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Certification and Civil Rights

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Federal Rules Decisions

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CERTIFICATION AND CIVIL RIGHTS^aCarl Tobias^{aa}

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A year ago in the pages of this reporter, Professor Arthur Miller urged that Federal Rule of Civil Procedure 11 not be prematurely revised.¹ His article contributes significantly to understanding of Rule 11's implementation. Professor Miller comprehensively analyzed questions that relate to the Rule's certification requirement. He also clarified numerous issues which have been unclear since the time that Rule 11 was fundamentally revised in 1983. Professor Miller specifically treated the Rule's application in civil rights cases, which has been one of the most problematic areas of its enforcement. Certain of the article's conclusions, however, were not supported by material included in the remainder of the piece or by available evidence. Moreover, the tone in which those conclusions and some portions of the article were cast could leave readers with the impressions that Rule 11 has been operating smoothly and poses little difficulty for federal court litigants, even civil rights plaintiffs.² These factors assumed special significance with the August 1990 announcement of the Advisory Committee on the Civil Rules soliciting written public comments on the Rule's application that were due on November 1, 1990, observing that the Committee would hold a hearing in February, 1991, to receive oral testimony, and stating that the Committee would consider possible amendment at its regularly scheduled meeting in April, 1991.³

***224** Professor Miller included many observations in the body of his article that enhance appreciation of Rule 11's enforcement. Most pertinently, he stated that critics have attacked the Rule for chilling zealous advocacy on behalf of plaintiffs in civil rights cases but remarked that "courts have shown a desirable sensitivity to this concern in a number of recent decisions."⁴

Formal judicial application of Rule 11 in civil rights cases has improved considerably over the last two years.⁵ All of the circuit courts have now issued opinions that are solicitous of the needs of civil rights plaintiffs and practitioners, many of whom have relatively few resources for litigating, which can make them risk averse.⁶ Most of the appellate courts have recognized that overly vigorous enforcement of Rule 11 can dampen the enthusiasm of these plaintiffs and lawyers. For example, the Seventh Circuit recently observed that Rule 11 cannot be permitted "to thoroughly undermine zealous advocacy ... especially in civil rights cases involving unpopular clients."⁷ The appellate court relied upon the warning in the Advisory Committee Note which accompanied Rule 11 that the Rule was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."⁸ Some appellate courts have made central to deciding whether civil rights lawyers had violated Rule 11's reasonable prefiling inquiry requirements the limited time that the attorneys often have for completing the inquiries.⁹

The circuit courts also have evinced solicitude for civil rights plaintiffs when reviewing the mandatory sanctions that trial judges have levied. ***225** A number of appellate courts have recommended that judges seriously consider non-monetary awards or make the ability of violators to pay relevant to any financial assessment.¹⁰ The Sixth Circuit even described the imposition of attorneys' fees on civil rights plaintiffs as an "extreme sanction" which should be limited to instances of severe misbehavior.¹¹

There have been similar improvements in trial court enforcement of Rule 11. One district judge refused to find that a civil rights lawyer had contravened the Rule “absent egregious conduct,” lest the court repress attempts to vindicate civil rights by injudiciously employing sanctions.¹² A few judges have been reluctant to conclude that civil rights plaintiffs who were proceeding pro se or who were pursuing cases which apparently were rather weak had violated Rule 11.¹³ Additional courts have evinced appreciation of the time pressures that confront some civil rights attorneys or of the problems of pleading and proving discrimination claims.¹⁴ Numerous district judges have refused to impose substantial sanctions on civil rights plaintiffs who they determined had contravened Rule 11.¹⁵

Professor Miller's conclusions are informative in a number of respects. For example, Professor Miller candidly acknowledged that “many areas of the law surrounding the revised rule remain less certain” than much practice pertaining to the new certification requirement which had “solidified into a reasonably harmonious and workable standard.”¹⁶ Nevertheless, considerable practice relating to certification remains unclear, while several aspects of the conclusions are problematic.

***226** Professor Miller may have overstated the extent to which practice under Rule 11 has stabilized and the degree to which the “overly enthusiastic hyperactivity of the first few years following its promulgation has begun to subside.”¹⁷ He thought that these trends were likely to continue, because the Supreme Court and the circuit courts are resolving numerous ambiguities in the Rule's enforcement.¹⁸ Two years ago, however, Professor Stephen Burbank found a “conflict between or among circuits on practically every important question of interpretation and policy under the Rule.”¹⁹ Much inconsistency remained at the time that Professor Miller published his recent article, and some of it had even worsened.

