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## Recent Work of the Civil Rules Committee

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# RECENT WORK OF THE CIVIL RULES COMMITTEE

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Congress reformed the procedures for amending the Federal Rules of Civil Procedure in 1988 by prescribing greater public participation in the rules revision process. Since that time, the Advisory Committee on the Civil Rules, which has primary responsibility for studying the Rules and developing proposals for change in them, has examined several important Rules and made controversial recommendations for modifying those provisions.<sup>1</sup> Although the Committee has assessed and suggested controversial revision in summary judgment and discovery, this article analyzes recent efforts of the Committee involving Rule 11, a provision that was fundamentally amended as recently as 1983.<sup>2</sup>

The Committee's work on Rule 11 has special relevance in Montana because those with rule revising authority amended the state analogue of Federal Rule 11 in 1984, ostensibly for the same

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1. The Advisory Committee (Committee) is a twelve-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 generally Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987); Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795, 797 n.2 (1991).

The Standing Committee is a similarly constituted body that approves Advisory Committee proposals. In July, the Standing Committee authorized the Committee to solicit public comment on its Rule 11 proposal after making minor modifications. Because these changes are relatively unimportant and the original proposal is likely to resemble the Rule that is adopted, we focus here on the Advisory Committee's efforts.

2. Federal 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.

reasons as the federal provision. Ironically, the federal entities with rule amending responsibility are seriously considering additional amendment of Rule 11 just as Montana judges, practitioners and attorneys apparently have become accustomed to the 1984 provision.

Montana Rule 11 is modeled substantially on Federal Rule 11. Revision and implementation of procedural rules in Montana seem to track closely developments at the federal level, and significant change in Federal Rule 11 now appears imminent. It is important, therefore, to survey recent developments relating to Federal Rule 11, as they may well anticipate subsequent treatment of the corresponding Montana provision.

The first section briefly describes the developments that led to the 1983 amendment of Federal Rule 11 and to the 1984 revision of Montana Rule 11. The second part analyzes implementation of the Federal Rule that prompted the Advisory Committee to study the provision and make suggestions for change. The third segment assesses the Committee's study and its recommendations. Because the proposals are nascent, the paper attempts to identify how they will develop and what ultimately will result. The fourth section briefly considers the consequences in the federal sphere for Montana Rule 11 and offers suggestions for revising the provision.

## I. THE 1983 AMENDMENT OF FEDERAL RULE 11 AND THE 1984 AMENDMENT OF MONTANA RULE 11

### A. *Federal Rule 11*

The developments that preceded the revision of Federal Rule 11 in 1983, and Montana Rule 11 in 1984, warrant only terse treatment here, as most of them have been chronicled elsewhere.<sup>3</sup> In approximately 1975, the federal judiciary, led by Chief Justice Warren Burger, and some writers began to assert that the federal courts were undergoing a "litigation explosion."<sup>4</sup> Numerous judges and certain commentators claimed that the quantity of federal

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3. See, e.g., Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314-17 (1986); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); Comment, *Rule 11 Sanctions*, 48 MONT. L. REV. 119 (1987).

4. See, e.g., Burger, *Agenda for 2000 A.D.—A Need For Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 (A. Levin & R. Wheeler ed. 1979). See generally Risinger, *supra* note 3, at 5-52 (pre-1975 history of Rule 11); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989) (litigation explosion).

civil lawsuits was increasing substantially and that too few of the cases were meritorious.<sup>5</sup> A number of the observers thought that the Federal Rules of Civil Procedure, as adopted in 1938, enabled parties and their counsel to abuse the process of litigation by, for instance, manipulating the liberal, flexible pleading regime and open-ended discovery for tactical benefit.<sup>6</sup>

Most of these propositions were controversial in the mid-1970s and still are.<sup>7</sup> Despite these difficulties and a dearth of relevant empirical information, the Advisory Committee and the Supreme Court recommended that Federal Rule 11 be substantially modified in 1983.<sup>8</sup> Congress did not reject these suggestions, and revised Rule 11 took effect in August 1983.<sup>9</sup> The amended provision commanded judges to sanction lawyers and litigants who do not perform reasonable inquiries before they file papers or who tender the documents for improper purposes.<sup>10</sup> The drafters meant for new Rule 11 to overcome the reluctance of attorneys and parties to seek sanctions and of judges to grant them, reluctance that had permitted initial Rule 11 to fall into disuse.<sup>11</sup>

### B. Montana Rule 11

Relevant developments in Montana closely followed those at the federal level. When Montana adopted essentially intact the Federal Rules of Civil Procedure in 1961, it promulgated a version of Rule 11 that was equivalent to Federal Rule 11, promulgated in

5. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987).

6. See, e.g., Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-43 (1986); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984).

7. See Tobias, *supra* note 4, at 288-89 (pertinent literature and efforts to resolve some of controversy); Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 522-23 (1988/89) (same). There is little consensus about what is litigation abuse or what would constitute a litigation explosion.

8. See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198-202 (1989).

9. See Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097, 1099-100 (1983). See generally A. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984). Rules 7, 16 and 26 were similarly and simultaneously amended and were intended to be an integrated package.

10. See *supra* note 2.

11. Original Rule 11, promulgated in 1938, remained unchanged until 1983. It required that bad faith be shown before sanctions could be imposed. This, and reluctance of lawyers and judges to accuse attorneys of such conduct, allowed the Rule to fall into disuse. See generally Risinger, *supra* note 3, at 34-42.

1938.<sup>12</sup>

Those responsible for rule amendment in Montana found this version of Rule 11 to be unsatisfactory for reasons quite similar to those motivating the federal rule revision in 1983.<sup>13</sup> These reasons included the problems of litigation abuse, the reluctance of lawyers, parties and judges to use the provision, and the need to streamline the litigation process.<sup>14</sup> Indeed, the drafters subscribed to a litany of reasons for revising Montana Rule 11 in 1984 that was virtually identical to that recited by their federal counterparts.<sup>15</sup> The phrasing of Montana Rule 11 also mirrored the Federal Rule 11 that had been promulgated one year earlier.<sup>16</sup>

## II. IMPLEMENTATION OF FEDERAL RULE 11

### A. Rule 11's Early Application

Federal courts' implementation of the 1983 amendment to Rule 11 made the provision the most controversial revision in the half-century history of the Federal Rules. Judges inconsistently interpreted the meaning of amended Rule 11's terms and inconsistently applied the provision to similar factual circumstances.<sup>17</sup> Revised Rule 11 also prompted considerable, costly satellite litigation involving, for instance, refined questions of the Rule's phrasing and disputes over the magnitude of the sanctions imposed.<sup>18</sup>

Much relevant evidence indicates that formal and informal Rule 11 activity significantly disadvantaged and even chilled the enthusiasm of civil rights plaintiffs and practitioners.<sup>19</sup> Sanctions

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12. See MONT. R. CIV. P. 11, MONT. CODE ANN. (1983). See generally MONT. R. CIV. P. 1-81, MONT. REV. CODES (1947) Vol. 7, at 888 (1964 Replacement); Mason, *The Montana Rules of Civil Procedure*, 23 MONT. L. REV. 1 (1961); Comment, *supra* note 3, at 119-21.

