened their investigation into the takeover. This new investigation included possible conspiracy charges against persons other than Hatcher and Jacobs who may have been involved.⁵⁰ SBI agents questioned Native Americans, African Americans, and others connected with the Robeson Defense Committee about their political activities and those of attorney Bob Warren and sought membership lists for the Tuscarora Tribe.⁵¹ The Sheriff's Department allegedly pressured public school officials to prevent the Committee from using educational facilities for meetings.⁵²

Hatcher and other citizens of the county informed Lewis Pitts and Barry Nakell that these activities were intimidating residents. The two lawyers claimed that they sought confirmation of the accounts in conversations with Robeson County public school officials, a tribal chief, and a security officer at a local state college.⁵³ In November and December, Nakell wrote two letters to the North Carolina Attorney General detailing the behavior of the SBI, the District Attorney, and the Sheriff, asking the Attorney General to

⁴⁷ Pitts Petition, *supra* note 1, at 5; Kunstler Petition, *supra* note 6, at 2; Nakell Petition, *supra* note 8, at 1-2.

⁴⁸ Pitts Petition, *supra* note 1, at 5.

⁴⁹ *In re Kunstler*, 914 F.2d 505, 511 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); Pitts Petition, *supra* note 1, at 5-6; Kunstler Petition, *supra* note 6, at 2; Nakell Petition, *supra* note 8, at 1-3.

⁵⁰ Pitts Petition, *supra* note 1, at 6; Kunstler Petition, *supra* note 6, at 2; *accord* Consolidated Brief, *supra* note 11, at 5. "In fact, this 'investigation' appeared to be a sham as the possibility of conspiracy had already been thoroughly investigated and discarded as part of the Federal prosecution." Pitts Petition, *supra* note 1, at 6-7. Warren was co-counsel with Lewis Pitts in the federal trial.

⁵¹ Pitts Petition, *supra* note 1, at 7; Nakell Petition, *supra* note 8, at 2-3.

⁵² Pitts Petition, *supra* note 1, at 7. This exclusion was contrary to school policy. *Id.* *But see* Consolidated Brief, *supra* note 11, at 6 (mentioning nothing about exclusion but explaining that sheriff's department was not responsible for providing security for meetings at school).

⁵³ Pitts Petition, *supra* note 1, at 7-8.

investigate and respond.⁵⁴ The Attorney General rejected these requests and claimed that the SBI was not participating in any abuse of process.⁵⁵

C. STATE PROSECUTION

After the North Carolina Attorney General rejected Nakell's requests, the District Attorney for Robeson County announced that he intended to call a grand jury to bring the previously suspended state charges against Hatcher and Jacobs.⁵⁶ Their lawyers, Nakell and Pitts, informed the District Attorney and the Governor's counsel that state prosecution would contravene the agreement, reached in ending the takeover, which provided only for federal criminal prosecution.⁵⁷ Nonetheless, on December 6, 1988, a Robeson County grand jury returned indictments against Hatcher and Jacobs for kidnapping.⁵⁸ Local authorities arrested Hatcher and released him on bond. Hatcher then fled to California, where state authorities held him in custody pending extradition. Jacobs was arrested in New York and unsuccessfully opposed extradition.⁵⁹

Later in December, agents of the SBI and of the District Attorney allegedly approached Jacobs's family without notifying Lewis Pitts, his attorney.⁶⁰ Court papers state that the agents suggested that Jacobs dismiss Pitts as his lawyer, "return voluntarily to Robeson County, testify against Hatcher, and implicate others" involved in the alleged conspiracy to take over *The Robesonian*.⁶¹ This interference troubled Jacobs, who was only twenty years old at the time, and disrupted his relationship with counsel and the joint defense with Hatcher.⁶²

Before and after the indictment, Pitts and Nakell claim that they made numerous attempts to convince the Attorney General

⁵⁴ *Id.* at 8; accord *In re Kunstler*, 914 F.2d 505, 511 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991); Nakell Petition, *supra* note 8, at 3-5.

⁵⁵ Kunstler Petition, *supra* note 6, at 2.

⁵⁶ *Id.*; see also Nakell Petition, *supra* note 8, at 5.

⁵⁷ Kunstler Petition, *supra* note 6, at 2; see also Nakell Petition, *supra* note 8, at 4-5.

⁵⁸ Kunstler, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 9; Kunstler Petition, *supra* note 6, at 2; accord Consolidated Brief, *supra* note 11, at 6.

⁵⁹ Nakell Petition, *supra* note 8, at 5; accord Kunstler, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 9.

⁶⁰ Pitts Petition, *supra* note 1, at 9-10; Nakell Petition, *supra* note 8, at 5-6.

⁶¹ Pitts Petition, *supra* note 1, at 10.

⁶² *Id.*

that the SBI and the District Attorney were intimidating residents of the county, thus restricting their exercise of First Amendment rights.⁶³ These persistent efforts proved unsuccessful, and a Deputy Attorney General informed Nakell in December to expect no additional help from that office, because the Director of the SBI had "closed the door."⁶⁴

III. THE CIVIL RIGHTS CASE

A. FILING AND PURSUIT

Nakell and Pitts concluded that they should seek injunctive relief to protect the Sixth Amendment rights to counsel of Hatcher and Jacobs and the First Amendment rights of the two men and of other Robeson County residents.⁶⁵ In January 1989, the attorneys researched relevant legal issues and conducted an additional factual investigation. They then circulated draft papers to numerous lawyers, including one who had expertise in litigation involving Section 1983 of Title 42 of the United States Code, for their advice.⁶⁶ Nakell and Pitts briefly refrained from bringing suit, however, in an attempt to explore Jacobs's opportunities for a favorable plea bargain.⁶⁷

On January 31, 1989, the eve of the first anniversary of *The Robesonian* takeover, however, Nakell filed the civil rights complaint in the Eastern District of North Carolina, and Pitts held a press conference announcing the litigation.⁶⁸ Nakell, Kunstler, and Pitts filed an amended complaint on March 16, 1989.⁶⁹ The plaintiffs were Hatcher, Jacobs, the Robeson Defense Committee, and several Native-American and African-American residents of Robe-

⁶³ Kunstler Petition, *supra* note 6, at 2; *accord* Kunstler, 914 F.2d at 511; Nakell Petition, *supra* note 8, at 4-6; *see also supra* text accompanying note 54 (describing attorneys' efforts).

⁶⁴ Pitts Petition, *supra* note 1, at 11; *accord* Nakell Petition, *supra* note 8, at 4-6.

⁶⁵ Pitts Petition, *supra* note 1, at 12; *accord* Kunstler, 914 F.2d at 511; Nakell Petition, *supra* note 8, at 6-7.

⁶⁶ Pitts Petition, *supra* note 1, at 12; Nakell Petition, *supra* note 8, at 7.

⁶⁷ Kunstler, 914 F.2d at 511; Nakell Petition, *supra* note 8, at 7-8.

⁶⁸ "The Court of Appeals opinion erroneously said that Petitioner Nakell held the press conference." Nakell Petition, *supra* note 8, at 8 n.5. The district court had not attributed to Nakell any comments to the press. Robeson Defense Comm. v. Britt, 132 F.R.D. 650, 654-55 (E.D.N.C. 1989), *aff'd in part and vacated in part sub nom. In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991). *Contra* Kunstler, 914 F.2d at 511.

⁶⁹ Kunstler, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 12.

son County who were actively involved in the Committee.⁷⁰ The defendants included the Governor, the Robeson County District Attorney and Sheriff, various members of their staffs, and numerous John Doe defendants.⁷¹

The complaint, filed pursuant to section 1983, alleged that the defendants had violated the First, Fifth, Sixth, and Fourteenth Amendments by participating in a campaign of intimidation and harassment to suppress political dissent.⁷² Plaintiffs sought to enjoin interference with the relationship between Jacobs and his attorney, harassment of participants in the campaign to remove the Sheriff, and the state prosecution of Hatcher and Jacobs, including the extradition of Jacobs.⁷³

The plaintiffs immediately moved for expedited discovery; however, the district judge stayed all discovery when the State requested a protective order alleging that the plaintiffs improperly sought this information to use in the pending criminal proceeding.⁷⁴ Plaintiffs submitted papers in opposition to the State's motion, but the trial court had not yet ruled on discovery when it granted the plaintiffs' motion to dismiss the case.⁷⁵

B. DISMISSAL

Many developments led Kunstler, Nakell, and Pitts to reconsider their pursuit of the civil rights case.⁷⁶ The attorneys said they believed that the government's approaches to Jacobs through his family undermined the relationship between Jacobs and Pitts and between the two defendants.⁷⁷ Jacobs, having unsuccessfully opposed extradition, decided to return to Robeson County in late

⁷⁰ *Kunstler*, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 12-13. Pitts represented Jacobs and his mother; Kunstler and Nakell represented the remaining plaintiffs. Pitts Petition, *supra* note 1, at 13.

⁷¹ *Kunstler*, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 13. The plaintiffs sued the Governor in his official capacity and all other defendants in their official and individual capacities. *Kunstler*, 914 F.2d at 511.

⁷² *Kunstler*, 914 F.2d at 511; Kunstler Petition, *supra* note 6, at 3.

⁷³ *Kunstler*, 914 F.2d at 511; Pitts Petition, *supra* note 1, at 14.

⁷⁴ *Kunstler*, 914 F.2d at 511-12; Kunstler Petition, *supra* note 6, at 3; Pitts Petition, *supra* note 1, at 14. The stay stalled the case and left the plaintiffs unable to advance it.

⁷⁵ *Kunstler*, 914 F.2d at 512; Pitts Petition, *supra* note 1, at 14.

⁷⁶ These circumstances are fully described in Pitts Petition, *supra* note 1, at 14-16; Kunstler Petition, *supra* note 6, at 4.

⁷⁷ Pitts Petition, *supra* note 1, at 14-15.

March 1989, secured local appointed counsel, and agreed to an independent plea bargain in April.⁷⁸ Moreover, the attorneys thought that the tactics of the SBI and the Sheriff's office had succeeded in eroding the momentum of the petition drive to remove the Sheriff, and the SBI apparently had ceased its conspiracy investigation of other Robeson County residents.⁷⁹

Several factors prompted the three attorneys to withdraw the litigation. Kunstler, Nakell, and Pitts believed that certain important claims had been mooted; that those which remained could be vindicated in Hatcher's criminal prosecution, the defense of which should be paramount; that the case was not moving because discovery had been blocked; and that pursuit of the damage claims alone was not worthwhile.⁸⁰

On April 20, Nakell sought from a Deputy Attorney General the defendants' approval of a stipulated dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(1)(ii).⁸¹ The Deputy rejected the request; however, she authorized the plaintiffs to "state that defendants did not object to a dismissal with prejudice under Rule 41(a)(2)."⁸² Nakell submitted a Rule 41(a)(2) motion, stating that defendants' counsel "do not oppose this motion and do not object to the Court granting it."⁸³ The district court judge signed the motion and a proposed order dismissing the case on May 2.⁸⁴ Neither document included any conditions or terms reserving to the defendants the right to take additional action in the suit.⁸⁵ In short, the trial judge dismissed the case three months after the plaintiffs filed it and prior to any hearings, discovery, or decisions on substantive motions.

⁷⁸ *Kunstler*, 914 F.2d at 512; *Pitts Petition*, *supra* note 1, at 15.

⁷⁹ *Pitts Petition*, *supra* note 1, at 15; *Kunstler Petition*, *supra* note 6, at 4.

⁸⁰ *Pitts Petition*, *supra* note 1, at 15-16. "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." FED. R. CIV. P. 41(a)(1)(ii).

⁸¹ *Kunstler*, 914 F.2d at 512; *Kunstler Petition*, *supra* note 6, at 4.

⁸² *Kunstler*, 914 F.2d at 512; *accord Pitts Petition*, *supra* note 1, at 16. "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." FED. R. CIV. P. 41(a)(2).

⁸³ *Kunstler Petition*, *supra* note 6, at 4.

⁸⁴ *Kunstler*, 914 F.2d at 512; *Kunstler Petition*, *supra* note 6, at 4-5.

⁸⁵ *Kunstler Petition*, *supra* note 6, at 5. "Nor did the defendants mention, let alone seek, any such term or condition." *Id.*

C. RULE 11 SANCTIONS

On June 13, the state defendants submitted a motion seeking Rule 11 sanctions from Kunstler, Nakell, and Pitts, and on July 5, the county defendants filed a similar motion.⁸⁶ On August 8, the plaintiffs' attorneys responded to these requests and moved for an evidentiary hearing. On September 5, the lawyers sought Rule 11 sanctions against the defendants.⁸⁷ After neglecting to rule on the request for an evidentiary hearing, the trial judge on September 8 heard oral argument exclusively on the question of whether Rule 11 had been violated. He instructed the litigants to submit additional material only upon request.⁸⁸

On September 19, the court asked the state defendants for a "short itemized statement in affidavit form showing time and expense incurred" in the litigation and on September 27 made a similar request of the county defendants.⁸⁹ On the same day, the county defendants submitted the requested affidavit. The next day, the trial judge signed his order granting sanctions of \$92,834, the exact amount that all counsel for defendants sought.⁹⁰ The court levied additional punitive sanctions of \$10,000 against each of the plaintiffs' three lawyers for making baseless allegations against public officials and seeking media attention.⁹¹ The plaintiffs' attorneys did not receive the response until the judge had signed the order, and they had no opportunity to contest the type or size of the sanction.⁹² According to Kunstler's later petition for certiorari:

⁸⁶ *Kunstler*, 914 F.2d at 512; Pitts Petition, *supra* note 1, at 16. Governmental pursuit of Rule 11 sanctions is somewhat unusual, at least at the federal level. See generally Tobias, *supra* note 38, at 460-61.

⁸⁷ *Kunstler*, 914 F.2d at 512; Kunstler Petition, *supra* note 6, at 5.

⁸⁸ *Kunstler*, 914 F.2d at 512. "This was the first time the district court had met counsel." Pitts Petition, *supra* note 1, at 16.

⁸⁹ Memorandum of Nakell, *supra* note 3, at 7-8.

⁹⁰ *Kunstler*, 914 F.2d at 512; Memorandum of Nakell, *supra* note 3, at 8. "Indeed, the Clerk actually entered the sanctions order in the docket sheet before it entered any of the affidavits of counsel for the State Defendants . . . and never entered the affidavit of counsel for the County Defendants." *Id.*

⁹¹ *Kunstler*, 914 F.2d at 512; Pitts Petition, *supra* note 1, at 18.

⁹² Memorandum of Nakell, *supra* note 3, at 8. "The Court's letter requesting the affidavits, the affidavits themselves, and the order arrived in their mail on the same day, Monday, October 2, 1989." *Id.* The attorneys had no opportunity to assert that the sanctions should be nonmonetary or, if monetary, what amount would be proper and whether equitable factors, such as their ability to pay, should apply. *Id.* at 8-9.

