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Reassessing Rule 11 and Civil Rights Cases

CARL TOBIAS

The Advisory Committee on the Civil Rules amended Federal Rule of Civil Procedure (Rule 11) in August 1983 because of increasing concern about attorney abuses in civil lawsuits and about the so-called litigation explosion. The revision commands courts to sanction lawyers and parties who do not undertake reasonable prefiling inquiries.¹ The Committee, in its Advisory Committee Note which accompanied promulgation of the amendment, expressly stated that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."² Certain aspects of the new version's implementation provoked substantial controversy which continued virtually undiminished from the amendment's August 1983 effective date at least until the fifth anniversary of its adoption. Perhaps most controversial was the question whether courts' application inhibited the pursuit of legitimate litigation, especially cases involving civil rights claims.³ Critics of Rule 11 contended that excessive, expensive and unnecessary satellite litigation engendered by the new provision, the amendment's inconsistent judicial enforcement, and its vigorous application against civil rights plaintiffs and lawyers disadvantaged and had a chilling effect on these parties and practitioners.⁴

1. See FED. R. CIV. P. 11. I do not address the amendment's proscription upon papers filed for improper purposes because few courts have depended on it to sanction and because its invocation has less potential for chilling valid litigation.

2. See FED. R. CIV. P. 11 advisory committee's note 97 F.R.D. 165, 199 (1983). "Chill" in this context, is derived from the "Chilling Effect Doctrine," which states "any law or practice which has the effect of seriously discouraging the exercise of a constitutional right." *Black's Law Dictionary* 217 (5th ed. 1979).

3. Civil rights litigation is a case which pursues the vindication of interests of many persons in enforcing mandates and values implicating civil rights found in federal civil rights statutes and the constitution. A typical example is litigation brought under 42 U.S.C. section 1983. Cf. S. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Procedure II* (1989 AM. JUDICATURE Soc'y 68,71) (helpful discussion of "civil rights cases").

4. Satellite litigation unrelated to the merits of lawsuits, such as that seeking attorney's fees for alleged Rule 11 violations. Chilling effects are "improper" impacts resulting from the amend-

The possibility that the revised version dampened the enthusiasm of civil rights plaintiffs and lawyers is an extremely controversial, but very important, issue because they seek to vindicate significant social values affecting many people, such as freedom from racial discrimination.

A number of developments relating principally to apparent improvements in the amendment's judicial enforcement which have occurred since approximately mid-1988 indicate that the rule may be causing those who bring civil rights cases less difficulty than was previously thought. The recent developments warrant close scrutiny, because they could leave the impression that Rule 11 no longer is problematic for civil rights plaintiffs and attorneys, and that impression may be inaccurate.

The first section of this paper analyzes how the amendment adversely affected civil rights plaintiffs and lawyers between August 1983 and mid-1988. The second part reviews numerous subsequent developments that appear to constitute improvements for the litigants and attorneys. The assessment shows that some developments should enhance application but that others may not or are currently unclear and that additional problems remain. In short, it is impossible to discern whether the developments ultimately will suffice for civil rights plaintiffs and lawyers. The last section, therefore, offers suggestions for ascertaining more conclusively what effects the rule is having in civil rights cases and for improving future judicial application.

I. THE FIRST FIVE YEARS OF EXPERIENCE WITH RULE 11

Numerous judges, writers and civil rights litigants and practitioners stated that Rule 11 posed many difficulties for those who pursued civil rights cases from the time it became effective in August 1983 until approximately the middle of 1988.⁵ The professors who performed

ment's application, from limitations, such as resource constraints on civil right's plaintiffs, and from their suits' inherent characteristics, such as their comparative novelty, that discourage potentially valid litigation. These parties and their lawyers are especially vulnerable to having their enthusiasm dampened because their lack of resources makes them risk adverse. All of these ideas are analyzed in Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buffalo L. Rev. 485, 495-98 (1989). At the time I researched and wrote this recent article, I, too, found that Rule 11 was adversely affecting civil rights plaintiffs and attorneys. Developments that have occurred since then appear to be improvements for them and prompted me to write this new piece which analyzes whether the developments will suffice.

5. The recent developments which appear to be improvements date roughly from mid-

two thorough studies premised on reported Rule 11 opinions determined that sanctions were sought from and imposed on civil rights plaintiffs considerably more often than civil rights defendants and that those who brought civil rights cases were being sanctioned at a much greater rate than plaintiffs in any other kind of federal civil lawsuit.⁶

One of these analysts, other writers, and a few judges found that courts vigorously applied the rule's requirements regarding reasonable prefilng legal inquiries and factual investigations against civil rights plaintiffs and lawyers.⁷ The judicial decisions that they had violated the amendment apparently were more problematic for the parties and attorneys than the determinations actually awarding sanctions. Courts seemed to enforce the compulsory sanctions command less rigorously against the plaintiffs and practitioners while imposing a relatively small number of substantial assessments on them.⁸ Nevertheless, the parties and attorneys still may have been adversely affected or chilled by certain aspects of sanctions decisionmaking. For example, judges' determinations to impose monetary sanctions in the overwhelming majority of situations, together with large awards in even a few civil rights cases, could have disadvantaged the litigants and lawyers.⁹

Concomitantly, there was considerable inconsistency in the amendment's application to numerous important questions. Judges disagreed substantially over the essential issue of what was required to satisfy the rule's reasonable prefilng inquiry commands, by, for in-

1988, although I do not adhere rigidly to that date in this piece. When I depart from it, I attempt to say so and afford an explanation. For a more thorough treatment of the ideas in this section, see Tobias, *supra* note 4, at 489-508.

6. See 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, *Rule 11: A Critical Analysis*, 118 F.D.R. 189, 200-01 (1988).

7. See Vairo, *supra* note 6, at 200-02, 205, 213-14, 217. *Accord* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., dissenting), *cert. dismissed*, 108 S. Ct. 1101 (1988); La France, *Federal Rule 11 and Public Interest Litigation*, 22 Val. U.L. Rev. 331 (1988); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 635-37 (1987). See, e.g., Szabo, 823 F.2d at 1073; Rogers v. Lincoln Towing Service, 771 F.2d 194 (7th Cir. 1985) (examples of vigorous application in both majority opinions).