13. See MONT. R. CIV. P. 11 annot. (Advisory Comm. Note) (1990). See generally MONT. R. CIV. P. 11 annot. (Compilers Comment) (1990).

14. See MONT. R. CIV. P. 11 annot. (Advisory Comm. Note) (1990). See generally MONT. R. CIV. P. 11 annot. (Compilers Comment) (1990).

15. Compare MONT. R. CIV. P. 11 annot. (Advisory Comm. Note) (1990) with FED. R. CIV. P. 11 (Advisory Comm. Note), reprinted in 97 F.R.D. 165, 198-201 (1983).

16. The Montana Rule does not include one sentence that is in the Federal Rule: The rule in equity that the averment of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. See FED. R. CIV. P. 11, *supra* note 2. See also MONT. R. CIV. P. 11.

17. See, e.g., *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200 (7th Cir. 1990) (comprehensive list of cases disagreeing whether Rule 11 imposes continuing duty). See Burbank, *supra* note 8, at 1930.

18. 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 Tobias, *supra* note 7, at 514.

19. We rely most here on Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 How. L.J. 161, 163 (1990); Tobias, *supra* note 7, at 490-507; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

motions were pursued, and granted, against these plaintiffs more frequently than any other classification of federal civil litigant.<sup>20</sup> Numerous courts vigorously enforced the provision's requirements governing reasonable prefiling inquiries against civil rights litigants and lawyers,<sup>21</sup> and a small number of judges imposed sizeable sanctions on the parties and attorneys.<sup>22</sup> The inconsistencies described above were particularly prevalent in civil rights actions.<sup>23</sup> This implementation of Rule 11 substantially disadvantaged civil rights plaintiffs and their counsel, whose resource deficiencies can make the litigants and lawyers risk averse.<sup>24</sup> Considerable evidence suggests that these developments served to dissuade those who might bring civil rights cases from instituting and zealously pursuing the actions.<sup>25</sup>

### B. Recent Improvements

During the last several years, there have been some improvements relating to Federal Rule 11.<sup>26</sup> All of the circuit courts of appeal have published opinions that are solicitous of civil rights plaintiffs and their counsel.<sup>27</sup> A number of these courts have warned district judges that overly zealous application of Rule 11's prefiling inquiry commands or levying substantial sanctions could have chilling effects on civil rights litigation.<sup>28</sup>

The formal enforcement of Federal Rule 11 by trial courts correspondingly has improved. For example, some judges have denied

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20. See Nelken, *supra* note 3, at 1327, 1340; Vairo, *supra* note 19, at 200-01.

21. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985).

22. See, e.g., Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991) (\$1,000,000 sanction).

23. See *supra* notes 17-19 and accompanying text.

24. See Tobias, *supra* note 7, at 495-98. This is not true of all civil rights plaintiffs and lawyers, especially institutional litigants and attorneys, such as the NAACP Legal Defense Fund.

25. See Tobias, *supra* note 7, at 503-06; Tobias, *supra* note 19, at 169-70. We recognize that these contentions are controversial. See also Advisory Committee on the Civil Rules of the Judicial Conference of the United States, *Call For Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, as Amended in 1983*, 131 F.R.D. 344, 345 (1990) [hereinafter *Call for Comments*].

26. We rely most here on Tobias, *supra* note 19, at 166-71; Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 122-23 (1991) and the primary sources cited therein.

27. We are speaking in the remainder of this paragraph primarily to formal judicial application rather than to informal Rule 11 activity.

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

requests for sanctions filed against civil rights plaintiffs who were proceeding pro se or were pursuing actions that appeared weak, while a few courts refused to impose substantial sanctions on civil rights litigants or lawyers who contravened the Rule.<sup>29</sup>

These apparent improvements in Rule 11 activity are subject to certain qualifications. A number of critics have argued that numerous judges have continued to exhibit insufficient solicitude for civil rights plaintiffs or attorneys.<sup>30</sup> Moreover, much of the improvement has involved formal Rule 11 activity; considerable activity under the Rule that has disadvantaged civil rights plaintiffs most substantially has been informal.<sup>31</sup>

### C. *Advisory Committee Decision to Study Rule 11*

The Advisory Committee, in one of its two regularly scheduled meetings during 1989, spent a half day discussing implementation of Federal Rule 11.<sup>32</sup> Two public interest representatives provided evidence indicating that the Rule was adversely affecting civil rights plaintiffs, and the Committee reached an informal agreement to examine possible amendment of Rule 11.<sup>33</sup>

These deliberations and the developments evaluated above eventually prompted the Committee to announce in August 1990 that it was commencing a study of amended Rule 11.<sup>34</sup> The Committee issued a *Call for Comments*, which sought written public submissions on the Rule that were due in November 1990 and oral testimony to be tendered at a hearing in New Orleans during Feb-

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29. See, e.g., *Tarka v. Time, Inc.*, 762 F. Supp. 603 (S.D.N.Y. 1991) (pro se); *Moore v. Roth*, No. 90 C 1097 (N.D. Ill. Apr. 24, 1990) (1990 U.S. Dist. LEXIS 4925) (same); *Solberg v. Inline Corp.*, 740 F. Supp. 680, 686 (D. Minn. 1990) (apparently weak case); *Summer v. Fuller*, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989) (same).

30. See, e.g., *Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989); *Cruz v. Savage*, 691 F. Supp. 549, 556 (D.P.R. 1988), *aff'd*, 896 F.2d 626 (1st Cir. 1990). One significant problem has been the failure to differentiate between product and conduct approaches to Rule 11 decisionmaking. See, e.g., *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1091 (3d Cir. 1988). See also *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991) (\$1,000,000 sanction). See generally *Tobias*, *supra* note 19, at 168.

31. The informal activity is most detrimental because it is difficult to detect, document, and have appellate courts alter. See generally *Tobias*, *supra* note 26, at 117.

32. The meeting, held in November, was one of the first opened to the public. See generally *Mullenix*, *supra* note 1, at 854.

33. The individuals were Alan Morrison, Esq., of Public Citizen and Professor Laura Macklin of the Georgetown Law Center Institute for Public Representation. See generally *Mullenix*, *supra* note 1, at 854 n.310.