Although the parties' affidavits presented sharply conflicting versions of critical facts, the court made its determinations, including evidentiary findings, solely on the basis of the affidavits and other written materials, without listening to a word of testimony or permitting the cross-examination of any affiant or the taking of any deposition to help resolve factual conflicts.⁹³

D. THE DISTRICT COURT OPINION

The trial judge commented at the outset of the opinion imposing the sanctions that the court had "been inundated with written materials" on Rule 11 issues and that the state and county "defendants ha[d] written 97 pages of memoranda, the plaintiffs 90."⁹⁴ The district judge preliminarily rejected the plaintiffs' contention that the dismissal precluded the defendants from pursuing Rule 11 sanctions.⁹⁵ The court relied primarily on the idea that the "terms and conditions that may be imposed upon a voluntary dismissal" are for the defendants' protection; this protection is unnecessary when the dismissal is with prejudice.⁹⁶

The judge then determined that plaintiffs' counsel had contravened all three prongs of Rule 11. First, the attorneys and parties failed to perform reasonable legal inquiries to ensure that the filing was in accord with current law or justified by a good faith argument for a change in existing law.⁹⁷ Second, they failed to conduct reasonable factual investigations before filing papers.⁹⁸ Finally, they submitted the complaint for improper purposes.⁹⁹ The court treated the improper-purpose requirement before the other two because the lawyers' motives and behavior troubled the judge.¹⁰⁰

⁹³ Kunstler Petition, *supra* note 6, at 5.

⁹⁴ Robeson Defense Comm. v. Britt, 132 F.R.D. 650, 652 & n.1 (E.D.N.C. 1989), *aff'd in part and vacated in part sub nom. In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991).

⁹⁵ *Id.* at 653.

⁹⁶ *Id.*

⁹⁷ *Id.* at 656-59.

⁹⁸ *Id.*

⁹⁹ *Id.* at 653-56.

¹⁰⁰ *Id.* at 653-54.

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 in-

The court found that the plaintiffs' attorneys never meant to litigate the lawsuit under section 1983. They had filed the case to generate publicity, to embarrass county and state officials, to gain leverage and secure discovery in the criminal prosecution, and to intimidate individuals pursuing the prosecution.¹⁰¹ The judge based his determinations on inferences derived from several considerations: the fact that one attorney held a press conference while another sent a copy of the complaint to the state court judge who probably would have conducted the criminal trial, the ability of the plaintiffs to obtain discovery otherwise unavailable, the litigation's timing, and, most important, counsel's "sudden and inexplicable" decision to dismiss the case with prejudice.¹⁰²

The court next stated that the complaint violated another requirement of Rule 11: it was not warranted by existing law.¹⁰³ The judge initially observed that much, if not all, of the pleading failed to "show that any plaintiff [was] entitled to any relief."¹⁰⁴ The court considered what it characterized as several significant claims to be lacking legal support. First, the judge rejected the plaintiffs' claim based on the Double Jeopardy Clause because that clause "does not prohibit subsequent prosecutions by different sovereigns."¹⁰⁵ Second, the court found unsubstantiated the assertion that the State violated Hatcher's Fifth Amendment rights by attempting to extract testimony from Jacobs. The Amendment's "protection is personal to the individual whose testimony is being compelled and cannot protect Hatcher."¹⁰⁶ Third, the court decided that federal abstention doctrine clearly barred the plaintiffs' request that state criminal proceedings be enjoined, rejecting the

quiry 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

¹⁰¹ *Robeson Defense Comm.*, 132 F.R.D. at 654-56.

¹⁰² *Id.*

¹⁰³ *Id.* at 656-57.

¹⁰⁴ *Id.* at 656.

¹⁰⁵ *Id.* The court cited *Heath v. Alabama*, 474 U.S. 82 (1985) (allowing sovereign states to prosecute successively same crime due to independent authority), and rejected the plaintiffs' "tool of the same authorities" exception premised on *Bartkus v. Illinois*, 359 U.S. 121 (1959), which argued that one sovereign was acting merely to facilitate the other's prosecution. *Robeson Defense Comm.*, 132 F.R.D. at 656.

¹⁰⁶ *Robeson Defense Comm.*, 132 F.R.D. at 656-57.

argument of exceptional circumstances.¹⁰⁷ Fourth, the judge believed that many of the plaintiffs' claims posed serious standing problems.¹⁰⁸

The court also found that the complaint was not well-grounded in fact and, thus, contravened the third requirement of Rule 11.¹⁰⁹ The judge declared that the plaintiffs had misstated several facts to "implicate the defendants in a massive and sinister conspiracy."¹¹⁰ The court specifically observed that, although a principal allegation in the complaint was that the defendants reneged on an agreement that government officials would not prosecute Hatcher and Jacobs in state court, the officers lacked the authority to bind the State in this manner.¹¹¹ Moreover, the court said that filing a complaint and then participating in discovery "in 'anticipation' that the complaint will prove warranted" violates Rule 11.¹¹² Furthermore, the judge found that the complaint was replete with serious allegations of criminal behavior and of malfeasance by high-ranking governmental officials and that many of these allegations purportedly lacked factual substantiation or were irrelevant to the litigation.¹¹³

The trial court, in selecting an appropriate sanction, proclaimed that such sanctions' primary purpose is "to compensate the offended parties for all reasonable expenses" attributable to the Rule

¹⁰⁷ See *id.* at 657. The court relied on *Younger v. Harris*, 401 U.S. 37 (1971), to bar injunctive relief against criminal proceedings absent a showing of bad faith or lack of reasonable expectation of conviction and chided the plaintiffs for presenting "no cases applying a *Younger* exception which even remotely resembles this case." *Robeson Defense Comm.*, 132 F.R.D. at 657.

¹⁰⁸ The court relied on *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), for the idea that "allegations of mere chill without any objective harm is [sic] not grounds for equitable relief." *Robeson Defense Comm.*, 132 F.R.D. at 657. The court chastised the plaintiffs for failing to show a "specific, present objective harm or a threat of specific future harm." *Id.*

¹⁰⁹ See *Robeson Defense Comm.*, 132 F.R.D. at 657-58 (discussing factual inconsistencies in plaintiffs' complaint).

¹¹⁰ *Id.* at 657.

¹¹¹ *Id.* The court criticized counsel for failing to consult the written agreement and the transcript of the negotiations leading to release of the hostages, because nothing in those materials suggested any promise not to prosecute. *Id.*

¹¹² *Id.* at 658.

¹¹³ *Id.* The plaintiffs' counsel sharply contested some arguments that the court called allegations, such as the charge that the Sheriff was engaged in drug trafficking, and strongly argued for the relevance of other facts that the court found irrelevant, such as the death of an African-American inmate while in the Sheriff's custody. See *id.* (discussing plaintiffs' allegations).

11 violation.¹¹⁴ The judge thus held the three lawyers jointly and severally liable for all attorneys' fees and expenses that defendants incurred: \$92,834.¹¹⁵ The court also levied "punitive sanctions" of \$10,000 on each lawyer based on findings that the Rule 11 violations were egregious and that the attorneys had intentionally filed outrageous claims and publicized the allegations against high-ranking officials.¹¹⁶

The district judge remarked that he had not imposed sanctions lightly. He stated that civil rights lawyers have been instrumental in promoting many societal goals and that "Mr. Kunstler has been a leading civil rights attorney for many years."¹¹⁷ The court held that Rule 11, nevertheless, must apply to all practitioners, observing that the decision "in no way will deter civil rights lawyers from filing legitimate complaints in the future to protect the civil rights of others and the Constitution that we all hold so dear."¹¹⁸

Kunstler, Nakell, and Pitts appealed the district court's decision.¹¹⁹ The North Carolina Civil Liberties Union, the North Carolina Academy of Trial Lawyers, the North Carolina Association of Black Lawyers, and the North Carolina Chapter of the National Lawyers Guild filed amicus briefs essentially supporting the appellants' views.¹²⁰ The Washington Legal Foundation, on behalf of itself, Senator Jesse Helms, Representatives Howard Coble and Alex McMillan, and the Allied Educational Foundation, submitted amicus briefs supporting the lower court decision and favoring the defendants' views.¹²¹ Oral argument occurred on June 5, 1990, but the Fourth Circuit did not issue an opinion until September. Between the time Hatcher and Jacobs broke into *The Robesonian* offices and the appellate court published its determination, there were many Rule 11 developments that sharply contrasted with the district court's decision.

¹¹⁴ *Id.* at 659.

¹¹⁵ *Id.* at 659-60.

¹¹⁶ *Id.* at 660. The court also barred counsel from practicing before it until they paid the sanctions. *Id.*

¹¹⁷ *Id.* at 659.

¹¹⁸ *Id.*

¹¹⁹ Morton Stavis of the Center for Constitutional Rights represented all three attorneys. *In re Kunstler*, 914 F.2d 505, 510 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991).

¹²⁰ *See id.* (identifying amici curiae for appellants).

¹²¹ *See id.* (identifying amici curiae for appellees).

IV. RULE 11 DEVELOPMENTS FROM EARLY 1988 UNTIL SEPTEMBER 1990

Beginning in 1988 and continuing through September 1990, many courts rendered Rule 11 decisions favorable to civil rights plaintiffs and practitioners.¹²² Nearly all of the circuit courts published opinions that recognized the needs of civil rights plaintiffs. For instance, some appellate judges expressed concern that excessively vigorous implementation of the Rule could chill the litigants' enthusiasm or undermine zealous advocacy.¹²³ A few circuit courts treated the limited time that practitioners have to conduct reasonable prefiling inquiries as a significant factor in deciding whether civil rights attorneys had contravened Rule 11.¹²⁴ Appellate judges also exhibited concern for civil rights plaintiffs when considering the kinds of sanctions imposed. Many courts suggested that district judges seriously consider nonmonetary assessments or the violators' ability to pay when calculating pecuniary awards.¹²⁵ Trial courts similarly improved their formal enforcement of the Rule in civil rights cases. Some district judges refused to find that pro se plaintiffs or plaintiffs who were litigating cases that appeared weak had contravened Rule 11.¹²⁶ Some trial courts were reluctant to

¹²² See Tobias, *supra* note 24, at 166-71 (citing primary sources); Tobias, *supra* note 31, at 110-16 (same).

¹²³ See Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990) (quoting Rule 11 advisory committee notes to 1983 amendment); *accord* Greenberg v. Hilton Int'l Co., 870 F.2d 926, 935 (2d Cir. 1989) (stating that sanctions could chill facially meritless and weak but viable claims); Davis v. Crush, 862 F.2d 84, 92 (6th Cir. 1988) (stating that chilling effect is not purpose of Rule 11).

¹²⁴ See Jenkins v. Missouri, 904 F.2d 415, 421 (8th Cir.) (stating that time for inquiry was limited by approaching school term), *cert. denied*, 111 S. Ct. 346 (1990); Gillette v. Delmore, 886 F.2d 1194, 1199-1200 (9th Cir. 1989) (noting that attorney was retained shortly before statute of limitations had run); *accord* Cabell v. Petty, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting) (noting that filing of complaint to meet statute of limitations made extensive inquiry impracticable).

¹²⁵ See, e.g., Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990) (suggesting use of ability-to-pay standard); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195-97 (3d Cir. 1988) (recommending ability to pay as one of mitigating factors court should consider); Thomas v. Capital Sec. Servs. 836 F.2d 866, 876-81 (5th Cir. 1988) (discussing ability to pay and nonmonetary sanctions for appropriate cases).

¹²⁶ E.g., Moore v. Roth, No. A-01422, 1990 WL 60735 (N.D. Ill. Apr. 24, 1990) (involving pro se litigant); Goldberg v. Weil, 707 F. Supp. 357, 362 (N.D. Ill. 1989) (involving pro se litigant); Solberg v. Inline Corp., 740 F. Supp. 680, 686 (D. Minn. 1990) (finding no violation of Rule 11 in weak COBRA case); Summer v. Fuller, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989) (finding no violation of Rule 11 in civil rights case of first impression).

levy large monetary assessments against civil rights plaintiffs or their counsel.¹²⁷

The Fourth Circuit contributed to these national trends. For example, one panel of the court, when vacating a trial judge's decision that Rule 11 had been violated in Title VII litigation, observed:

Even a vague and conclusory complaint may be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. Indeed, if Rule 11 permitted sanctions merely on the basis of inartful pleading, rather than for a failure to investigate the legal and factual basis for that pleading, Rule 12(e) motions for a more definite statement would be virtually unheard of.¹²⁸

Other panels expressed similar concern for civil rights plaintiffs and lawyers when reviewing sanctions that district courts imposed.¹²⁹

The conclusion that Rule 11's application improved between early 1988 and September 1990 must be qualified. Some judges apparently failed to appreciate several subtleties involved in enforcing Rule 11¹³⁰ or were insufficiently attentive to the needs of civil

¹²⁷ See, e.g., the district court opinion referred to in *Banov*, 899 F.2d at 40, 42; *Cruz v. Savage*, 691 F. Supp. 549, 556 (D.P.R. 1988) (noting this reluctance), *aff'd*, 896 F.2d 626 (1st Cir. 1990).

¹²⁸ *Simpson v. Welch*, 900 F.2d 33, 36 (4th Cir. 1990).

¹²⁹ See, e.g., *Reuber v. Food Chem. News, Inc.*, 899 F.2d 271, 290 (4th Cir.) (affirming district court's denial of sanctions without review), *reh'g granted and vacated on other grounds*, 922 F.2d 197 (4th Cir. 1990) (en banc), *on reh'g*, 925 F.2d 703 (4th Cir.) (en banc), *cert. denied*, 111 S. Ct. 2814 (1991); *Introcaso v. Cunningham*, 857 F.2d 965, 970 (4th Cir. 1988) (vacating award of sanctions because district court's findings were insufficient to justify sanctions).

