1992

Reconsidering Rule 11

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

University of Miami Law Review

VOLUME 46 MARCH 1992 NUMBER 4

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CARL TOBIAS*

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Peggy Hesse for valuable research, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

I. INTRODUCTION

The Advisory Committee on the Civil Rules recently proposed that the Supreme Court and Congress amend Federal Rule of Civil Procedure 11.[1] The Rule, as revised in 1983, has been the most con-

1. Rule 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, 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. The Advisory Committee is a 12-member body comprised of federal judges, law professors, and practitioners, which Congress has authorized to study the Federal Rules and to formulate proposals for change as indicated. *See* Harold S. Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 796, 797 n.2 (1991).

The Committee on Rules of Practice and Procedure of the Judicial Conference (Standing Committee) is a similarly constituted entity that must approve Advisory Committee proposals before they proceed to subsequent approval stages. In July, 1991, the Standing Committee

troversial amendment in the half-century history of the Federal Rules. Judges have inconsistently applied the 1983 revision, and it has engendered much expensive satellite litigation. Considerable evidence suggests that Rule 11 activity has chilled civil rights plaintiffs and attorneys. These difficulties led the Advisory Committee to initiate a study of the Rule in August of 1990, to solicit written public comments on its operation which were due that November, and to hold a public hearing on the Rule in February of 1991.

The Committee's decision to recommend changes in Rule 11 is important for many reasons. The Rule's language, its judicial implementation, and its invocation by lawyers and litigants have been extremely controversial. Rule 11 has sparked intense debate among the bench, the bar, and writers and has prompted five major studies of its implementation. Judges have issued approximately 2,000 reported opinions, thousands of unreported determinations, and many additional unpublished decisions. There has also been much informal Rule 11 activity. Indeed, the Rule's influence is so pervasive that federal court practitioners ignore it at their peril.

The amendment process also is significant because the Advisory Committee's proposal is certain to provoke lively debate. Moreover, reexamination of Rule 11 is one of the first experiments with the new rule revision procedures that Congress prescribed in 1988 to enhance public scrutiny of the process. The Committee deliberations warrant documentation because its "intent" in recommending modification will inform application of the amendment that the Supreme Court and Congress promulgate.[2] It is important, therefore, to evaluate the suggestions for change and the decisional processes underlying them. This Article undertakes that effort.

Part II examines the developments that led the Advisory Committee to reconsider Rule 11 and the public responses to its Call for Comments on the Rule. Part III descriptively analyzes the specific changes that the Committee recommended, provides the rationales

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authorized the Advisory Committee to seek public comment on its proposal. Because the proposal included only minor changes and the Advisory Committee's original proposal should closely resemble the Rule ultimately promulgated, that Committee's work is the focus of this Article.

2. I recognize that inescapable limitations restrict any effort to document the intent of a 12-person drafting committee whose members each expressed views with varying clarity. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-99, 508 (1986). It is important, however, to document what was said and to attempt to capture what was intended in the seven hours of Committee discussion. By watching the deliberations, I was able to witness certain subtleties and inflections and, thereby, gain insights into the rule revisors' thinking that are otherwise unavailable, even to one who listens to the tape recordings of the meeting.

afforded for them, and evaluates their implications. This Part next assesses the proposal in light of the problems that the current Rule has posed for judges, attorneys, and parties since the 1983 revision. The proposal's responsiveness remains unclear in part because its efficacy depends on the courts' exercise of their discretion in implementing new Rule 11.

Part IV provides suggestions for the future. It finds that the significant complications which existing Rule 11 has presented, uncertainty whether the proposal will ameliorate them, and the new problems that it will create warrant greater change than the Committee has recommended. Those with rule-amending responsibility, therefore, should seriously consider rejecting the proposal or revising it more substantially. If the rule revisors disagree with these suggestions, however, they should follow the recommendations for change in particular parts of the proposal when adopting a new version of Rule 11.

II. DEVELOPMENTS THAT PRECEDED THE PROPOSAL

A. *Rule 11's 1983 Amendment*

In the mid-1970s, the federal courts experienced a "litigation explosion."[3] Several judges and a few writers asserted that the civil caseload was increasing dramatically and that many of these lawsuits, especially civil rights cases, lacked merit.[4] Some judges and commentators believed that the 1938 Federal Rules permitted parties and attorneys to abuse the litigation process by, for example, manipulating procedural provisions for tactical advantage.[5]

Most of the contentions were controversial then and remain so.[6]

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3. *See, e.g.*, 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); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989); *see also* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 4 (1976) (discussing pre-1975 history of Rule 11).

4. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979); Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984); Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976); Thomas B. Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987). *But see Rotolo*, 532 F.2d at 927 (Gibbons, J., dissenting); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-43 (1987).

5. Judges and writers were especially critical of flexible pleading and discovery. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-43 (1986); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984).

6. *See* Tobias, *supra* note 3, at 288-89 (discussing pertinent literature and efforts to

Notwithstanding these complications and a paucity of applicable data, the Advisory Committee and the Supreme Court suggested Rule 11's substantial revision as one response to litigation abuse.[7] Congress agreed, and amended Rule 11 became effective in August 1983.[8] The revised Rule required courts to sanction litigants and practitioners who fail to conduct reasonable legal or factual inquiries before filing papers and those who submit such papers for improper purposes.[9] The drafters intended to overcome the reluctance both of parties and lawyers to invoke original Rule 11 and of judges to sanction. Such reticence had allowed the provision to lapse into disuse.[10]

B. *Activity Under Revised Rule 11*

1. DISADVANTAGEOUS ACTIVITY DURING THE INITIAL HALF-DECADE

From the time that the amended Rule took effect in August 1983 until approximately 1988, Rule 11 had an adverse effect on many parties and attorneys, especially civil rights plaintiffs and their counsel.[11] Civil rights plaintiffs had sanctions motions filed, and granted, against them more often than any other type of federal court litigant.[12] Many judges vigorously applied Rule 11's reasonable prefiling inquiry requirements against civil rights plaintiffs,[13] and some judges imposed

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resolve some of the controversy); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 522-23 (1988-89) (same). There is little consensus about what constitutes litigation abuse or a litigation explosion.

7. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198-2202 (1989).

8. *See* Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983); *see also* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984). Rules 7, 16, and 26 were similarly amended and were an integrated package.

9. *See* FED. R. CIV. P. 11.

10. The original Rule 11, adopted in 1938 and unchanged until 1983, required a showing of bad faith for sanctions to be imposed. FED. R. CIV. P. 11 (1982). This, and general reluctance of judges and lawyers to accuse attorneys of such conduct, permitted the Rule to fall into disuse. *See* Risinger, *supra* note 3. I am indebted to Donna Stienstra, Beth Wiggins, and Thomas Willging for reviewing the material in the remainder of this section. Any errors that remain are mine.

11. Carl Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 HOW. L.J. 161, 163 (1990); Tobias, *supra* note 6, at 490-507; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).

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

13. *See, e.g.*, Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 90 (1988); Rodgers v. Lincoln Towing Serv., 771 F.2d 194 (7th Cir. 1985).

sizable sanctions.[14]

Many courts inconsistently interpreted the Rule's language or inconsistently enforced its provisions in similar factual contexts, and there was much satellite litigation involving Rule 11.[15] This activity had harmful implications for many parties, lawyers, and judges, but it particularly disadvantaged civil rights plaintiffs and their attorneys, whose lack of resources can make them risk-averse.[16] These considerations detrimentally affected and probably chilled the plaintiffs and lawyers.[17]

2. IMPROVEMENTS SINCE 1988

In 1988, courts began to construe Rule 11 more favorably to most litigants and practitioners, especially civil rights plaintiffs and their counsel.[18] Every circuit court issued decisions that evinced solicitude for civil rights plaintiffs and attorneys.[19] Several appellate panels admonished trial judges for overzealous enforcement of Rule 11's prefiling inquiry requirements or for levying large sanctions that might discourage plaintiffs.[20]

Formal district court application also improved. For instance, many judges rejected Rule 11 motions filed against civil rights plaintiffs who were pursuing rather tenuous claims, or imposed minimal sanctions on parties found in violation.[21] Indeed, since 1990, courts have issued few published opinions that lack solicitude for these plaintiffs. Although the number of circuit and trial court Rule 11 decisions in the federal reporter system steadily increased from 1984 to 1987, it levelled off in the district courts during 1987 and 1988, and the quan-

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14. *See, e.g.*, Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992) (imposing $1,000,000 sanction).

15. *See, e.g.*, Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); *see also* Burbank, *supra* note 7, at 1930-31 (inconsistent application); Tobias, *supra* note 6, at 514 (satellite litigation).

16. *See* Tobias, *supra* note 6, at 495-98.

17. *See id.* at 503-06; Tobias, *supra* note 11, at 169-70. I recognize that these contentions are controversial. *See* Advisory Committee on the Civil Rules, 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, 347 (1990) [hereinafter *Call for Comments*].

18. *See* Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 120-27 (1991); Tobias, *supra* note 11, at 162.

19. The remainder of this paragraph addresses only formal judicial application with opinions that appear in the federal reporter system or on computer, rather than informal Rule 11 activity.

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

21. *See, e.g.*, Solberg v. Inline Corp., 740 F. Supp. 680, 686 (D. Minn. 1990); Summer v. Fuller, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989).

tity of appellate and trial court opinions declined in 1989.[22]

Although experience with Rule 11 has improved since 1988, several concerns remain. Many observers have contended that some judges have not been solicitous of civil rights plaintiffs, as evidenced by several controversial cases.[23] Moreover, the improvements examined have been in formal Rule 11 activity. This is significant, because much Rule 11 activity that disadvantaged these plaintiffs most severely has been informal.[24]

C. *Congressional Change in the Rule Revision Process*

Congress substantially modified the process for revising the Federal Rules in the Judicial Improvements and Access to Justice Act of 1988.[25] Congress hoped to improve the rule-amending procedures by subjecting them to greater public scrutiny.[26] The Act expressly provided that nearly all Advisory Committee deliberations be open to the public, and called for public input throughout the process of rules revision.[27]

D. *Advisory Committee Reconsideration of Rule 11*

The Advisory Committee discussed Rule 11 for a half-day in its November 1989 meeting, one of the first sessions open to the public under the new procedures. Two individuals representing public interest litigants presented evidence that the Rule was disadvantaging civil rights plaintiffs, and the Committee agreed to consider revision.[28]

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22. Thomas Willging, Deputy Research Director of the Federal Judicial Center, Statement at Advisory Committee Meeting, Washington, D.C. (May 23, 1991) (notes on file with author). *See also* ELIZABETH WIGGINS, THOMAS WILLGING, AND DONNA STIENSTRA, FEDERAL JUDICIAL CTR., RULE 11: FINAL REPORT TO ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, § 1D, at 1 (1991) [hereinafter FEDERAL JUDICIAL CTR.]. There also is a condensed version of the Final Report, *see* FEDERAL JUDICIAL CENTER, FJC DIRECTIONS NO. 2 (Nov. 1991) [hereinafter FJC DIRECTIONS].

23. *See* Blue v. United States Dep't of Army, 914 F.2d 525, 540 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991); *In re* Kunstler, 914 F.2d 505, 516 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1609 (1991); Avirgan v. Hull, 705 F. Supp. 1544, 1545 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

24. Informal application is most detrimental because it is difficult to detect, document, and correct. *See* Tobias, *supra* note 18, at 117.

25. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

26. *See generally* Geoffrey C. Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)); *see also* 28 U.S.C. § 2072(c)(1)(2), (d) (1988).

27. 28 U.S.C. § 2073(c) (1988); *see also* Mullenix, *supra* note 1, at 830-43.

28. The individuals were Alan Morrison, Esq., of Public Citizen and Professor Laura Macklin of the Georgetown Law Center Institute for Public Representation. *See generally*

Representative Robert Kastenmeier, then the Chair of the House Committee on the Courts, Intellectual Property and the Administration of Justice, wrote Judge John Grady, then the Chair of the Advisory Committee, requesting information on the Advisory Committee's examination of Rule 11.[29] During February of 1990, Judge Grady indicated that the Rule warranted more study.[30]

These developments and the increasing criticism of Rule 11 activity led the Advisory Committee to announce in August 1990 that it was reexamining Rule 11.[31] The Committee issued a Call for Comments, seeking written public input on the Rule's operation, that was due on November 1, 1990, and oral testimony to be submitted in February 1991.[32] The Committee also commissioned an empirical evaluation of Rule 11 by the Federal Judicial Center ("FJC") and stated that the Committee would assess all of the material assembled in deciding whether to propose an additional amendment of the Rule at its semi-annual spring meeting.[33] The reconsideration of Rule 11 accordingly became one of the initial attempts to employ the new rule revision process that Congress had mandated in 1988.[34]

E. *Public Responses to Call for Comments*

More than 125 individuals and groups provided written comments on the Rule, with the overwhelming majority criticizing Rule

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Mullenix, *supra* note 1, at 854 (describing 1989 Advisory Committee meeting). Judge Grady appointed a subcommittee comprised of Professor Paul Carrington of Duke University School of Law, the Committee Reporter, Magistrate Judge Wayne Brazil of the Northern District of California, and Thomas E. Willging to identify important issues involving operation of Rule 11 and to prepare a plan for empirical research. During December, Willging prepared a memorandum describing the state of empirical knowledge about Rule 11, focusing on issues that Carrington had identified as salient. After the FJC Research Division received comments from the subcommittee, Willging and others in the Division began planning and implementing an empirical study of Rule 11.

29. Letter from Rep. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Intellectual Property and the Administration of Justice to Judge John F. Grady, Civil Rules Chairman, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Jan. 9, 1990) (on file with author).

30. Letter from Judge John F. Grady to Rep. Robert W. Kastenmeier (Feb. 9, 1990) (on file with author). At that time, the FJC Research Division had formulated a basic research design and was elaborating its details.

31. *Call for Comments, supra* note 17; *see also* Mullenix, *supra* note 1, at 854.

32. *Call for Comments, supra* note 17, at 345. Rule 11's controversial nature led the Committee to reverse the normal sequence of seeking public comment after it develops a proposal.

33. *Id.*; *see also* Mullenix, *supra* note 1, at 854.

34. *See* Mullenix, *supra* note 1, at 801 (providing comprehensive analysis of attempt to revise Rule 25.1 governing informal discovery).

11 and its application.[35] The principal objections were that the Rule was fostering excessive, costly satellite litigation, that judges were inconsistently implementing the provision, that Rule 11 activity was disadvantaging civil rights plaintiffs and attorneys, and that the Rule was eroding civility among lawyers.