34. See *Call for Comments*, 131 F.R.D. 344 *passim*. See generally *Mullenix*, *supra* note 1, at 854.

ruary 1991.<sup>35</sup> The Committee also requested that the Federal Judicial Center (FJC) undertake an empirical analysis of Rule 11's operation and stated that the Committee would evaluate all of the material submitted and collected in determining whether to suggest amendment of the Rule at its semi-annual spring session.<sup>36</sup>

Many persons and organizations responded to the Committee's *Call for Comments* on Rule 11's operation.<sup>37</sup> A majority of those commenting criticized the Rule as written and as implemented. The most significant objections were that the provision promoted unnecessary satellite litigation, that courts inconsistently construed and enforced Rule 11, and that Rule 11 activity detrimentally affected civil rights plaintiffs and attorneys.<sup>38</sup>

The individuals and groups that offered oral testimony at the February public hearing afforded substantially similar observations.<sup>39</sup> They testified that Rule 11 fostered expensive satellite litigation, was inconsistently applied and chilled the enthusiasm of civil rights plaintiffs and their counsel.<sup>40</sup>

The FJC assembled and preliminarily assessed Rule 11 data from five districts having computerized docket information and trial judges' responses to a questionnaire and provided that material to the Advisory Committee before the oral hearing.<sup>41</sup> The FJC made numerous tentative findings, several of which are pertinent to this paper. Information collected from the five districts showed that civil rights plaintiffs on the average were 2.6 times more likely to be sanctioned than other litigants and that attorney's fees are the preferable sanction for federal courts.<sup>42</sup> Approximately four-fifths of the district judges believed that litigation abuse was a minor problem, even as a similar number favored retaining the provi-

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35. See *Call for Comments*, 131 F.R.D. at 345.

36. See *id.*

37. These comments are on file at the Federal Judicial Center and the Administrative Office of the United States Courts, both in Washington, D.C.

38. This analysis is based on Professor Tobias' review of numerous written comments and his discussions with a number of commentators.

39. See Transcript of Public Hearing on Rule 11, New Orleans, La. (Feb. 21, 1991) (available from Administrative Office of the United States Courts, Washington, D.C.).

40. This is premised on material in the Transcript, *supra* note 39, and telephone conversations with Thomas Willging and Elizabeth Wiggins, FJC Research Division (Feb. 26, 1991) and with Professors Melissa Nelken, Hastings College of the Law, and Georgene Vairo, Fordham University School of Law, and witnesses at the hearing (Feb. 26, 1991). See also *supra* note 38 and accompanying text.

41. See FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Feb. 27, 1991) [hereinafter FJC REPORT].

42. See *Summary of the Study of Rule 11 Cases in Five District Courts*, in FJC REPORT, *supra* note 41, at 9-15.



sion essentially intact.<sup>43</sup> The FJC also found that there was substantial variation in Rule 11's invocation across the country.<sup>44</sup> Indeed, the FJC confirmed other observers' statements that between 1983 and 1989 nearly forty percent of the reported Rule 11 decisions were issued in the Northern District of Illinois and the Southern District of New York and that the Southern District of New York accounted for some twenty-five percent of all reported determinations.<sup>45</sup>

The Montana federal district is one of the districts with the lowest incidence of Rule 11 activity nationwide.<sup>46</sup> This probably reflects the local "legal culture" in which most lawyers and many litigants know one another personally and are reluctant to jeopardize continuing relationships and civility among attorneys, parties and judges by invoking Rule 11.<sup>47</sup>

Near the termination of the February public hearing, the Advisory Committee decided that some change in amended Rule 11 was warranted, although it specifically rejected reinstatement of the pre-1983 formulation.<sup>48</sup> The Committee also asked that the FJC refine several dimensions of the preliminary assessment that the Center had performed.<sup>49</sup> Judge Sam Pointer of the Northern District of Alabama, the Advisory Committee Chair, and Professor Paul Carrington of Duke University School of Law, the Committee's Reporter, undertook the drafting of proposed modifications in the Rule's text and its accompanying *Advisory Committee Note*.<sup>50</sup> The Committee considered those suggestions at its semi-annual

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43. See *Summary of the Analysis of Judges' Responses to a Questionnaire on Rule 11*, in FJC REPORT, *supra* note 41.

44. Statement of Thomas Willging at Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

45. *Id.* Accord Nelken, *supra* note 3, at 1326-27; Vairo, *supra* note 19, at 200.

46. Since August 1983, judges in the Montana federal district have published three Rule 11 opinions. See *Ostheimer v. Gall*, CV No. 89-147-M-CCL (D. Mont. Feb. 6, 1991) (1991 U.S. Dist. LEXIS 1989); *Lussy v. Haswell*, 618 F. Supp. 1360 (D. Mont. 1985); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 560 F. Supp. 213 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984). See also *Elks Nat'l Found. v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991). The judges also have issued Rule 11 warnings. See, e.g., *First Nat'l Bank v. Intermountain Bancorp., Inc.*, 662 F. Supp. 213 (D. Mont. 1987), *aff'd*, 865 F.2d 264 (9th Cir. 1988).

47. This is premised on conversations with numerous Montana practitioners. See generally Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429 (1992).

48. This is premised on material in the Transcript, *supra* note 39, and the telephone conversations, *supra* note 40.

49. The Committee especially wanted the FJC to refine information regarding sanctioning in civil rights cases. See *infra* notes 51-52 and accompanying text (FJC report in response to Committee's requests given at May 23, 1991, Committee meeting).

50. The Committee Note is the document that accompanies the Rules and explains their language and the reasons why the Committee proposed changes in the Rules.

meeting on May 23 and 24, 1991.

### III. ANALYSIS OF THE ADVISORY COMMITTEE'S SUGGESTIONS

#### A. Report on Data Refinement

The researchers with primary responsibility for conducting the FJC study reported to the Advisory Committee before it commenced discussion of the proposed recommendations for change in Rule 11 and the *Committee Note*.<sup>51</sup> The evaluators stated that refinement of the preliminary analysis yielded few new insights.<sup>52</sup> The most important impression that their report left was that Rule 11 activity in civil rights litigation might be less problematic than numerous civil rights plaintiffs and lawyers had asserted.<sup>53</sup>

#### B. Specific Committee Proposals

The Advisory Committee proposed numerous specific changes in Rule 11. The most important modifications will be analyzed in terms of provision for violations of the Rule, the sanctions to be imposed, and sanctioning on initiative of the court. A general assessment will then be provided.

##### 1. Specific Proposals

###### a. Rule Violations

Perhaps the most significant change relating to violations of the Rule is the imposition of a "continuing duty" on lawyers and pro se parties. The proposal provides that Rule 11 would be contravened "by presenting or maintaining a claim, defense, request, demand, objection, contention or argument in" a paper submitted to the court that violates certification requirements as to reasonable inquiry.<sup>54</sup>

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51. The stress that the Committee apparently placed on the studies and public comment probably reflected sensitivity to the criticism that Rule 11's 1983 amendment was based on inadequate data. See *supra* note 8 and accompanying text.