¹³⁰ Most important was the failure to differentiate between the "product" (focusing on the complaint or other documents) and "conduct" (focusing on prefiling inquiry) approaches to Rule 11 decisionmaking. See, e.g., *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989) (finding complaint not frivolous and denying sanctions on that basis rather than analyzing reasonableness of plaintiff's investigation); *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1091 (3d Cir. 1988) (upholding sanctions against civil rights plaintiff for frivolous claim). See generally *Burbank*, *supra* note 20, at 1933-34, 1941-42 (suggesting that judges impose sanctions for conduct reasons only); *Tobias*, *supra* note 24, at 168 (noting that courts use frivolous-product approach).

rights plaintiffs when choosing sanctions.¹³¹ Moreover, the improvements observed have been in formal Rule 11 decisionmaking. This distinction is important because a significant quantity of Rule 11 activity is informal, as is much activity that is most detrimental to civil rights plaintiffs.¹³² Furthermore, in June 1990, the Supreme Court prescribed a very deferential abuse-of-discretion standard for appellate review of trial court Rule 11 decisionmaking.¹³³

Additional developments that did not directly involve the Rule's judicial application could lead to improvements for civil rights plaintiffs. The Advisory Committee, during its regularly scheduled meeting in November 1989, spent one-half day discussing Rule 11's implementation. Two representatives of public interest organizations presented evidence that the Rule was detrimentally affecting civil rights plaintiffs.¹³⁴ At the conclusion of the meeting, the Committee informally agreed to explore the possibility of an amendment.¹³⁵

A short time thereafter, Representative Robert Kastenmeier, Chairman of the House Committee on the Courts, Intellectual Property, and the Administration of Justice, contacted Judge John Grady, Chairman of the Advisory Committee, requesting informa-

¹³¹ See, e.g., *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) (imposing \$1 million sanction against civil rights plaintiff), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

¹³² Formal Rule 11 activity leads to the issuance of an opinion that is published in the federal reporter system or is available on one of the computerized reporting systems. Informal Rule 11 activity is all other activity, including threats to invoke the Rule. Informal activity can be more detrimental because it is difficult to detect, document, and alter at the appellate level. See generally Tobias, *supra* note 31, at 117 (arguing that hostility to litigants is more likely to appear in informal settings).

¹³³ See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (prescribing deferential abuse-of-discretion standard for appellate review). Another recent Supreme Court Rule 11 opinion could be detrimental to civil rights plaintiffs, because it applies the Rule's requirements to represented parties who sign papers. *Business Guides, Inc. v. Chromatic Communications Enters.*, 111 S. Ct. 922 (1991); see also *Willy v. Coastal Corp.*, 112 S. Ct. 1076 (1992) (allowing courts to impose Rule 11 sanctions when court is later determined to be without subject-matter jurisdiction).

¹³⁴ They were attorney Alan Morrison of Public Citizen and Professor Laura Macklin of the Georgetown University Law Center Institute for Public Representation. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795, 854 n.310 (1991).

¹³⁵ Telephone Interview with Charles Geyh, Professor of Law, Widener University, Harrisburg, Pa., and former counsel, House Committee on the Courts, Intellectual Property, and the Administration of Justice (June 17, 1992). See generally Mullenix, *supra* note 134, at 854.

tion on the committee's consideration of Rule 11.¹³⁶ In February 1990, Judge Grady responded to Representative Kastenmeier, expressing his belief that there was considerable need for additional study of the Rule and for more data on its operation.¹³⁷

Professor Arthur Miller, who was the Reporter for the Advisory Committee when the Supreme Court and Congress promulgated the 1983 amendments to the Federal Rules of Civil Procedure, wrote in July 1990 that "[i]t would be unfortunate if the decibel level of the debate over Rule 11 led to its precipitous revision before sufficient experience accumulated."¹³⁸ Professor Miller asserted that "considerable progress has been made" but urged patience, recognizing that the process of refining the Rule's enforcement "will take many more years."¹³⁹

On July 24, 1990, nearly seven years after amended Rule 11 became effective, the Advisory Committee announced that it was initiating a study of Rule 11.¹⁴⁰ The Committee called for the public to submit written comments on the Rule's operation by November 1; scheduled a hearing for February 1991, at which time it planned to receive oral testimony; and said that it would consider revision of Rule 11 at the Committee's regular meeting in April 1991.¹⁴¹

V. THE CIRCUIT COURT OPINION

A. GENERAL OVERVIEW

On September 18, 1990, a panel of the Fourth Circuit issued its opinion in *In re Kunstler*.¹⁴² The appellate court reviewed all of

¹³⁶ Telephone Interview, *supra* note 135.

¹³⁷ Letter from Judge John Grady, Chairman of the Advisory Committee on Civil Rules, to Rep. Robert Kastenmeier, Chairman of the House Committee on the Courts, Intellectual Property, and the Administration of Justice (Feb. 9, 1990) (copy on file with the *Georgia Law Review*).

¹³⁸ Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505 (1990).

¹³⁹ *Id.* Professor Melissa Nelken, who has studied Rule 11 closely, urged similar caution while recommending constructive changes in the Rule. See Melissa Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385, 405-08 (1990) (arguing against repeal of Rule 11); cf. Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223 (1991) (response to Professor Miller's article).

¹⁴⁰ *Call for Comments*, *supra* note 30, at 344-45. See generally Mullenix, *supra* note 134, at 854.

¹⁴¹ *Call for Comments*, *supra* note 30, at 345.

¹⁴² 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991). On the same day, a different panel issued an opinion in another controversial civil rights case involving Julius

the trial judge's determinations pursuant to an abuse-of-discretion standard.¹⁴³ It found that the defendants' failure to notify the trial judge or plaintiffs before dismissal that the state and the county intended to invoke Rule 11 would not preclude consideration of a motion for sanctions under the Rule.¹⁴⁴ The Fourth Circuit upheld the lower court's decision that Kunstler, Nakell and Pitts had contravened all three prongs of Rule 11.¹⁴⁵ The appellate panel vacated and remanded for reconsideration the district judge's determination regarding the appropriate sanction. The circuit court found that the lower court had based its assessment on the erroneous propositions that Rule 11's principal purpose was compensation and that publicizing the litigation's allegations was behavior punishable under the Rule.¹⁴⁶ The panel held that due process required that the attorneys have an opportunity to challenge the type and amount of sanctions imposed, although the court said that the district judge need not hold an evidentiary hearing for any of his Rule 11 decisions.¹⁴⁷

Several aspects of the Fourth Circuit determination are particularly striking and warrant criticism. The appellate court reviewed the trial court's determination with extreme deference, failing to scrutinize the district court's findings that plaintiffs' counsel contravened the Rule and selectively considering the plaintiffs' assertions. The Fourth Circuit accepted uncritically, and adopted nearly verbatim, many propositions, even ideas relating to legal issues, in the trial judge's opinion. The appellate panel also refused to delve deeply into the case's factual background, endorsing wholeheartedly the trial court's version of the facts, while failing to mention the seventy-page memorandum that Nakell filed in response to

Chambers, Executive Director of the NAACP Legal Defense Fund, which was an appeal from the decision of a different judge in the Eastern District of North Carolina. *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990) (holding counsel's conduct warranted sanctions but district court failed to exercise selectivity in imposing wide range of sanctions and to be sensitive to deterrence its decision may have on future Title VII litigants with meritorious claims), *cert. denied*, 111 S. Ct. 1580 (1991). Although disposition of the two cases was similar, the two panels' scrutiny of the facts and treatment of the attorneys contrasts markedly. Some of those contrasts will be examined in the footnotes below.

¹⁴³ *Kunstler*, 914 F.2d at 513 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990)).

¹⁴⁴ *Id.* at 512-13.

¹⁴⁵ *Id.* at 513-21.

¹⁴⁶ *Id.* at 522-25.

¹⁴⁷ *Id.* at 521-22.

questions at oral argument.¹⁴⁸ This type of appellate review penalizes parties found to have violated Rule 11 in cases such as this one when district judges vigorously apply the provision.

B. SPECIFIC ANALYSIS

1. *Sanctions After Dismissal.* The panel first observed that the defendants' failure before dismissal to notify the plaintiffs or the district court of the defendants' intent to seek Rule 11 sanctions would not necessarily bar a sanctions motion.¹⁴⁹ The appellate court acknowledged that certain equitable factors, such as a party's promise not to pursue sanctions or an inordinately long delay after voluntary dismissal before filing a Rule 11 motion, could preclude sanctions.¹⁵⁰ Because the State invoked Rule 11 six weeks after dismissal and the county filed its motion several weeks later, the panel found that the delay did not prejudice the plaintiffs' lawyers and that the district judge properly considered the motion.¹⁵¹ In comparison, some courts have held that a district judge should not grant a Rule 11 motion filed after a plaintiff has sought dismissal under Rule 41(a)(2) and after entry of an order dismissing with prejudice upon the defendant's consent, if the order includes no term or condition reserving the right to seek sanctions.¹⁵² Defendants who wish to preserve the right to invoke Rule 11 normally should respond with cross-motions to the plaintiffs' Rule 41(a)(2) motion to dismiss.¹⁵³ Numerous courts have denied sanctions motions that defendants filed after Rule 41(a)(2) dismissals when the parties failed to reserve their rights.¹⁵⁴

¹⁴⁸ Memorandum of Nakell, *supra* note 3.

¹⁴⁹ *Kunstler*, 914 F.2d at 512-13.

¹⁵⁰ *Id.* at 513.

¹⁵¹ *Id.*

¹⁵² *See, e.g.,* *Colombrito v. Kelly*, 764 F.2d 122, 133-35 (2d Cir. 1985) (refusing to allow Rule 11 sanctions after voluntary dismissal with prejudice under Rule 41(a)(2)); *see also* *Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (discussing plaintiff's right to withdraw voluntary dismissal rather than comply with order imposing attorney's fees); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986) (discussing proper use of Rule 41(a)(2) by district court).

¹⁵³ *See, e.g.,* *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 932-33 (2d Cir. 1989) (noting defendant's cross-motion for sanctions, fees, and costs); *Kya-Hill v. Davidson*, No. 87 CIV. 7802 (JES), 1988 WL 108487 (S.D.N.Y. Oct. 12, 1988) (noting that defendants could file cross-motion after 41(a)(2) dismissal).

¹⁵⁴ *See, e.g.,* *Roe v. Operation Rescue*, Civ. A. No. 88-5157, 1989 WL 66452 (E.D. Pa. June 19, 1989) (holding motions after final judgment untimely), *order aff'd*, 892 F.2d 142 (3d

2. *Violations of Rule 11.* The trial judge found that plaintiffs' counsel had contravened Rule 11's three prongs. The Fourth Circuit first examined the liability of Kunstler, who said that he did not participate actively in the case but depended on Nakell, "who was on the scene, *to prepare and file it.*"¹⁵⁵ The appellate panel decided that a recent Supreme Court pronouncement supported the district judge's determination that Kunstler's complete reliance on another attorney itself contravened Rule 11.¹⁵⁶

a. Well Grounded in Fact. The Fourth Circuit agreed with the district court judge that the factual misstatements in the complaint were pervasive and that these errors involved information that the plaintiffs' attorneys knew or should have known.¹⁵⁷ The panel also remarked that some causes of action were premised on allegations that "utterly lacked" any factual basis, commenting that such claims constitute the very litigation abuse at which Rule 11 is aimed.¹⁵⁸ The Fourth Circuit correspondingly upheld the trial judge's findings that many allegations against local and state officials were factually unsubstantiated or were irrelevant to the case.¹⁵⁹ The relationship between discovery and Rule 11 also was important to the appellate court's determinations. The panel stated that for the Rule's purposes, the pre-filing factual investigation to support a complaint generally will suffice, if all of the information that can be secured before suit substantiates the pleading's allegations, although additional facts must be secured with discovery to prove the claim ultimately.¹⁶⁰

The Fourth Circuit chastised the plaintiffs' attorneys for including factual inaccuracies, irrelevant material, and unsupported allegations in the complaint. The panel's treatment of the facts war-

Cir.), *cert. denied*, 111 S. Ct. 385 (1990); *Feldman v. Village of Lombard*, No. 86 C 3295, 1987 WL 9000 (N.D. Ill. Mar. 26, 1987) (holding that defendants had waived rights during 41(a)(2) hearing).

¹⁵⁵ *Kunstler*, 914 F.2d at 513-14 (emphasis added by court).

¹⁵⁶ *See id.* at 514 (citing *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadenca Indus. Corp.*, 493 U.S. 120 (1989)). "Having failed in his responsibility, Mr. Kunstler may not now be heard to protest that he does not share in any violations of Rule 11 which are evident on the face of the complaint." *Id.*

¹⁵⁷ *See id.* (rejecting plaintiffs' claim that errors were isolated).

¹⁵⁸ *Id.* at 514-15. The example used was the allegation regarding a "no state prosecution" agreement, which the court found that North Carolina law did not authorize. *Id.*

¹⁵⁹ "[T]he complaint was filled with irrelevant allegations not tied to specific injuries to plaintiffs . . ." *Id.* at 515.

¹⁶⁰ *Id.* at 516.

rants criticism, however. Most important, the court considered the complaint filed to the almost total exclusion of the attorneys' behavior in conducting the factual investigation that preceded the complaint's drafting, thus significantly de-emphasizing Rule 11's reasonable prefiling inquiry language.

The Fourth Circuit accepted most of the defendants' speculations and rejected practically all of the plaintiffs' evidence. The court concomitantly gave virtually no credence to the explanations of plaintiffs' counsel for their actions in performing the factual inquiry and actually capitalized on the explanations to disparage the attorneys. For instance, Nakell and Pitts proffered thorough "affidavits, correspondence, court papers," and proofs of the time spent investigating to detail the reasonableness of their factual inquiry.¹⁶¹ The panel responded that the lawyers had offered no excuse for the numerous clear errors of fact in their complaint, particularly given the ample time that they ostensibly had to prepare the pleading and the hours purportedly expended in drafting it.¹⁶² Moreover, the circuit court mischaracterized and selectively analyzed certain allegations in the plaintiffs' pleading, undertook scant review of the pertinent underlying facts, adopted uncritically much material in the district judge's opinion, and embraced his version of the facts, although the trial court had little more familiarity with the facts than the appellate court.¹⁶³ Illustrative of most of these phenomena is the emphasis accorded to allegations that the Sheriff was participating in drug trafficking.¹⁶⁴ Nakell vehemently and convincingly denied that the plaintiffs had made such an allegation; in any event, whatever allusion they made to drug trafficking was inconsequential.¹⁶⁵

¹⁶¹ Kunstler Petition, *supra* note 6, at 18.

¹⁶² Kunstler, 914 F.2d at 516.

¹⁶³ The panel arguably seized on "isolated factual errors," thus violating its own precedent in *Forrest Creek Assocs. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1244-45 (4th Cir. 1987). *Cf. Blue v. United States Dep't of Army*, 914 F.2d 525, 540 (4th Cir. 1990) (stating that complaint's allegations and supporting evidence should be set forth with "generous reading" they are due or with "strongest evidence" they presented), *cert. denied*, 111 S. Ct. 1580 (1991). *But see Kunstler*, 914 F.2d at 514 (noting errors not isolated but pervaded complaint). As to the trial court's limited familiarity with the facts, see *supra* note 88; *infra* note 225 and accompanying text.

¹⁶⁴ See Kunstler, 914 F.2d at 515 (suggesting that allegations were scandalous and sensational).

¹⁶⁵ Memorandum of Nakell, *supra* note 3, at 2-3; *cf. Pitts Petition*, *supra* note 1, at 23 (noting panel's mischaracterization of complaint's central allegations).