The FJC completed the compilation and preliminary analysis of information on Rule 11 using computerized docket data from five districts and responses from a survey of all federal trial judges.[36] The material gathered from the five districts indicates that civil rights plaintiffs, on the average, were no more likely to be sanctioned under Rule 11 than litigants who pursue other types of cases that experience a high rate of Rule 11 activity.[37] Additionally, attorneys' fees remain the sanction of choice for courts, notwithstanding the availability of many non-monetary alternatives.[38] The material also revealed that eighty percent of district judges favor retaining Rule 11 in its 1983 form, and a similar number believe that groundless lawsuits, the primary focus of that amendment, pose little difficulty.[39]

Sixteen persons spoke at the February public hearing, many voicing complaints similar to the written public comments.[40] For example, many witnesses criticized the satellite litigation that Rule 11 foments, the Rule's unpredictability, inconsistent judicial enforcement, and the chilling effect upon legitimate cases, especially civil rights actions.[41] After the public hearing, the Advisory Committee agreed that some revision of Rule 11 was necessary and it requested the FJC to refine certain aspects of its preliminary analysis.[42] The Committee Chair, Judge Sam Pointer of the United States District Court for the Northern District of Alabama, and the Committee

35. These comments are on file at the Administrative Office of the United States Courts in Washington, D.C.

36. FEDERAL JUDICIAL CTR., *supra* note 22, §§ 1A-1B.

37. *Id.* 1C, at 1-8. *See also* FJC Directions, *supra* note 22, at 21-27.

38. Federal Judicial Ctr., *supra* note 22, § 1B, at 9. The study revealed that fee awards to the opposing party constituted 70 to 93 percent of rulings that imposed sanctions in the five districts surveyed. The proposed Committee Note includes a thorough list of non-monetary alternatives. *See* FED. R. CIV. P. 11 Advisory Committee's Note (Proposed Official Draft 1991); *accord* Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988).

39. FEDERAL JUDICIAL CTR., *supra* note 22, § 1A, at 1.

40. Transcript of Public Hearing on Rule 11, New Orleans, La. (Feb. 21, 1991).

41. *Id.*; Telephone interview with Thomas Willging and Elizabeth Wiggins, FJC Research Division (Feb. 26, 1991); Telephone interview with Professors Melissa Nelken, University of California, Hastings College of the Law, and Georgene Vairo, Fordham University School of Law (Feb. 26, 1991). *See also supra* notes 11-17 and accompanying text, and text following note 35. In fairness, the Committee invited more critics than proponents of Rule 11 to testify at the hearing.

42. *See* sources cited *supra* notes 36-39. The Committee was particularly interested in having the FJC refine data relating to sanctioning in civil rights cases.

Reporter, Professor Paul Carrington of Duke University School of Law, assumed primary responsibility for drafting the proposed changes in Rule 11's terms and in the Advisory Committee Note which will be considered during the Committee's semi-annual meeting in late May.[43]

III. THE ADVISORY COMMITTEE'S PROPOSAL FOR CHANGE

A. *Preliminary Report on Rule 11 Studies*

Before the Advisory Committee discussed the suggestions for revising Rule 11, the individuals who compiled the FJC's preliminary analysis reported on continuing Rule 11 studies.[44] Elizabeth Wiggins, who refined some features of the preliminary assessment, stated that these efforts produced little new evidence.[45] Thomas Willging provided several pertinent observations about the Rule's impact on civil rights cases. Willging evaluated the case files for all civil rights suits in which judges imposed sanctions in five districts. His study showed that plaintiffs' Rule 11 violations consisted primarily of inadequate prefiling legal inquiries, occasionally of deficient factual investigations, and rarely of papers filed for improper purposes.[46] Moreover, courts sanctioned few represented civil rights plaintiffs over the three-year period examined.[47] Willging also believed that virtually none of the "cases presented good faith arguments for changes in the law and they were not the *Brown v. Board of Education* or *Gideon v. Wainwright* of the '90s."[48] This information and subsequent Committee discussion left the general impression that Rule 11's implementation was not as problematic as many civil rights plaintiffs and attorneys

43. The Committee Note accompanies the Rule and explains its language and the reasons why the Committee proposed changes.

44. The emphasis that the Committee placed on public comment and the studies may have reflected sensitivity to the criticism that Rule 11's 1983 revision was premised on minimal data. *See supra* note 7 and accompanying text.

45. Elizabeth Wiggins, Research Division of the Federal Judicial Center, Statement at Advisory Committee Meeting, Washington, D.C. (May 23, 1991) (notes on file with author); *see also supra* notes 36-39 and accompanying text.

46. Willging, *supra* note 22; *see also supra* notes 36-39 and accompanying text.

47. Judges sanctioned the following number of represented civil rights plaintiffs in the following United States District Courts: District of Arizona, 1; District of Columbia, 2; Northern District of Georgia, 7; Eastern District of Michigan, 6; Western District of Texas, 9. FEDERAL JUDICIAL CTR., *supra* note 22, § 1C, at 4-5.

48. Willging, *supra* note 22. Willging added that in the "442 suit category" of civil rights cases, judges imposed no sanctions on plaintiffs pursuing voting rights or housing discrimination claims. Those employment discrimination cases in which judges imposed sanctions involved "private employment discrimination mostly and the sanctions imposed were relatively modest monetary amounts." *Id.*

had contended.[49]

Wiggins and Willging found 835 reported cases in which district courts applied Rule 11 to sanction motions and 346 reported appellate opinions between 1984 and 1989.[50] They suggested that reported decisions are the "tip of the iceberg" of Rule 11 activity and made a very preliminary estimate that only one to ten percent of the judiciary's application of the Rule to sanction motions appears in reported determinations.[51] Between 1984 and 1989, district courts in the Northern District of Illinois and the Southern District of New York issued thirty-eight percent of the reported opinions, with the Southern District of New York accounting for one-quarter of all the decisions.[52]

Willging also explained the preliminary results of the American Judicature Society ("AJS") study of lawyers in the Second, Fifth, and Ninth Circuits who had experience with Rule 11 during the preceding year.[53] In July, the AJS issued a "Preliminary Report" that posited numerous tentative determinations similar to those of the FJC, although cautioning that more definitive conclusions must await refinement of the data collected.[54] Perhaps most relevant to this paper is the AJS' observation that Rule 11 apparently has been more problematic in "ordinary litigation," such as automobile accident cases, than in high profile or controversial suits, such as civil rights actions.[55]

B. *Descriptive Analysis of Specific Changes Proposed*

1. REPRESENTATIONS TO COURT

The Advisory Committee proposed a new Rule 11(b),[56] titled

49. *See* Mullenix, *supra* note 1, at 825; Tobias, *supra* note 18.

50. Willging, *supra* note 22; *see also* FED. JUDICIAL CTR., *supra* note 22, § 1D at 1. "Reported" opinions are those published in the federal reporter system.

51. Wiggins, *supra* note 45; Willging, *supra* note 22; *cf.* STEVEN B. BURBANK, AMERICAN JUDICATURE SOC'Y, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 59, 98-99 (1989) (suggesting only 10% of Rule 11 decisionmaking appears in federal reporter system and less than 40% on computerized services).

52. Willging, *supra* note 22; *accord* FEDERAL JUDICIAL CTR., *supra* note 22, § 1D at 1-2; Vairo, *supra* note 11, at 200.

53. *See* HERBERT KRITZER ET AL., AMERICAN JUDICATURE SOC'Y, RULE 11 STUDY: PRELIMINARY ANALYSIS (1991). Willging stated that the AJS study collected the "most systematic data to date on attorneys' experiences with Rule 11 in their daily practices [and] promised to be an informative final report." Willging, *supra* note 22.

54. KRITZER, *supra* note 53.

55. *Id.* at 5-7; *see also* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

56. There also is a new Rule 11(a), titled "Signature." FED. R. CIV. P. 11(a) (Proposed

"Representations to Court," which provides:

> *By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances—*
>
> *(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;*
>
> *(2) it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and*
>
> *(3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*[57]

The subdivision preserves the requirement that lawyers and pro se litigants[58] file papers only for proper purposes. It also retains, with certain modifications, the command that attorneys and unrepresented parties perform reasonable inquiries into the law and the facts before signing documents that they submit to courts.[59] Proposed Rule 11(b), however, includes several significant changes.

a. Continuing Duty

Most important is the Committee's decision to impose a "continuing duty" on lawyers and pro se litigants to withdraw practically any part of a paper when it becomes untenable.[60] The Note which would accompany the new Rule explains that a party's obligation to "stop

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Official Draft 1991). *See infra* notes 214-215 and accompanying text. The proposed Rule and its accompanying Advisory Committee Note are reprinted in 137 F.R.D. 74-82 (1991).

57. FED. R. CIV. P. 11(b) (Proposed Official Draft 1991).

58. Represented parties are not subject to the proposed Rule's requirements. This responds to Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922, 928-31 (1991), which held that represented parties who sign papers are subject to existing Rule 11's requirements. Consequently, the technical nature of numerous requirements in the proposal will make them especially onerous for pro se litigants.

59. The proposal essentially retains the idea that certification be to the best of the signer's knowledge, information, and belief after reasonable inquiry. FED. R. CIV. P. 11(b) (Proposed Official Draft 1991).

60. *Id.* ("By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn . . . ."). The Rule covers the "continued maintenance in federal court of totally meritless claims or defenses" raised in state court before removal. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

and think" before filing legal or factual assertions includes the responsibility to abandon positions that cease to have merit.[61] The Note states that the proposal partially expands litigants' duties to the court, while it places increased restraints on judges. The Note also affords judges more flexibility when treating infractions of Rule 11, so that the use of attorneys' fees as sanctions could be substantially reduced.[62]

This observation and others, such as those on "safe harbors," in the Note and Committee deliberations,[63] illuminate the Committee's thinking. The imposition of a continuing duty appears to be only a minor extension of the prefiling duty to stop and think. Moreover, mechanisms, such as safe harbor provisions, would appear to offset the expanded responsibility created by a continuing duty.[64]

Notwithstanding this impression, the continuing duty substantially departs from Rule 11 and its attendant Advisory Committee note. The Rule's present language applies exclusively to the initial signing of pleadings, motions, and other papers.[65] The Note expressly admonishes district court judges to test the signer's behavior by asking what was reasonable at the time of signing, and to avoid using the "wisdom of hindsight," because Rule 11 was not meant to restrict lawyers' creativity or enthusiasm in pursuing legal or factual theories.[66] Accordingly, a clear majority of the circuits have refused to recognize a continuing obligation.[67]

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61. FED. R. CIV. P. 11 proposed advisory committee's note (Proposed Draft Aug., 1991).

62. *Id.*

63. "Safe harbors" are mechanisms that insulate litigants from sanctions, such as the ability to withdraw a deficient claim upon being notified of its inadequacy. *See infra* notes 114-23 and accompanying text.

64. During the meeting, the Committee discussed the continuing duty idea only minimally, and most Committee members seemed to assume that its imposition was appropriate. This was one of numerous explicit and implicit compromises that the Committee struck. *See infra* notes 117-18, 220-21, 256-57 and accompanying text.

65. FED. R. CIV. P. 11; *see also* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1200-01 (7th Cir. 1990); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

66. FED. R. CIV. P. 11 advisory committee's note.

67. *Compare Dahnke*, 906 F.2d at 1201 (no continuing duty); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Associated Contractors, 877 F.2d 938, 943 (11th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 1133 (1990); Thomas v. Capital Sec. Servs., 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc) (same); Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987) (same); *Oliveri*, 803 F.2d at 1273-74 *with* Anderson v. Beatrice Foods Co., 900 F.2d 388, 393 (1st Cir. 1990) (continuing duty). One Sixth Circuit panel, in Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989), cast doubt on the idea of a continuing duty that another panel of the court apparently articulated in Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988) (continuing duty). A similar situation obtains in the Fourth Circuit. One panel of the court, in Brubaker v. City of Richmond, 943 F.2d 1363, 1382 (4th Cir. 1991), cast doubt on the idea of a continuing duty that another panel of the court apparently articulated in Blue v. United States

The proposed duty is inadvisable for several important policy and practical reasons. It will place burdensome responsibilities on attorneys and parties, especially those with limited resources, those pursuing nontraditional lawsuits, or those whose cases are "close" legally or factually. Demanding that lawyers and pro se litigants withdraw any "claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper" once it seems invalid is onerous.[68] One major complication is that the obligation parses too finely the concept of a "paper" and could encourage the scrutiny of minutiae, a practice that numerous courts have rejected since 1983. These courts consider the significance of a specific claim to the entire paper or evaluate the paper as a whole in ascertaining whether signers violated Rule 11.[69] In many situations, the duty will impose responsibilities that are difficult to satisfy. For instance, lawyers and unrepresented parties would have to identify and track every assertion from the date of filing until the litigation's conclusion to pinpoint if, and when, any one loses merit so that it may be immediately withdrawn. Opposing attorneys could invoke Rule 11 throughout a lawsuit, especially as to factual assertions, and disrupt its vigorous pursuit, securing strategic benefits that some practitioners will be unable to resist.[70]

Even in cases that involve less arduous burdens, where deficient assertions can be identified comparatively easily, the continuing obligation will require lawyers and pro se litigants to perform tasks unrelated to their lawsuits' merits.[71] For example, if a plaintiff learns in the middle of discovery that an automobile accident happened at a different intersection than the one originally pled, the party must promptly notify the court and opposing litigants to correct the offend-

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Department of the Army, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied*, 111 C. Ct. 1580 (1991). *See also* Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922, 943 n.5 (1991) (Kennedy, J., dissenting) (refusing to recognize continuing duty when issue not briefed).

68. FED. R. CIV. P. 11(b) (Proposed Official Draft 1991).

69. *See, e.g.*, Burull v. First Nat'l Bank, 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 n.2 (7th Cir. 1987); *Oliveri*, 803 F.2d at 1280; Premium Financing v. Greater N.Y. Mutual Ins., 136 F.R.D. 175, 178 (W.D. Mo. 1991); Vista Mfg. v. TRAC-4, Inc., 131 F.R.D. 134, 140 (N.D. Ind. 1990). The Court of Appeals for the Ninth Circuit, sitting en banc, recently overruled several panels that had relied on the "paper as a whole" theory. Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362-65 (9th Cir. 1990); *see also In re* Grantham Bros., 922 F.2d 1438, 1442 (9th Cir. 1991); Dodd Ins. Servs. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1158 (10th Cir. 1991).

70. *See infra* notes 97-110 and accompanying text; *see also* Marcus, *supra* note 5, at 494.

71. I am indebted to John Frank, Esq. of Lewis & Roca, Phoenix, Az., for numerous ideas in this paragraph.

ing paper, essentially polishing pleadings that had ceased to have any value. This activity will distract parties, attorneys, and judges from the substance of disputes and impose unwarranted expenses while fruitlessly complicating lawsuits.