8. See Tobias, *supra* note 4, at 498-501.

9. *Id.*, at 501 n.58 "selection of the sanction with the greatest potential to be financially burdensome is not neutral, because it disproportionately affects and may [even chill] those with relatively few resources." *Id.* at 501 n.58. Correspondingly, inconsistent judicial application of the mandatory sanctions command and excessive, expensive satellite litigation over it have disadvantaged civil rights litigants. See *infra* notes 10-11 and accompanying text.

stance, confusing the relative significance of that inquiry and the merits.¹⁰ Moreover, courts which found that parties had violated the amendment differed markedly, even in apparently similar factual circumstances, over the appropriate purpose, type and amount of the sanction to be imposed.¹¹

Numerous observers remarked on the inconsistencies. An appellate judge, who believed a \$53,000 sanction was proper and dissented from a majority opinion recognizing trial court discretion to impose an award as low as \$10,000, criticized his colleagues for promoting inconsistency and arbitrariness in sanctions decisionmaking and for ignoring the rule's important compensatory goal.¹² The individual who conducted a significant study of the amendment stated that by mid-1986 the consensus in the circuit courts which had existed was beginning to unravel, and she doubted whether the appellate courts would be able to "develop a coherent set of [R]ule 11 standards."¹³ The person who served as the Reporter for the Third Circuit Task Force on Rule 11 found that most of the circuits were in substantial disagreement on many important issues involving the amendment.¹⁴

Closely related to inconsistent judicial application was the problem of excessive, unwarranted, expensive litigation over issues extraneous to the substance of disputes, such as that implicating refined questions of the amendment's meaning.¹⁵ For example, one judge asserted that the rule's technical, overzealous application by the other members of a circuit court panel would open new vistas for satellite

10. See SANCTIONS: RULE 11 AND OTHER POWERS 18-19 (G. Joseph, P. Sandler and C. Shaffer 2d ed. 1988); Tobias, *supra* note 4, at 492-98. *Szabo*, 823 F.2d 1073, exemplifies judicial disagreement, while *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987), typifies confusion of the reasonable prefilng inquiry with the merits.

11. See Tobias, *supra* note 4, at 498-501. The classic illustration is the litigation involving Eastway Construction Company and New York City, in which "disposition of sanctions questions required two district court decisions and three circuit court opinions in which the judges disagreed dramatically." *Id.* at 499 text accompanying note 50.

12. See *Eastway Constr. Co. v. City of New York*, 821 F.2d 121, 124 (2d Cir. 1986) (Pratt, J., dissenting), *cert. denied*, 108 S. Ct. 269 (1987).

13. See Vairo, *supra* note 6, at 205. *Accord* Sanctions, *supra* note 10, at 14-16, 24-25.

14. See Burbank, *The Transformation of American Civil procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1930-31 (1989). Professor Burbank was not speaking in his capacity as Reporter, however.

15. The *Eastway* litigation is a classic example in the context of sanctions decisionmaking generally and disputes over the propriety of specific awards levied. See *supra* note 11. *Cf.* *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) (requesting courts to "grade accuracy of advocacy" of each paper filed increases judicial determinations and parties' expenses).

litigation.¹⁶ A district judge stated in 1987 that he would not be "surprised if shortly the Rule 11 tail were wagging the substantive law dog in many cases."¹⁷

In short, all of these developments detrimentally and even disproportionately affected civil rights plaintiffs and practitioners. One significant example not yet mentioned is that vigorous application of the rule's reasonable prefilng factual investigation mandate apparently had the effect of imposing more stringent pleading requirements on civil rights plaintiffs, if only to counter sanctions motions.¹⁸ Perhaps most important, these parties' and lawyers' lack of resources makes them especially susceptible to having their enthusiasm for litigation dampened by the type of judicial enforcement reviewed.

It is highly controversial, however, whether courts' application actually had chilling effects on civil rights plaintiffs and attorneys. Considerable information suggests that such an effect was experienced between August 1983 and mid-1988.¹⁹ One judge feared that too vigorous or rigid enforcement of the rule would have "chilling effects" that "reach as tellingly to the most meritorious [civil rights] claim as to the least."²⁰ A few courts in the context of civil rights cases voiced more general concerns that Rule 11's application might chill the enthusiasm and creativity of attorneys.²¹ A small number of judges urged that the amendment be implemented cautiously in civil rights litigation, seemingly worried about the possibility of such an effect.²²

Individuals who prepared several thorough assessments of the rule substantially agreed with what the courts said and offered additional observations.²³ For example, one evaluator asserted that the "statistics gleaned from the reported cases—which show a dramatic

16. See *Szabo*, 823 F.2d at 1085-86. He added that the majority's "nitpicking approach [was] not unlike the grading of law school examinations." *Id.* at 1086.

17. See *Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987).

18. See Tobias, *supra* note 4, at 494 notes 32-33 and accompanying text.

19. For more thorough treatment of chilling effects, see *id.* at 503-06.

20. See *Szabo*, 823 F.2d at 1086 (Cudahy, J., dissenting).

21. See, e.g., *Cabell v. Petty*, 810 F.2d, 463, 468 (4th Cir. 1987) (Butzner, J., dissenting); *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987). These were civil rights suits, but the courts seemed to be invoking the more general concern regarding chilling in the advisory committee note. See *supra* note 2 and accompanying text.

22. See, e.g., *Szabo*, 823 F.2d at 1085-86 (Cudahy, J., dissenting); *Yancey*, 674 F. Supp. at 575.

23. See Sanctions, *supra* note 10; Nelken, *supra* note 6; Vairo, *supra* note 6. The first source did not expressly assess civil rights suits; however, it did cite to many such cases.

impact on plaintiffs in [civil rights] cases—seem to justify” opponents’ concerns that the amendment “would ‘chill’ vigorous advocacy.”²⁴ She also stated that it was impossible to ascertain the number of meritorious claims that had not been pursued out of fear of the amendment.²⁵ Moreover, civil rights lawyers’ belief that they were the “primary victims of Rule 11”²⁶ and the significant amount of anecdotal information involving threats to sanction the attorneys²⁷ strongly indicate that judicial enforcement could have a chilling effect on them and their clients.