The appellate court also seemed to suggest that plaintiffs in the Fourth Circuit can rely less on discovery for Rule 11 purposes than plaintiffs in other circuits, including the Seventh Circuit, several of whose members have championed vigorous enforcement of the Rule.¹⁶⁶ This issue is important because, in civil rights cases, plaintiffs often depend substantially on information that can be secured only through discovery, since the material is in the minds or files of defendants—in this case, law enforcement officials.¹⁶⁷ The role of discovery is significant to the instant case because the case involved a multitude of sharply disputed factual issues, some of which could not be clarified or resolved until discovery.¹⁶⁸

Finally, several examples demonstrate the panel's selective approach to appellate review. First, the Fourth Circuit found that a single subcomponent of one of the plaintiffs' six claims lacked a factual basis,¹⁶⁹ but the court failed to analyze closely the other, more substantial factual premises in the complaint. The district judge and the panel also seized on a lone sentence in the plaintiffs' memorandum that sought expedited discovery; both courts inferred that the lawyers "relied entirely upon discovery in the hope of finding some factual support for many of their claims" and con-

¹⁶⁶ Compare *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990) (stating that use of discovery to learn facts of case is reasonable) (discussed in *Kunstler*, 914 F.2d at 516) and *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1068 (7th Cir. 1987) (stating that use of discovery to prove case is permissible) with *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) (stating that use of discovery as sole means of establishing case is impermissible), *cert. dismissed*, 485 U.S. 901 (1988). See also *supra* note 35 and accompanying text (discussing Seventh Circuit judges' advocacy of vigorous enforcement of Rule 11).

¹⁶⁷ See *Tobias*, *supra* note 19, at 494-95, 498 (citing *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), as valuable illustration of civil rights action in which important information was in minds and records of defendants as well as for statement that "those who challenge police violations of an individual's civil rights need not secure the detailed information required to prove patterns of supervisory misconduct prior to filing, because citizens are 'extremely unlikely' to have that data before formal discovery").

¹⁶⁸ For instance, whether the state authorities indicated to Hatcher that there was a "no state prosecution" agreement was a significant, sharply contested factual issue. Similarly, establishing the "tool of the same authorities" exception that would permit a double jeopardy claim was dependent on showing a nexus between federal and state prosecutors. Both required discovery, which the district judge prevented. *Kunstler Petition*, *supra* note 6, at 18; see also *supra* notes 73-74 and accompanying text (discussing court-ordered stay of discovery).

¹⁶⁹ This was the claim that there had been a "no state prosecution" agreement, one of several premises for seeking injunctive relief. *Pitts Petition*, *supra* note 1, at 29 & n.3.

cluded that this dependence indicated an "unacceptable level of pre-filing investigation."¹⁷⁰ Moreover, the Fourth Circuit practically ignored counsel's pre-filing inquiry,¹⁷¹ a phenomenon illustrated by this terse quotation charging an "unacceptable level of pre-filing investigation." In fact, in the court's only other reference to the investigation, it concluded that the investigation failed to excuse the "many clear factual errors" included in the complaint.¹⁷² The panel's focus on the quality of the product—the complaint, its factual allegations, and counsel's ability to prove them—to the nearly complete exclusion of the attorneys' behavior in performing the pre-filing inquiry that underlies the paper improperly underemphasizes significant language in Rule 11.¹⁷³ Elevating the importance of product over conduct is particularly inadvisable in cases, such as this one, in which there is a wealth of information available regarding the pre-filing investigation that plaintiffs actually undertook.¹⁷⁴

¹⁷⁰ *In re Kunstler*, 914 F.2d 505, 515 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991). The sentence was in counsel's memorandum in opposition to the State's motion seeking a protective order. It emphasized that the discovery sought would permit plaintiffs' counsel to augment their evidence and satisfy Rule 65(b)'s requirements for temporary injunctive relief. *Pitts Petition*, *supra* note 1, at 43-44 & n.14. Rule 65(b) states:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

FED. R. CIV. P. 65(b).

¹⁷¹ The panel extracted little from the record or from Nakell's post-oral-argument memorandum, *supra* note 3, both of which detailed the extensive pre-filing inquiry that counsel conducted. *Pitts Petition*, *supra* note 1, at 41 & n.12.

¹⁷² *Kunstler*, 914 F.2d at 516. The court identified one kind of alleged error, and that error implicated the plaintiffs' allegations regarding several officials who made policy for Robeson County. The panel rejected the claims because the officers were state employees, not county officials. The panel asserted that this distinction was integral to the complaint and the allegation of a countywide conspiracy; however, the panel was wrong. *Pitts Petition*, *supra* note 1, at 45-57.

¹⁷³ See *supra* note 100 for the relevant language from Rule 11. The court should initially attempt to determine whether counsel performed a reasonable pre-filing inquiry (conduct). Only when that effort proves inconclusive should the judge analyze the papers (product) that the inquiry yielded to make the reasonableness determination. Tobias, *supra* note 31, at 108 n.11.

¹⁷⁴ "Nakell and Pitts were entirely steeped in the facts of the case and had made a thor-

b. Well Grounded in Law. The Fourth Circuit upheld the trial judge's determination that the plaintiffs' attorneys filed a complaint that "on the whole was not well grounded in law."¹⁷⁶ The analysis resembled the appellate review of the district court's finding that the pleading was not well-grounded in fact. The panel essentially ignored the prefiling inquiry that counsel conducted, the plaintiffs' substantial claims, and their arguments for extending existing law. It emphasized, however, several relatively insignificant claims that the trial judge decided were unsubstantiated and adopted practically whole cloth the lower court's treatment.¹⁷⁸

The sanctioned attorneys argued that the defendants' lengthy answers to the complaint and the approval of the complaint by a civil rights lawyer with expertise in section 1983 litigation substantiated the validity of the complaint's legal premise. The Fourth Circuit flatly rejected these arguments.¹⁷⁷ The court stated that the length of the defendants' responses would not make otherwise unsupported claims legitimate and might signify only that there were numerous meritorious defenses.¹⁷⁸ Merely securing review of a pleading by an attorney with specialized knowledge did not satisfy Rule 11, because that lawyer may have little familiarity with the particular facts, the pertinent law, or the prefiling investigation.¹⁷⁹ The panel's summary treatment of the contentions of the sanctioned attorneys, especially regarding review of the complaint, accorded insufficient importance to whether the plaintiffs performed a reasonable prefiling inquiry.¹⁸⁰

The Fourth Circuit then analyzed what it characterized as "several substantial claims" that the trial judge determined lacked legal foundation.¹⁸¹ The panel held the plaintiffs' double jeopardy

ough investigation. The papers filed . . . included a massive collection of affidavits, correspondence, court papers and materials . . ." Kunstler Petition, *supra* note 6, at 18.

¹⁷⁶ *Kunstler*, 914 F.2d at 518.

¹⁷⁶ For example, the panel apparently conducted virtually no independent research on the legal issues.

¹⁷⁷ *Kunstler*, 914 F.2d at 516-17.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 517.

¹⁸⁰ Counsel seemed to offer the details of the review principally to show reasonable conduct, although the panel emphasized product. See generally *supra* note 173.

¹⁸¹ *Kunstler*, 914 F.2d at 517. The court also ignored the claims, such as those involving the First Amendment, that the plaintiffs' counsel considered substantial. See *supra* text accompanying note 176.

claim inapplicable to subsequent prosecutions by different sovereigns.¹⁸² The court acknowledged the "tool of the same authorities" exception but found that it should be restricted to situations that involved limited state participation.¹⁸³ The panel held the exception inapplicable because the complaint alleged that state officials orchestrated the state prosecution, even though counsel had made a plausible good-faith argument for extending the exception to instances in which state, not federal, officials predominate.¹⁸⁴

The appellate court next upheld the district judge's decision that the plaintiffs' Fifth Amendment claim had no legal support, stating that the Amendment's "protection is personal to the individual whose testimony is being compelled."¹⁸⁵ The Fourth Circuit observed that the plaintiffs' counsel "as experienced attorneys should have been well aware of this" constitutional rule and criticized them for not attempting "to explain away this glaring blunder."¹⁸⁶ The treatment reveals more about the appellate court than the lawyers. As Nakell stated in his memorandum filed after oral argument, the trial judge and the circuit court chose to ignore the plaintiffs' substantial and correctly pleaded Sixth Amendment claim and instead seized upon a minor mistake in one paragraph that also based the claim on the Fifth Amendment.¹⁸⁷

The panel affirmed the district court's determination that abstention doctrine clearly precluded plaintiffs from enjoining state criminal proceedings.¹⁸⁸ The Fourth Circuit, relying on contrary intracircuit precedent, refused to find that exceptional circumstances justifying federal intervention exist when prosecutions are pursued

¹⁸² *Kunstler*, 914 F.2d at 517.

¹⁸³ *Id.* (citing *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976)). The exception is that a state prosecution that follows an unsuccessful federal prosecution can violate the Double Jeopardy Clause of the Fifth Amendment if the state prosecution results from manipulation by federal authorities. *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). Neither the Supreme Court nor the District of Columbia Circuit, however, has limited the exception in the way the Fourth Circuit limited it.

¹⁸⁴ The argument for extension is that the exception should apply equally to state and federal authorities. Petition For Rehearing and Suggestion For Rehearing In Banc at 9, *Kunstler* (No. 89-2815) [hereinafter *Petition for Rehearing*].

¹⁸⁵ *Kunstler*, 914 F.2d at 517.

¹⁸⁶ *Id.*

¹⁸⁷ Memorandum of Nakell, *supra* note 3, at A12 n.3; accord *Petition for Rehearing*, *supra* note 184, at 7; *Pitts Petition*, *supra* note 1, at 35 & n.8.

¹⁸⁸ *Kunstler*, 914 F.2d at 517.

to discourage citizens from exercising constitutional rights.¹⁸⁹ The plaintiffs, however, had offered two convincing grounds for distinguishing that case.¹⁹⁰ Moreover, even if the precedent were controlling within the circuit, Rule 11 expressly permits good-faith arguments for changes in the law that are premised on decisions of the Supreme Court and other circuits.¹⁹¹

The Fourth Circuit likewise upheld the trial judge's finding that a number of claims raised serious standing difficulties.¹⁹² The panel invoked a narrow example and technically applied standing doctrine to require that Hatcher and Jacobs show concrete and specific harm; the court determined that the particular plaintiffs had failed to make this showing because they had the fortitude to resist governmental intimidation.¹⁹³

¹⁸⁹ *Id.* The precedent is *Suggs v. Brannon*, 804 F.2d 274 (4th Cir. 1986).

¹⁹⁰ In *Suggs*, the plaintiffs argued that the obscenity statute under which they were prosecuted was unconstitutional. 804 F.2d at 277-78. Moreover, the court in *Suggs* relied on language in a footnote in a Supreme Court opinion stating that "bad faith in this context generally means" a certain type of prosecution. *Id.* at 278 (citing *Kugler v. Helfont*, 421 U.S. 117, 126 n.6 (1975) (emphasis added)). Use of the term "generally," which leaves open the possibility of specific exceptions, makes plausible the type of argument premised on "bad faith" prosecution in *Kunstler*. See generally *Petition for Rehearing*, *supra* note 184, at 11-12 (distinguishing *Suggs*).

¹⁹¹ Rule 11 states,

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. . . .

FED. R. CIV. P. 11; *cf.* *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990) (holding that precedent from district court in another federal circuit contrary to position of plaintiff does not render position frivolous); *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 758-59 (1st Cir. 1988) (holding that absence of First Circuit precedent did not preclude good-faith argument for extension of law); *Danese v. City of Roseville*, 757 F. Supp. 827, 830 (E.D. Mich. 1991) (holding that precedent in other circuits contrary to party's position does not render that position unreasonable); see *Petition for Rehearing*, *supra* note 184, at 11 (arguing that challenges to controlling precedent in circuit do not violate Rule 11 as long as consistent with Supreme Court and other circuits' opinions); *cf.* *Kunstler Petition*, *supra* note 6, at 19 (arguing that discovery is necessary on exceptional-circumstances issue).

¹⁹² *Kunstler*, 914 F.2d at 517.

¹⁹³ *Id.* at 517-18. Hatcher and Jacobs, however, did show the kinds of particularized identifiable governmental violations of rights that other courts have held to afford a reasonable basis for stating a cognizable claim for the purposes of Rule 11. See, e.g., *Meese v. Keene*, 481 U.S. 465, 472-75 (holding that risk of injury to reputation and of impairment to political career provided plaintiff with standing to challenge governmental action); *Allee v. Medrano*, 416 U.S. 802, 811-14 (1974) (holding that persistent pattern of police misconduct is sufficient basis for federal court to exercise equitable powers); *Hobson v. Wilson*, 737 F.2d 1, 27

c. Improper Purpose. The Fourth Circuit affirmed the trial court's determination that counsel filed suit for an improper purpose and its decision not to hold an evidentiary hearing on the issue for similar reasons.¹⁹⁴ The panel stated that the finding of improper purpose was not "clearly erroneous," was supported by the baseless allegations made in the complaint and by the "cumulative nature of the evidence," and would not have been modified had the district judge held an evidentiary hearing.¹⁹⁵

The appellate court remarked that Rule 11's definition of improper purpose, which includes considerations such as harassment or causing unwarranted delay or unnecessary increase in litigation expense, is not exclusive.¹⁹⁶ The circuit panel observed that it would be improper to file a complaint that did not have as its central and sincere purpose the vindication of rights in court.¹⁹⁷ This articulation is simply incorrect; the Supreme Court has long held that the First Amendment right to petition prohibits punishing persons who pursue legitimate litigation for an apparently inappropriate purpose.¹⁹⁸ This Fourth Circuit ruling is one of several entered in extremely controversial cases in which judges premised findings of Rule 11 violations on determinations that plaintiffs had instituted suit primarily for a purpose other than vindicating rights through the legal process.¹⁹⁹

(D.C. Cir. 1984) ("Whatever authority the Government may have to interfere with a group engaged in unlawful activity, . . . it is never permissible to impede or deter lawful civil rights/political organization, expression or protest with no other direct purpose and no other immediate objective than to counter the influence of the target associations."). See generally Petition for Rehearing, *supra* note 184, at 4-5 (discussing plaintiffs' showing of specific harm).

¹⁹⁴ *Kunstler*, 914 F.2d at 518-21.

¹⁹⁵ *Id.* at 520-21. The panel's invocation of a "clearly erroneous" standard is curious because it specifically stated that an abuse-of-discretion standard would govern. *Id.* at 513.

¹⁹⁶ *Id.* at 518.

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 743 (1983) (holding that well-founded lawsuit brought for retaliatory purposes is not to be enjoined as unfair business practice); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (finding that parties are entitled to use courts to "advocate their causes and points of view respecting resolution of their business and economic interests in relation to their competitors" unless argument is nothing more than attempt to interfere directly with business of competitors).