52. Statements of Elizabeth Wiggins and Thomas Willing, FJC Research Division, at Advisory Comm. Meeting, Washington D.C. (May 23, 1991).

53. The paucity of later Committee discussion of civil rights suits left this impression, although there were many references to concerns about the Rule's potential chilling effects. See generally Mullenix, *supra* note 1, at 825; Tobias, *supra* note 19, at 165-66.

54. See Proposed Fed. R. Civ. P. 11(b), in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Rules*, 137 F.R.D. 53, 74-77 (1991) [hereinafter *Proposed Rules*]. "The wording is sufficiently broad to cover the continued maintenance in federal court of totally meritless claims or defenses that were raised in state court before removal." Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra*, at 78.

The first prong of existing Rule 11, regarding submissions for improper purposes, would be retained essentially intact.<sup>55</sup> The requirements as to factual and legal representations are modified. Attorneys and pro se parties would be required 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."<sup>56</sup> Correspondingly, legal contentions must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>57</sup> The major changes in the requirements covering factual assertions are intended to make clear that plaintiffs are entitled to allege facts in papers that may only be available with discovery and that parties have a duty of candor to reveal assertions that do not have evidentiary support.<sup>58</sup> The principal modification in the requirements pertaining to legal contentions is that arguments be "nonfrivolous," rather than good faith contentions as currently required.<sup>59</sup>

The proposed changes in Rule 11's text are problematic in numerous ways. Most troubling is imposition of the continuing duty, which represents a significant departure from current Rule 11 and is a responsibility that most of the circuit courts addressing the issue have declined to impose under the existing Rule.<sup>60</sup>

55. See Proposed Fed. R. Civ. P. 11(b)(1), in *Proposed Rules*, *supra* note 54, at 75-76. The proposal essentially retains the idea that certification be to the best of the signer's knowledge, information and belief after reasonable inquiry.

56. Proposed Fed. R. Civ. P. 11(b)(3), in *Proposed Rules*, *supra* note 54, at 76.

57. Proposed Fed. R. Civ. P. 11(b)(2), in *Proposed Rules*, *supra* note 54, at 76.

58. The *Proposed Rule 11 Committee Notes* state:

[T]he certification with respect to factual allegations and denials is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm evidentiary support for the allegation or denial. . . . Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule to withdraw the allegation or denial.

Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 78-79.

Judge William Schwarzer initially articulated this duty of candor; however, the Ninth Circuit refused to impose that obligation and reversed the lower court. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986), *reh'g denied*, 809 F.2d 584 (9th Cir. 1987) (en banc).

59. Proposed Fed. R. Civ. P. 11(b)(2), in *Proposed Rules*, *supra* note 54, at 76. Compare Proposed Fed. R. Civ. P. 11(b)(2), *supra*, ("nonfrivolous") with Fed. R. Civ. P. 11, *supra* note 2 ("good faith").

60. The wording of current Rule 11 applies only to the initial signing of papers. Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 78. See Fed. R. Civ. P. 11, *supra* note 2. See also *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *Accord Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200-01 (7th Cir. 1990). The *Committee Note* specifically warned trial courts to test the

The Advisory Committee's determination to propose the ongoing updating of allegations included in papers seems inappropriate for a number of practical and policy reasons. It will impose duties that are onerous, and very difficult to satisfy, in nearly all types of civil lawsuits. Requiring unrepresented parties and attorneys to withdraw any "claim, defense, request, demand, objection, contention or argument in a pleading, written motion, or other paper" immediately upon its becoming untenable is very burdensome.<sup>61</sup> The responsibility parses too precisely the idea of a paper, rather than focusing on the paper as a whole as some courts have done.<sup>62</sup> Moreover, it would be quite difficult to monitor all assertions on a continuing basis throughout discovery, to discern exactly that time when they become untenable, so that such assertions may be promptly withdrawn.<sup>63</sup>

The principal change in the requirements governing legal assertions is that pro se litigants and attorneys cannot submit papers that include nonfrivolous contentions urging the "extension, modification, or reversal of existing law or the establishment of new

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signer's conduct by asking "what was reasonable . . . at the time" the paper was signed and to avoid using the "wisdom of hindsight." See FED. R. CIV. P. 11 Advisory Comm. Note, 97 F.R.D. 165, 199 (1983).

Most circuit courts have declined to impose a continuing duty. Compare *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200 (7th Cir. 1990) (no continuing duty); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938, 943 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1133 (1990) (same); *Thomas v. Capital Sec. Servs., Inc.*, 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 v. Thompson*, 803 F.2d 1265, 1273-74 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (same) with *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 393 (1st Cir.), *cert. denied*, 111 S. Ct. 233 (1990) (continuing duty); *Blue v. United States Dep't of Army*, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991) (apparent recognition of continuing duty). One panel of the Sixth Circuit, in *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir.), *reh'g denied*, 1989 U.S. App. LEXIS 9965 (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). See also *Business Guides, Inc. v. Chromatic Communications Enters.*, 111 S. Ct. 922, 943 n.5 (1991) (Kennedy, J., dissenting) (refusal to recognize continuing duty when issue not briefed).

61. Proposed Fed. R. Civ. P. 11(b), in *Proposed Rules*, *supra* note 54, at 75.

62. See, e.g., *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1434 n.2 (7th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Vista Mfg., Inc. v. TRAC-4, Inc.*, 131 F.R.D. 134, 140 (N.D. Ind. 1990). But see *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362-65 (9th Cir. 1990).

63. *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991), is illustrative. The appellate court, by affirming the trial judge's decision that certain of plaintiffs' allegations were frivolous after resolving a number of credibility determinations against the litigants, essentially punished their counsel for pursuing the precise credibility determinations that the adversary system is intended to afford.

law.”<sup>64</sup> Replacement of the term “good faith” with the phrase “nonfrivolous” forfeits the advantage of familiar terminology,<sup>65</sup> while it imports into the Rule a concept that courts have had difficulty applying. Reliance on “frivolousness” overemphasizes the merits of the case or the quality of the papers (product), rather than the reasonableness of the prefiling inquiries (conduct).<sup>66</sup> Courts correspondingly have experienced problems enunciating consistent standards for ascertaining frivolousness—an idea intrinsically resistant to uniform definition—and affording sufficient guidance to lawyers and litigants and adequate deterrence.<sup>67</sup>

The Advisory Committee also retained the abuse-of-discretion standard for appellate review of all Rule 11 determinations that the Supreme Court announced in *Cooter & Gell v. Hartmarx Corp.*<sup>68</sup> Application of that standard in a number of major cases suggests that it may be overly deferential, especially for review of decisionmaking by trial courts that vigorously apply Rule 11. This phenomenon is demonstrated by two recent panel opinions of the Fourth Circuit, which sustained trial court findings that two of the country’s most respected civil rights attorneys had violated the Rule in controversial cases.<sup>69</sup> The Advisory Committee included several new features in its proposal that may partially offset these potential problems. The Committee provided in the new Rule’s text for a number of procedural protections, the most significant of which is the concept of “safe harbors.”<sup>70</sup> The Committee intro-

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64. Proposed Fed. R. Civ. P. 11(b)(2), in *Proposed Rules*, *supra* note 54, at 76.