Insofar as the continuing duty represents an attempt to end innocuous conduct that is less reprehensible than abuse, the goal appears unattainable and the effort inadvisable. For instance, some negligent or inadvertent activity simply may be intrinsic to, or a fixed cost of, the complexities of federal court practice or human endeavor. Thus, efforts to end such activity are unrealistic and unfair. When conduct is attributable to the substantial resource discrepancies that exist among numerous federal court litigants, sanctioning and essentially punishing the behavior seem inequitable.[72] It is similarly unfair and impracticable to expect every attorney to practice at a level of precision only the wealthiest clients can afford or the most experienced lawyers can attain. In any event, courts already possess other mechanisms, such as Federal Rules of Civil Procedure 16, 26, and 37, to treat much conduct that is less harmful than abuse.[73]

These and additional reasons make the obligation peculiarly inappropriate in litigation, such as discrimination cases, that seeks to vindicate fundamental constitutional rights or prescribed legislative interests. Imposing this duty on plaintiffs is particularly troublesome because it frustrates clear congressional intent that the judiciary facilitate the vindication of such rights and interests—activity which can contribute to positive growth in the law.[74]

The considerations are acute in many civil rights cases, particularly those that allege discrimination, turn on defendant's mindset, are highly fact-dependent, or involve credibility. For example, in *Blue v. United States Department of the Army*,[75] a controversial employment discrimination class action, the Fourth Circuit affirmed the trial judge's finding that plaintiffs and their counsel had contravened Rule 11.[76] By sustaining the district court's decision that some of plaintiffs' allegations were frivolous after it had resolved many questions of credibility against the parties, the Fourth Circuit effectively punished their lawyers for pursuing the very credibility judgments that the adversary system is meant to provide. Many courts, however, have

72. *See* Tobias, *supra* note 6, at 495-98; *see also infra* note 74 and accompanying text.

73. *See infra* notes 273-77 and accompanying text.

74. This intent is recognized by substantive, procedural, and fee-shifting legislation. *See, e.g.*, Civil Rights Act of 1964, 28 U.S.C. § 1447 (1988); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988); *see also* Tobias, *supra* note 3, at 284-85.

75. 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

76. *Blue* was the largest such class action ever brought against the Army. *Id.* at 531.

not allowed adverse credibility findings at trial to support the shifting of litigation expenses.[77]

In *Christiansburg Garment Co. v. EEOC*,[78] the Supreme Court explicitly instructed appellate and district judges not to base sanctions on hindsight determinations.[79] Sanctioning attorneys who fail to predict credibility accurately contravenes this hindsight instruction and misconceives the role of lawyers. It not only blurs the distinction between attorneys and finders of fact, but also erodes clients' entitlement to zealous and loyal advocacy.[80]

The crucial consequence of imposing this continuing duty is that it will discourage, and perhaps chill, civil rights plaintiffs and lawyers—the very individuals whom Rule 11 may have disadvantaged the most since 1983.[81] Because many of these individuals possess limited resources, the duty's burdensome nature and the risk of sanctions or having to participate in expensive satellite litigation could dissuade them from vigorously pursuing valid cases.[82] Consequently, these plaintiffs and lawyers may be discouraged, even though the Committee specifically attempted to minimize potential chilling.[83]

Inclusion of the continuing obligation, by increasing the responsibilities of parties and lawyers to the court, affords some advantages,

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77. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 183-84 (1976); District No. 8, Int'l Ass'n of Machinists v. Clearing, 807 F.2d 618, 622 (7th Cir. 1986); Oliveri v. Thompson, 803 F.2d 1265, 1277-78 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). In *Blue*, the trial judge's conclusions respecting frivolousness were premised on the credibility of witnesses. The Fourth Circuit relied substantially on the lower court's credibility determinations and the panel's own de novo observations as to whether plaintiffs proffered credible evidence. Yet, some of the district judge's conclusions lacked uniformity or were internally inconsistent. Further, neither the Fourth Circuit nor the district judge explained how plaintiffs' lawyers could have predicted what testimony the trial court would ultimately believe or why the attorneys were required to challenge clients who were pursuing claims with documentary substantiation. 914 F.2d at 540.

78. 434 U.S. 412 (1978).

79. *Id.* at 421-22; *see also supra* notes 65-67, 75-77 and accompanying text.

80. *See* Nix v. Whiteside, 475 U.S. 157, 189 (1986) (Blackmun, J. concurring) (arguing that the Court's holding erodes client's right to zealous, loyal advocacy); Greenberg v. Sala, 822 F.2d 882, 886-87 (9th Cir. 1987) (blurring roles of lawyers and fact finders); *cf.* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (prohibiting judges from making credibility determinations on summary judgment).

81. Although the question whether Rule 11 has chilled civil rights plaintiffs and attorneys is controversial, considerable evidence suggests that the enthusiasm of many of the parties and attorneys has been dampened, if not chilled. *See, e.g.*, Tobias, *supra* note 11, at 169-70; Vairo, *supra* note 11, at 200-01, 232-33; *see also* Mullenix, *supra* note 1, at 825 n.151; *Call for Comments, supra* note 17, at 347-48; *infra* note 83 and accompanying text.

82. *See* Tobias, *supra* note 6, at 495-98. These practical considerations are peculiarly applicable to much employment discrimination litigation which involves credibility determinations and questions of motive and intent.

83. At the Advisory Committee meeting, almost every Committee member voiced concern about chilling, which resulted in attempts to reduce potential chilling, such as the explicit provision for safe harbors and nonmonetary sanctions.

such as reducing litigation abuse and expediting dispute resolution, thus effectuating the purposes of the 1983 amendments.[84] However, realization of these advantages seems speculative, because it would be contingent on the duty's ideal operation.[85]

b. Certification Respecting Law

The present Rule requires that signers undertake reasonable prefiling inquiries to certify that their papers are "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[86] The proposed Rule commands signers to certify that certain components of a paper are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[87]

The most significant proposed change is substitution of the term "nonfrivolous" for "good faith" as a modifier of legal argument.[88] The Committee discussed these two possibilities and the word "reasonable," but selected "nonfrivolous," maintaining that several circuits have employed the term and that courts understand it.[89] Some members favored retaining "good faith," however, because the phrase would not alter existing terminology that has acquired certain meaning to which judges, lawyers, and litigants are accustomed.[90]

Several criticisms, in addition to that of losing familiar language, can be levelled at the Committee's approach. Many courts have experienced problems applying "frivolousness" to Rule 11.[91] For example, judges who rely on it often unduly emphasize the papers' quality or the claims' merits (product), rather than the reasonableness of prefiling inquiries (conduct).[92] Courts that stress product have

84. FED. R. CIV. P. 11 advisory committee's note.

85. For instance, judges, parties, and attorneys would have to apply the duty properly. This does not imply that litigants and lawyers should have limited obligations to the court or that imposing continuing duties will be an inefficacious means for achieving certain advantages in the litigation process. But, as a practical matter, the imposition of a continuing duty may be too onerous for plaintiffs and defendants.

86. FED. R. CIV. P. 11.

87. *See* FED. R. CIV. P. 11(b)(2) (Proposed Official Draft 1991).

88. *Compare id.* ("nonfrivolous") *with* FED. R. CIV. P. 11 ("good faith").

89. Judge Mariana R. Pfaelzer, C.D. Cal., Judge Sam N. Pointer, Jr., N.D. Ala., Professor Arthur R. Miller, Harvard Law School, and Larrine S. Holbrooke, Esq., Statements at Advisory Committee Meeting, Washington, D.C. (May 23, 1991) (notes on file with author).

90. Miller, *supra* note 89; Holbrooke, *supra* note 89. Similar sentiments were expressed numerous times during the Committee's deliberations, especially when it was drafting specific language.

91. *See, e.g.*, ViON Corp. v. United States, 906 F.2d 1564, 1566 (Fed. Cir. 1990); Romero v. City of Pomona, 883 F.2d 1418, 1429 (9th Cir. 1989); *see also* Burbank, *supra* note 7, at 1933-34, 1941-42.

92. *See, e.g.*, Gutierrez v. City of Hialeah, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989).

encountered difficulties articulating uniform standards for discerning frivolousness—a notion inherently resistant to consistent definition—and providing sufficient guidance and deterrence to attorneys and parties.[93] Even if frivolousness were more appropriate, substituting it for good faith imposes onerous requirements on lawyers and litigants who have limited resources or pursue nontraditional or unpopular legal theories, such as public interest and civil rights litigants.[94]

The proposed change may offer a few benefits. For example, the Committee candidly admitted that the current Rule "occasionally has created problems for a party which seeks to assert novel legal contentions"[95] and responded by permitting arguments for the "establishment of new law."[96]

c. Certification Respecting Factual Assertions

The existing Rule mandates that signers conduct reasonable prefiling inquiries to certify that their papers are "well grounded in fact."[97] The recommended text requires signers to certify that "any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[98]

A number of courts have stated that the present Rule proscribes filing suit and using discovery "as the sole means of finding out whether you have a case."[99] The Note to the proposed Rule explains that parties sometimes have sound reasons to think that facts are false

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Even authors of clear Rule 11 decisions emphasize the quality of the papers or the merits of the litigation. *See, e.g.*, Alia v. Michigan Supreme Court, 906 F.2d 1100, 1103 (6th Cir. 1990) (Wellford, J., dissenting); Davis v. Carl, 906 F.2d 533 (11th Cir. 1990). Neither the papers nor the merits are irrelevant. The court, however, should initially attempt to determine whether there was a reasonable prefiling inquiry. Only after that effort proves inconclusive should the court consider the papers or the merits to determine reasonableness. Tobias, *supra* note 18, at 108 n.11.

93. *See* BURBANK, *supra* note 51, at 20-21; Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 226 (1991).

94. *See, e.g.*, Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1086 (7th Cir. 1987), (Cudahy, J., dissenting) *cert. dismissed*, 485 U.S. 901 (1988); Oliveri v. Thompson, 803 F.2d 1265, 1280-81 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *see also* Tobias, *supra* note 6, at 495-98.

95. Attachment to Letter from Judge Pointer, Chair, Advisory Committee on Civil Rules, to Judge Robert Keeton, Chair, Standing Committee on Rules of Practice and Procedure 2 (June 13, 1991) [hereinafter Attachment to Letter] (on file with author).

96. FED. R. CIV. P. 11(b)(2) (Proposed Official Draft 1991).

97. FED. R. CIV. P. 11.

98. *See* FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991).

99. Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *accord* Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986); Harris v. Marsh, 679 F. Supp. 1204, 1388 n.276 (E.D.N.C. 1987). Numerous courts have stated that Rule 11 does not modify the flexible notice pleading system of the Federal Rules.

or true but need discovery to collect evidentiary substantiation for their beliefs.[100] The Committee acknowledged that the Rule had posed difficulties for these litigants, recognized the propriety of permitting the parties to plead facts that lack evidentiary support and of affording them discovery, and partially clarified the relationships among discovery, Rule 11, and Rule 8, which governs pleading.[101]

The proposal requires, however, that litigants withdraw allegations for which they cannot secure evidentiary substantiation after having reasonable opportunity for additional investigation or discovery.[102] The command expressly applies to denials under Rule 8 based on lack of information and was part of the Committee's avowed effort to equalize the burdens that Rule 11 imposes on plaintiffs and defendants.[103]

The proposal's effect on the existing imbalance is unclear. For example, the Committee did not address the current disequilibrium created by the nationwide requirement that civil rights plaintiffs plead with specificity under Rule 8.[104] Such elevated pleading will complicate compliance with the proposal's strictures as to facts by, for instance, demanding that the parties place more factual allegations in their papers. Even if the burdens were equalized, both plaintiffs and defendants should have reduced, not similarly onerous, responsibilities.

The proposal's imposition of a "duty of candor" on attorneys and pro se litigants to inform the court and other parties when they include factual assertions that "are likely to have evidentiary support

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See, e.g., Beeman v. Fiester, 852 F.2d 206, 210-11 (7th Cir. 1988); Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987).

100. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991). Judge Pointer offered a cogent example during the meeting. He stated that the proposal would permit an employment discrimination plaintiff confronting a 90-day statute of limitations to plead what could not be proved at the time and to withdraw the allegations if discovery showed that they were untenable. Pointer, *supra* note 89.

101. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991); *accord* Attachment to Letter, *supra* note 95, at 2.

102. *See* FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991) (emphasis added); *see also* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

103. *See* FED. R. CIV. P. 8(b); FED. R. CIV. P. 11 (Proposed Official Draft 1991). One important reason why fewer sanction motions have been filed against defendants is that the Federal Rules of Civil Procedure afford defendants only a short time to answer complaints, thus making answers and defendants less vulnerable to sanctions. Insofar as the proposed change represents an attempt to seek a proper balance in Rule 11, it seems advisable.

104. All circuits now require that plaintiffs plead with particularity. *See* Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984); *accord* Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). For a recent example, see Arnold v. Board of Educ., 880 F.2d 305, 309 n.2 (11th Cir. 1989). *But cf.* Tobias, *supra* note 3, at 296-301 (noting that Rule 8's language, courts' authority, and other data do not support elevated pleading requirements).

after a reasonable opportunity for further investigation or discovery"[105] is unnecessarily burdensome. The obligation will particularly disadvantage litigants who lack access to information relevant to their papers or have few resources for gathering, assessing, and synthesizing material that is more accessible.

Compliance would be impossible in numerous situations. For example, when facts pertinent to plaintiffs' cases are in defendants' minds or when parties possess little time or money to assemble and evaluate relatively accessible information, they will be unable to identify specifically "any allegations or denials of facts [that] are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[106] Even if these litigants do not have to speculate, they may experience difficulty determining precisely which factual contentions are likely to have evidentiary substantiation and exactly what would be a reasonable opportunity for additional investigation and discovery, much less ascertaining how a fact-finder ultimately will view the predictions.[107] Indeed, these are the very type of fact-specific inquiries that have engendered inconsistency, satellite litigation, and chilling since 1983.[108]

Even in circumstances where parties with scarce resources or limited access to relevant data could discharge the duty of candor more readily, they still may be disadvantaged. For instance, if the litigants can easily identify "allegations or denials [that] are likely to have evidentiary support,"[109] compliance may compromise their cases by requiring that parties' pleadings reveal possible factual weaknesses. This duty also could encumber pleading because it effectively demands that plaintiffs plead on information and belief and, thus, additionally erodes Rule 8's integral purpose of simplifying pleading.[110]

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105. FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991). Judge Schwarzer initially articulated this duty of candor; however, on appeal, the Ninth Circuit refused to impose that obligation. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 127 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531, 1539 (9th Cir. 1986).

The Committee first proposed to impose this duty as to legal assertions, and then as to both factual and legal assertions, before it settled on factual assertions alone. *See* FED. R. CIV. P. 11(b)(2)-(3) (Proposed Draft May 24, 1991) (copy on file with author); FED. R. CIV. P. 11(b)(2)-(3) (Proposed Draft June 13, 1991) (copy on file with author).

106. FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991).

107. These difficulties hark back to those involving credibility determinations and judicial hindsight discussed *supra* notes 77-80 and accompanying text.

108. FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991); *see also infra* notes 244-47, 252-55 and accompanying text.

109. FED. R. CIV. P. 11(b)(3) (Proposed Official Draft 1991).

110. FED. R. CIV. P. 8(a) ("A pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends [and] (2) a short and plain statement

Many of these problems complicate compliance with the continuing duty. For example, it would be difficult to track all factual allegations or denials to detect exactly when they no longer have or are likely to have evidentiary support, as reasonable opportunity for investigation or discovery has expired so that the assertions may be promptly abandoned.

The provisions governing allegations and denials of facts may afford certain benefits. For instance, the duty of candor may alert judges early in litigation to potentially questionable factual contentions. These advantages, however, are less compelling than the disadvantages posed.

2. SANCTIONS

The Committee suggested a new Rule 11(c), titled "Sanctions." This subdivision retains the requirement that courts impose an appropriate sanction, including monetary awards and attorneys' fees, when they determine that attorneys or parties contravened Rule 11. The Rule also incorporates several important modifications.[111]

a. Procedures for Sanctioning

Rule 11(c) enumerates broad procedures that cover sanctioning.[112] The Committee provided them because such provisions are virtually absent from existing Rule 11, and many judges had afforded minimal or inconsistent procedures, especially for purposes of due process.[113]

i. Safe Harbors

Movants would only be able to seek sanctions twenty-one days (or such other time as the court may prescribe) after service of motions which describe the specific offending behavior, and offering

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of the claim showing that the pleader is entitled to relief."); *see also supra* notes 103-05 and accompanying text.

111. *See* FED. R. CIV. P. 11(c) (Proposed Official Draft 1991).

112. Most of the procedures proposed in Rule 11(c)(1)(A) and Rule 11(c)(3) and are treated here. Those procedures for sanctioning on the court's initiative are analyzed separately *infra* Part III.B.2.a.ii.

113. Current Rule 11 is practically devoid of procedures. *See* FED R. CIV. P. 11; ADVISORY COMMITTEE ON CIVIL RULES, INTERIM REPORT ON RULE 11, at 12 (Apr. 9, 1991) [hereinafter INTERIM REPORT]; *cf.* FED. R. CIV. P. 11 advisory committee's note (quoting two paragraphs to procedural prescriptions). For examples of inconsistent procedures, compare Donaldson v. Clark, 819 F.2d 1551, 1558-59 (11th Cir. 1987) with Tom Growney Equip. v. Shelly Irrigation Dev., 834 F.2d 833, 836 (9th Cir. 1987) and Thomas v. Capital Sec. Servs., 836 F.2d 866, 871-75 (5th Cir. 1988).

them an opportunity to withdraw or correct the suspect allegation.[114] This procedure is dubbed the "safe harbor." Although several Committee members contended that violators of the improper purpose prong do not deserve such protection,[115] the Committee failed to adopt that position, and neither the proposal's text nor the Note mentions it.

A true safe harbor, if workable, affords needed protection for parties with scant resources or those who pursue nontraditional, close, unpopular, or political cases.[116] The measure's inclusion was an important means of responding to criticism of Rule 11, especially its tendency to chill.[117] The safe harbor, thus, embodies the Committee's efforts to strike an appropriate balance among the competing, often conflicting interests which the proposal would affect.[118] Moreover, the informal operation of the mechanism could resolve some disputes over particular allegations and therefore reduce litigation expenses of attorneys, parties, and judges.[119]

However, the safe harbor suggested will entail certain disadvantages. It may not limit the costs or have the effects described above. The procedure also would provide the opponents of its intended beneficiaries numerous opportunities for tactical use and abuse.[120] For example, litigants that contemplate filing sanctions motions must notify other parties of every purported violation throughout the lawsuit. Each time a litigant receives notice, the safe harbor will require that the target undertake much activity in a three-week period. The

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114. FED. R. CIV. P. 11(c)(1)(A) (Proposed Official Draft 1991).

115. Judge Winter was this idea's foremost proponent, although a few other members concurred. Judge Ralph K. Winter, 2d Cir., Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991) (notes on file with author).

116. *See* Tobias, *supra* note 6, at 495-98.

117. *See supra* notes 17, 24, 28, 64 and accompanying text; *infra* notes 256-57 and accompanying text. Some members apparently found the perception that Rule 11 chills legitimate litigation sufficient to warrant an amendment. That idea at least seems to have motivated the Committee's request that the FJC refine its data on civil rights cases. *See supra* note 42 and accompanying text.

118. These competing interests include: the need to minimize the Rule's chilling effects; the need to achieve its principal purpose, deterrence of litigation abuse, with fewer disadvantageous side effects; and the need to increase lawyers' and litigants' responsibilities to the court represented by the continuing duty.

119. When the opponent withdraws the challenged allegation, attorneys and parties would save costs because the equivalent of a letter would suffice to provide notice and obviate the need for spending resources on elaborate motions. Consequently, courts would expend no resources resolving motions.

120. This harks back to the continuing duty problem. The proposed Committee Note, however, does warn against using sanction motions for "improper purposes," such as emphasizing the merits of a litigant's position, and that these motions are sanctionable. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

party will have twenty-one days to analyze the procedural and substantive validity of the notice; reassess its own allegations; conduct additional research, if indicated; withdraw or correct questionable assertions, even potentially legitimate ones; formulate responses that persuasively defend those contentions which are not withdrawn or corrected; and perhaps reconsider the advisability of continuing the litigation. Many attorneys will dispute the notice's timing and clarity, especially in terms of breadth and particularity, as it must only "describe the specific conduct" alleged to violate the Rule.[121] Courts will have to resolve those and other technical controversies when targets refuse to withdraw or correct the challenged assertions and movants request sanctions.[122]

These factors suggest that the proposed safe harbor may merely place an official imprimatur on much problematic informal practice under current Rule 11.[123] Indeed, the procedure could accentuate one of that Rule's worst features: its "threat and retreat" aspect, which deflects the focus of cases from the litigants' claims to the lawyers' abilities, undermining even more civility in the profession and inundating all involved with additional paper. In short, the safe harbor, although well-intentioned, would afford few meaningful benefits and will have detrimental ramifications for courts, parties, and attorneys—especially by increasing litigation expenses.

ii. Independent Sanctions Motions

The subdivision requires that motions be independently served, not attached as separate prayers for relief in other papers as is prevalent under the existing Rule.[124] The Committee intended to make sanctions' pursuit more onerous, thereby reducing Rule 11 activity.[125]

iii. Notice and Opportunity to Respond and Order

The proposal includes two significant additional procedures. First, its prefatory phrase requires that judges afford targets "notice and a reasonable opportunity to respond."[126] The Note explains that the specific circumstances present will suggest appropriate proce-

121. FED. R. CIV. P. 11(c)(1)(A) (Proposed Official Draft 1991).

122. Of course, the underlying question of whether a Rule 11 violation occurred lurks behind these technical problems and awaits judicial resolution.

123. I am indebted to John Frank for numerous ideas in this paragraph.

124. FED. R. CIV. P. 11(c)(1)(A) (Proposed Official Draft 1991) ("A motion . . . shall be served separately from other motions or requests . . . .").

125. Advisory Comm. Meeting, *supra* note 22. The Committee seemed to believe that this requirement ultimately would save judges, lawyers, and litigants time.

126. FED. R. CIV. P. 11(c) (Proposed Official Draft 1991).

dures, such as written submissions, oral argument, or an evidentiary hearing.[127] Second, courts must explain the violative behavior and the basis of the sanction levied, if requested by the non-moving party.[128] The Note states that judges should give their reasons when granting Rule 11 motions but normally need not explain denials.[129]

These procedures offer some benefits, especially by clarifying existing Rule 11. For instance, allowing infrequent explanations for the denial of sanctions requests promotes judicial economy. The prescriptions also accord litigants more process than numerous courts had under the current Rule. Nevertheless, the Committee would leave for case-by-case determination the precise nature of notice, opportunity to respond, and sanctions' justification.[130] These decisions may necessarily be case-specific but the lack of particularized guidance providing, for example, that procedures be tailored to violations' perceived severity could foster inconsistency and deficient process.

iv. Timing of Sanctions Motions

The Rule leaves open for case-by-case resolution the question when to file sanctions motions.[131] The Note explains that motions should ordinarily be served immediately after the alleged offense occurs and could be considered untimely if delayed.[132] In some situations, parties should only make motions once other litigants have had a "reasonable opportunity for discovery," but the safe harbor mechanism precludes movants from awaiting the litigation's conclusion or the particular allegation's disposition.[133]

This treatment appears responsive to concerns about timing. Tardy motions have prejudiced numerous lawyers and parties for many reasons, as when relevant evidence had become stale or delay led to unfair surprise or to an increase in the sanctions ultimately requested.[134] Sanctions that were prematurely sought simply to

127. FED. R. CIV. P. 11 advisory committe note (Proposed Official Draft 1991).

128. FED. R. CIV. P. 11(c)(3) (Proposed Official Draft 1991).

129. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

130. *Id.* ("Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances.").

131. *Id.*

132. *Id.* Some courts have so held. *See, e.g.*, Colombrito v. Kelly, 764 F.2d 122, 133-35 (2d Cir. 1985); Roe v. Operation Rescue, No. 88-5157 (E.D. Pa. June 19, 1989); Feldman v. Village of Lombard, No. 86 C 3295 (N.D. Ill. March 26, 1987).

133. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991); *see also* Chambers v. Nasco, 111 S. Ct. 2123, 2138-39 (1991).

134. Perhaps the most compelling recent example is *In re* Kunstler, 914 F.2d 505 (4th Cir.

dramatize the motion's seriousness or as an intimidation technique have harmed others, such as by interrupting their cases' pursuit.[135] The Note states that attorneys should not invoke Rule 11 for these purposes and suggests that judges defer potentially disruptive motions until the suit's termination.[136] The principal remaining difficulty is that the proposal leaves much to case-specific judicial resolution, although this may be endemic to many timing questions.[137]

v. Judicial Discretion/Appellate Review

The Note states that decisions on Rule violations and appropriate sanctions are entrusted to trial judges' discretion and that appellate courts will review these determinations for abuses of discretion,[138] thus retaining the Supreme Court standard articulated in *Cooter & Gell v. Hartmarx Corp.*[139] This approach lacks sufficient rigor, particularly for review of decisions by district judges who vigorously enforce Rule 11. For example, two Fourth Circuit panels deferentially reviewed trial judges' findings that civil rights attorneys had contravened Rule 11.[140] Such appellate review of the district courts' overzealous application allowed substantial sanctions to be imposed on two preeminent civil rights lawyers in close, controversial cases.[141]

1990), *cert. denied*, 111 S. Ct. 1607 (1991). Plaintiffs believed that the case concluded when they withdrew their claim pursuant to FED. R. CIV. P. 41(a)(2) in April, 1989. The defendants reserved no rights but filed Rule 11 motions nearly two months later. In late September, 1989, the trial judge imposed substantial sanctions on plaintiffs. *In re* Kunstler, at 510. A year later, the Fourth Circuit upheld the lower court's finding of a Rule 11 violation but vacated the sanction imposed, *id.*, and in April 1991, the Supreme Court denied counsel's petition for a writ of certiorari. Delay can reduce civility among judges, litigants, and lawyers, and complicate credibility determinations. *See* INTERIM REPORT, *supra* note 113, at 12.

135. Motions which seek substantial sanctions during pursuit of a case can chill the enthusiasm of litigants who are risk averse because they lack resources or power and can lead them to abandon litigation. *See* Tobias, *supra* note 6, at 495-98.

136. Attorneys should not tender motions as a discovery mechanism, to stress the substance of a litigant's position, to extract an unfair settlement, to create conflicts of interest between clients and lawyers, or to seek disclosure of material otherwise protected as work product or by the attorney-client privilege. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991). The Committee Note evinces concern about disruption that is created when a disclosure of communications between lawyer and client is needed to ascertain whether the Rule was violated. *Id.*

137. *See* INTERIM REPORT, *supra* note 113, at 12 ("All of the suggestions tendered to the Committee about how the rule could be amended to deal with the question of timing have their own problems.").

138. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

139. 110 S. Ct. 2447, 2461 (1990).

140. *See* Blue v. United States Dep't of Army, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991); *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991).

141. In reviewing whether Rule 11 had been violated, the *Kunstler* panel did not scrutinize closely the district judge's factual or legal determinations, a number of which were erroneous.

The Eleventh Circuit similarly reviewed and let stand a one million-dollar award levied by a trial judge against a public interest litigant, although that sanction could bankrupt the organization.[142]

b. Appropriate Sanction

i. Introductory Consideration of Committee's Objectives

The Committee, in providing judges guidance for selecting an appropriate sanction, apparently had four primary objectives.[143] It wanted to stress the availability of nonmonetary sanctions and that Rule 11's principal purpose is deterring litigation abuse. The Committee also sought to reduce judicial reliance on financial sanctions, namely attorney-fee shifting, and on the Rule's compensatory goal.[144] Indicia of these objectives are in the proposal's text, the Note, and Committee deliberations. One description of the proposal in the Note epitomizes Committee thinking: it "expands litigants' and lawyers' responsibilities to the court, while calling for greater judicial restraint in considering imposition of sanctions to deter [violative] conduct."[145]

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914 F.2d at 513-21. The panel, however, did vacate the sanctions imposed as inappropriate and afforded guidance that was solicitous of civil rights plaintiffs. *Id.* at 522-25.

The *Blue* panel analyzed more closely the trial court's factual findings but deferred too greatly to its legal determinations. Certain of both types of rulings, however, were erroneous. *Blue*, 914 F.2d at 536-45. Nevertheless, the panel reversed certain sanctions because they were improperly levied. *Id.* at 544-50.

The lawyer in *Kunstler* was William Kunstler, the civil rights attorney who represented the "Chicago Seven." The lawyer in *Blue* was Julius Chambers, Director-Counsel of the NAACP Legal Defense Fund. One reason that such treatment could have chilling effects is that many civil rights lawyers become more cautious when the most respected among them are sanctioned.

142. Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992). These disadvantages outweigh deferential review's benefits, which include placing responsibility in the decisionmaker who typically is most familiar with the facts and the behavior of sanction targets and restricting the number of appeals by limiting their prospects for success.

143. The court "shall impose an appropriate sanction upon the attorneys, law firms, or parties determined . . . to be responsible for a violation." FED. R. CIV. P. 11(c) (Proposed Official Draft 1991). This subsection is organized differently because the appropriate sanction idea was central to the Committee's work and vital to its objectives.