¹⁹⁹ E.g., *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992). In *Saltany*, 55 citizens and residents of Libya filed suit to recover for injuries sustained in

The appeals court stated that the district judge's conclusion that the plaintiffs' attorneys never intended to litigate the case most strongly supported the improper-purpose finding.²⁰⁰ The presence of so many allegations that lacked a basis in law or fact justified this finding.²⁰¹ The existence of baseless allegations could be due to inexperience or incompetence, which would not require a finding of improper purpose.²⁰² The panel reasoned, however, that the insertion of baseless allegations in the complaint could not be ascribed to inexperience because the attorneys clearly were experienced, while the number of claims lacking foundation suggested that the assertions were not attributable to incompetence.²⁰³ The court assumed that "counsel wilfully included the baseless claims" and that a judge could infer that the lawyers had filed the lawsuit to harass or for some purpose other than vindicating their clients'

the 1986 bombing of their country by the United States. 886 F.2d at 439. The trial judge dismissed the complaint but rejected Rule 11 sanctions in an effort to maintain federal courts as fora for litigation brought as a "public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement." *Id.* (quoting district court opinion in *Saltany v. Reagan*, 702 F. Supp. 319, 322 (D.D.C. 1988)). The appellate court summarily reversed, instructed the district judge to levy an appropriate sanction, and observed that it did "not conceive it a proper function of a federal court to serve as a forum for 'protests,' to the detriment of parties with serious disputes waiting to be heard." *Id.* at 440.

Avirgan arguably resembles *Saltany*, insofar as the litigation can be characterized as a protest against allegedly inappropriate political behavior of the United States in Latin America. In *Avirgan*, journalists filed suit to recover for injuries sustained in a bombing at a press conference in Nicaragua. 932 F.2d at 1575. The plaintiffs' lead counsel supplemented the complaint with a detailed affidavit outlining the purported testimony of 79 witnesses who counsel claimed had knowledge that the defendants set and exploded the bomb. *Id.* at 1581. The plaintiffs' counsel, however, would not provide the names of these witnesses and, thus, prevented the defendants from deposing those witnesses and delayed orderly discovery. *Id.* At the same time, the plaintiffs were permitted to conduct two years of discovery. *Avirgan v. Hull*, 705 F. Supp. 1544, 1545 (S.D. Fla. 1989). When the plaintiffs' counsel eventually complied with the order to reveal the names of their witnesses, the court discovered that approximately 20 of the 79 were unknown to the plaintiffs' counsel, several did not know or had not spoken to the plaintiffs' counsel, and the remainder could not furnish any admissible statements. 932 F.2d at 1581. Upholding the award of costs and attorneys' fees after undertaking very deferential review, the court stated, "[F]iling a lawsuit is not a gratuitous license to conduct infinite forays in search of evidence." *Id.* at 1582 (quoting *Collins v. Walden*, 834 F.2d 961, 965 (11th Cir. 1987)).

²⁰⁰ *Kunstler*, 914 F.2d at 519.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

rights.²⁰⁴

The appellate panel also stated that the trial judge "inferred an improper purpose from the timing" of the complaint's filing and of its dismissal,²⁰⁵ while he considered incredible or absurd the explanations that counsel proffered.²⁰⁶ The Fourth Circuit acknowledged that the attorneys had submitted affidavits that sharply disputed the district judge's determinations.²⁰⁷ The appellate court, however, refused to find clearly erroneous the trial judge's decisions that the explanations were not believable or reasonable, given all of the evidence regarding the filing of the pleading and the frivolous character of the allegations asserted.²⁰⁸

The Fourth Circuit did caution that district courts should exercise particular care in assessing the purpose of a party or an attorney who signs a pleading or other court document, adding that an evidentiary hearing might be required when there are credibility issues, contested factual questions, or reasoned explanations of purpose afforded.²⁰⁹ The panel apparently failed to appreciate that these were the very types of factors that underlay much of the trial judge's improper-purpose finding and its own affirmance of that decision. Indeed, each court's resolution of the improper-purpose question is problematic, because both are grounded in unsupported speculation, inference derived from apparently false premises, and the rejection of counsel's rational explanations.²¹⁰

²⁰⁴ *Id.*

²⁰⁵ *Id.* Plaintiffs filed on the "eve of the anniversary of the takeover of *The Robesonian*." *Id.*

²⁰⁶ The trial court found incredible the explanation that numerous claims had become moot and absurd the assertion that the "wide-spread conspiracy involving high-level" officials suddenly had become insignificant. *Id.*

²⁰⁷ *Id.* at 520.

²⁰⁸ *Id.*

²⁰⁹ *Id.* The panel criticized several additional aspects of the trial judge's improper-purpose determination, such as his consideration of improper purpose before reasonable pre-filing inquiry. *Id.* at 518. The weight of authority is against sanctioning for improper purpose when a reasonable inquiry precedes a paper's filing. *See, e.g.,* Burkhardt v. Kinsley Bank, 852 F.2d 512, 515 (10th Cir. 1988) (holding that counsel's reliance on several decisions from another jurisdiction and on conference with bankruptcy judge before filing complaint indicated reasonable inquiry and precluded sanctions); Hudson v. Moore Business Forms, 836 F.2d 1156, 1159 (9th Cir. 1987) ("[A] complaint that is found to be well-grounded in fact and law cannot be sanctioned as harassing, regardless of the attorney's subjective intent.").

²¹⁰ The Fourth Circuit's convoluted reasoning discussed in the text accompanying notes 203-204 is typical. *See generally* Pitts Petition, *supra* note 1, at 57-59. The panel again seemed to emphasize product unduly, especially in light of considerable evidence regarding

3. *Due Process.* The Fourth Circuit held that "due process does not require an evidentiary hearing before sanctions are imposed," even when the court depends in part on Rule 11's improper-purpose prong.²¹¹ The panel relied substantially on a leading Fifth Circuit case and the Advisory Committee Note that accompanied Rule 11 to ascertain whether, and if so what type of, a hearing is necessary before a judge levies sanctions.²¹² An observation in the Note, which the Fifth Circuit and many other courts recite, is that, when the court's involvement in the substantive proceedings affords it thorough appreciation of the facts needed to resolve Rule 11 issues, additional inquiry will be unnecessary.²¹³ The Fifth Circuit correspondingly stated that if a judge must resolve credibility questions or decide whether a good-faith legal argument can be asserted, some type of hearing often will be appropriate.²¹⁴

The Fourth Circuit acknowledged that the number of determinations involving credibility that the district judge made in the absence of an evidentiary hearing should have suggested that such a proceeding would have been worthwhile.²¹⁵ Nonetheless, the panel found the trial court's participation in the litigation adequate to provide it full knowledge of the relevant facts without the need for an evidentiary hearing.²¹⁶ The appellate court also decided that due process was satisfied, because the district judge afforded counsel the opportunity to contest his determinations of Rule 11 violations through the submission of "voluminous written legal arguments," affidavits, and thorough participation in oral argument.²¹⁷ The Fourth Circuit held, however, that the lawyers must have an opportunity to contest the type and amount of sanctions levied, especially given their large monetary nature.²¹⁸ It therefore re-

conduct. See *supra* note 173.

²¹¹ *Kunstler*, 914 F.2d at 521.

²¹² *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987); FED. R. CIV. P. 11 advisory committee's note.

²¹³ *Kunstler*, 914 F.2d at 521 (citing *Donaldson*, 819 F.2d at 1561 (citing FED. R. CIV. P. 11 advisory committee's note)). The court in *Donaldson* observed that this situation often arises when the judge has ruled on the legal or factual merits of motions to dismiss or motions for summary judgment. 819 F.2d at 1561 n.13.

²¹⁴ *Kunstler*, 914 F.2d at 521 (citing *Donaldson*, 819 F.2d at 1561).

²¹⁵ *Id.* at 522.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

manded the determinations to the trial court for reconsideration.²¹⁹

The Fourth Circuit found unpersuasive the precedent that the plaintiffs' counsel cited for the proposition that a hearing should be required when judges premise Rule 11 sanctions on bad faith or when issues of credibility are involved.²²⁰ The panel correspondingly rejected the lawyers' contention that an evidentiary hearing was necessary in this lawsuit, even if not in all cases implicating the question of improper purpose.²²¹

The court's due process analysis is problematic in several respects. The panel unduly de-emphasized those cases stating that due process requires a hearing if a Rule 11 violation is predicated on bad faith or if issues of credibility are implicated.²²² Indeed, the Third Circuit recently suggested that a hearing should be held "to resolve disputes of material fact when the cold record may not disclose the full story."²²³ Even the sources that the Fourth Circuit invoked, namely the Fifth Circuit case and the Advisory Committee Note, indicate that counsel for plaintiffs were due more process than they received in the instant case.²²⁴ The notion that a trial court's participation in litigation could give it complete understanding of the pertinent facts is simply inapplicable, because the judge had *no* substantive involvement before the defendants sought sanctions, and he entered the Rule 11 proceeding with severely limited knowledge of the lawsuit.²²⁵ Finally, a hearing was needed to resolve many disputed issues of credibility raised by nu-

²¹⁹ *Id.*

²²⁰ *Id.* at 521 (citing *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 206 (7th Cir. 1985); *INVST Fin. Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 405 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987)). The panel found the courts' reasoning scant. *Id.*

²²¹ "[T]he findings are not clearly erroneous even excluding some evidence of 'improper motive' which appellants contested." *Kunstler*, 914 F.2d at 522.

²²² See *supra* note 220 (citing these cases). See generally *Kunstler* Petition, *supra* note 6, at 14-16 (discussing these cases and court's failure to follow them).

²²³ *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1359 (3d Cir. 1990). "No precedent holds that a court may rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts." *Kunstler* Petition, *supra* note 6, at 16.

²²⁴ See *supra* notes 212-214 and accompanying text (discussing these sources). See generally Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

²²⁵ The original case was dismissed voluntarily little more than three months after its filing. The only action taken in that period was a plaintiff's motion for expedited discovery and defendant's motion for a protective order. *Kunstler*, 914 F.2d at 511-12.

merous assertions in the affidavits and papers submitted.²²⁶

4. *The Sanctions Imposed.*

a. *Additional Sanctions.* The Fourth Circuit found improper the district judge's imposition of "additional sanctions" of \$10,000 on each of the three lawyers for intentionally filing outrageous claims and publicizing them.²²⁷ The panel stated that Rule 11 does not reach all behavior within the judicial process and clearly does not encompass activity outside of that system.²²⁸

b. *Attorney's Fees.* The appellate court vacated the amount of the monetary sanction, finding that the trial judge had erred by invoking Rule 11 to compensate the defendants and to shift fees.²²⁹ The Fourth Circuit instructed that the Rule should not be blindly employed as a fee-shifting device.²³⁰ The panel reiterated its view that judges should levy the "least severe sanction adequate to serve" the Rule's purposes, adding that Rule 11's principal objective is to "deter future litigation abuse" and that the amount of financial sanctions always should reflect this purpose.²³¹ The court admonished trial judges to keep in mind Rule 11's other purposes, which include reimbursing victims of violations, punishing existing litigation abuse, streamlining litigation, and promoting court management.²³²

The Fourth Circuit offered valuable guidance for district courts contemplating the imposition of monetary assessments. The panel

²²⁶ See *supra* text accompanying note 216 (discussing rationale for Fourth Circuit panel's contrary view).

²²⁷ *Kunstler*, 914 F.2d at 525.

²²⁸ *Id.*; accord *Simpson v. Welch*, 900 F.2d 33, 36 (4th Cir. 1990) ("The rule does not purport to sanction conduct in the course of a lawsuit . . . that does not involve the signing of pleadings."); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620-22 (8th Cir. 1987) ("Rule 11 is not the proper basis for sanctions against an attorney based on alleged misrepresentation in a settlement agreement.").

²²⁹ *Kunstler*, 914 F.2d at 522.

²³⁰ *Id.* (citing *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987)); accord *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) ("Rule 11 is not a fee-shifting device in the sense that the loser pays. It is a law imposing sanctions if counsel files with improper motives or inadequate investigation.").

²³¹ *Kunstler*, 914 F.2d at 523 (noting that district court must choose least severe sanction possible); *id.* at 522-23 ("[T]he primary . . . purpose of Rule 11 is to deter future litigation abuse."); accord *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (noting deterrence function); *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 871-75 (5th Cir. 1988) (noting that court must impose least severe sanction necessary to effectuate deterrence function).

²³² *Kunstler*, 914 F.2d at 522; accord *Blue v. United States Dep't of Army*, 914 F.2d 525, 547 (4th Cir. 1990); *White v. General Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990).

requested that trial judges clearly explain the reasons for the sanctions they choose to levy, thereby facilitating appellate review of the propriety of awards.²³³ The Fourth Circuit also suggested that lower courts consult four considerations that the Tenth Circuit recently articulated in *White v. General Motors Corp.*²³⁴ The panel embellished those factors.

The first consideration is the reasonableness of the attorney's fees that the moving party incurred. In *White*, the Tenth Circuit stated that calculating the amount of the litigant's reasonable expenses generally is the initial step,²³⁵ remarking that the injured party has a duty to mitigate its costs.²³⁶ In *Kunstler*, the Fourth Circuit provided guidance specific to this case, observing that the district judge should consider whether the movants failed to mitigate their expenses by invoking Rule 11 after dismissal and whether the substantial time the defendants devoted to pursuing sanctions was justified.²³⁷ Recapitulating the least-severe-sanction concept, the panel stated that monetary awards should never be premised exclusively on the movant's attorney's fees and that "reasonable fees" need not necessarily be actual ones.²³⁸ The appellate court held that "due process does not require an evidentiary hearing" on reasonableness²³⁹ but that a trial court in its discretion may allow sanctioned parties to contest their opponents' fee statements.²⁴⁰ In support of its due process decision, the Fourth Circuit differentiated the purposes of Rule 11 sanctions from the shifting

²³³ *Kunstler*, 914 F.2d at 523; accord *Thomas*, 836 F.2d at 882-83; *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437-40 (7th Cir. 1987).

²³⁴ 908 F.2d 675, 684-85 (10th Cir. 1990).

²³⁵ *Id.* at 684. In evaluating reasonableness, the judge should remember that the claim's frivolous nature is "what justify[ed] the sanction[.]" *Id.*

²³⁶ *Id.*; accord *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1092, 1094 (3d Cir. 1988); *Thomas*, 836 F.2d at 878-81.

²³⁷ *Kunstler*, 914 F.2d at 523 ("Only attorney time which is in response to that which has been sanctioned should be evaluated."); accord *White*, 908 F.2d at 684. Judges should also consider whether the movants should have given earlier notice of the possible violation. *Kunstler*, 914 F.2d at 523.

²³⁸ *Kunstler*, 914 F.2d at 523 (citing *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 211 (4th Cir. 1988)); accord *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) (holding that reasonable fees need not be actual and citing *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1439-40 (7th Cir. 1987)).

²³⁹ *Kunstler*, 914 F.2d at 524.