All of the observations are consistent with plausible inferences regarding the chilling effect that could be drawn from courts’ application between the rule’s effective date and the middle of 1988.²⁸ Numerous considerations, such as fear about large sanctions awards or the costs of satellite litigation, can discourage potential litigants from instituting cases or impair their vigorous pursuit of litigation begun. The factors and additional difficulties can prevent civil rights practitioners from attempting to vindicate new or unpopular legal theories or from being sufficiently zealous advocates, and the attorneys may refuse to take on clients whose cases demand legal or factual elaboration.

II. DEVELOPMENTS SINCE MID-1988

Since approximately the mid-point of 1988, there have been numerous developments which suggest that the amendment may be less problematic for civil rights plaintiffs and practitioners than it was during the first half-decade of implementation. The developments assessed are not intended to be a comprehensive catalog, but focus on events most significant to these litigants and attorneys.

24. See Vairo, *supra* note 6, at 200. Cf. Nelken, *supra* note 6, at 1339 (concerns regarding chilling expressed before amendment’s promulgation were well-founded).

25. See Vairo, *supra* note 6, at 201. Cf. Yancey, 674 F. Supp. at 575 (significant, “unanswerable question” is how much legitimate litigation is being chilled. The co-editor of Sanctions, *supra* note 10, at 2, stated more generally that chilling of lawyers’ creativity or enthusiasm in pursuing theories of law had occurred. Moreover, writers argued that civil rights lawyers and litigants had experienced chilling. See LaFrance, *supra* note 7, at 353; Note, *supra* note 7, at 631.

26. See Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 871 n.4 (5th Cir. 1988) (quotation extracted from document prepared in connection with projected rule 11 study by Center for Constitutional Rights).

27. The anecdotal information is derived from discussions with civil rights and public interest attorneys. See Tobias, *supra* note 4, at 502 n.61, 505 n.73 and accompanying text.

28. See Tobias, *supra* note 4, at 505-06 notes 74-76 and accompanying text.

A. Judicial Application

Relatively recent developments pertaining to certain aspects of the rule's judicial application could constitute improvements for those who pursue civil rights suits. A few appellate court panels have overturned trial judges' determinations that civil rights plaintiffs had contravened Rule 11, explicitly stating that the imposition of sanctions could have had a chilling effect.²⁹

A growing number of courts have evidenced particular concern for the needs of civil rights litigants and lawyers. For example, the Eleventh Circuit has accorded considerable deference to district judges' decisions that civil rights plaintiffs were not in violation of the amendment,³⁰ while numerous trial courts have refused to sanction civil rights plaintiffs who appeared to have relatively weak cases.³¹ Quite a few judges have stated that Rule 11 should not be employed to deter unpopular or controversial litigation, although these pronouncements infrequently have been in civil rights cases.³²

Many courts, primarily in suits not involving civil rights, have recognized numerous specific problems with the amendment's application and have attempted to ameliorate or to remedy the difficulties or offered cogent suggestions for doing so.³³ For instance, a number of judges have admonished litigants and lawyers not to invoke Rule 11 routinely; have stated that it is to be reserved for exceptional circumstances, or have observed that only litigation abuse or assertions of

29. See *Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988); *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1127 (9th Cir. 1989). Cf. *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 935 (2d Cir. 1989) (rejecting amendment's rigorous enforcement in employment discrimination suit because of possibility of chilling potentially viable cases). Accord *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 760 (1st Cir. 1988). See also *O'Rourke v. City of Norman*, 875 F.2d 1465, 1476 (10th Cir. 1989) (reversing on merits and vacating sanctions' imposition).

30. See *O'Neal v. DeKalb County, Ga.*, 850 F.2d 653, 658 (11th Cir. 1988); *Rolleston v. Eldridge*, 848 F.2d 163 (11th Cir. 1988). Accord *Tabrizi v. Village of Glen Ellyn*, 883 F.2d 587, 593 (7th Cir. 1989); *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989).

31. See, e.g., *Summer v. Fuller*, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989); *Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989); *Gordon v. Hercules, Inc.*, 715 F. Supp. 1033 (D. Kan. 1989); *Pickens v. Children's Mercy Hospital*, 124 F.R.D. 209, 211 (W.D. Mo. 1989); *Jones v. Deutsch*, 715 F. Supp. 1237, 1252 (S.D.N.Y. 1989); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479, 484 (E.D. Pa. 1988). Of course, this implicates the merits which should be deemphasized in comparison to the prefiling inquiry.

32. See, e.g., *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1091 (3d Cir. 1988); *Thomas*, 836 F.2d at 877.

33. The judicial application examined is tailored narrowly to civil rights litigation. For somewhat broader treatment, see Tobias, *supra* note 4, at 518-22.

patently unmeritorious claims should be considered to violate the amendment.³⁴

Correspondingly, some courts when determining what mandatory sanctions are most appropriate have seriously considered non-monetary alternatives or made violators' ability to pay relevant to imposition of that form of sanction or to monetary assessments.³⁵ Many judges also have enforced Rule 11 in a number of additional ways that might be advantageous for civil rights plaintiffs and practitioners.³⁶

In short, these judicial approaches to the amendment's application, especially insofar as they limit inconsistent enforcement and expensive satellite litigation, could prove beneficial to civil rights litigants and attorneys and even reduce potential chilling. Critical analysis of these developments in the courts which seem to be improvements show, however, that some are problematic in certain ways, while there remain other difficulties relating to Rule 11.

One important problem with these recent developments is that numerous apparent improvements are pronouncements, while others are recommendations for enforcing the amendment that have actually been applied in relatively few civil rights cases. The statements and suggestions are helpful, but the ideas must in fact be applied carefully and systematically in civil rights actions. There exist, accordingly, complex questions of clarity, of translation and of transferability, among others. Indeed, authors of some of the finest Rule 11 opinions, while recognizing that reasonableness of prefling inquiries was the central question in determining if the amendment had been violated, seemed to emphasize the merits or the quality of the papers.³⁷

34. The Third Circuit has subscribed the most to these propositions. *See, e.g.,* Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 99 (3d Cir. 1988); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988). For a recent articulation which cites to numerous opinions rendered by courts outside the Third Circuit, *see* Doering v. Union County Board of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988).