144. One helpful example is the Committee's recognition that a "monetary award may be the most effective deterrent in some circumstances." FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

145. *Id.* The second iteration states that the "revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule." *Id.* A similar example is the quotation, *supra* note 144, and there were numerous analogous examples during Committee deliberations. *See also supra* note 64 and accompanying text.

ii. The Proposal's Text

The Committee achieved its objectives by defining "appropriate sanction," which is essentially undefined in existing Rule 11.[146] The proposal's text provides that it "shall be limited to what is sufficient to deter comparable conduct by persons similarly situated."[147]

The Committee rejected the suggestion that an appropriate sanction be one which is the "least severe adequate to deter." Judge William Schwarzer, who now directs the FJC, developed that idea in 1984,[148] and several circuit courts subsequently adopted the notion.[149] Most members thought that judges would view the phrase as requiring the "absolute lowest sanctions"[150] and thereby create an improper judicial mindset or send the signal that the Committee was relaxing concern about litigation abuse.[151]

The Committee elaborated upon the idea of an "appropriate sanction" by stating:

> The sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.[152]

This articulation retains much of the current Rule's wording. For example, sanctions may encompass monetary awards of attorneys' fees that the infraction imposes on the other party.[153] Nonetheless, there are several significant changes.

Most important, the text, before mentioning financial sanctions,

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146. The 1983 version did provide that an appropriate sanction "may include an order to pay to the other party or parties the amount of the reasonable expenses incurred" because of the paper's filing, "including a reasonable attorney's fee." FED. R. CIV. P. 11. This language, especially the provision regarding attorney's fees, has been the source of considerable difficulty. *See infra* note 176 and accompanying text.

147. FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991).

148. *See* William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1984). Numerous judges have looked to Judge Schwarzer for guidance in applying Rule 11. *See* National Assoc. of Gov't Employees Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 223-24 (1988).

149. *See In re* Kunstler, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195-96 (3d Cir. 1988).

150. Pointer, *supra* note 89.

151. Miller, *supra* note 89. Several members stated that circuit courts could employ the notion under the Committee's formulation. Colloquy between Judge Pointer and Judge Phillips, Advisory Committee Meeting, Washington, D.C. (May 24, 1991). Another important suggestion, offered by Judge Pointer, which the Committee rejected was the concept of "remedial measures" that would be less onerous than sanctions. *Id.*

152. FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991).

153. FED. R. CIV. P. 11.

states that "the sanction may consist of, or include, directives of a nonmonetary nature."[154] The text also explicitly provides for monetary penalties to be paid to the court[155] and for payment of some or all of the reasonable attorney's fees and other expenses that directly result from the violation.[156]

The two sentences defining and elaborating "appropriate sanction" reflect the Committee's intent to stress Rule 11's deterrent purpose, to encourage courts' use of nonmonetary sanctions while discouraging reliance on financial awards, and to deemphasize the Rule's compensatory goal. The Committee's language choices—use of "shall be limited," "is sufficient," and the express inclusion of "deter" in the first, definitional sentence—illustrate the four objectives.[157] The goals also are demonstrated in the second, elaborative sentence by employment of "may consist of," "or include," and "monetary penalty"; use of "directives of a nonmonetary nature" and its placement before "monetary penalties"; permitting awards of partial fees; and mentioning compensation.[158]

The only word choice that may depart from the objectives is the provision for paying movants "some or all of the reasonable attorneys' fees and other costs incurred," rather than "costs, including attorney's fees," language employed in earlier drafts of the proposal.[159] Yet even that phrasing is consistent, because courts authorized to award "*some or all* of the *reasonable* attorneys' fees"[160] could assess less than the fees in fact sustained, especially by recognizing that reasonable fees need not be the ones actually incurred.[161]

iii. Committee Note/Deliberations

The Committee Note and the Committee's deliberations confirm

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154. FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991).

155. *Id.* This would clarify confusion as to whether current Rule 11 authorizes such penalties. *Compare* Blue v. United States Dep't of Army, 914 F.2d 525, 548 (4th Cir. 1990) (district court erred in imposing penalty of nearly $38,000 for court expenses), *cert. denied*, 111 S. Ct. 1580 (1991) *with* Cannon v. Loyola Univ. of Chicago, 116 F.R.D. 243, 244 (N.D. Ill. 1987) (threat to impose sanctions payable to court for wasting judicial resources). *See also* Eisenberg v. University of New Mexico, 936 F.2d 1131, 1136-37 (10th Cir. 1991) (distirct court may impose sanction in form of fine for court's time).

156. FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991).

157. *Id.*; *see supra* notes 143-44 and accompanying text.

158. *Id.*

159. *Compare* FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991) *with* FED. R. CIV. P. 11(c) (Proposed Draft May 24, 1991). *Cf.* FED. R. CIV. P. 11 (amount of reasonable expenses, including reasonable attorneys' fee).

160. FED. R. CIV. P. 11(c)(2) (Proposed Official Draft 1991) (emphasis added).

161. *See, e.g., In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); White v. General Motors Corp., 908 F.2d 675, 683-84 (10th Cir. 1990).

the propositions above while affording valuable additional insights into its thinking. Indeed, the Committee enunciated these four objectives more clearly and emphatically during its discussions than in the proposal's text or the Note.

a. Emphasis of Deterrence

The Committee indicated in many ways that deterrence is Rule 11's principal goal.[162] The Note frequently mentions this deterrent purpose, explaining that an appropriate sanction is one which will deter future improper conduct by the person or by others similarly situated.[163] The need to emphasize deterrence was a constant refrain in Committee deliberations. Typical were the remarks of several members that an appropriate sanction would be one which is sufficient to deter.[164]

b. Deemphasis of Compensation

The committee intended to discourage the use of Rule 11 for compensation. The Reporter stated that a major goal was to "refocus sanctioning from compensation to deterrence."[165] Some members similarly suggested that the Committee encourage judges to deemphasize compensation when choosing sanctions.[166]

c. Deemphasis of Monetary Sanctions

The Committee stated in numerous ways that courts should reduce significantly the number and magnitude of monetary sanctions, particularly awards of attorneys' fees, imposed under current Rule 11. During Committee deliberations, most members acknowledged that many judges had treated attorneys' fees as the sanction of first resort under the 1983 amendment, assessing awards that were excessive in both number and size. Judge William Bertelsman and Judge Mariana Pfaelzer mentioned the "widespread belief at the beginning" of Rule 11's implementation that the "normal sanction was to be fee shifting,"[167] while Justice Michael Zimmerman

162. This was the 1983 amendment's primary goal; the Supreme Court stamped its imprimatur on that idea in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990).

163. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

164. Pointer, *supra* note 89; Winter, *supra* note 115; Justice Michael D. Zimmerman, Utah Supreme Court, Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991).

165. Professor Paul Carrington, Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991).

166. *Id.*; Holbrooke, *supra* note 89; Pfaelzer, *supra* note 89.

167. Judge William O. Bertelsman, E.D. Ky., Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991); Pfaelzer, *supra* note 89.

remarked on the "national perception that fee shifting is the primary sanction and the sanction of first choice."[168] An important theme in the meetings was the willingness of courts to compensate and shift fees, thereby fostering the Rule's overuse and potential chilling effect.[169]

Several members suggested that courts be urged to limit imposition of these sanctions. Judge Pointer stated that the Committee was "trying to contract the fee-shifting possibilities," Justice Zimmerman observed that no one defends fee-shifting as the principal sanction, and Judge Bertelsman wanted the Committee to "make clear that sanctions should not primarily be" attorneys' fees.[170]

The Committee sought to restrict rather than eliminate the courts' reliance on compensation, monetary sanctions, and fee-shifting. Particularly telling is the Note's statement that judges may award fees and that financial assessments sometimes can be the most efficacious deterrent.[171] Another sign of the Committee's intent to circumscribe, yet retain, such sanctioning is textual provision for payment of "some or all of the reasonable attorneys' fees" that movants incur as a "direct result of the violation."[172] The Note similarly proscribes reimbursement for services attributable to delay in seeking sanctions, states that partial compensation may sufficiently deter those with modest resources, and admonishes courts about fee shifting that contravenes the requirements governing statutory fee awards, exemplified by *Christiansburg Garment*.[173]

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168. Zimmerman, *supra* note 164.

169. Carrington, *supra* note 165; James Powers, Esq., Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991); Pfaelzer, *supra* note 89.

170. Bertelsman, *supra* note 167; Pointer, *supra* note 89; Zimmerman, *supra* note 164.

171. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

172. *Id.* These limitations apparently were derived from other sources. Many courts applying the 1983 amendment had stated that reasonable fees need not be actual fees and had imposed on movants the duty to mitigate their expenses. *See, e.g.*, Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1093-94 (3d Cir. 1988); Dubisky v. Owens, 849 F.2d 1034, 1037 (7th Cir. 1988).

173. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991); *see also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Many courts applying the 1983 amendment had made "ability to pay" an important equitable consideration. *See, e.g., In re* Kunstler, 914 F.2d 505, 524 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990). Some critics have argued that courts should not rely on Rule 11 to require civil rights plaintiffs to pay the attorneys' fees of defendants, because that would contravene the idea that prevailing plaintiffs in these cases normally are entitled to fees and prevailing defendants ordinarily are not. *See* Brief for Amicus Curiae Public Citizen Litigation Group, Business Guides v. Chromatic Communication Enters., 111 S. Ct. 922 (1991) (No. 89-1500). The Advisory Committee Note adds that payments to other litigants for reducing their injuries may be preferable to fines payable to courts, especially for violations of the improper purpose clause. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991). It is important to understand the

d. Emphasis of Nonmonetary Sanctions

The Committee encouraged increased use of nonmonetary sanctions in several ways. The Note expressly observes that courts have available many sanctions: striking the violative paper; issuing a warning, reprimand, or censure; demanding participation in certain educational programs; requiring that fines be paid to the court; and referring attorneys to disciplinary authorities.[174] The Committee did not place this material in the text; however, the Note states that "for emphasis, [the text] does specifically note that sanctions may be nonmonetary as well as monetary."[175] This decision seems curious, as some members recognized that attorneys' fees became the sanction of choice because the term appears in current Rule 11's text.[176] Judge Pointer, the proposal's principal drafter, explained that he simply deemed it inappropriate to place the Note's comprehensive listing in the text of a Rule.[177]

iv. Miscellaneous Considerations Primarily Related to Appropriate Sanctions

a. "Factors" in the Committee Note

The Note similarly states that the Committee did not attempt to specify in the Rule's text the factors that courts should consider when "deciding whether to order a sanction or what sanctions would be appropriate in the circumstances."[178] Instead, the Note enumerates many factors that could apply in a particular case:

> Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity in other litigation. . . .[179]

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substantial qualifications being imposed. First, monetary awards are to be used in the service of deterrence. Second, violations of the improper purpose requirement are the worst case scenarios.

174. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991) (citing MANUAL FOR COMPLEX LITIGATION § 42.3 (2th ed. 1985)).

175. *Id.*; *see also* FED. R. CIV. P. 11(c) (Proposed Official Draft 1991).

176. Bertelsman, *supra* note 167; Pfaelzer, *supra* note 89; Zimmerman, *supra* note 164; *see also supra* notes 167-70 and accompanying text.

177. Pointer, *supra* note 89. The Committee seemed to defer to Judge Pointer's views.

178. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

179. *Id.* It is unclear why the Note states that courts may consider the factors in resolving

Although this guidance may not help judges resolve alleged Rule violations, the factors should assist the judiciary select appropriate sanctions.[180] Several specific factors, such as whether those responsible have legal training or the ability to pay, are the types of factors that courts should consider in choosing a sanction.[181] Most of the factors imply that judges should tailor sanctions' severity to the seriousness of the violative behavior and to the harm caused to courts or parties. Absent express prescription of this approach and in the presence of other factors, such as the potential for chilling legitimate litigation,[182] judges may be reluctant to apply these factors, which remain ambiguous and could be misconstrued.

A few factors listed may present difficulty. For instance, "whether the person has engaged in similar [improper] conduct in

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possible Rule violations. The standards specifically articulated in proposed Rule 11(b)(1)-(3) should be the principal, if not the exclusive, decisional criteria. Several factors listed in the Note, such as the amount needed to deter, are obviously irrelevant or should be so treated. "Whether the person has engaged in similar conduct in other litigation" should be irrelevant, because Rule violations should be based only on behavior in the instant case. *Id.*; *see also* Blue v. United States Dep't of Army, 914 F.2d 525, 547 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

180. Most of the remaining factors are much more relevant to choosing appropriate sanctions than to possible Rule violations. For example, whether the improper behavior "was intended to injure [and] what effect it had on the litigation process in time and expense" are quite relevant to ascertaining proper sanctions but of limited relevance to Rule violations. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

Insofar as any of the factors may be properly applied in discerning whether the Rule was contravened, it is unclear precisely how this can be most effectively achieved, particularly how the factors are to mesh with the decisional criteria prescribed in proposed Rule 11(b)(1)-(3). For instance, whether the improper behavior "was part of a pattern of activity," *id.*, is unclear: are two infractions sufficient or must there be five, and is their relative severity relevant? It also may be difficult to measure the effect that the conduct had on the "litigation process in time or expense." *Id.* This entails questions involving the severity of the violation, how it affected the litigation process, and the calculation of the temporal and monetary costs.

In the final analysis, it may simply be preferable to include in the text clearly delineated standards, which, if violated, support the imposition of sanctions. This would provide notice, due process, and clarity.

181. The reference to legal training and the limited responsibilities that the proposed Rule imposes on represented parties substantially reduce the significant obligations that the Supreme Court imposed on them in Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922 (1991). *See supra* notes 58-60 and accompanying text.

182. This has been one of the principal criticisms levelled at Rule 11 since its 1983 amendment. *See supra* notes 16-17, 23, 28, 64 and accompanying text. Recent cases that speak to chilling are Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); Jones v. Westside-Urban Health Ctr., 760 F. Supp. 1575, 1581 (S.D. Ga. 1991); Tutton v. Garland Indep. Sch. Dist., 733 F. Supp. 1113, 1119 (N.D. Tex. 1990); *see also* Tobias, *supra* note 18, at 110-16. Additional equitable factors that courts apply include the offender's experience and ability, the seriousness of the violation, and the extent to which there was bad faith or malice. *See In re* Kunstler, 914 F.2d 505, 524-25 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195-97 (3d Cir. 1988).

other litigation" should have limited relevance and could be prejudicial.[183] Courts may also experience difficulty determining whether challenged behavior "was part of a pattern of activity"[184] or "was intended to injure"[185] and "what effect it had on the litigation process in time or expense."[186]

The Note affords few broader suggestions. For example, the Rule provides little guidance for situations in which multiple factors are present, although the Note alludes to that possibility.[187] The failure to set priorities among the factors or to recommend ways of valuing and perhaps balancing them, especially when in conflict, could complicate judicial efforts to select appropriate sanctions.[188]

b. Liability for Sanctions

The proposal's text provides that judges "shall impose an appropriate sanction upon the attorneys, law firms, or parties determined . . . to be responsible for a violation."[189] The Note instructs that a paper's signer assumes a non-delegable duty to the court and usually will be the person sanctioned,[190] although judges may need to sanction others occasionally in addition to, but rarely instead of, the signer.[191] The Note adds that the change is meant to remove limitations in current Rule 11 which the Supreme Court had interpreted to

183. Past improper conduct may be relevant as an indicator that past sanctions were inadequate to deter such conduct in the future. *See, e.g.*, *White*, 908 F.2d at 685; *Doering*, 857 F.2d at 197 n.6. "Repeat offenses" certainly have been treated as relevant to criminal law sentencing, although they have been hedged with procedural protections. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 25.1 (1985).

184. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991). The contrast, "or an isolated event," provides some assistance, although it is unclear how many infractions constitute a pattern and whether their relative severity is relevant.

185. *Id.* Courts could become embroiled in numerous difficult determinations of credibility in applying this factor. Moreover, negligently inflicted harm could have effects equally serious as intentionally perpetrated harm.

186. *Id.*

187. *Id.* ("[A]ll of these [factors] may in a particular case be proper considerations.").

188. For instance, should a violator's inability to pay and vulnerability to chilling outweigh the "need to deter that person from repetition in the same case [or] to deter similar activity in other litigation"? *Id.* Correspondingly, should the improper behavior's effect on the litigation process override these factors? *See id.*

Despite the inherent difficulties of affording particularized guidance for resolving fact-specific situations, greater specificity would be desirable. *Cf.* Carl Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Adminstrative Proceedings*, 82 COLUM. L. REV. 906 (1982) (more factors do not necessarily yield better decisions); *see also supra* note 188 and accompanying text; *infra* notes 243, 302 and accompanying text.

189. FED. R. CIV. P. 11(c) (Proposed Official Draft 1991).

190. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

191. *Id.*

proscribe awards against the signer's law firm.[192] The modification seems fairer, because it would fix liability on those actually responsible. The change should encourage compliance by a broader spectrum of responsible actors, such as partners and law firms, that might otherwise avoid liability by, for instance, having salaried associates sign and be responsible for papers.[193]

A related provision states that monetary sanctions may be assessed against represented parties only for violations of the improper purpose clause.[194] The Note explains that this limitation would avoid potential difficulties under the Rules Enabling Act,[195] but that it would not restrict judicial power to impose sanctions having collateral monetary implications.[196] This prohibition, and other cautions in the Note,[197] respond to concerns about courts' authority to shift fees.[198]

c. Awards for Prevailing on Sanctions Motions

Rule 11(c) also provides that judges may award to prevailing litigants the reasonable expenses and attorneys' fees incurred in filing or resisting Rule 11 motions.[199] Judge Pointer indicated that recovery of these costs should be the "norm."[200] Assessing these expenses seems fair. Moreover, the possibility of recovering the costs for opposing motions should provide several benefits. Because plaintiffs are targeted more than defendants, but three-quarters of sanctions motions are denied, parties' invocation of Rule 11 may become more

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192. *Id.*; *see also* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 459 (1989); The change reinstitutes what several members stated was the intent of the 1983 drafters. Advisory Committee Meeting, Washington D.C. (May 23, 1991). *Accord Pavelic*, 110 S. Ct. at 460 (Marshall, J., dissenting).

193. The problem was mentioned during the Committee's deliberations.

194. FED. R. CIV. P. 11(c) (Proposed Official Draft 1991).

195. FED. R. CIV. P. 11 Advisory Committee's Note (Proposed Official Draft 1991) (citing Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922 (1991)); *see also* Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (1989); Chambers v. Nasco, 111 S. Ct. 2123 (1991); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

196. FED. R. CIV. P. 11 Advisory Committee's Note (Proposed Official Draft 1991). Examples are "dismissal of a claim, preclusion of a defense [and] preparation of amended pleadings." *Id.*

197. "In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)."; *see also supra* note 173 and accompanying text.

198. *See, e.g., Chambers*, 111 S. Ct. at 2141-46 (Kennedy, J., dissenting); *Business Guides*, 111 S. Ct. at 935 (Kennedy J., dissenting); *see also supra* note 173.

199. *See* FED. R. CIV. P. 11 Advisory Committee's Note (Proposed Official Draft 1991).

200. Pointer, *supra* note 89.

balanced,[201] while the Rule's overuse could be reduced. In numerous situations, however, the provision may afford an additional incentive to seek sanctions and could engender some satellite litigation. Litigants also should be able to defend against Rule 11 motions without incurring additional expense, as the Fourth Circuit recently observed.[202]

d. Mandatory Sanctioning

The proposal retains mandatory sanctioning. The Committee seemed concerned that substituting "may" for "shall" would send the wrong signal. Because the principal problems with sanctions' imposition since 1983 have involved judicial application, reversion to a discretionary standard would be inconsequential. For instance, judges who levied large sanctions against civil rights plaintiffs under the current Rule could impose similar awards by exercising this newly articulated discretion.

v. Critical Assessment of Guidance on Appropriate Sanctions

The Committee's guidance for choosing an appropriate sanction typifies much of the proposal.[203] Those suggestions respond to certain criticisms of current Rule 11. For example, the recommendations should reduce chilling by discouraging courts' reliance on financial sanctions, as they achieve some deterrence by prescribing monetary sanctions, when indicated.[204] The guidance may be deficient primarily because it is ambiguous and depends too much on judicial discretion while remaining insufficiently responsive to several additional problems posed by the existing Rule, such as inconsistency and satellite litigation.[205]

The phrase "appropriate sanction" is illustrative. This unclear, open-ended concept on which courts would train their discretion can be inconsistently interpreted and applied differently in similar situations, fostering the Rule's overuse, satellite litigation, and chilling effects. Equally instructive is the Note's pronouncement that judicial power to award attorneys' fees is retained and that monetary assessments may be the most efficacious deterrent in certain situations.[206] Judges exercising their discretion in effectuating this guidance could

201. *See* INTERIM REPORT, *supra* note 113, at 9-10.

202. Blue v. United States Dep't of Army, 914 F.2d 525, 548-49 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

203. *See infra* notes 234-55 and accompanying text.

204. *See supra* notes 143-45, 152-77 and accompanying text.

205. *See infra* notes 234-47 and accompanying text.

206. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

conclude that fee shifting would be the best means of deterring abuse. Indeed, they may be correct. Unfortunately, such sanctions will most effectively deter those lawyers and litigants who have the least power and resources, chilling their ability to bring suit.[207]

c. Sanctions on the Court's Initiative

Proposed Rule 11(c) includes several provisions that govern sanctioning on the court's initiative.[208] The subdivision retains courts' power to sanction sua sponte but imposes several new requirements on judges while according targets greater procedural protection.[209] Courts must issue orders to show cause and afford reasonable opportunity for responses before levying sanctions.[210] Rule 11(c) proscribes assessment of monetary penalties after litigants voluntarily dismiss or settle a case, because parties should not subsequently have to confront an unexpected sanction, which could influence their decisionmaking.[211] Although litigants who withdraw offending assertions have no safe harbor after judges issue orders to show cause, courts should consider the withdrawal in choosing sanctions.[212] These procedures respond to criticism that judges now possess excessive flexibility to sanction on their own initiative and that some judges abuse this discretion.[213] The requirements should be an improvement, although they may not suffice for parties with scarce resources.

d. Additional Miscellaneous Considerations

Numerous additional indicia of Committee intent are in the proposal's text, the accompanying Note and the Committee's deliberations. For example, Rule 11(a), titled "Signature," retains several provisions of the existing Rule[214] and deletes others as unnecessary.[215] However, these are clarifying measures. Correspondingly, one paragraph in the Note states that Rule 11 is not the sole source for con-

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207. *See supra* notes 16, 22-23, 28, 64 and accompanying text.

208. *See* FED. R. CIV. P. 11(c)(1)(B), 2(A)-(B) (Proposed Official Draft 1991).

209. *Id.*; FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

210. FED. R. CIV. P. 11(c)(1) (Proposed Official Draft 1991).

211. FED. R. CIV. P. 11(c)(2)(B) (Proposed Official Draft 1991); FED. R. CIV. P. 11 (Proposed Official Draft 1991).

212. FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

213. *See, e.g.*, Tobias, *supra* note 6, at 501-03; Tobias, *supra* note 11, at 169-70; *see also supra* note 24 and accompanying text.

214. The proposed Rule retains the requirements for signatures on papers and that unsigned papers be stricken, unless the lawyer or litigant who failed to sign them promptly does so after being notified. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

215. The note deletes provisions regarding the effect of answers given under oath and stating that the signing of a paper is a certification that the signer has read it. *Id.*

trolling inappropriate presentations to courts, and lists a catalog of options,[216] while another paragraph provides that the Rule's terms only govern material presented to courts.[217] This guidance could correct the tendencies of numerous parties and some judges to consider Rule 11 as the exclusive sanctioning provision in the Federal Rules or to invoke it in disputes more properly addressed under the discovery rules.[218] During the seven hours that the Committee discussed the proposal, the members articulated numerous specific ideas. Because several broad themes and dynamics characterize and contribute to an understanding of the proposal, they warrant additional treatment here.

One pervasive theme in Committee deliberations was a concerted effort to respond to criticism of the current Rule. Many members expressly stated that they were attempting to be responsive, and many suggestions testify to this. For instance, concern about chilling, satellite litigation, and judicial economy underlay inclusion of safe harbors and efforts to limit reliance on monetary sanctions.[219]

The Committee concomitantly attempted to strike appropriate balances and to accommodate all interests that the proposal would affect.[220] One example was the repeated refrain that the Committee "send the right message"[221] about deterring litigation abuse. Imposition of the continuing duty and retention of mandatory sanctions and monetary awards manifest ongoing substantial concern over abuse. Contrasting these with provisions for safe harbors, increased procedural protection, and reduced fee shifting, illustrates Committee efforts to reach fair, feasible compromises and to be responsive to all affected.

A third theme was the Committee's attempt to accord district courts substantial discretion. A number of members argued for the retention of such discretion, apparently believing that they should

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216. The Note lists fee shifting statutes, contempt, impositions of sanctions, awards of expenses or directing remedial actions under other rules or 28 U.S.C. § 1927 (1988), and tort actions for malicious prosecution or abuse of process. *See also infra* notes 271-75 and accompanying text.

217. Rule 11 does not cover papers involving disclosure and discovery that are not so filed but may be served on litigants, although Rules 26 and 37 govern those papers. *See* FED. R. CIV. P. 11 advisory committee's note (Proposed Official Draft 1991).

218. *See Call for Comments, supra* note 17, at 345; *see also* KRITZER, *supra* note 53, at 5 (noting that discovery abuse remains a prominent reason for Rule 11 activity).

219. *See supra* notes 114-22, 143-77 and accompanying text. The Committee also relied heavily on the data that it had collected.

220. Pointer, *supra* note 89; Miller, *supra* note 89.

221. Judge Wayne D. Brazil, Mag. N.D. Cal., Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991); Holbrooke, *supra* note 89.

defer to judges who must enforce the Federal Rules.[222] Examples are courts' great discretion to select appropriate sanctions and considerable discretion to resolve Rule 11 motions.[223] Moreover, the deferential standard of appellate review retained affords trial judges much discretion vis-à-vis circuit courts.[224] A narrower theme of the Committee's work is that Rule 11 not be considered a cure for every ill that plagues the litigation process. Several members mentioned the availability of substantive tort law remedies, namely abuse of process and malicious prosecution.[225]

The dynamics of Committee deliberations enhance comprehension of its efforts.[226] Judge Pointer, individual members, and the group as a whole constantly attempted to reach consensus, voting only when necessary. Members displayed little reluctance to criticize or to express their opinions forthrightly, although public attendance could have compromised candor.[227] The Committee frequently reasoned by example to develop proposals that would work in practice.[228] Moreover, the members were acutely sensitive to the limitations of employing certain phraseology to convey the exact meaning desired. For instance, the observation that using "reasonably calculated" connoted "estimated" led to its replacement in defining an appropriate sanction.[229]

The Committee's work also demonstrates difficulties inherent in "drafting by committee."[230] For example, at several decisional points, there was insufficient time for the type of careful reflection that complex rule drafting invariably demands,[231] notwithstanding

222. Miller, *supra* note 89; Winter, *supra* note 115.

223. *See supra* notes 143-88 and accompanying text.

224. *See supra* notes 139-42 and accompanying text.

225. Judge Robert E. Keeton, D. Mass., Statement at Advisory Committee Meeting, Washington, D.C. (May 23-24, 1991); Pointer, *supra* note 89; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 119-21 (5th ed. 1984).

226. *See supra* note 2.

227. This fundamental tension in modern administrative government is witnessed in the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1988); *see also* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 8.3.2e (1985).

228. Committee discussion of the safe harbors provisions considered timing, the form of notice, possible responses, cost, and benefits among other factors.

229. Judge Pointer employed "reasonably calculated" in preparing a draft on the evening of May 23 for Committee consideration on the morning of May 24. *Cf. supra* notes 88-90 and accompanying text (similar debate and word choice); *see also infra* text accompanying note ?.

230. There is virtually no work on collaborative writing in law. *But see* Bari Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 MONT. L. REV. 373 (1991); *see also* ANDREA LUNSFORD & LISA EDE, PLURAL AUTHORS/SINGULAR TEXTS (1990) (work on collaborative writing in other fields).

231. This is somewhat impressionistic, but there simply seemed to be inadequate time to think through the type of complex, polycentric problems that Rule 11 poses, to explore fully

Committee efforts to surmount this complication.[232] An ironic dynamic was that appellate judges and professors, rather than district judges and practitioners, dominated Committee discussions, in that district judges must apply the Rules and lawyers must practice under them. Judge Pointer was one exception, and, as Chair, he ran the meetings fairly and expeditiously, affording everyone full opportunity to speak and even participating in the overnight drafting of pertinent terminology.

C. *Critical Assessment of Proposed Rule 11*

1. ANALYTICAL PROBLEMS

It is difficult to evaluate the Committee's proposal. The suggestions are the first steps in a protracted rule-revision process, and the recommendations attempt to rectify many problems created by a very controversial Rule. These difficulties can be ascribed more to Rule 11 as applied than as written, a circumstance that the proposal affects only tangentially.

Projecting how courts will effectuate clear, let alone ambiguous, guidance is problematic. There could be slippage between the Committee's intent in drafting the proposal and the judiciary's implementation of the amendment adopted. These complications may well accompany numerous untested concepts. Some difficulties similar to those experienced since 1983 and certain new problems, which defy precise prediction, will attend enforcement. Indeed, formulating definitive conclusions is impossible, because the suggestions' efficacy will depend on courts' exercise of their discretion to effectuate them.