²⁴⁰ *Id.* When the sanction is large and premised on movants' fee statements, violators should be allowed to evaluate and contest the charges to help the court in its decisionmaking. *Id.*

of attorney's fees, which fee-shifting statutes prescribe, by observing that offenders have already had the opportunity to contest Rule violations and by recognizing the need to minimize the number of Rule 11 hearings.²⁴¹

The minimum amount reasonably needed to deter the conduct that contravened the Rule constitutes the second factor from *White*.²⁴² The Fourth Circuit explained that trial judges must constantly remember the restricted purpose of Rule 11 and that its enforcement should not chill the pursuit of facially legitimate litigation or attorneys' creativity in introducing new legal theories.²⁴³

The third consideration is the ability of offenders to pay the amount assessed. The Tenth Circuit in *White* analogized sanctions to punitive damages and inability to pay to an affirmative defense.²⁴⁴ The Fourth Circuit in *Kunstler* stated that the imposition of monetary awards absent consideration of this factor would be an abuse of discretion, admonished judges to refrain from levying monetary assessments that would bankrupt violators or drive lawyers out of practice,²⁴⁵ and advised that offenders who may be ordered to pay large monetary awards should be permitted to tender information on their financial status.²⁴⁶ In the instant case, the panel instructed that the violators should have been allowed to

²⁴¹ *Id.* at 523-24. The court said that Rule 11 sanctions are not principally intended to compensate but to deter attorney and litigant misconduct, so offenders have less interest in contesting them than in disputing allegations that they violated the Rule in the first place. *Id.* at 524. In cases such as this one, however, the reputational and resource interests of the sanctioned attorneys are substantial.

²⁴² *White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990); *accord Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-96 (3d Cir. 1988); *Eastway Constr. Corp. v. City of N.Y.*, 637 F. Supp. 558, 565 (E.D.N.Y. 1986) (revising award upward but stating sanction must be reasonably necessary to serve Rule 11's purpose), *modified and remanded*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

²⁴³ *Kunstler*, 914 F.2d at 524; *accord Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990); *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 935 (2d Cir.), *reh'g granted*, 875 F.2d 39 (2d Cir. 1989); *Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988).

²⁴⁴ *White*, 908 F.2d at 685. The offenders have the burden of bringing forward evidence of their financial status. *Kunstler*, 914 F.2d at 524. *See generally Doering*, 857 F.2d at 195-96 (citing case authority on ability to pay).

²⁴⁵ *Kunstler*, 914 F.2d at 524; *accord Doering*, 857 F.2d at 195, 196; *Tedeschi v. Smith Barney, Harris Upham & Co.*, 579 F. Supp. 657, 664 (S.D.N.Y. 1984), *aff'd per curiam*, 757 F.2d 465 (2d Cir.), *cert. denied*, 474 U.S. 850 (1985).

²⁴⁶ *Kunstler*, 914 F.2d at 524-25; *accord Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1439 (7th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

show that the size of the sanctions would unfairly limit the attorneys' access to federal courts, restrict their ability to practice, or inflict "great financial distress."²⁴⁷

A miscellany of considerations comprises the fourth factor. In *White*, the Tenth Circuit enumerated the offender's experience, history, and capability; the violation's severity; the degree of bad faith or malice implicated in the offense; the risk of chilling effects; and additional factors deemed proper in specific situations.²⁴⁸ The Fourth Circuit found relevant counsel's substantial experience, the "scandalous and outrageous" character of the allegations they asserted, and the litigation's asserted improper purpose.²⁴⁹

The Fourth Circuit, in affording guidance on the amount of monetary sanctions to be imposed, evinced concern for the needs of civil rights plaintiffs and lawyers. Certain aspects of its treatment, however, remain less solicitous. For example, the panel understated the need for sanctioned parties to have an opportunity to contest financial awards.²⁵⁰ Although the appellate court vacated the assessments levied, it remanded them for a "reasonableness" determination to the same district judge who had demonstrated considerable hostility toward counsel, as evidenced by the imposition of \$30,000 in punitive, unauthorized sanctions absent any semblance of due process.²⁵¹

In short, the Fourth Circuit opinion is deficient in many important respects. The court uncritically adopted much of the trial judge's opinion, including the court's interpretation of Rule 11 and its application of the provision to the evidence.²⁵² Highly significant was the panel's selective approach to appellate review. The court affirmed the trial judge's finding that counsel had violated

²⁴⁷ *Kunstler*, 914 F.2d at 524.

²⁴⁸ *White*, 908 F.2d at 685; accord *Doering*, 857 F.2d at 196-97. The judge can also increase sanctions for attorneys who previously have been sanctioned and sometimes must consider the propriety of joint and several liability. *Kunstler*, 914 F.2d at 525.

²⁴⁹ *Kunstler*, 914 F.2d at 525.

²⁵⁰ See *supra* note 241 (discussing panel's analysis of attorneys' various interests in averting sanctions).

²⁵¹ See *supra* text accompanying note 116 (discussing trial court's imposition of punitive attorney sanctions); cf. *Kunstler*, 914 F.2d at 525 (reversing trial court's award of \$10,000 against each lawyer).

²⁵² See *supra* notes 163-165, 181-193 and accompanying text (discussing specific trial court determinations that appellate court adopted). See generally *Petition for Rehearing*, *supra* note 184, at 1-2 (pointing out flaws in Fourth Circuit opinion).

the Rule in filing a "baseless" complaint, yet failed to set forth fairly the allegations in that complaint or to view generously the evidence adduced to support them.²⁵³ The panel considered the factual and legal premises for only two of six causes of action that plaintiffs pleaded; totally ignored their strongest claims; focused on unimportant, isolated factual mistakes in the complaint and on the plaintiffs' less significant legal claims; and narrowly interpreted the claims, rejecting, for example, counsel's arguments for extending existing law.²⁵⁴ The Fourth Circuit even seemed to test the plaintiffs' allegations by the erroneous standard of whether the claims would prevail rather than whether they were plausible and overemphasized the validity of the complaint rather than the reasonableness of the inquiry that supported it.²⁵⁵

VI. SUBSEQUENT DEVELOPMENTS RELATING TO *IN RE KUNSTLER*

A. PETITION FOR REHEARING EN BANC

In October 1990, Kunstler, Nakell, and Pitts filed petitions for rehearing and suggestions for hearing en banc.²⁵⁶ On October 11, 1990, the Fourth Circuit denied the petitions, which failed to receive the vote of a single member of the court.²⁵⁷ The Fourth Circuit responded to the petition with unusual alacrity for a federal appeals court ostensibly inundated by the litigation explosion and

²⁵³ This approach contrasts with the appellate review in *Blue v. United States Dep't of Army*, 914 F.2d 525, 540-41 (4th Cir. 1990). The panel in that case gave "plaintiffs' allegations the generous reading" it believed they were due. *Id.* at 540.

²⁵⁴ For instance, the plaintiffs' First and Sixth Amendment claims received little treatment, the defendants' jurisdictional authority received great emphasis, and the exceptions to legal rules for which plaintiffs contended received little credence. *Cf.* *Petition for Rehearing*, *supra* note 184, at 1-2 (arguing that appellate court's analysis conflicts with several Fourth Circuit opinions).

²⁵⁵ *Kunstler*, 914 F.2d at 514-18. The erroneous standard apparently violates *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), which asks whether the claims were "reasonable or plausible . . . under the circumstances." The Fourth Circuit in *Blue*, 914 F.2d at 535-38, as in *Kunstler*, also overemphasized the merits and gave too little attention to the prefiling inquiry.

²⁵⁶ *Petition for Rehearing*, *supra* note 184 (Nakell's petition); *Petition for Rehearing and Suggestion for Rehearing in Banc submitted on Behalf of William Kunstler*, *Kunstler* (No. 89-2815); *Appellant Pitts' Petition for Rehearing and Suggestion for Rehearing in Banc*, *Kunstler* (No. 89-2815).

²⁵⁷ *In re Kunstler*, No. 89-2815, 1990 U.S. App. LEXIS 22983 (4th Cir. Oct. 11, 1990); Telephone Interview with Barry Nakell, appellant in *Kunstler* (Nov. 1, 1990); *cf.* Tobias, *supra* note 31, at 144 (noting intracircuit Rule 11 variation and infrequency of en banc hearings to foster consistency).

one apparently so overburdened that Congress created four new judgeships for it in the 101st Congress.²⁵⁸

B. PETITION FOR CERTIORARI

In November 1990, Kunstler and Pitts filed separate petitions for writs of certiorari with the United States Supreme Court, and Nakell did so in January 1991.²⁵⁹ On April 15, 1991, the Supreme Court denied the petitions, thus making the Fourth Circuit the lawyers' "court of last resort."²⁶⁰ It appears unlikely, however, that counsel would have received more solicitous treatment from the Supreme Court. The Court has long expressed concern about the litigation explosion and has demonstrated increasing willingness to interpret procedural provisions in ways that frustrate attainment of congressional goals, such as reducing discrimination, in substantive statutes—phenomena that the disastrous civil rights rulings of the Court's 1988 Term exemplify.²⁶¹ The denial of certiorari meant, of course, that the three attorneys had the difficult task of persuading the very judge who imposed such large sanctions on them that he should exercise his discretion to levy a much smaller

²⁵⁸ Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098-99.

²⁵⁹ As to Kunstler and Pitts, see *Kunstler v. Britt*, 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990); *Pitts v. Britt*, 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990); *Pitts Petition*, *supra* note 1; *Kunstler Petition*, *supra* note 6. As to Nakell, see *Nakell v. Britt*, 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991); *Nakell Petition*, *supra* note 8. *Julius Chambers*, who was sanctioned in *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990), also decided to appeal the Fourth Circuit decision. See *Chambers v. United States Dep't of Army*, 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991); *Petition for a Writ of Certiorari on Behalf of Julius Chambers, Chambers v. United States Dep't of Army*, 59 U.S.L.W. 3503 (U.S. 1990) (No. 90-1076).

²⁶⁰ *Kunstler v. Britt*, 111 S. Ct. 1607 (1991); *Pitts v. Britt*, 111 S. Ct. 1607 (1991); *Nakell v. Britt*, 111 S. Ct. 1607 (1991). The Court also denied *Julius Chambers's* petition in *Blue. Chambers v. United States Dep't of Army*, 111 S. Ct. 1580 (1991). Of course, all of the circuit courts have increasingly become courts of last resort because the Supreme Court grants so few petitions for certiorari.

²⁶¹ See Theodore Y. Blumoff & Harold S. Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. Rev. 1 (1990) (discussing apparent policies underlying recent Supreme Court Title VII cases and how decisions manifest these policies through use of procedure); Symposium, *The United States Supreme Court's 1988 Term Civil Rights Cases*, 64 TUL. L. REV. 1341 (1990) (discussing Supreme Court's doctrines and decisions on discrimination); Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 993 (1991) (discussing use of amended Rules 11, 16, and 26 in civil rights and discrimination cases) [hereinafter Tobias, *Judicial Discretion*]; Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992) (discussing Supreme Court cases of 1988 Term and Civil Rights Act of 1991, which modified many of those cases) [hereinafter Tobias, *Procedural Problems*].

award. Given the lack of solicitude for the lawyers that the judge had already exhibited, his substantial discretion to choose the sanction, and the Fourth Circuit's guidance, it was unlikely that the district court would significantly reduce the assessment.²⁶²

C. DISTRICT COURT OPINION ON REMAND

On August 30, 1991, the district court issued an opinion holding Kunstler, Nakell and Pitts jointly and severally liable for \$50,000 in sanctions.²⁶³ The trial judge reiterated many of the instructions that the Fourth Circuit afforded for ascertaining an appropriate sanction; however, the district court failed to apply that guidance meaningfully. The trial judge essentially imposed the sanctions for compensatory purposes, generally seemed to misunderstand the appellate court's directions, and specifically contravened several explicit instructions.

The trial judge initially summarized the Fourth Circuit's guidance. The district court recognized that Rule 11's principal purpose is the deterrence of future litigation abuse and that a judge is to impose the "least severe sanction adequate to serve the various purposes of Rule 11."²⁶⁴ The district court then stated that other purposes of Rule 11, such as reimbursing victims of Rule 11 violations, controlling dockets, and punishing violations, should be considered in ascertaining appropriate sanctions.²⁶⁵ The judge observed that when monetary sanctions are imposed, their amount "should always reflect the primary purpose of deterrence."²⁶⁶ The trial court correspondingly stated that the Fourth Circuit required it to consider explicitly four factors in selecting a pecuniary sanction: "(1) The reasonableness of the opposing party's attorney's fees; (2) the minimum amount necessary to deter; (3) the ability to pay; and (4) the severity of the Rule 11 violation."²⁶⁷ The judge

²⁶² The Fourth Circuit's guidance, although potentially solicitous of civil rights plaintiffs, remained general enough that it failed to cabin sufficiently the trial judge's considerable discretion to select the sanction.

²⁶³ *In re Kunstler*, No. 89-06-CIV-3-H (E.D.N.C. Aug. 30, 1991) [hereinafter District Court Opinion II].

²⁶⁴ *Id.* at 2 (citing *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991)).

²⁶⁵ *Id.* (citing *Kunstler*, 914 F.2d at 522).

²⁶⁶ *Id.* (quoting *Kunstler*, 914 F.2d at 523).

²⁶⁷ *Id.* (citing *Kunstler*, 914 F.2d at 523).

added that monetary awards should be based upon these considerations and should not be premised exclusively on the amount of attorney's fees that the movant has incurred.²⁶⁸

The trial court recognized that a broad array of sanctions was available and reiterated the idea that a judge must select the least severe sanction necessary to achieve the Rule's deterrent purpose.²⁶⁹ Nonetheless, the court determined that a monetary award was appropriate as the "minimum sanction adequate to deter future Rule 11 violations,"²⁷⁰ offering little justification for that decision. The judge characterized counsel as experienced trial lawyers who were "well versed in the Federal Rules of Civil Procedure and Rule 11" and who provide "legal services for public interest clients."²⁷¹ The court also stated that the violation's character and the attorneys' persistence in claiming that there was no Rule 11 violation required "more than a mere reprimand . . . to deter future violations."²⁷² The judge, therefore, apparently premised his decision to impose monetary sanctions on counsel's failure to be sufficiently contrite. In short, the court afforded virtually no support for its determination to levy a financial award.

Once the district court found that monetary sanctions were appropriate, it purportedly applied the four factors articulated by the Fourth Circuit.²⁷³ Nevertheless, the trial judge apparently ignored certain important facets of the appellate court's enunciation of those considerations, while diffidently applying numerous other aspects.

The district court, in evaluating the initial factor, the reasonableness of movant's attorney's fees, found that the fee requests submitted were accurate and justified but determined that they must be reduced by the amount spent in pursuing sanctions.²⁷⁴ Thus, while the defendants sought \$93,000 in sanctions, the trial judge determined that the maximum amount that it could consider

²⁶⁸ *Id.* (citing *Kunstler*, 914 F.2d at 523).