35. *See, e.g.,* Doering, 857 F.2d at 195-97; Thomas, 836 F.2d at 876-81. *Cf.* Morrison v. Lipscomb, 877 F.2d 463, 469 (6th Cir. 1989) (award of attorney's fee against losing civil rights plaintiff is "extreme sanction" limited to truly egregious misconduct); Tobias, *supra* note 4, at 521 n.137 (cases stating that "reasonable fees" need not be those actually incurred and that parties' who move for sanctions have duty to mitigate expenses).

36. For instance, the Fifth Circuit in Thomas, 836 F.2d at 866, rendered an en banc decision to give district courts, in that circuit, guidance on a broad range of Rule 11 issues. *Cf.* Mars Steel Corp. v. Continental Bank, 880 F.2d 928 (7th Cir. 1989) (en banc decision to give guidance; especially on standard of appellate review of Rule 11 determinations).

37. *See, e.g.,* Napier, 885 F.2d at 1091 (characterizing claims as "legally frivolous"). For earlier examples, *see* Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 (3d Cir. 1989); Greenberg v.

Moreover, it is exceedingly difficult to premise accurate conclusions about whether the rule's enforcement actually has improved, much less about potential chilling effects, on apparent improvements in national judicial application derived primarily from the comparatively small number of opinions available.³⁸ Marked differences in such considerations as local legal cultures and judges' attitudes toward the amendment mean that there is likely to be substantial variation in Rule 11 activity and application nationwide.³⁹

Recent statistics indicate that as many as 90 percent of sanctioned dispositions may not appear in the federal reporter system, while fewer than four in ten are available through computerized reporting services, namely Lexis and Westlaw.⁴⁰ There are disparities in publication practices which can even vary from case to case for individual members of the judiciary. The decision to publish a Rule 11 opinion can be premised on factors which range from the desire to clarify ambiguity in the rule's interpretation to the wish to punish the lawyer in violation or to deter other attorneys who might be disposed to engage in similar behavior.⁴¹ Correspondingly, what appears on the face of an opinion may be primarily for public consumption, as when its author assembles or characterizes the facts in ways that support the result reached.⁴²

Certain of these considerations are crucial to ascertaining whether judicial application has improved, or chilling effects have been experienced, because considerable Rule 11 activity, and much which is said to disadvantage civil rights plaintiffs, such as threats to impose sanctions, are informal.⁴³ Should these significant obstacles be

Sala, 822 F.2d 882, 887 (9th Cir. 1987). For more discussion of questions involving clarity, translation and transferability, see *Tobias*, *supra* note 4, at 510-17.

38. I rely substantially in this paragraph on S. Burbank, *supra* note 3, although the recently completed rule 11 study conducted under the auspices of the Federal Judicial Center also provides much helpful pertinent information. See T. Willging, *The Rule 11 Sanctioning Process* (Federal Judicial Center 1988).

39. See S. Burbank, *supra* note 3, at 406, 96-97. Accord T. Willging, *supra* note 38, at 179-89.

40. See S. Burbank, *supra* note 3, at 59, 98-99.

41. These roughly mirror the rule's purposes. For thorough discussion of the purposes and a valuable attempt at clarification, see *Thomas*, 836 F.2d at 876-81.

42. See Nelken, *supra* note 6, at 1339-40. For more discussion of difficulties entailed in relying on opinions available through the federal reporter system and computerized services, see S. Burbank, *supra* note 3, at 4-6, 44-45, 97; Nelken, *supra*, at 1339-40.

43. See *Tobias*, *supra* note 4, at 501-03.

overcome, there still would be complications entailed in detecting litigants' motivations and problems of measurement, among others. For instance, it is extremely difficult to discern why those who contemplate suit decide to forgo litigation, while the enthusiasm of some who consider filing or choose to sue may be chilled as substantially by the prospect of expensive, unwarranted satellite litigation as by actual imposition of sanctions.⁴⁴

Even were it possible to reach more definitive conclusions about whether the apparent improvements in judicial application examined will suffice, there remain other difficulties with the rule which could disadvantage and chill those who bring civil rights cases. Since mid-1988, the number of Rule 11 motions filed against civil rights plaintiffs apparently has remained comparatively constant and the percentage of motions granted seems to have declined somewhat.⁴⁵ During that period, the civil rights bar's concern about the rule and its chilling effects may well have intensified, while at the same time, numerous courts evinced relatively little solicitude for civil rights litigants and practitioners.⁴⁶ There are additional indicators of application that could be detrimental for the parties and attorneys. For instance, one judge recently imposed a sanction of more than \$1,000,000 against a non-profit legal organization. A clear majority of courts continues to rely on monetary assessments as the sanction of choice and a Seventh Circuit panel proclaimed that Rule 11 is a fee-shifting statute.⁴⁷

44. Chilling again implicates resource difficulties mentioned *supra* note 4. Indeed, civil rights litigants' "lack of resources means that the actual assessment of sizeable sanctions may be only marginally more discouraging than the threat of imposition." Tobias, *supra* note 4, at 501 n.57.

45. These assertions are premised on an impressionistic survey of Rule 11 activity by me research assistants and me. See Tobias, *supra* note 4, at 491 n.20. They also are premised on assessments made by the person who conducted the most significant study of reported Rule 11 activity. See Telephone conversation with Professor Georgene Vairo, Fordham University, School of Law (Mar. 14, 1989).

46. The assertion as to the civil rights bar is premised on conversations with civil rights and public interest lawyers. Indeed, civil rights attorneys are "screaming more than ever," while several civil rights lawyers have been devoting nearly all of their time to appealing Rule 11 motions they allege were improperly granted. Telephone conversation with Professor George Cochran, University of Mississippi, School of Law (April 4, 1989). For a recent case evincing little solicitude, see *Robeson Defense Committee v. Britt*, — F. Supp. — (E.D.N.C. Sept. 29, 1989).