65. Some Committee members favored the retention of “good faith” for that reason. Statements of Professor Arthur Miller and Larrine S. Holbrooke, Esq., at Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

66. See, e.g., *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989), *overruled on other grounds* by *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990); *Gutierrez v. City of Hialeah*, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989), *reconsideration denied*, 729 F. Supp. 1329 (S.D. Fla. 1990). Neither the merits nor the papers are irrelevant, although courts generally should consult them only after an attempt to ascertain whether the prefiling inquiry was reasonable proves inconclusive. See *Tobias*, *supra* note 26, at 108 n.11. The continuing duty concept at least has the advantage of emphasizing conduct, although it is vulnerable to criticism on other grounds. See *supra* notes 60-63 and accompanying text.

67. See S. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 20-21 (1989); *Tobias*, *Certification and Civil Rights*, 136 F.R.D. 223, 226 (1991). Even if the notion of frivolousness could be applied more easily, it would impose higher standards generally and disadvantage parties who pursue untested, unpopular or nontraditional theories specifically.

68. 110 S. Ct. 2447, 2461 (1990). The opinion clarified much lower court inconsistency as to the proper standard of appellate review.

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

70. Safe harbors are measures, such as the ability to withdraw a violative assertion

duced the safe harbor idea that permits movants to pursue sanctions only after providing written notice to other parties of why they believe that the litigant had violated the Rule and affording the party an opportunity to withdraw the allegedly violative assertion.<sup>71</sup> One important benefit of the notice/safe harbor procedure is that it will give offenders a "second chance," thereby reducing Rule 11's potential for chilling.<sup>72</sup> Insofar as the procedure works properly, it also should foster prompt disposition of numerous controversies involving particular allegations, thus decreasing the costs of litigation for lawyers and clients and requiring minimal judicial involvement.<sup>73</sup>

Although application of this new concept probably would offer some benefits, it is unclear precisely how advantageous the safe harbor notion will be in practice. The procedure, particularly when used in combination with the continuing duty idea, could burden attorneys, parties, and courts in ways similar to the 1983 Rule, or might introduce wholly new problems. The notice requirement is subject to abuse through overuse, while numerous complications could arise over the timing and clarity of notification and responses to notice.<sup>74</sup>

Other specific procedures afforded in proposed Rule 11(c) should constitute improvements. The requirements that courts provide parties and attorneys notice and reasonable opportunity to respond to sanctions motions and recite the behavior or circumstances that support the imposition of a sanction, if requested, clarify exactly what procedures are available and warrant adoption.<sup>75</sup>

### *b. Sanctions Imposed*

The Advisory Committee had four principal goals when affording courts guidance for effectuating their compulsory obligation to choose an appropriate sanction.<sup>76</sup> It apparently wished to

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once notified of its insufficiency, that protect parties from sanctions.

71. See Proposed Fed. R. Civ. P. 11(c), in *Proposed Rules*, *supra* note 54, at 76-77.

72. See *supra* notes 23, 36, 38 and accompanying text (chilling effects).

73. When those notified properly withdraw challenged assertions, lawyers and litigants would save expenses because a relatively informal motion could provide notice and vitiate any need to spend resources on formal motions, and judges would spend no time treating motions.

74. For example, the breadth and particularity of the reasons afforded why the offending assertion contravenes Rule 11 could be disputed.

75. The proposed change in requirements governing factual assertions, to recognize the need for discovery in certain cases, is advisable. See *supra* notes 56, 58-59 and accompanying text.

76. "[T]he court shall impose an appropriate sanction upon the attorneys, law firms,

emphasize that Rule 11's major purpose is the deterrence of litigation abuse and to stress the availability of nonmonetary sanctions. The Committee also seemed to think that judges had depended too heavily on monetary awards, especially of attorneys' fees, as well as Rule 11's compensatory purpose—all of which the Committee meant to deemphasize.<sup>77</sup> Indications of the Committee's thinking appear in the text of proposed Rule 11, in its *Committee Notes*, and in the deliberations of the Committee. One telling example is the call made twice in the *Notes* for judges to exercise greater restraint when considering the assessment of sanctions to deter violative behavior.<sup>78</sup>

One significant way that the Committee attempted to accomplish these objectives was in defining "appropriate sanction," a phrase that was left nearly undefined in the current Rule.<sup>79</sup> The Committee agreed to the following formulation: An appropriate sanction "shall be limited to what is sufficient to deter comparable conduct by persons similarly situated."<sup>80</sup>

The Committee also tried to achieve these goals by expanding on the definition of "appropriate sanction" in the sentence that followed the one above:

[T]he sanction may consist of, or include, directives of a non-monetary 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.<sup>81</sup>

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or parties determined . . . to be responsible for a violation . . ." Proposed Fed. R. Civ. P. 11(c), in *Proposed Rules*, *supra* note 54, at 76. Treatment here is organized differently than above because the appropriate sanction concept was integral to the efforts of the Committee and the goals were so significant. The goals described are not intended to be exhaustive.

77. The goals in this sentence and the preceding one are related but not mutually exclusive. This is demonstrated by the Committee's acknowledgement that "[a] monetary award may be the most effective deterrent in some circumstances . . ." See Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 79.

78. See Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 79-80. An analogous example is the quoted language, *supra* note 77, while Committee members afforded a number of similar examples in the Committee deliberations.

79. The 1983 amendment stated that such a sanction might include an opponent's reasonable expenses, including reasonable attorney's fees. See Fed. R. Civ. P. 11, *supra* note 2.

80. Proposed Fed. R. Civ. P. 11(c)(2), in *Proposed Rules*, *supra* note 54, at 77. The Committee rejected adoption of the idea that a sanction be the least severe adequate to deter, a concept to which several circuit courts have subscribed. 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). See also Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985).