Additional factors complicate accurate prediction. One difficulty is the selection and application of appropriate analytical parameters. For instance, should the relevant criterion be how substantially the proposal would reduce Rule 11's invocation, monetary sanctions, chilling effects, or litigation abuse? Correspondingly, should the potential benefits and disadvantages of the recommendations be viewed from the perspective of judges, litigants, or lawyers?

Notwithstanding such problems, some preliminary assessments can and should be posited, principally by considering the proposal in light of the major difficulties that Rule 11 has posed for courts, par-

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all feasible solutions, commit ideas to paper in ways that would prove workable, and let concepts "settle." *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

232. *See, e.g.*, *supra* notes 219-29; *infra* notes 56-57 and accompanying text. I do not mean to be critical. In the final analysis, it may be impossible to write first drafts that effectively serve as final drafts for issues as difficult as those Rule 11 presents.

ties, and attorneys since 1983. That proposal should respond in certain ways, but may be unresponsive or only partly responsive to the complications presented by judicial discretion, ambiguity, inconsistency, satellite litigation, overuse, and chilling effects.[233]

2. THE PROPOSAL AND THE PROBLEMS OF CURRENT RULE 11

a. Judicial Discretion

The Committee's suggestions respond to difficulties created by placing substantial judicial discretion in trial courts. For instance, textual provision for sanctioning on the court's own initiative will limit district judges' discretion to invoke Rule 11 and should concomitantly reduce chilling effects.[234]

Numerous aspects of the proposal will be unresponsive to the problems that discretion poses. For example, retaining deferential appellate review leaves trial courts great discretion.[235] Simply restricting this discretion may not be responsive to other difficulties that discretion or Rule 11 creates. For instance, mandatory sanctioning has required that judges who considered sanctions unnecessary impose them anyway, which could unnecessarily harm lawyers' reputations.

The recommendations are partly responsive to the complications that discretion entails. For example, the guidance for selecting an appropriate sanction limits discretion to shift attorneys' fees, but that phrase requires the exercise of much discretion.[236] Provision for a number of procedures similarly cabins discretion, although judges must invoke discretion to choose specific procedures in many cases.[237]

b. Ambiguity

The suggestions should be responsive to some problems created by ambiguity in the current Rule. A general example is the prescription of more explicit procedural protections than were in that Rule

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233. There are other complications, such as incivility and problematic informal Rule 11 activity, but those listed in the text have been most important. There also is a subtle distinction between most of the complications and the difficulties they create. For instance, the problem of ambiguity can lead to inconsistency and chilling.

234. *See supra* notes 208-13 and accompanying text.

235. *See supra* notes 139-42 and accompanying text.

236. *See supra* notes 203-07 and accompanying text.

237. *See supra* notes 112-42 and accompanying text. The selection of some procedures, such as those involving factual assertions, must be left to case-by-case determination. Other choices, such as ones implicating the precise nature of targets' notice and opportunity to respond and courts' justifications of their sanctioning decisions may. Nonetheless, the Rule should explicitly provide, for example, that procedures be tailored to the violation's perceived severity. *See supra* text following note 130.

and than numerous judges had afforded.[238] These provisions should reduce alleged procedural irregularities and should combat related problems, such as satellite litigation and chilling effects.

The proposal is unresponsive in certain respects. It retains a few unclear concepts, such as "appropriate sanctions" and "reasonable attorney's fees,"[239] and incorporates several untested ideas which could be confusing, such as "safe harbors" and the Note's "factors."[240] The proposal replaces relatively clear concepts, such as good faith, with ambiguous ones, namely frivolousness.[241] Mere clarification also might not alleviate other complications which ambiguity or Rule 11 presents. For instance, elucidating the existence of a continuing duty by expressly prescribing it will foster satellite litigation and chilling.[242] However, the recommendations are partly responsive to the problems that ambiguity poses. For example, the Note clarifies Rule 11 by specifying many factors to guide the courts, but leaves unexplained how they inform the choice of an appropriate sanction.[243]

c. Inconsistency

Inconsistent interpretation of Rule 11's terms and its inconsistent application in similar factual circumstances are closely related to ambiguity. The proposal will reduce some inconsistancy. For instance, clarification of procedures should limit inconsistent protections that judges have provided.

The proposal could be deficient in numerous ways. For example, new concepts, such as safe harbors, can be inconsistently construed and differently applied in analogous factual contexts, prompting satellite litigation and chilling.[244] Increasing consistency alone may be unresponsive to other difficulties with the Rule. For instance, making tiny portions of a paper violative will rectify conflicting interpretations but could foster overuse and chilling.[245]

Yet, the proposal also is partly responsive. The guidance for selecting an appropriate sanction should limit the imposition of dissimilar sanctions in like factual situations. Nonetheless, the many factors pertinent to exercise of courts' discretion and differing judicial

238. *See supra* notes 112-42 and accompanying text.
239. *See supra* notes 143-89, 199-207 and accompanying text.
240. *See supra* notes 114-23, 178-88 and accompanying text.
241. *See supra* notes 88-94 and accompanying text.
242. *See supra* notes 60-83 and accompanying text.
243. *See supra* notes 178-88 and accompanying text.
244. *See supra* notes 114-22 and accompanying text. This is similarly true of "frivolousness." *See supra* notes 88-94 and accompanying text.
245. *See supra* notes 69-73 and accompanying text.

opinions as to which sanctions will best achieve Rule 11's multiple purposes could promote disparate sanctioning.

d. Satellite Litigation

Ambiguity and inconsistency implicate problems involving satellite litigation attributable to existing Rule 11. Insofar as the proposal enhances clarity, satellite litigation over the Rule's meaning should decline. The proposal may be unresponsive in other ways; to the extent that it incorporates novel precepts or leaves notions imprecise, satellite litigation will be a concomitant.[246] Much of the proposal will be partly responsive. For instance, the reduced likelihood of recovering attorneys' fees should limit satellite litigation, but ambiguity over when they could be awarded may not.[247]

e. Overuse

The current Rule's overuse is linked to ambiguity, inconsistency, and satellite litigation.[248] Certain features of the proposal, such as requiring that sanctions motions be served separately, should discourage Rule 11's invocation,[249] but others may not. For example, the heightened demands that the continuing duty places on impecunious parties will complicate their compliance and might encourage the Rule's use.[250] Some elements could be partially responsive. For instance, safe harbors should restrict the Rule's formal invocation, but the tactical benefits provided might increase informal use.[251]

f. Chilling Effects

The proposal's responsiveness to the chilling that Rule 11 prompts is derivative of many ideas above. For example, insofar as

246. Perhaps a "shakedown" period for implementation of any rule revision should be considered a fixed cost of amendment. *See* Arthur R. Miller, *Of Frankstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

247. *See supra* notes 143-88, 205-07 and accompanying text.

248. *See supra* note 246 and accompanying text; *infra* note 251 and accompanying text.

249. *See supra* notes 124-25 and accompanying text.

250. *See supra* notes 60-83 and accompanying text.

251. *See supra* notes 120-23 and accompanying text. Concerns about problematic informal Rule 11 activity are so closely related to overuse that textual treatment is unwarranted. For example, the requirements for sanctioning on the court's initiative should be responsive to criticisms of courts that improperly invoked the Rule in informal contents. *See supra* notes 23-24, 208-13 and accompanying text. The proposal is partly responsive to concerns that parties and attorneys have informally invoked Rule 11 in inappropriate ways. For instance, although safe harbors would regularize certain of this activity, the procedure, especially when joined with the continuing duty, could increase improper informal activity. *See supra* notes 24, 60-83, 120-22 and accompanying text.

the proposal reduces ambiguity, inconsistency, satellite litigation, or overuse, chilling should decrease.[252] The escape hatch that safe harbors afford may limit chilling of those who wish to pursue novel legal theories or close cases.[253] Other components would be unresponsive. For instance, the onerous nature of the continuing duty and the command that legal allegations be nonfrivolous will dampen poor litigants' enthusiasm.[254] Some constituents would be partly responsive. For example, requirements governing factual assertions that clarify the relationships among Rules 8 and 11 and discovery could encourage parties who need information, even as the duty of candor discourages them.[255]

3. THE BALANCES STRUCK

The Committee might have struck different, and ostensibly better, balances among the various affected interests. For instance, the proposal lacks adequate solicitude for the needs of litigants and lawyers, especially impecunious ones, and is overly deferential to the judiciary. Provisions for the continuing duty, the duty of candor, and "nonfrivolous" legal arguments will impose onerous obligations on parties and attorneys and could increase judicial workloads. These requirements, by expanding the obligations of litigants and lawyers to the court, might deter abuse. They may have been a trade-off for permitting safe harbors and for encouraging reduced reliance on monetary sanctions, both of which should limit chilling.[256] Nevertheless, an incorrect balance was struck because the proposed Rule will insufficiently ameliorate the burdens for parties and attorneys, particularly poorer ones.[257]

In sum, this descriptive analysis and critical assessment of the proposal show that it should be beneficial in some respects, but will be partly unresponsive or responsive in more ways, to significant complications that Rule 11 has created since 1983. Many ideas examined above warrant suggestions for the future.

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252. Of course, to the extent that the proposal does not limit those phenomena, the potential for chilling will remain. Lingering uncertainty about implementation of guidance for selecting appropriate sanctions is illustrative. *See supra* notes 199-207 and accompanying text.

253. *See supra* notes 114-19. It may limit, not eliminate, chilling. *See supra* notes 119-23 and accompanying text (noting complications safe harbors may entail).

254. *See supra* notes 60-83, 88-94 and accompanying text.

255. *See supra* notes 97-109 and accompanying text.

256. Attachment to Letter, *supra* note 95, at 2.

257. For a discussion of other balancing, see *supra* notes 64, 117-18 and accompanying text.

IV. SUGGESTIONS FOR THE FUTURE

A. *Introductory Consideration of the Rule Revision Process*

Judge Pointer reworked the proposal in light of the Committee's recommendations, circulated the revisions to the members who approved them, and sent the final changes to the Standing Committee for its consideration on June 13, 1991.[258] That Committee made some modifications in July and sought public comment on the new version in August.[259] After the Advisory Committee receives written and oral submissions, it will consider that input in deciding additional alterations. The Committee then will forward its suggestions to the Standing Committee, the Judicial Conference and the Supreme Court, which must approve them; the Supreme Court transmits all proposals for change in Federal Rules to Congress before May 1 of any given year, and they become effective seven months later, unless Congress acts.[260]

This lengthy procedure has several important ramifications. Even if it proceeds as smoothly as possible, the proposal will not take effect until December 1993. The number of steps and entities in the process means that there should be ample opportunity for public comment. Substantial modification is rather unlikely because nearly all official bodies involved, except Congress, have historically deferred to the Advisory Committee as the experts with primary responsibility for studying the Rules and developing suggested revisions.[261] Thus, while the proposal is nascent, it should closely resemble the amendment which ultimately is adopted.[262]

B. *Suggestions for Future Treatment of the Proposal*

1. POSSIBLE REJECTION OF THE PROPOSAL

The proposal's rejection merits serious consideration in light of myriad factors mentioned throughout this paper. These include the

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258. *See* Attachment to Letter, *supra* note 95.

259. *Compare* FED. R. CIV. P. 11 (Proposed Official Draft 1991) *with* FED. R. CIV. P. 11 (Proposed Draft June, 1991) (copy on file with author).

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

261. *See* Tobias, *supra* note 3, at 293, 337-40. *But cf.* Burbank, *supra* note 195, at 1018-201 (documenting increased congressional willingness since 1973 to intercept proposed rules and amendments governing evidence and civil, criminal, and appellate procedure); *see also* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

262. *See infra* notes 287-89 and accompanying text. *But cf.* Mullenix, *supra* note 1, at 855 (predicting that Committee will retreat and abdicate reformulation of Rule 11 to Congress).

complications ascribed to Rule 11 since 1983, such as inconsistency, satellite litigation, and chilling effects, which will recur because they are inherent or intractable or because the proposal would affect them only minimally.[263]

A number of the proposal's specific aspects will pose clear difficulties. Most problematic is the continuing duty, which would impose burdensome responsibilities on all litigants, but especially impecunious ones, potentially deterring them from pursuing claims. The onerous nature of the requirements as to factual and legal assertions is similarly problematic.

Numerous uncertainties will accompany the proposal's implementation. Civil rights litigation is illustrative. For the suggestions to accommodate the needs of civil rights plaintiffs and attorneys, the judiciary would have to appreciate the subtleties of their cases and of Rule 11. Courts must correctly effectuate the proposal's clear concepts, properly resolve its ambiguities, carefully exercise their considerable discretion, and be sensitive to many intrinsic characteristics of civil rights suits and the restraints upon civil rights plaintiffs.[264] Even were such refined application easier to attain, there would remain significant risks, namely the possibility of chilling valid litigation.[265]

The time, energy, and money that the proposal's implementation will consume may exceed the enormous resources that courts, attorneys, and parties have devoted to Rule 11 since 1983.[266] Indeed, the proposal's promulgation could trigger another decade of inconsistent enforcement, satellite litigation, and chilling.

Retaining Rule 11 in its current or proposed form appears unnecessary. The principal difficulty of litigation abuse, which prompted the 1983 revision, has been ameliorated.[267] Courts which apply the Rule have achieved many additional objectives which underlie it. Rule 11 has brought sanctions to the attention of judges

263. *See supra* notes 234-55 and accompanying text; *see also supra* note 246.

264. Tobias, *supra* note 6, at 516-17; *see also* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5 (1991); Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988).

265. *See* Tobias, *supra* note 6, at 517; Cochran, *supra* note 264, at 6. *But cf.* Melissa L. Nelken, *Has The Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385 (1990) (urging amendment to lessen chilling effects).

266. *See* WILLIAM A. MCCORMACK, JR. ET AL., SANCTIONS: RULE 11 AND OTHER POWERS 21-25 (Gregory P. Joseph et al. eds., 2d ed. 1988); Tobias, *supra* note 6, at 517.