47. See *Avirgan v. Hull*, 691 F. Supp. 1357 (S.D. Fla. 1988), *appeal filed*, No. 89-5143 (11th Cir. 1989) (\$1,000,000 sanction); Telephone conversation, *supra* notes 45, 46 (monetary sanctions' high incidence); *Hays v. Sony Corp.*, 847 F.2d 412, 419-20 (7th Cir. 1988) (Rule 11 is fee shifting statute); *but cf. Mars Steel*, 880 F.2d at 932 ("Rule 11 is not a fee-shifting statute in the sense that the loser pays").

In short, the recent developments relating to Rule 11 in the courts eventually may represent significant improvements for civil rights plaintiffs and practitioners. Nonetheless, some are problematic, while there remain additional difficulties with the amendment, so that there is currently a mixed picture. Similarly, several other developments which could be promising prove equally inconclusive when closely analyzed.

B. Judge Schwarzer's Commentary

A number of judges, when enforcing the amendment, look for guidance to United States District Judge William Schwarzer. He wrote a very influential article which included helpful recommendations for implementing the rule and urged that it be applied strictly in 1985. The Judge has vigorously enforced the amendment since 1983.⁴⁸ His relatively recent Commentary on Rule 11 in the *Harvard Law Review*, which is already being cited by numerous judges, deserves attention particularly because he has been such a staunch proponent of the amendment's stringent implementation.⁴⁹

Judge Schwarzer acknowledged that courts' inconsistent enforcement between the amendment's effective date and early 1988 had promoted unpredictability. This lack of predictability, and lawyers' use of the rule for tactical purposes, as well as to recover attorney's fees, has generated excessive satellite litigation.⁵⁰ He suggested that courts shift their focus from the merits of disputes to the reasonableness of prefil-ing inquiries in treating sanctions motions.⁵¹ Judge Schwarzer recommended as well that judges deter abuse of the rule's principal purpose and, concomitantly, de-emphasize its compensatory aspects, particularly by limiting fee shifting when imposing sanctions.⁵²

If courts were to implement these ideas effectively and augment them, especially by considering central to Rule 11 decisionmaking, certain factors important to civil rights plaintiffs, such as their re-

48. See Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181 (1985). That piece has been widely cited by federal judges.

49. See Schwarzer, Rule 11 Revisited (Commentary), 101 Harv. L. Rev. 1013 (1988) [hereinafter Commentary]. For recent examples citing to it, see *Mars Steel*, 880 F.2d at 936; *Doering*, 857 F.2d at 194.

50. See Commentary, *supra* note 49, at 1015-18.

51. See *id.* at 1021.

52. See *id.* at 1019-21.

source constraints, the suggestions ultimately could enhance application for the litigants and perhaps decrease potential chilling.⁵³ However, considerably more courts must subscribe to these concepts, implement them with much greater facility, and evidence more appreciation of the subtleties involved than have thus far.⁵⁴ In the near term, therefore, significant advantages for those who bring civil rights cases are unlikely to accrue.

Judge Schwarzer also observed that, although the amendment's unpredictable enforcement could lead to chilling, "lawyers should have little to fear in light of the type of conduct that courts have punished [and my] own experience has disclosed no anecdotal evidence of chilling."⁵⁵ The statement that attorneys should not be concerned is less than reassuring, given the inconsistent judicial application of the rule's reasonable prefiling inquiry and mandatory sanctioning requirements. As to Judge Schwarzer's assertion that he has witnessed no chilling, it is unclear why a federal judge, who vigorously advocates the amendment's strict enforcement, would detect any evidence of chilling.⁵⁶ Therefore, Judge Schwarzer's inability to discern chilling is not dispositive; however, there has been considerable anecdotal evidence of chilling which apparently has not decreased since the publication of his Commentary.⁵⁷

C. *Recent Studies*

1. *Federal Judicial Center Study*

T.E. Willging recently completed a Rule 11 study, premised primarily on interviews with thirty-six judges and sixty lawyers, under the auspices of the Federal Judicial Center.⁵⁸ The assessment found relatively few problems with the amendment and anticipated even less in the future, now that the half-decade "shakeout" period prescribed

53. For more treatment of the factors that I argue courts should consider in Rule 11 decisionmaking, see Tobias, *supra* note 4, at 495-98, 513-525.

54. For a sense of the difficulties entailed, see Tobias, *supra*, at 510-17.

55. See Commentary, *supra* note 49, at 1017.

56. See Tobias, *supra* note 4, at 508-10.

57. See Tobias, *supra* note 4, at 503-506. See generally *supra* notes 45-47 and accompanying text.

58. See T. Willging, *supra* note 38. Although the study bears a 1988 publication date, it was only released to the public in March 1989.

by the Advisory Committee's Reporter has passed.⁵⁹ Certain information reported in the study could prove problematic for civil rights plaintiffs and attorneys, while much of that data has ambiguous implications for them.

Willging detected too little evidence of inconsistent judicial application to warrant much concern, because the initial time for adjustment has ended, a "consensus has evolved as to the general framework for applying Rule 11," and a "relatively clear set of doctrinal standards has begun to emerge."⁶⁰ He did remark that "challenges arise . . . in defining the conduct that is required to satisfy the objective certification requirements of the rule: What is a 'reasonable inquiry' into the legal and factual basis of a claim?"⁶¹ Of course, this is the very question that lawyers must address before filing papers and that judges must resolve in ascertaining whether the amendment has been violated, the issue over which courts have disagreed so substantially. Willging also determined that there was minimal unnecessary satellite litigation, claiming that it was not the problem suggested by published opinions or by the literature.⁶²

He found little evidence that "sanctions have a chilling effect on creative advocacy or unpopular causes" or on civil rights litigants while stating that "judicial reformulations of the standards for testing the adequacy of legal inquiry . . . appear faithful to the Advisory Committee's concern about chilling effects."⁶³ Willging criticized those who have "concluded that there is statistical evidence of disproportionate sanctioning of plaintiffs' attorneys in civil rights cases."⁶⁴

The evaluator did acknowledge that statistical methodology is unlikely to detect chilling effects in public interest litigation and that chilling may be greater in public interest lawsuits while observing that policymakers will "have to rely on systematically collected and documented anecdotal evidence for further testing of the chilling-effect hy-

59. See *id.* at 40 n.65 (citations omitted). Professor Arthur Miller was the Reporter when rule 11 was amended. See Miller & Culp, *Litigation Costs, Delay Promoted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 23.