81. Proposed Fed. R. Civ. P. 11(c), in *Proposed Rules*, *supra* note 54, at 77.

Although the formulation would retain considerable wording used in the current Rule,<sup>82</sup> the Committee included several important modifications. Most significant was explicit prescription in the new Rule's text, before mentioning monetary sanctions, that "the sanction may consist of, or include, directives of a nonmonetary nature . . . ."<sup>83</sup> Moreover, the text expressly states that financial penalties may be paid into court and that monetary penalties, constituting all of movants' unnecessary expenditures incurred, including attorneys' fees, can be ordered.<sup>84</sup>

The phrasing that the Advisory Committee used in these two sentences indicates that it meant to achieve the four objectives stated above.<sup>85</sup> The *Committee Notes* and the deliberations of the Committee on May 23 and 24, 1991, explicate and reaffirm these ideas and inform understanding of the group's thinking.<sup>86</sup>

The *Committee Notes* mention, and Committee members observed, numerous times that deterrence of abuse is Rule 11's principal purpose. Perhaps most telling as to the respective emphasis on deterrence and deemphasis of compensation was the Reporter's observation that a significant aim of the Committee's efforts was to "refocus sanctioning from compensation to deterrence."<sup>87</sup> The Committee made clear in many ways its concern that judges substantially decrease the quantity and size of monetary sanctions, especially of attorney's fees, that had been levied under the present Rule.<sup>88</sup> Most of the Committee members candidly admitted that courts had treated monetary awards of fees as the "sanction of first resort" and that excessive reliance on these types of sanctions had led to the Rule's overuse and may have chilled certain litigants.<sup>89</sup> A

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82. Each articulation provides that a sanction may include an order to pay the expenses, including attorney's fees, that the Rule violation caused the opponent to incur. See *id.*; FED. R. Civ. P. 11, *supra* note 2.

83. Proposed Fed. R. Civ. P. 11(c)(2), in *Proposed Rules*, *supra* note 54, at 77.

84. *Id.*

85. See text accompanying *supra* note 77 and sentence between text accompanying *supra* notes 76 and 77. For instance, employment of the phrases "is sufficient" and "shall be limited" and explicit inclusion of the word "deterrence" in the initial, definitional sentence illustrate the four goals. Proposed Fed. R. Civ. P. 11(c)(2), in *Proposed Rules*, *supra* note 54, at 77.

86. Professor Tobias attended the Committee meetings and the material that follows attempts to capture the Committee's thinking.

87. Statement of Professor Paul Carrington, Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

88. This information is organized somewhat differently by treating material derived from the meetings before information in the *Committee Notes*.

89. Committee members acknowledged that there were too many financial awards of fees and too great a number that were too large. For instance, Judges William Bertelsman and Mariana Pfaelzer observed that there had been a "widespread belief at the beginning" of implementation of the 1983 version that the "normal sanction was to be fee shifting."



number of members recommended that judges be discouraged from invoking these forms of assessments. Judge Pointer observed that the group was "trying to contract the fee-shifting possibilities," while Judge William Bertelsman stated that the Committee should "make clear that sanctions" were not primarily attorney's fees.<sup>90</sup>

The Committee did not eliminate financial sanctions, even of attorney's fees, but attempted to reduce reliance on them. The *Committee Notes* explain that the Rule retains judicial authority to award fees and that monetary awards may be the best deterrent in certain situations.<sup>91</sup> The *Notes*, however, limit in several important ways those circumstances in which such sanctions will be proper.<sup>92</sup>

The Committee provided several indications of its intent to encourage courts to employ nonmonetary sanctions more frequently. It expressly prescribed nonmonetary sanctions in the Rule's text and placed it prior to financial assessments.<sup>93</sup> The *Committee Notes* explicitly state that judges can resort to a number of possible nonmonetary sanctions, enumerating a list of them.<sup>94</sup> The Committee decided against providing these specific possibilities in the text principally because Judge Pointer deemed that an inappropriate place for providing such guidance.<sup>95</sup> This

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Statements of Judges Bertelsman and Pfaelzer, Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

90. Statements of Judges Pointer and Bertelsman, Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

91. See Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 79-80. The *Notes* specifically stated that particularly for violations of the improper purpose prong, payments to parties for injuries suffered would be better than payments into court. *Id.* at 79.

92. Situations in which monetary awards and fee shifting are most appropriate, described *supra* note 91 and accompanying text, are substantially qualified. Financial assessments are to be employed in the service of deterrence, and contravention of the improper purpose clause is the worst case scenario. The *Notes* impose other limits by stating that reasonable fees not be actual ones and that partial reimbursement should adequately deter lawyers and litigants with few resources. See *id.* See generally *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988) (reasonable fees need not be actual); *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) (ability to pay significant equitable factor).

93. See Advisory Comm. Meeting, Washington, D.C. (May 23, 1991) (tapes of meeting available from Administrative Office of U.S. Courts, Washington, D.C.); *supra* text accompanying note 81. "[F]or emphasis, [the Rule's text] does specifically note that sanctions may be nonmonetary as well as monetary." Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 79.

94. See Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 79. These include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . [and] referring [lawyers] to disciplinary authorities . . ." *Id.*

95. Statements of Judge Pointer, Advisory Comm. Meeting, Washington, D.C. (May

was true as well of a thorough listing of factors that courts are to consider in ordering sanctions and selecting appropriate ones.<sup>96</sup>

The comprehensive elaboration of factors should prove quite valuable to judges in their efforts to choose proper sanctions.<sup>97</sup> It is less clear why those considerations apply to Rule violations, because the principal, if not the exclusive, decisional criteria should be those specifically stated in the Rule's text.<sup>98</sup>

### c. *Sua Sponte Sanctions*

The proposed Rule retains judicial authority to act on the court's initiative when sanctioning but requires that judges follow certain procedures while affording the targets of sanctions enhanced procedural protection.<sup>99</sup> Most important is the requirement that courts issue show cause orders and provide reasonable opportunity to respond before they sanction litigants or lawyers.<sup>100</sup> The Committee's inclusion of new procedural requirements in the proposed Rule's text should clarify informal judicial invocation of current Rule 11 that has been criticized.<sup>101</sup> These procedures should constitute improvement, although they may be inadequate.<sup>102</sup>

23, 1991).

96. The *Committee Notes* list these factors:

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 . . . .

Proposed Fed. R. Civ. P. 11 Comm. Notes, in *Proposed Rules*, *supra* note 54, at 80.

97. For instance, particular factors, such as whether the signer has legal training and the individual's capacity to pay are exactly the kinds of considerations that courts ought to consider in choosing sanctions.

98. See Proposed Fed. R. Civ. P. 11(b)(1)-(3), in *Proposed Rules*, *supra* note 54, at 75-76. See also *supra* notes 54-69 and accompanying text. For example, some of the factors listed, such as the amount needed to deter, are clearly irrelevant or must be so considered. These are the last two considerations listed in the factors enumerated in *supra* note 96.