²⁶⁹ *Id.* at 3-4.

²⁷⁰ *Id.* at 4.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See *supra* text accompanying note 267 (listing these factors).

²⁷⁴ District Court Opinion II, *supra* note 263, at 4-6; accord *Brubaker v. City of Richmond*, 943 F.2d 1363, 1387 (4th Cir. 1991); see also *Blue v. United States Dep't of Army*, 914 F.2d 525, 548 (4th Cir. 1990) ("Litigants should be able to defend themselves from sanction without incurring additional sanctions."), *cert. denied*, 111 S. Ct. 1580 (1991).

reasonable as a financial sanction was \$59,000.²⁷⁵ The district court simply neglected to apply the Fourth Circuit's instructions that it exclude from consideration in computing attorney's fees any time that lawyers spent defending unsanctioned claims²⁷⁶ and that it reduce the fees awarded because of defendants' failure to give earlier notice of potentially sanctionable conduct.²⁷⁷ The trial judge apparently failed to apply the appellate court's guidance directing him to consider whether the defendants neglected to mitigate their expenditures by filing a Rule 11 motion only after dismissal,²⁷⁸ although the district court did mention this instruction.²⁷⁹

The trial judge then tersely examined the second factor, the minimum amount necessary to deter.²⁸⁰ The court rejected the sanctioned attorneys' assertion that damage to their reputations and public embarrassment were sufficient sanctions and accused counsel of refusing to help it ascertain a monetary amount consistent with the Rule's deterrent purpose.²⁸¹ The judge, accordingly, premised the determination that a substantial pecuniary sanction was necessary on his own analysis of the lawyers' behavior and their reactions to the sanctions motion.²⁸² The court found that "more than a nominal amount or 'token' award" was warranted to guarantee that the attorneys would not file meritless litigation in the future.²⁸³ The district judge failed to make any individualized determination of the least severe sanction necessary to deter.²⁸⁴ The court did not conduct this inquiry, even though Nakell presented the court with a wealth of evidence that substantially supported the imposition of a nonmonetary sanction or a significantly smaller financial award.²⁸⁵

²⁷⁵ District Court Opinion II, *supra* note 263, at 4-6.

²⁷⁶ *See id.*; *see also In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991).

²⁷⁷ *See* District Court Opinion II, *supra* note 263, at 4-6; *see also Kunstler*, 914 F.2d at 523.

²⁷⁸ *See* District Court Opinion II, *supra* note 263, at 4-6; *see also Kunstler*, 914 F.2d at 523.

²⁷⁹ District Court Opinion II, *supra* note 263, at 5.

²⁸⁰ *Id.* at 6-7.

²⁸¹ *See id.* at 7.

²⁸² *Id.*

²⁸³ *Id.* at 6-7.

²⁸⁴ *Id.*

²⁸⁵ Nakell presented evidence, for example, of his reputation for honesty, ethical propriety, and public service and of the profound impact that the sanctions already imposed had

The trial judge next considered the third factor, ability to pay.²⁸⁶ Although Pitts had submitted much evidence relating to this consideration, the court summarily concluded that the magnitude of the sanction selected was insufficiently large to bankrupt the attorneys or force them to quit practicing.²⁸⁷ The judge apparently attempted to justify the cryptic treatment of ability to pay and the lack of consideration that he accorded to each individual lawyer's capacity. The court observed that the imposition of joint and several liability meant that Kunstler, Nakell, and Pitts could formulate their own contribution system for paying the sanction, flip-pantly remarking that counsel clearly coordinated commencement of the litigation that led to sanctioning and that they could pursue a similar approach in paying the assessment.²⁸⁸

The district court finally turned to the fourth factor, which comprises a miscellany of considerations that the Fourth Circuit articulated.²⁸⁹ The judge examined only two of the considerations and employed them essentially to substantiate the large amount of the sanction levied.²⁹⁰ First, the court derived the proposition that counsel's violation of Rule 11 was intentional from the attorneys' expertise as experienced trial lawyers.²⁹¹ Second, the judge stated that the lawyers contravened all three parts of Rule 11, characterizing "[s]uch an extensive violation [as] egregious," and found that their behavior amply supported a strong sanction.²⁹² The court, however, failed to mention two critical considerations espoused by the Fourth Circuit—the offender's history and the danger of chilling the kind of litigation implicated.²⁹³ The application of these considerations should have led the judge to levy a much smaller sanction. For example, Nakell offered substantial evidence of his exemplary record of legal representation, especially for resource-poor individuals, such as Native Americans in Robeson County

had on him. Brief of Appellant Barry Nakell at 9-13, *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) (No. 91-2267), *cert. denied*, 111 S. Ct. 1607 (1991) [hereinafter Brief of Nakell].

²⁸⁶ District Court Opinion II, *supra* note 263, at 7.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 7-8; see also *Kunstler*, 914 F.2d at 524-25.

²⁹⁰ District Court Opinion II, *supra* note 263, at 7-8.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *supra* text accompanying note 290 (noting that judge considered only two of many factors).

and incarcerated persons.²⁹⁴ Correspondingly, when civil rights attorneys learn that their ablest colleagues, lawyers such as Julius Chambers, William Kunstler, and Barry Nakell, have received large sanctions, this chills the enthusiasm of all civil rights practitioners.²⁹⁵

The court summarized its failure to accord individualized consideration to Kunstler, Nakell, and Pitts by holding that all three attorneys must be held jointly and severally liable.²⁹⁶ The judge flatly refused to make any distinction among the lawyers, treating them equally, because he considered their violations to be identical.²⁹⁷ The district court concluded its opinion by imposing joint and several liability on Kunstler, Nakell, and Pitts in the amount of \$50,000.²⁹⁸ The judge also prohibited all three attorneys from appearing in or practicing before the Eastern District of North Carolina until they paid the sanction.²⁹⁹

D. FOURTH CIRCUIT OPINION ON APPEAL OF REMAND

In October 1991, Kunstler, Nakell, and Pitts filed notices of appeal of the determination on remand to the trial court.³⁰⁰ Briefing occurred in early 1992, and oral argument was conducted on May 4, 1992.³⁰¹ On July 2, the Fourth Circuit issued a per curiam, unpublished opinion in which it very deferentially reviewed the sanctions determination of the district judge.³⁰²

The panel initially disagreed with appellants' contention that the imposition of nonmonetary sanctions would have satisfied Rule 11's purposes.³⁰³ The court stated that the trial judge considered

²⁹⁴ Brief of Nakell, *supra* note 285, at 12-13.

²⁹⁵ See *Blue v. United States Dep't of Army*, 914 F.2d 525, 546-51 (4th Cir. 1990) (affirming imposition of substantial sanction on Julius Chambers, Director-Counsel of NAACP Legal Defense Fund), *cert. denied*, 111 S. Ct. 1580 (1991). See generally Stephen Labaton, *Solution to Wasteful Lawsuits Becomes a Problem*, N.Y. TIMES, June 14, 1992, at E2.

²⁹⁶ District Court Opinion II, *supra* note 263, at 8.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 9.

²⁹⁹ *Id.* This ruling meant that Nakell would have to pay the entire amount to practice in the court, were Kunstler and Pitts not to contribute. Brief of Nakell, *supra* note 285, at 9 n.1.

³⁰⁰ Brief of Nakell, *supra* note 285, at 1.

³⁰¹ Telephone Interview with Barry Nakell, Professor of Law, University of North Carolina (June 18, 1992).

³⁰² *In re Pitts*, No. 91-2265, 1992 U.S. App. LEXIS 15265 (4th Cir. July 2, 1992).

³⁰³ *Id.* at *3.

nonfinancial sanctions but determined that the circumstances of the lawsuit required that he levy a monetary award to deter future abuse of the litigation process.³⁰⁴ The Fourth Circuit observed that such a decision was within the district judge's discretion and found no abuse in the ruling.³⁰⁵

The panel then examined appellants' argument that the size of the monetary sanctions imposed was excessive. The court reiterated the four factors that it had instructed the district judge to take into account when ascertaining the amount of the assessment.³⁰⁶ The Fourth Circuit traced the trial judge's calculations.³⁰⁷ It stated that he began with \$93,000 in fees and expenses that defendants claimed, reduced that by the amount spent on pursuit of sanctions, and determined that the remaining fees and costs of \$59,000 were reasonable.³⁰⁸ The panel stated that the district judge imposed sanctions of \$50,000 after considering the other three factors—"appellants' ability to pay, the minimum necessary to deter, and the severity of the violation."³⁰⁹

The Fourth Circuit essentially agreed with appellants' contention that the lack of itemization made it impossible to discern whether expenses sought by defendants for time spent by SBI agents and paralegals were devoted to pursuing Rule 11 sanctions.³¹⁰ The court expressed concern about the "lack of specificity" in affidavits substantiating these costs and disallowed them, remarking that the trial judge might have had this generality in mind when reducing the sanctions calculation from \$59,000 to \$50,000.³¹¹

The court decided that careful review of the briefs, the record, and oral arguments revealed that the rest of appellants' challenges lacked merit.³¹² The Fourth Circuit concluded that the district judge acted within his discretion when levying sanctions but reduced the judgment to \$43,325, subtracting the amount allowed for

³⁰⁴ *Id.* at *3-4.

³⁰⁵ *Id.* at *4.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at *5.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at *5.

³¹¹ *Id.*

³¹² *Id.* at *6.

expenses of SBI agents and paralegals.³¹³

VII. ADDITIONAL NATIONAL AND FOURTH CIRCUIT JURISPRUDENCE THAT DISADVANTAGES CIVIL RIGHTS PLAINTIFFS AND LAWYERS

As troubling as the ruling in *In re Kunstler* is for civil rights plaintiffs and attorneys, the opinion might be somewhat less problematic were it not part of broader developments in the Fourth Circuit and nationwide.³¹⁴ The Supreme Court and many lower federal courts have applied substantive and procedural provisions of civil rights legislation and the Federal Rules of Civil Procedure in ways that disadvantage, and even disproportionately affect, civil rights plaintiffs and their counsel.³¹⁵ These developments need not be comprehensively chronicled here, for that task has been undertaken elsewhere.³¹⁶ Several examples, however, suffice to demonstrate that the whole is more than the sum of its parts.

In the 1988 Term, the Supreme Court interpreted substantive and procedural language of numerous civil rights statutes in ways that complicate the efforts of civil rights plaintiffs to vindicate their rights.³¹⁷ The Court affirmed the Fourth Circuit's finding that a racial harassment claim was not cognizable under *Patterson v. McLean Credit Union*,³¹⁸ one of the major civil rights cases of that

³¹³ *Id.*

³¹⁴ See generally Tobias, *supra* note 15; Tobias, *Procedural Problems*, *supra* note 261.

³¹⁵ See Tobias, *supra* note 15, at 296-335 (arguing that Federal Rules as applied adversely affect civil rights plaintiffs); Phyllis T. Baumann, et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992) (arguing that procedures as applied adversely affect employment discrimination plaintiffs); Tobias, *Procedural Problems*, *supra* note 261, at 811-13 (analyzing Civil Rights Act of 1991).

³¹⁶ See, e.g., Blumoff & Lewis, *supra* note 261 (analyzing employment discrimination cases of 1988 Term of Supreme Court); Tobias, *supra* note 15, at 296-335 (discussing judicial application of Rules 8, 11, 19, 24(a)(2), 68, and others and recognizing pattern of adverse application of these rules to civil rights plaintiffs); *Overview: Civil Rights in the 1990s—Title VII and Employment Discrimination*, 8 YALE L. & POL'Y REV. 197, 197-379 (1990) (discussing in series of articles issues and policy choices in employment discrimination after 1988 Term).

³¹⁷ See generally Tobias, *Procedural Problems*, *supra* note 261, at 811-13; Sandra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Reponse: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990) (recounting history of civil rights legislation and Supreme Court enforcement thereof and examining legislative responses to Court's decisions).

³¹⁸ 491 U.S. 164, 178 (1989), *aff'g in part, vacating in part, and remanding* 805 F.2d 1143 (4th Cir. 1986).

Term. All of the circuits, including the Fourth Circuit, now demand that the plaintiffs plead with particularity under Rule 8.³¹⁹ Typical of the circuit's jurisprudence is a recent determination that affirmed a lower court's decision to read Rule 68 in conjunction with the fee-shifting provision of Title VII in a manner that severely restricts plaintiffs' ability to recover fees, thus potentially limiting the number of attorneys who are willing to take civil rights cases.³²⁰

VIII. IMPLICATIONS OF *IN RE KUNSTLER*

The Fourth Circuit litigation involving Rule 11 could have many deleterious consequences. For the Native American and African American residents of Robeson County who have little political power and few economic resources, it represents the loss of one important opportunity to increase their strength in a community where they have experienced discrimination and to limit alleged corruption among local officials. Insofar as these individuals, and others similarly situated, rely on federal civil rights litigation to reduce discrimination and to enhance their political, economic, and social opportunities, both courts' unsolicitous treatment of the parties and their lawyers in *In re Kunstler* discourages them. The Fourth Circuit and the district court have correspondingly compromised the exercise of fundamental First Amendment rights of free speech and freedom of association and assembly and perhaps permitted the chilling of a legitimate form of protest in Robeson County.

³¹⁹ See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 30 & n.30 (D.C. Cir. 1984) (citing authority from all circuits), *cert. denied*, 470 U.S. 1084 (1985); *Wetherington v. Phillips*, 526 F.2d 591 (4th Cir. 1975); *cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 954 F.2d 1054 (5th Cir.), *cert. granted*, 112 S. Ct. 2989 (1992) (indication that Supreme Court may resolve issue). See generally Tobias, *supra* note 15, at 296-301 (discussing federal judicial application of Rule 8 in public law litigation). For analysis of the application of numerous additional Rules, see *id.* at 301-35 (discussing Rules 11, 68, 19, and 24(a)(2)).

³²⁰ *Spencer v. General Elec. Co.*, 894 F.2d 651, 662-64 (4th Cir. 1990). Rule 68 governs settlement offers. The Rule states, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68. *Spencer* purports to follow *Marek v. Chesny*, 473 U.S. 1 (1985), which interpreted Rule 68 governing settlement offers in conjunction with the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988 (1982). See generally Thomas P. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13 (Autumn 1988) (reporting on study results of offers to settle in civil litigation).