60. See T. Willging, *supra* note 38, at 39-42.

61. *Id.* at 42-43.

62. See *id.* at 108-12.

63. *Id.* at 8-10, 44.

64. See *id.* at 10, 160-63. He stated that the studies lack baseline data and fail to take into account the comparatively heightened risk of incurring sanctions in civil rights cases as opposed, for example, to ordinary contract or student loan repayment litigation.

pothesis.”⁶⁵ Willging found that monetary sanctions were imposed by the overwhelming majority of judges,⁶⁶ and he recommended that courts exercise caution in sanctioning “attorneys for indigent clients or in pro bono cases unless the frivolity is clearly the fault of the lawyer.”⁶⁷ Furthermore, Willging stated that judges and lawyers have “reserved final judgment about the perceptions and realities of general and specific chilling effects, about the tendency of Rule 11 to generate satellite litigation . . . and about the relative lack of clear standards and procedures to guard against abuses.”⁶⁸

2. *Third Circuit Task Force Report on Rule 11*

The Third Circuit Task Force recently finished a study of all rule 11 activity within its geographic purview for the period from July 1, 1987 to June 30, 1988.⁶⁹ The Task Force cautioned against relying too substantially on any particular year's worth of information drawn from one circuit, especially a circuit which has indicated that the amendment is to be reserved for exceptional circumstances.⁷⁰ The ideas in the Task Force Report deserve respect, because the study is the first assessment to be based on systematically collected empirical evidence. The Task Force made some recommendations for the future and afforded numerous instructive insights which implicate concerns of civil rights plaintiffs and practitioners.

It stated that satellite litigation involving the amendment apparently was creating little significant difficulty for trial courts or litigants.⁷¹ Moreover, the Task Force rejected the propositions that the rule was a “cottage industry or that Rule 11 motions [were] routine in the Third Circuit” even in civil rights cases.⁷² It also observed that the

65. *See id.* at 168.

66. *See id.* at 530.

67. *Id.* at 166.

68. *Id.* at 174.

69. *See* S. Burbank, *supra* note 3. I realize that the data underlying the study apply to the period before mid-1988. However, numerous ideas relevant to civil rights litigation in the Report are premised on relatively recent guidance from the Third Circuit indicating that the rule's application is to be limited sharply. Moreover, the assessment was only made public quite recently.

70. It warned of different local legal cultures and judicial viewpoints on rule 11 and the hazards of relying on reported opinions. *See* S. Burbank, *supra* note 3, at 4-6. Indeed it “would not predict what a similar task force would find in three years” even in the Third Circuit, *See id.* at 95.

71. *See id.* at 77, 83.

72. *See id.* at 95.

possibility of chilling parties' and lawyers' enthusiasm in the circuit did not "warrant serious concern."⁷³

However, the Task Force did find that civil rights plaintiffs and attorneys were sanctioned at significant rates, percentages approximating those detected in the studies mentioned above.⁷⁴ Moreover, the Task Force remarked that it shared certain concerns of civil rights practitioners.⁷⁵ The Task Force maintained that congressional enactment of fee-shifting legislation, such as the Civil Rights Attorneys' Fees Award Act of 1976, which was meant to guarantee the availability of a competent pool of lawyers for civil rights plaintiffs, constituted an independent ground for applying amended Rule 11 sparingly, particularly to compensate, against those attorneys.⁷⁶ Furthermore, it suggested that greater attention be focused on whether the rule's enforcement is having a disproportionately adverse impact on indigent persons.⁷⁷

D. *Miscellaneous Developments*

Considerable evidence is accumulating that litigants and practitioners have exercised greater restraint in invoking amended Rule 11 since mid-1988.⁷⁸ For example, a growing number of law firms now requires attorneys to secure the approval of the litigation section or the permission of the firm management committee before filing sanctions motions. Correspondingly, some lawyers are counseling their clients to weigh seriously the costs and benefits of seeking sanctions, while clients are exhibiting more caution.

In sum, there have been numerous recent developments, especially in the courts, relating to amended Rule 11 that could represent

73. *See id.* at 84.

74. *See id.* at 69 (47% rate). *Cf. Vairo, supra* note 6, at 200-01 (71% rate). The Task Force's "sanction survey reveal[ed] similar results" to earlier studies of Nelken and Vairo, *supra* note 6, finding that the "sanctions imposed in reported cases are usually monetary, and they usually require payment to another party." It was "surprised by that finding [because] the Third Circuit has repeatedly emphasized the availability of non-monetary sanctions." S. Burbank, *supra* note 3, at 37.

75. I was particularly concerned that "lower federal courts . . . not lightly add sanctions to dismissal for those who seek to expand our horizons." S. Burbank, *supra* note 3, at 72. For additional concerns, *see id.* at 68-72.

76. *See* S. Burbank, *supra* note 3, at 72. The Fees Act is 42 U.S.C. section 1988 (1982).

77. *See* S. Burbank, *supra* note 3, at 72, 98.

78. These assertions are premised on conversations with attorneys in numerous cities around the country.

improvements for civil rights plaintiffs and practitioners. Nonetheless, certain of the developments are problematic for the parties and lawyers, while a number of difficulties with the amendment remain. What these considerations portend for the future is examined next.

III. SUGGESTIONS FOR THE FUTURE

A. *Lessons*

The selective survey of the more than six years of experience with Rule 11 above, especially the relatively recent developments and the complications that remain, yields numerous lessons. The clearest ideas which emerge from the review are how little we actually know about the amendment's enforcement in civil rights cases and its potential chilling effects on civil rights plaintiffs and attorneys. Moreover, what we purport to know is confusing and even contradictory as well as based on minimal data or on information that is limited temporally, geographically or in scope. Caution also is warranted in concluding too readily that the recent developments will constitute meaningful improvements for civil rights litigants and lawyers or mean that they are experiencing no chilling effects.