99. See Proposed Fed. R. Civ. P. 11(c)(1)(B), in *Proposed Rules*, *supra* note 54, at 76-77.

100. See *id.* Courts cannot order the payment of financial sanctions unless they issue show cause orders before the case is settled or voluntarily dismissed. *Id.*

101. Some critics contended that courts had excessive flexibility to impose sanctions *sua sponte* and that a few judges even abused their discretion. Statement of Judge Pointer, Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

102. For example, it might have been advisable to include a safe harbor provision in this subdivision like that in proposed Rule 11(c)(1)(A). See also *supra* notes 70-74 and accompanying text.

### C. Future Directions

The course of future action on the Committee's nascent proposal for change in Rule 11 is currently unclear. The Committee forwarded its suggestions promptly to the Standing Committee, which made minor changes and circulated a preliminary draft of a proposed amendment for public comment in August.<sup>103</sup> Once public input is received and any necessary modifications are made, the Standing Committee will send the proposal to the Judicial Conference; if that entity approves the efforts, the proposal will be submitted to the Supreme Court for its consideration.<sup>104</sup> Given the Court's clearly articulated concern about the litigation explosion and litigation abuse, it seems unlikely to disagree with what the Standing Committee forwards.<sup>105</sup> If the Court subscribes to the proposal that it receives, the Court must submit the proposal to the Congress by May 1, 1993, and the proposal will become effective on December 1, 1993, unless Congress acts.<sup>106</sup>

Should the proposal be approved at all levels, it could become effective in December 1993.<sup>107</sup> This prospect appears reasonably likely because all participants that pass on the proposals, except Congress, generally defer to the entities below them in the hierarchy. Significant public criticism of, or opposition to, the proposal could lead the Advisory or Standing Committees to change their work product, and that type of public input could well persuade Congress to modify the proposal that it receives.<sup>108</sup>

In short, it appears plausible that the Supreme Court and Congress will soon agree to adopt a new Rule 11 that is quite similar to the proposal recently developed by the Advisory Committee. Whether that type of provision should be promulgated as a new

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103. See *Proposed Rules*, *supra* note 54; Letter from Judge Pointer, Chair, Advisory Comm. on Civil Rules, to Judge Robert Keeton, Chair, Standing Comm. on Rules of Practice and Procedure (June 13, 1991) (copy on file with author).

104. See 28 U.S.C. §§ 2072(a), 2073, 2074 (1988).

105. For example, Chief Justice Rehnquist's end-of-the-year reports on the state of the federal judiciary routinely express concern about the litigation explosion. See also *supra* notes 4-11 and accompanying text.

106. See 28 U.S.C. § 2074(a) (1988).

107. *Id.* Accord Statement of Judge Pointer, Advisory Comm. Meeting, Washington, D.C. (May 24, 1991).

108. Congress has been comparatively reluctant to act independently out of apparent deference to the expertise of the Committee and concern over the cooperative, interbranch character of the rules amending process. See Tobias, *supra* note 4, at 293, 337-40. *But cf.* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982) (documenting increased congressional willingness since 1973 to intercept proposed rules and amendments governing evidence and civil, criminal and appellate procedure). See generally Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

Montana Rule 11 is considered below.

#### IV. SHOULD MONTANA ADOPT A NEW RULE?

##### A. Introduction

Reconsideration of amended Rule 11 at the federal level affords an auspicious occasion for reexamination of Montana Rule 11. Montana frequently follows rule revision developments in the federal sphere, as it did in 1984 when modeling revision of Montana Rule 11 on the amendment of Federal Rule 11 a year earlier. The controversial nature of the revision of Federal Rule 11 in 1983 and the acknowledgement that the amendment has created numerous problems, however, should lead to analysis of Montana Rule 11 to ascertain whether it warrants additional change and, if so, what modifications might be most efficacious.

The Montana Supreme Court has issued relatively few Rule 11 opinions, and there apparently has been comparatively little Rule 11 activity in the state district courts.<sup>109</sup> Nonetheless, the supreme court has published more decisions recently, while Rule 11 activity seems to be increasing in the trial courts.<sup>110</sup> Moreover, much can be learned from the problems that Rule 11 has created in the federal courts since 1983 and how those difficulties may be minimized in Montana. Now, thus, is an opportune time to evaluate Montana Rule 11, to anticipate problems that could arise in its application, and to capitalize on the federal experience and proposals for change at that level. Most important, it seems appropriate to ascertain whether Montana Rule 11 might be improved through additional revision while tailoring any revision of Montana Rule 11 to the needs of the bench and bar of this state. For example, even if the generally cordial relations that prevail in Montana among judges and lawyers have minimized the problems that Montana

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109. See *State Bd. of Dentistry v. Kandarian*, 248 Mont. 444, 813 P.2d 409 (1991); *Wise v. Sebens*, 248 Mont. 32, 808 P.2d 494 (1991); *Sundheim v. Reef Oil Corp.*, 247 Mont. 244, 806 P.2d 503 (1991); *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990); *Smith v. Barrett*, 242 Mont. 37, 788 P.2d 324 (1990); *McCracken v. City of Chinook*, 242 Mont. 21, 788 P.2d 892 (1990); *D'Agostino v. Swanson*, 240 Mont. 435, 784 P.2d 919 (1990); *In re Adoption of R.D.T.*, 239 Mont. 33, 778 P.2d 416 (1989); *Bee Broadcasting Assocs. v. Reier*, 236 Mont. 275, 769 P.2d 709 (1989); *Easley v. Burlington N. R.R.*, 234 Mont. 290, 762 P.2d 870 (1988); *Brown v. Jensen*, 231 Mont. 340, 753 P.2d 870 (1988); *Bauer v. Kar Prods., Inc.*, 230 Mont. 422, 749 P.2d 1385 (1988); *Searight v. Cimino*, 230 Mont. 96, 748 P.2d 948 (1988); *State ex rel. Sorensen v. Roske*, 229 Mont. 151, 745 P.2d 365 (1987); *Gold Reserve Corp. v. McCarty*, 228 Mont. 512, 744 P.2d 160 (1987); *Branstetter v. Beaumont Supper Club, Inc.*, 224 Mont. 20, 727 P.2d 933 (1986); *Schmidt v. Colonial Terrace Assocs.*, 223 Mont. 8, 723 P.2d 954 (1986). See also *Nimmick v. Hart*, 248 Mont. 1, 808 P.2d 481, 491 (1991) (suggesting district court consider Rule 11 sanctions).