267. *See* INTERIM REPORT, *supra* note 113, at 6-7; William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014-15 (1988); Tobias, *supra* note 6, at 514; *see also* THOMAS E. WILLGING, FEDERAL JUDICIAL CTR., THE RULE 11 SANCTIONING PROCESS 67-69 (1988) (analysis of controversy).

and lawyers, making each keenly aware of their significance.[268] The Rule has alerted many attorneys to the importance of performing reasonable prefiling inquiries, which has encouraged them to stop and think before submitting papers and has discouraged the pursuit of frivolous lawsuits.[269]

Accomplishing these related goals has been and remains important. Nonetheless, judges can achieve these objectives with other efficacious techniques that might involve less disadvantages. Relatively effective measures for combatting litigation abuse are Title 28, section 1927 of the United States Code[270] and civil contempt, which protect the courts, and tort law remedies, such as abuse of process and malicious prosecution, which protect parties.[271] The recent Supreme Court opinion in *Chambers v. Nasco*[272] greatly expands the possibilities for sanctioning abuse under inherent judicial authority, thus reducing the need to sanction through Rule 11. Sanction provisions in Rules 16, 26, and 37 treat post-filing, abusive and less reprehensible activity; they also decrease the need for sanctioning through Rule 11 and for the continuing duty.[273]

For streamlining the litigation process, another stated purpose of the 1983 amendment, vigorous case management has proven more efficacious under Rules 16 and 26 than Rule 11 and has fewer deleterious side effects.[274] Judges responding to the FJC survey found the expeditious resolution of motions to dismiss and summary judgment, Rule 16 pretrial conferences, sanctions under Rules 26 and 37, and informal warnings to be more effective than Rule 11.[275] Some evidence even suggests that the current Rule, by reducing civility among lawyers and decreasing settlement prospects, may delay dispute resolution.[276] Indeed, the Committee recently urged that revision be pre-

268. *See* MCCORMACK ET AL., *supra* note 266, at 2, 16, 24; WILLGING, *supra* note 267, at 55-65. *See generally* David O. Stewart, *The Year of Sanctioning Litigants*, 77 A.B.A. J. 34 (Aug. 1991) (describing the trend of judges to impose sanction on litigants).

269. *See* INTERIM REPORT, *supra* note 113, at 6-7; Schwarzer, *supra* note 267, at 1014-15; Vairo, *supra* note 11, at 232-33.

270. 28 U.S.C. § 1927 (1988).

271. *See supra* notes 174, 216, 225 and accompanying text; *see also* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 954 (1991).

272. 111 S. Ct. 2123 (1991).

273. *See supra* note 73 and accompanying text.

274. *See* FED. R. CIV. P. 11 advisory committee's note (noting that greater judicial attention to pretrial abuses and sanction imposition should "help to streamline litigation process.").

275. FEDERAL JUDICIAL CTR., *supra* note 22, § 1A, at 1-2; *see also* INTERIM REPORT, *supra* note 113, at 5.

276. *See* Tobias, *supra* note 6, at 515; *cf.* INTERIM REPORT, *supra* note 113, at 8-9 (noting that although Rule 11 motions often exacerbate contentious and uncooperative behavior

mised on the notion that Rule 11 "in its present form, though somewhat helpful in controlling and deterring groundless pleadings and motions . . . should not be viewed as the primary means to accomplish that objective and tends to produce consequences that can frustrate the judicial process."[277]

Compensation, which was not a primary objective of the Rule at its inception, has since assumed questionable validity as a matter of governmental authority. Judges have levied attorneys' fees so often that Rule 11 has effectively become a fee-shifting provision.[278] This attribute of Rule 11 has been criticized because "allocation of the costs accruing from litigation is a matter for the legislature, not the courts."[279] Compensation also is dubious on policy and practical grounds, as it foments unnecessary satellite litigation and can chill legitimate cases, factors the Committee apparently recognized in suggesting the de-emphasis of compensation.

The need to combat the litigation explosion, which was another reason for the 1983 revision, has been and remains highly controversial. It is unclear that such an explosion ever occurred. For example, three-quarters of the judges whom the FJC polled observed that groundless lawsuits pose minor or no difficulty.[280] Insofar as there have been frivolous cases which might be characterized as a litigation explosion, the present Rule has discouraged some of them. To the extent that unwarranted satellite litigation could be denominated part of such an explosion, Rule 11 is contributing to it.[281]

Some ostensible goals of the current Rule, such as the notion that sanctioning through the Federal Rules would fundamentally change abusive behavior of lawyers and litigants, have proven unrealistic.[282]

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among litigants, the impact on settlement is unclear); *see also* INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 20 (Apr., 1991) (Rule 11 sanctions "incivility flash point").

277. INTERIM REPORT, *supra* note 113, at 2.

278. FEDERAL JUDICIAL CTR., *supra* note 22, § 1B, at 9 (finding fee shifting to adversary was sanction chosen 82% of time on average in five districts surveyed); *see also* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989); INTERIM REPORT, *supra* note 113, at 11, 16.

279. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570, 1576 (1990); *accord* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975).

280. FEDERAL JUDICIAL CTR., *supra* note 22, § 2A, at 2; *see also* INTERIM REPORT, *supra* note 113, at 5. *See generally* Tobias, *supra* note 3, at 287-89 (discussing the litigation explosion).

281. *See supra* notes 15-17, 41 and accompanying text. *Cf.* INTERIM REPORT, *supra* note 113, at 7-8 (reporting district judges' survey which did not indicate substantial discontent over time spent on Rule 11, although motions may have created excessive satellite litigation in some courts).

282. *See* FED. R. CIV. P. 11 advisory committee's note (noting that original Rule 11 is not

Insofar as the existing Rule represents an attempt to eliminate the carelessness or neglect which can be ascribed to resource deficiencies, that objective seems unattainable and is misguided as a matter of policy.[283]

This analysis demonstrates that there are few reasons for retaining Rule 11 in its present form. Moreover, much else in this Article indicates that the proposal would minimally improve the existing Rule. An example alluded to several times is the tendency of the proposal to erode numerous critical purposes of the 1938 Federal Rules, such as consistency and merits-based resolution of disputes.[284] The analysis shows that the disadvantages of sanctioning under Rule 11 outweigh the benefits, unless many features of the proposal are modified. Numerous ideas in this Article suggest that the rule revisors should seriously consider Rule 11's repeal or more substantial amendment than the proposal contemplates.

The changes that warrant examination are reinstating the pre-1983 version of Rule 11 or its major components, such as making bad faith the standard for Rule violations and the imposition of discretionary sanctions. Other possibilities include the exemption of civil rights plaintiffs and lawyers from Rule 11 or from liability for attorneys' fees or the imposition of less stringent tests of compliance on them.[285] Monetary sanctions should be sharply reduced and permitted only in cases of egregious litigation abuse and when there is a compelling need to deter.[286]

Although the rule revisors should carefully consider these recommendations, they may not be feasible, as many judges responsible for amending the Rules might find the concepts unpalatable. For example, the Advisory Committee flatly rejected the reversion to a

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effective in deterring abuses and amendment attempts to correct by encouraging courts to sanction abusive conduct); *see also supra* notes 70-73 and accompanying text.

283. *See supra* note 72 and accompanying text; *cf. supra* notes 73, 271-73 (describing other equally effective, less problematic mechanisms for sanctioning behavior). Insofar as Rule 11 discourages plaintiffs' vindication of constitutional and statutory rights, it frustrates congressional intent. *See supra* notes 74-81 and accompanying text.

284. *See supra* notes 71, 100-10 and accompanying text. The 1938 drafters also sought to increase uniformity and to encourage flexible, pragmatic judicial application. *See* Burbank, *supra* note 7; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) (recognizing these purposes and the 1983 amendment's erosion of them).

285. *See* Nelken, *supra* note 12, at 404-08 (suggesting emphasis on sufficiency of prefiling inquiries, elimination of fee shifting, and caution in Committee's Note about sanctioning civil rights plaintiffs). *But see* Oliveri v. Thompson, 803 F.2d 1265, 1280-81 (2d Cir. 1986) (rejecting a special test for civil rights cases), *cert. denied*, 480 U.S. 918 (1987); Tutton v. Garland Indep. School Dist., 733 F. Supp. 1113, 1118 (N.D. Tex. 1990) (same).

286. *See* MCCORMACK ET AL., *supra* note 266, at 2-3, 24-25; Vairo, *supra* note 11, at 233.

pre-1983 formulation in February, 1991 and again that May.[287] Correspondingly, a majority of Supreme Court Justices and most circuit and district judges also are concerned with litigation abuse. They seem committed to retaining Rule 11 essentially intact, if only as a weapon, albeit of limited efficacy, against abuse.[288] These phenomena were evidenced last Term by the Court's increased amenability to finding that lower courts can reach beyond attorneys to their clients when imposing sanctions.[289] Therefore, it is important to examine possible changes in the proposal.

2. SUGGESTIONS FOR CHANGE IN THE PROPOSAL

a. Problematic Aspects

The proposal presents many difficulties that warrant correction or amelioration.[290] Most significant is the proposal's unresponsiveness to the major problems that Rule 11 in its current form creates.[291] For example, under the proposal district judges would retain excessive discretion; however, this could be limited by stricter appellate review.[292] Too much ambiguity remains in the proposal, while it incorporates new, confusing notions. Such unclear ideas should be omitted or replaced with clearer concepts.[293]

Least desirable of the proposal's particulars is the continuing duty which will place onerous responsibilities on lawyers and litigants, especially those with little time or money. This duty may have a potentially chilling effect. The obligation might afford some benefits, but it will be so burdensome that it should be omitted.[294]

Furthermore, the substitution of "nonfrivolous" for "good faith" will impose more onerous demands on attorneys and parties, particularly those who pursue nontraditional or unpopular legal theories or those who have scarce resources. The substitution will also replace a

287. Pointer, *supra* note 89.

288. *See* Tobias, *supra* note 18, at 124 n.89; *see also supra* note 39 and accompanying text.

289. *See, e.g.*, Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991); Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922 (1991); *see also* Willy v. Coastal Corp., 112 S. Ct. 1076 (1991); Stewart, *supra* note 268.

290. Much examined in this subsection was thoroughly explored in the descriptive analysis and the critical assessment in this Article's second Part. The treatment below, therefore, will be relatively terse, consisting principally of examples that refer to earlier evaluation. The introductory paragraphs consider general problematic and advisable aspects and the subsequent paragraphs analyze with greater specificity.

291. *See supra* notes 234-55 and accompanying text.

292. *See supra* notes 139-42, 223-24, 235. Of course, the proposal might include fewer discretionary provisions or circumscribe more narrowly the discretion that remains. *But cf. supra* notes 236-37.

293. *See supra* notes 178-88, 239-41 and accompanying text.

294. *See supra* notes 60-85 and accompanying text.

familiar standard with one that courts have applied inconsistently.[295] These disadvantages warrant retaining good faith. The duty of candor will similarly burden impecunious lawyers and litigants. For example, lack of access to pertinent data and lack of resources to collect and analyze relevant information, even when accessible, will impair attorneys' and litigants' compliance.[296] Because these disadvantages would outweigh the benefits, the duty of candor should be deleted.

Mandating that courts scrutinize minuscule fragments of a paper for possible infractions parses too finely the idea of a paper and assigns attorneys and parties excessively refined duties.[297] If the rule revisors determine that an approach premised on the paper as a whole lacks adequate rigor, they should employ an approach that considers the challenged behavior's severity, or alternatively, a significant portion of, or multiple assertions in, the suspect paper.[298]

Some less troubling specifics remain sufficiently problematic that they should be omitted or substantially modified. For instance, the abuse of discretion standard for appellate review is too deferential.[299] Because the detriments, most significantly the potential for chilling, are greater than the advantages, more stringent oversight is preferable.

b. Advisable Aspects

The proposal responds in certain ways to the difficulties that the existing Rule poses. For example, the proposal partially limits judicial discretion and might reduce inconsistency, satellite litigation, and chilling.[300] A number of specific elements are advisable. Safe harbors offer a necessary safety valve, particularly for parties who lack funds or wish to pursue nontraditional or unpopular cases, and thus may decrease chilling. This could save resources of litigants, lawyers, and courts. Although safe harbors may waste resources if improperly invoked, judges can combat this problem.[301]

The guidance for selecting an appropriate sanction also is help-

295. *See supra* notes 88-93 and accompanying text.

296. *See supra* notes 105-10 and accompanying text.

297. *See supra* notes 68-73 and accompanying text.

298. *See supra* note 69 and accompanying text.

299. *See supra* notes 139-42, 235 and accompanying text.

300. *See, e.g., supra* notes 143-88 and accompanying text (limiting discretion); *supra* notes 95-96, 100, 112-13, 126-29 and accompanying text (clarifications); *supra* text accompanying notes 243-44 (reduced inconsistency); *supra* text accompanying notes 245-46 (reduced satellite litigation); *supra* notes 252-53 and accompanying text (reduced chilling).

301. *See supra* notes 116-20 and accompanying text (could save or waste resources); *supra* note 136 and accompanying text (ways to combat waste). The Committee also should

ful. Achievement of the Committee's four objectives would improve sanctioning and could reduce Rule 11's overuse and chilling effects while providing some deterrence. Lingering ambiguity in the guidance provided means, however, that courts may continue relying too substantially on monetary assessments. There should be additional clarification, stating that financial sanctions must be sharply circumscribed. The factors in the Committee Note also should be elaborated by, for instance, expressly warning of the potential for chilling legitimate litigation.[302]

Many less significant facets also are advisable, particularly if modified. For example, the requirements relating to factual assertions clarify the relationships among Rules 8 and 11 and discovery while reducing Rule 11's pro-defendant tilt.[303] The requirements, however, impose the duty of candor, which should be eliminated.[304] Similarly, express provisions for increased procedures and for sanctioning on the court's initiative should limit inconsistency and chilling effects, although both prescriptions warrant refinement.[305]

V. CONCLUSION

The Advisory Committee, in suggesting Rule 11's amendment, has attempted to respond to criticism. The recommendations may not suffice, in part because their efficacy is contingent upon judicial implementation. If the new Rule 11 closely resembles the proposal, there will be little improvement, and courts, lawyers, and litigants could embark on another decade of difficulties similar to those experienced since 1983.

The rule revisors should consider rejection or substantial modification of the proposal. They should effectuate the suggestions in this Article, deleting the proposal's most problematic provisions, clarifying less troubling aspects, and altering other features. If these

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elaborate what is to be included in safe harbor notifications. *See supra* note 121 and accompanying text.

302. *See supra* notes 178-82, 187-88 and accompanying text.

303. *See supra* notes 97-103 and accompanying text.

304. *See supra* notes 105-08 and accompanying text.

305. *See supra* notes 112-42, 208-13 and accompanying text. The procedures governing notice and opportunity to respond to sanction motions and judicial justifications for sanctions decisionmaking might be refined by prescribing that procedures be tailored to a violation's perceived severity. *See supra* notes 126-30 and accompanying text. This would implement current notions of procedural due process. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-12 to 10-18 (2d ed. 1988). Certain elements of the proposal are not clearly advisable or inadvisable. The Committee's decision to retain the mandatory sanctioning requirement is illustrative. *See supra* text following note 202.

changes were instituted, Rule 11 could be significantly improved. The Rule might even deter litigation abuse, which was the principal purpose of its 1983 revision, while simultaneously reducing satellite litigation and chilling effects, which are the amendment's foremost disadvantages.