Given the importance of civil rights litigation in American society, there are compelling needs to know more about, and to enhance understanding of, the amendment's application in civil rights cases. We must undertake efforts to resolve the controversial question of whether Rule 11 is quelling the enthusiasm of civil rights plaintiffs and attorneys or at least to develop a more refined appreciation of judicial enforcement's consequences for those who bring civil rights actions.

B. *Reassessing Rule 11*

Although the recent developments relating to the amendment surveyed in the second section of this paper are checkered, they do lead me to be less pessimistic than before and to moderate somewhat my earlier recommendations.⁷⁹ I suggested that Congress, the Supreme Court and the Advisory Committee seriously consider Rule 11's expeditious repeal or amendment or that federal courts at least severely curtail the rule's enforcement.⁸⁰ Those recommendations

79. See Tobias, *supra* note 4, at 513-25.

80. See *id.* at 106-11, 148-49 and accompanying text.

were premised on analysis of the costs and benefits of continued broad application indicating that the disadvantages, especially for civil rights litigants, were substantially greater than the advantages, particularly in terms of deterring an indeterminate quantity of litigation abuse.⁸¹ Certain recent judicial developments illustrating, for example, that the rule can be applied in ways more solicitous of civil rights litigants or that satellite litigation may be less problematic than before make conceivable improved judicial enforcement. Thus, while it may not yet be time to declare that Rule 11's amendment has been a failed experiment, it surely would be premature to characterize the new version as a success.

As a practical matter, Congress, the Court, and the Advisory Committee appear unlikely in the near future to repeal or amend Rule 11.⁸² Neither Congress nor the Committee has evinced substantial interest in altering the rule, although both entities should seriously consider the possibility or at least thoroughly investigate it.⁸³ Moreover, the assembly, assessment, and synthesis of additional data, especially if that information clearly shows that the amendment is chilling or seriously disadvantaging civil rights plaintiffs and practitioners, may convince these decisionmakers that change is warranted.

C. *Studies*

Some of this work, especially ascertaining chilling effects with sufficient accuracy, is very difficult to do. There are problems of definition, detection, and measurement because chilling effects themselves are intangible and amorphous. For instance, it is difficult to ascertain precisely what constitute warnings that lawyers might be contravening Rule 11; warnings are proper and may be fair for courts and litigants by giving notice that a violation is about to occur and by reducing

81. *See id.* at 513-17, 522-25.

82. This is especially true, now that the five year "shakeout" period has passed. *See supra* note 60 and accompanying text. For a critical assessment of the rule revision procedures, finding them inadequate for contemporary needs, see Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 Mich. L. REv. 1057 (1989).

83. The Committee, through the Judicial Conference, has supported a number of assessments of the rule, such as the new study conducted by T. Willging, examined *supra* noted 58-68 and accompanying text. Moreover, it has evinced somewhat greater interest recently in possible amendment. *See, e.g.*, Letter from Judge Joseph Weis, Chairman, Standing Committee on Rules of Practice from Procedure to Carl Tobias (Aug. 9, 1989); Letter from Professor Paul Carrington, Reporter, Advisory Committee to Carl Tobias (Aug. 7, 1989) (on file with author).

sanctions' potential size. It is even harder to distinguish warnings from threats to sanction the attorney which can be quite subtle and can be inappropriate, especially insofar as they reflect judicial dissatisfaction with plaintiffs' determination to proceed with the merits.⁸⁴ Correspondingly, it is equally problematic to discern why those who contemplate suit decide to forgo litigation or why parties who file cases choose to discontinue them as well as estimate the number of valid claims that never were pursued out of fear about Rule 11.⁸⁵ Nevertheless, much more can be accomplished in the future than has been. Although the complexity of the issues relating to chilling means that they may defy definitive resolution, it is possible to clarify the questions and to learn considerably more than currently is known about how the rule discourages civil rights litigants and practitioners.

In the future, studies should be performed which are as rigorous and thorough as feasible, and that concentrate on what courts' enforcement means for civil rights plaintiffs and attorneys, especially in terms of the potential for reducing their enthusiasm. There must be systematic collection, analysis and synthesis of data in a sufficient number of geographic areas, with diverse enough legal cultures and judicial attitudes toward Rule 11, over adequate time to afford statistical validity. An attempt should be made to determine whether the high percentage of sanctions imposed on civil rights plaintiffs, found in two national studies of reported opinions and detected by the Third Circuit Task Force, is representative.⁸⁶ There should be efforts to ascertain exactly what number of sanctions motions are being lodged against civil rights plaintiffs and lawyers, precisely how much informal Rule 11 activity of what type, including sanctions, threats and warnings, involves them, and the specific amount of inconsistent application and satellite litigation that exists. Once these are determined, their implications, especially in terms of chilling effects, for civil rights litigants and attorneys should be calculated. Crucially important to some of these determinations will be assembling and documenting sys-

84. See Tobias, *supra* note 4, at 501-02.

85. See *supra* notes 25, 44 and accompanying text. Two members of the Illinois bar recently observed that "we cannot count the number of unfilled cases that would have been brought had rule 11 not been amended, much less can we judge their merit." Elson & Rothchild, Rule 11: Objectivity and Competence, 123 F.R.D. 361, 365 (1989).

86. See Nelken, *supra* note 6, at 1327; Vairo, *supra* note 6, at 200-01; S. Burbank, *supra* note 3, at 69.

tematically anecdotal evidence of Rule 11 activity that has potential chilling effects, especially by seeking the viewpoints of individuals and lawyers who actually consider bringing and in fact do pursue civil rights cases.