110. See *supra* note 109.

Rule 11 could create, it may well be advisable to take preventive measures before the Rule erodes civility in the state, as Rule 11 apparently has at the federal level.<sup>111</sup>

### B. Possible Repeal of Montana Rule 11

One important question that should be addressed initially is whether there actually was a need for the 1984 amendment of Montana Rule 11. Although that revision was said to be necessitated by problems similar to those that led to change in Federal Rule 11, there was then, and continues to be, in Montana, nothing that could fairly be characterized as a litigation explosion. Moreover, there is little litigation abuse that cannot be treated effectively with other mechanisms, minimal incivility in the bench and bar, and less need to expedite dispute resolution than in the federal courts. It is appropriate, therefore, to consider seriously the repeal of current Montana Rule 11 and reinstatement of the pre-1984 formulation, which required a finding of bad faith.<sup>112</sup> If that proposal would effect too dramatic a change in the current legal culture or send the wrong signal, there at least should be reconsideration of Montana Rule 11 with an eye toward selecting those aspects of the present and proposed Federal Rule 11 and state equivalents of Rule 11 that would be best suited for application in Montana.

### C. Amendment of Current Montana Rule 11

#### 1. Rule Violations

It may be advisable to reinstate a subjective/bad faith requirement for Rule violations, as some states have done and writers have suggested.<sup>113</sup> Attorneys and litigants would experience less difficulty satisfying this type of requirement and would subject less of their activity to the Rule, thereby reducing the provision's invocation. Return to a subjective/bad faith standard would move in a different direction than the federal analogue, which retains an objective/reasonableness standard while seeking to increase the re-

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111. See *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 564 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 484 U.S. 918 (1987); COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, INTERIM REPORT 20-21 (Comm. Print Apr. 1991).

112. See *supra* note 12 and accompanying text.

113. See, e.g., NEB. REV. STAT. § 25-824 (1989); PA. R. CIV. P. 1023 (1990); LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 354 (1988); Tobias, *supra* note 7, at 522-24.

sponsibilities of lawyers and parties to the court through imposition of a continuing duty.<sup>114</sup>

If Montana Rule 11 retains an objective standard, serious consideration should be accorded to several important aspects of the proposal to amend the analogous requirements of Federal Rule 11. First, Montana Rule 11 should not impose a continuing obligation, which is the most problematic aspect of the proposed Federal Rule. Lawyers and litigants would have great difficulty complying with such a duty. The obligation also could multiply the number of Rule 11 inquiries, for example, with questions regarding the adequacy of timing and notice, and could lead to potential abuse in the Rule's invocation.

The provision for safe harbors could pose some similar problems, especially as to timing, notice and abuse; however, these disadvantages probably would be outweighed by the potential benefits. Safe harbors may provide a safety valve for civil rights plaintiffs and for other litigants and lawyers who pursue unpopular, controversial or untested theories or who possess relatively few resources. Another helpful provision included in the proposed Federal Rule recognizes the need for discovery to prove certain factual allegations.

Two new provisions added to the requirements governing legal assertions in the proposed Federal Rule 11 could prove problematic and should not be imported into Montana Rule 11. One is substitution of "nonfrivolous" for "good faith" as the adjective modifying legal argument. Reliance on that term would unduly emphasize product, engender greater inconsistency, provide less clarity and complicate efforts of lawyers and litigants to comply with the Rule. The proposed Federal provision also imposes a duty of candor, which might help courts but would burden attorneys and parties.<sup>115</sup>

## 2. Sanctions Imposed

Montana Rule 11 also should make the imposition of sanctions discretionary rather than mandatory. This would represent a return to earlier practice and would afford courts greater flexibility in treating Rule violations, while providing offenders somewhat

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114. See *supra* notes 54, 56-67 and accompanying text.

115. It would help courts, for example, by identifying early in the litigation legal contentions that may have marginal validity. It would burden lawyers and litigants, especially those with limited resources or who pursue nontraditional legal theories, for example, by requiring them to spend additional time and money developing their legal theories and by potentially prejudicing their cases. See *generally supra* note 59 and accompanying text.

more protection from sanctions. The Federal Advisory Committee rejected this possibility because Committee members believed that it would send the wrong signal—that they were insufficiently serious about curbing litigation abuse.<sup>116</sup>

The Committee also seemed to have four principal objectives in providing judges guidance for imposing appropriate sanctions: emphasizing deterrence as Rule 11's major purpose and the availability of nonmonetary sanctions, while deemphasizing Rule 11's compensatory goal and awards of financial assessments, particularly of attorney's fees.<sup>117</sup> The Montana Rule should incorporate these four objectives, and this can be achieved by employing measures similar to those that the Committee employed. The relative emphases to be accorded deterrence, compensation, nonmonetary and financial sanctions could be treated by expressly providing for each in the Rule's text. For emphasis, nonmonetary sanctions, and a specific enumeration of possibilities, should be explicitly prescribed in the text.<sup>118</sup> Correspondingly, financial awards might be downplayed by deleting them from the text or by conditioning such assessments on serious misbehavior or a finding of compelling need to deter.<sup>119</sup>

### 3. *Additional Provisions*

The proposed Federal Rule specifically includes procedures for sanctioning on the court's own initiative. This was intended to regularize sua sponte activity at the federal level, as to which there were some allegations of abuse.<sup>120</sup> This apparently has not been problematic in Montana; thus explicit prescription may be unnecessary.

The Advisory Committee retained the abuse-of-discretion standard for appellate review of all district court decisionmaking that the United States Supreme Court recently articulated.<sup>121</sup> Such a deferential standard could prove problematic for review of Rule 11 decisionmaking by trial courts that apply the Rule too vigorously, although this also seems to have posed minimal difficulty in Montana.

In short, Montana should anticipate problems with Rule 11

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116. See Advisory Comm. Meeting, Washington, D.C. (May 23-24, 1991) (tapes of meeting available from Administrative Office of U.S. Courts, Washington, D.C.).

117. See *supra* notes 76-97 and accompanying text.

118. See *generally supra* notes 83, 93-95 and accompanying text.

119. See *generally supra* notes 81, 84, 88-92 and accompanying text.

120. See *generally supra* notes 99-102 and accompanying text.

121. See *generally supra* notes 68-69 and accompanying text.

that have occurred at the federal level and act promptly to change Montana Rule 11 before similar difficulties arise here. Because the complications, such as litigation abuse, at which Federal Rule 11 was aimed were never very widespread and continue to be limited in Montana, return to the pre-1984 formulation may well be advisable. If that change is too drastic, the Montana rule revisors should seriously consider the specific suggestions above. Adoption of any of them should constitute improvement.

#### CONCLUSION

The Federal Advisory Committee has responded to substantial criticism of Federal Rule 11 by proposing significant change in the provision. These developments in the federal sphere afford an appropriate occasion for the reconsideration of Montana Rule 11. By capitalizing on the federal experience, Montana can minimize the worst aspects of Rule 11 and maximize its best dimensions. The rule revisors should seriously consider amending Montana Rule 11 in ways that will be effective and that are tailored to the local legal culture. This might prompt return to a pre-1984 version of the Rule or at least substantial revision that adopts the best components of the Advisory Committee's work while eschewing the rest.