The trial judge's vigorous application of Rule 11 and the appellate court's failure to scrutinize such enforcement may effectively mean that the pursuit of civil rights cases in certain federal district courts has for all practical purposes been foreclosed.³²¹ The panel's lack of concern for vindication of essential First and Sixth Amendment rights as well as statutory civil rights is disheartening, because the Fourth Circuit is, in nearly all cases, the court of last resort in a region that has a long, troubled history of denying political and economic power to racial minorities.³²² The threat that some district judges, who are unsympathetic and even hostile to civil rights plaintiffs and attorneys, will zealously enforce Rule 11 and that circuit courts will deferentially review such application, in conjunction with other detrimental developments, such as the Supreme Court's civil rights opinions of the 1988 Term, will additionally diminish the already small pool of lawyers who are willing to

³²¹ The *Kunstler* and *Blue* litigation could discourage potential civil rights plaintiffs and counsel who might represent them from pursuing litigation in the Eastern District of North Carolina. Data assembled in five federal districts having computerized dockets show that civil rights plaintiffs are more likely to be sanctioned than litigants who pursue a number of other types of cases. See FJC REPORT, *supra* note 34, § 1C (summarizing Rule 11 sanctions in civil rights cases from five federal district courts).

³²² Much school desegregation and voting rights litigation arose out of the Fourth Circuit. For example, the Supreme Court consolidated cases from the Eastern District of South Carolina and the Eastern District of Virginia with *Brown v. Board of Education*, 347 U.S. 483 (1954). One of the leading voting rights cases held Virginia's poll tax unconstitutional. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The trial court had upheld the use of the poll tax as a prerequisite to voting in state and local elections. *Harper v. Virginia State Bd. of Elections*, 240 F. Supp. 270, 271 (E.D. Va. 1964), *rev'd*, 383 U.S. 663 (1966). In *Loving v. Virginia*, 388 U.S. 1 (1967), the United States Supreme Court reversed the Virginia Supreme Court case of *Loving v. Commonwealth*, 147 S.E.2d 78 (Va. 1966), *rev'd*, 388 U.S. 1 (1967), which had upheld a conviction under a state statute prohibiting interracial marriages between Whites and African Americans. *Id.* at 82. In *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court struck down the application of Virginia laws, which defined as malpractice the actions of attorneys who joined suits without having a personal stake, such as the NAACP joining in racial discrimination suits. In *Button*, the Court reversed the Virginia Supreme Court case of *NAACP v. Harrison*, 116 S.E.2d 55 (Va. 1960), *rev'd sub nom.* *NAACP v. Button*, 371 U.S. 415 (1963). The Virginia court had affirmed in part and reversed in part a declaratory judgment against the NAACP. The Virginia court had held that a state statute that provided for disbarment of attorneys who accepted employment from an organization acting as agent for another person, but which itself had no pecuniary right or liability, was constitutional. *Id.* at 64-69. The Virginia Court also had struck down a statute that made it unlawful for any person not having a direct interest in the suit to offer money or anything of value to another to induce that person to commence a suit. *Id.* at 69-72.

pursue civil rights cases aggressively.³²³ Moreover, these problems could sharply curtail the representation of unpopular persons or causes as well as the filing and vigorous pursuit of highly political or controversial lawsuits, such as those seeking to challenge the questionable exercise of governmental authority.

The *Kunstler* case has serious professional and personal consequences for attorneys like Barry Nakell and Lewis Pitts, who take on these types of cases, causes, and clients in an effort to improve the quality of justice for all citizens. It is difficult to estimate the impact in the legal community and the broader society of having the appeals court besmirch one's reputation and impugn one's integrity in the pages of the Federal Reporter. This treatment ignores the enormous monetary, temporal, and emotional expenditures that these two attorneys and William Kunstler have devoted to defending their reputations and their resources. Even if the entire monetary sanction had been removed, Nakell might have ceased pursuing cases like *Bounds v. Smith*,³²⁴ which convinced the Supreme Court to create new rights for incarcerated individuals, who are the least powerful members of society. Perhaps Nakell will quit the practice altogether, a course of action that Rule 11 has forced some lawyers to consider and a few to follow.³²⁵

³²³ For a discussion of developments that have additionally diminished the small pool of civil rights attorneys, see *Evans v. Jeff D.*, 475 U.S. 717, 743-59 (1986) (Brennan, J., dissenting); *Marek v. Chesny*, 473 U.S. 1, 15-32 (1985) (Brennan, J., dissenting). For discussion of the Reagan Administration's federal judicial appointments and their lack of solicitude for civil rights plaintiffs, see Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 191-98 (1988). Cf. Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 480 (1991) (expressing similar ideas regarding Bush Administration appointees); Tobias, *Procedural Problems*, *supra* note 261, at 811-13 (noting that Congress passed Civil Rights Act of 1991 after bitter fight, but legislation did not treat numerous procedural obstacles that civil rights plaintiffs confront).

³²⁴ 430 U.S. 817 (1977). *Bounds* reaffirmed the requirement that prison officials provide prisoners with law libraries and legal assistance. *Id.*

³²⁵ See Labaton, *supra* note 295, at E2 (noting that some lawyers left practice because of Rule 11 sanctions); George Cochran, Professor of Law, University of Mississippi, and Charles Presto, Esq., Atlanta, Ga., Statements at New York University Rule 11 Conference (Nov. 2-3, 1990) (same); cf. *In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990) ("A court should refrain from imposing a monetary award so great that it will bankrupt the offending parties or force them from the future practice of law."), *cert. denied*, 111 S. Ct. 1607 (1991); see also *supra* text accompanying note 245 (discussing *Kunstler* court's assertion that district judges should refrain from levying sanctions that would drive attorneys out of practice).

IX. RECONSIDERING RULE 11

As disadvantageous as *In re Kunstler* could be for the vindication of civil rights in the Fourth Circuit and nationally, the litigation will have served a valuable purpose if it persuades those responsible for changing the Federal Rules of Civil Procedure that fundamental revision of Rule 11 must now be seriously considered. On November 1, 1990, the Advisory Committee on the Civil Rules received written public comments on Rule 11's operation. An overwhelming number of those comments criticized the Rule, and many who commented called for its repeal or substantial amendment.³²⁶

Numerous witnesses offered similar observations at a February 1991 public hearing held in New Orleans.³²⁷ That testimony and the preliminary findings of a Federal Judicial Center study of Rule 11, which the Advisory Committee commissioned, apparently prompted the Committee to conclude that some revision was warranted.³²⁸ Most Committee members seemed to believe that additional amendment was necessary, while a few apparently considered the perception that Rule 11 was chilling litigants and lawyers to be sufficient justification.³²⁹ The Judicial Center's tentative determinations that civil rights plaintiffs were more likely than certain other litigants to be sanctioned in numerous federal districts led the Advisory Committee to ask for refinement of the data.³³⁰

³²⁶ Telephone Interview with Thomas Willging, Deputy Research Director, Federal Judicial Center (Nov. 15, 1990). This also is my assessment after reviewing many of the comments submitted.

³²⁷ Telephone Interview with Thomas Willging, Deputy Research Director, Federal Judicial Center (Feb. 26, 1991); Telephone Interview with Melissa Nelken, Professor, Hastings College of the Law (Feb. 26, 1991); Telephone Interview with Georgene Vairo, Professor, Fordham University School of Law (Feb. 26, 1991). Professors Nelken and Vairo testified at the February hearing.

³²⁸ See *supra* note 327 and accompanying text (discussing testimony); FEDERAL JUDICIAL CENTER, PRELIMINARY REPORT ON RULE 11 (Feb. 27, 1991) [hereinafter PRELIMINARY REPORT]. The Judicial Center also found that approximately 80% of the federal district judges favor retaining Rule 11 intact, even though a similar number believe that the Rule does not prevent litigation abuse. Moreover, monetary assessments remain the "sanction of choice" for violations of Rule 11. See Executive Summary in PRELIMINARY REPORT, *supra*.

³²⁹ These ideas are gleaned from the telephone conversations, *supra* note 327, and from what the Committee members actually said about possible revision at the oral hearing.

³³⁰ See *supra* note 321 (citing Judicial Center data); telephone interviews, *supra* note 327 (noting Committee request that data be refined); cf. Marshall, et al., *supra* note 38, at 965-73 (noting that civil rights plaintiffs are more likely to be sanctioned than nearly all other litigants).

At the regularly-scheduled Advisory Committee meeting, which was held in late May of 1991, the Committee proposed revisions in Rule 11 that were circulated for public comment in August 1991.³³¹ One significant change was the Committee's imposition of a "continuing duty," which would require lawyers and pro se litigants to withdraw almost any portion of a paper when it becomes untenable.³³² The Committee also prescribed "safe harbors," which would require that parties provide alleged violators notice and opportunity to withdraw deficient claims before the parties file Rule 11 motions.³³³ The proposed Advisory Committee note that would accompany the proposed Rule also affords judges increased flexibility in punishing violations, admonishing them to reduce the use of attorney's fees as sanctions.³³⁴ Public comment on the proposal, which was due in February 1992, was nearly as critical as that submitted in November 1990.³³⁵

In mid-June 1992, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) approved many of the recommendations that the Advisory Committee had forwarded and included several significant changes of its own.³³⁶ The most important modification that the Standing Committee made was the suggested reversion to the discretionary imposition of sanctions once Rule violations have been found.³³⁷ The Committee

³³¹ JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53, 74-82 (1991) [hereinafter FED. R. CIV. P. 11 (Proposed Draft)]. *See generally* Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992) (analyzing Rule 11 proposal).

³³² FED. R. CIV. P. 11(b) (Proposed Draft), *supra* note 331, *reprinted in* 137 F.R.D. at 75. *See generally* Tobias, *supra* note 331, at 866-70.

³³³ FED. R. CIV. P. 11(c)(1)(A) (Proposed Draft), *supra* note 331, *reprinted in* 137 F.R.D. at 76. *See generally* Tobias, *supra* note 331, at 875-79.

³³⁴ *See* FED. R. CIV. P. 11 (Proposed Draft), *supra* note 331, advisory committee's note, *reprinted in* 137 F.R.D. at 78-80. *See generally* Tobias, *supra* note 331, at 880-87.

³³⁵ This conclusion is premised on my review of numerous comments and discussions with a number of commentators. *See also supra* note 330 and accompanying text (addressing November comment).

³³⁶ JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 43 (July 1992) (on file with author) [hereinafter PROPOSAL]. The Advisory Committee made numerous changes in its May 1991 draft before sending it to the Supreme Court. *See* Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. (forthcoming 1992).

³³⁷ *See* PROPOSAL, *supra* note 336, at 46 (Proposed FED. R. CIV. P. 11(c)) ("[T]he court

correspondingly agreed to include in the committee note the ideas that monetary sanctions "should ordinarily be paid into court as a penalty" and should be paid to those injured by violations only in "unusual circumstances."³³⁸ The Committee also decided to limit the continuing-duty concept.³³⁹

In September, the Judicial Conference approved the proposal that the Standing Committee tendered and submitted the proposal to the Supreme Court.³⁴⁰ The Court in turn must forward its recommendation to Congress before May 1, 1993, and that proposal will become effective 210 days thereafter, unless Congress alters it.³⁴¹

In re Kunstler vividly demonstrates the advisability of the type of amendment now under consideration. The case and other Rule 11 litigation illustrate that the Supreme Court and Congress should repeal or revise the provision expeditiously. If the Supreme Court does not make additional changes solicitous of civil rights plaintiffs, Congress may want to intercede, if only to prevent additional erosion of the substantive civil rights legislation that it has passed.³⁴² Without additional amendment of Rule 11, its enforcement could continue to discourage individuals and attorneys who pursue civil rights cases in objective good faith.

CONCLUSION

The Judicial Conference's recent indication that it will propose

may . . . impose an appropriate sanction . . ." (emphasis added)); see also Randall Samborn, *Key Panel Votes Shift in Rule 11*, NAT'L L.J., July 6, 1992, at 13 (discussing this proposal). The pre-1983 version of Rule 11 was discretionary. FED. R. CIV. P. 11, reprinted in 97 F.R.D. 196, 197 (1983).

³³⁸ Proposed FED. R. CIV. P. 11 proposed advisory committee note, PROPOSAL, *supra* note 336, at 53-54; see also *supra* text accompanying note 334.

³³⁹ See Proposed FED. R. CIV. P. 11(b), PROPOSAL, *supra* note 336, at 45; see also Proposed FED. R. CIV. P. 11 proposed advisory committee note, PROPOSAL, *supra* note 336, at 53-54.

³⁴⁰ Marianne Lavell, *The Judicial Conference Would Alter Rule 11*, NAT'L L. J., Oct. 5, 1992, at 5. See generally Lewis, *supra* note 20 (discussing rules revision process); Mullenix, *supra* note 134 (same).

³⁴¹ Samborn, *supra* note 337; see also 28 U.S.C. § 2074(a) (Supp. 1992) (requiring submission of proposed rule to Congress and establishing effective date). Each entity in the rule revision hierarchy typically evinces increasing deference to the judgment of those below it.

³⁴² See Tobias, *supra* note 336, § III (suggesting additional refinement in Rule 11 proposal); see also Tobias, *Judicial Discretion*, *supra* note 261, at 961 (discussing general congressional reluctance to intercede in rule revision); *supra* note 323 (discussing judicial and legislative failure to treat procedural problems in civil rights cases).

revision of Rule 11 affords considerable promise of change for those civil rights plaintiffs and lawyers who have been the victims of nearly nine years of experimentation with Rule 11. Repeal or substantial amendment will help parties and attorneys who seek to reduce discrimination by vindicating rights in the federal courts. Revision of Rule 11 would be an advance, albeit a modest one, especially for Native Americans and African Americans like residents of Robeson County who band together to combat discrimination, poverty, and alleged official misconduct.

More than four years after Eddie Hatcher and Timothy Jacobs broke into *The Robesonian*,³⁴³ and nearly three years after both men completely paid any debt that they owed society, there has been little change in Robeson County.³⁴⁴ Numerous Native-American and African-American residents of Robeson County still are attempting to exercise their First Amendment rights and to attain a measure of political and economic power, even as many continue to encounter discrimination and governmental intimidation. Allegations of official misconduct remain rampant, while there is apparently considerable drug trafficking.

As Barry Nakell prepares for another semester of teaching law students about the justice system, he must confront the unhappy prospect of knowing that he will never be completely vindicated. Perhaps Nakell will discontinue his quiet, but forceful, work to achieve social justice for all North Carolinians. William Kunstler has defiantly proclaimed: "I'm not going to pay any fine . . . I'm going to rot in jail if that's what I have to do to dramatize this thing."³⁴⁵ The ultimate irony, of course, is that years after the events that led to the Rule 11 proceeding, and even some time after the Rule is ultimately revised, certain litigants and lawyers, who seek to vindicate fundamental constitutional and civil rights, will continue to experience the chilling effects of the 1983 amendment to Rule 11.

³⁴³ See *supra* text accompanying note 6 (describing this event).

³⁴⁴ See *supra* text accompanying notes 78, 80 (describing termination of Jacobs's criminal suit and of civil litigation on behalf of Hatcher and Jacobs).

³⁴⁵ Don J. DeBenedictis, *Rule 11 Snags Lawyers*, 77 A.B.A. J., Jan. 1991, at 16, 17.