The Third Circuit Task Force affords many helpful suggestions for conducting future studies, such as what litigation should count as a civil rights case, the risks of relying too greatly on reported opinions and what Rule 11 activity to assess in addition to those decisions and how to analyze it.⁸⁷ The Task Force also indicated that there was considerable need to evaluate sanctions activity in geographic areas where the practices of attorneys and courts' views on Rule 11 differ from those in the Third Circuit, such as the Seventh Circuit, several of whose members have indicated their intention to apply the amendment vigorously.⁸⁸ Additional candidates might be areas in which lawyers aggressively file sanctions motions and some judges rigorously enforce Rule 11, such as the Southern District of New York or the Northern District of California.⁸⁹ Rural locales with potentially different legal cultures, such as the Rocky Mountains or sparsely populated sections of the Midwest or the South, also should be examined. The person who conducted the recent study sponsored by the Federal Judicial Center carefully premised his choice of certain districts for assessment on considerations, such as diversity while offering helpful suggestions for selecting appropriate study areas.⁹⁰ He also provided instructive insights on how to test the chilling effect hypothesis and valuable advice on interviewing judges and lawyers that should prove helpful in eliciting much information relevant to chilling.⁹¹

87. See S. Burbank, *supra* note 3, at 4-6, 44-45, 68-72, 96-99.

88. See *id.* at 59, 96-97, 99. The Task Force did not specifically recommend that circuit for study, although it did "suspect that . . . the icebergs are larger in the Seventh Circuit and that one of them is colder." *Id.* at 59. Indications of intent to apply Rule 11 vigorously appear in *Hays v. Sony*, 847 F.2d at 419-20; *Szabo*, 823 F.2d at 1080-85; and *Dreis & Krump Mfg. v. Int'l Ass'n of Machinists*, 802 F.2d 247, 255 (7th Cir. 1986). Moreover, the four concurring judges in *Mars Steel* recognized the "wide-ranging implications that [R]ule 11 sanctions have had in the post-1983 era for the practice of law in this circuit." See 880 F.2d at 940 (Flaum J.). Nonetheless, the majority opinion, apparently evinces moderating tendencies in that circuit, see *id.* at 932-36, as does opinions like *Tabrizi*, 883 F.2d 587.

89. See T. Willging, *supra* note 38, at 179 (Southern District of New York and Northern District of Illinois had three times as many published Rule 11 opinions as the next closest districts).

90. See *id.* at 179-89.

91. See *id.* at 8-10, 15-19, 160-63, 168, 184-85. For valuable treatment of numerous difficul-

D. *Judicial Application*

While these studies are being conducted, judges requested to sanction civil rights litigants and lawyers should remember what has been said above, especially that their resource deficiencies make them risk averse and peculiarly susceptible to chilling, particularly by overly vigorous application of the rule. Courts should seriously consider severely circumscribing enforcement because the costs of continued broad implementation still seem to outweigh the benefits.⁹² Considerable recent work suggests that several of the rule's principal purposes, such as encouraging attorneys to stop and think before they file papers and limiting litigation abuse, have been substantially achieved or that these goals and others that have not yet been completely attained can be addressed at least as efficaciously with additional mechanisms, such as case management and civil contempt.⁹³ Courts could significantly curtail application in numerous ways. They might follow the lead of several Third Circuit judges who have stated that the rule is to be reserved for extraordinary circumstances while limiting fee-shifting sanctions to outrageous abuses of the litigation process.⁹⁴

Those judges who think that the amount of attorney abuse warrants ongoing broad enforcement should keep in mind the needs of civil rights plaintiffs and lawyers and be responsive to them. The judges should remember the recent developments in the courts and other suggestions for improvements in judicial application and employ them when treating Rule 11 motions filed against those who bring civil rights cases.⁹⁵ Helpful examples are Judge Schwarzer's recommendations: that the focus shift from the merits to prefiling inquiries' rea-

ties involved in attempting to collect and evaluate empirical information, see Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. Mich. J.L. Ref. 647, 686-91 (1988).

92. I believe that courts should do so, because the costs remain too substantial, even though I have moderated somewhat my earlier views. See *supra* notes 79-83 and accompanying text.

93. Recent work suggesting that several of the rule's major purposes are being achieved is S. Burbank, *supra* note 3, at 74, 96; T. Willging, *supra* note 38, at 11-12; Commentary, *supra* note 48, at 1014-15. Recent work suggesting that certain purposes can be achieved at least as efficaciously with other mechanisms is Sanctions, *supra* note 10, at 2, 16, 24-25; Tobias, *supra* note 4, at 513-17; Vairo, *supra* note 6, at 233.

94. For the Third Circuit jurisprudence, see *supra* note 34 and accompanying text. The suggestion regarding feeshifting is mine. See Tobias, *supra* note 4, at 517 n.124, 521 n.135 and accompanying text. I believe, however, that it approximates what Judge Schwarzer intended in his Commentary. Moreover, some courts have suggested as much. See, e.g., *Doering*, 857 F.2d at 194-97.

95. See *supra* notes 29-36 and accompanying text.

sonableness, that deterrence of litigation abuse be integral to Rule 11, and that the amendment's compensatory purpose be de-emphasized.⁹⁶ Others include according serious consideration to nonmonetary sanctions or making ability to pay central to imposing that alternative or to the size of monetary awards. Courts as well should develop new approaches to Rule 11 that are solicitous of civil rights plaintiffs and practitioners.

CONCLUSION

During the first five years of Rule 11's existence, it adversely affected civil rights litigants and attorneys and apparently had chilling effects on them. Some recent developments could constitute improvements for these parties and lawyers and perhaps chill them less, although a number of the developments currently appear mixed, while certain problems remain. Whether what has happened actually will yield meaningful improvements for those who pursue civil rights claims, especially by reducing chilling, must await additional developments relating specifically to the recent and to future Rule 11 activity and its rigorous assessment. Most important will be how broad and effective developments have been, as well as careful judicial application in civil rights cases. The extent of actual improvements, particularly decreases in potential chilling, will not be clear until considerably more close scrutiny of the amendment has been completed. Such evaluation, which should rigorously analyze all relevant Rule 11 activity, especially that which is informal, ought to commence as soon as is feasible. While the assessments proceed, judges should carefully enforce the rule in civil rights cases.

96. See *supra* notes 51-52 and accompanying text. Cf. Tobias, *supra* note 4, at 517-25 (suggestions for continued broad enforcement).