Persistent problems inhere in the “product” and “conduct” approaches to Rule 11. Numerous courts continue to overemphasize the merits of the litigation or the quality of the submitted papers (product), rather than the reasonableness of the inquiries that preceded the filing of the papers (conduct).²⁰ Courts which stress product have experienced considerable difficulty enunciating consistent standards for ascertaining the frivolousness of papers—a concept intrinsically resistant to uniform definition—and affording sufficient guidance to lawyers and litigants and adequate deterrence.²¹ Courts should consider initially the behavior of attorneys and parties in conducting pre-filing inquiries to determine whether they were reasonable. Only when courts cannot ascertain reasonableness from available evidence as to how lawyers and litigants performed the pre-filing inquiries should courts consider products and draw inferences from them.²² When judges have consulted product, they ***227** have disagreed over precisely how much of the paper must be frivolous.²³ In addition to these complications involving the product and conduct approaches, courts have differed as to whether Rule 11 imposes a continuing duty, confusion which recent First, Fourth and Sixth Circuit opinions do not clarify,²⁴ and have disagreed about numerous other issues.²⁵

There is little evidence that the “overly enthusiastic hyperactivity” of the early years of Rule 11's application that Professor Miller identified has decreased for civil rights plaintiffs. The number of cases in which civil rights defendants have sought Rule 11 sanctions from the plaintiffs has declined only minimally over the last several years,²⁶ although the percentage of Rule 11 motions granted against them apparently has dropped.²⁷ Inconsistent judicial application and unnecessary, expensive satellite litigation continue to disadvantage these plaintiffs and their counsel. Moreover, numerous district judges still find that the plaintiffs have contravened Rule 11, determinations that often are affirmed on appeal. Most of these phenomena are not likely to change, as circuit courts apply the extremely deferential abuse of discretion standard of appellate review that the Supreme Court articulated last Term.²⁸ Illustrative ***228** are two recent Fourth Circuit cases in which panels deferentially reviewed, and refused to overturn, findings of district judges that plaintiffs' lawyers had violated Rule 11 in controversial civil rights cases.²⁹ Although these panels and others have scrutinized and vacated or reversed trial court determinations imposing

large sanctions, some appellate courts have not, and one case in which a \$1,000,000 sanction was levied on a public interest organization is on appeal.³⁰

It also is important to realize that I have been speaking primarily of formal Rule 11 activity, and I assume that Professor Miller was doing so. It now appears that considerable Rule 11 activity which disadvantages civil rights plaintiffs the most is informal.³¹ This informal activity includes occasional judicial threats to sanction plaintiffs in chambers, if they refuse to withdraw counts that judges believe lack merit.³² It is impossible to ascertain precisely how widespread the detrimental informal activity is. Accumulating anecdotal evidence indicates that it is significant and warrants concern. While important Rule 11 studies currently being conducted by the Federal Judicial Center and the American Judicature Society do address this informal Rule 11 activity, they are not likely to enhance significantly present understanding of the activity.³³

Professor Miller, although admitting that the process of refining the application of Rule 11 “will take many more years,” observed that there has been “considerable progress” and that it would be unfortunate were the “decibel level of debate over the Rule to foster precipitous revision before sufficient experience accumulated.”³⁴ Professor Miller's plea for patience is problematic for civil rights plaintiffs, whose enthusiasm has been dampened and many of whom cannot afford the unnecessary *229 expense that Rule 11 litigation entails.³⁵

Professor Miller also asserted that the current debate over Rule 11 is redolent of the controversy over class actions which ensued during the 1970s following the 1966 amendment of Rule 23, controversy which subsided once class action practice stabilized.³⁶ One difficulty with this analogy is that some of the quieting may have been at the expense of those who seek to vindicate fundamental civil rights through class action litigation: the number of civil rights class actions which were filed plummeted from 1586 in 1975, to 798 in 1980, to 185 in 1986.³⁷ Moreover, much of the present popularity of class actions derives less from their efficacy as a technique for facilitating the vindication of fundamental civil rights than their effectiveness as a case management mechanism for expediting the resolution of mass tort cases.³⁸

It is important as well to understand that Rule 11's application is a small, but significant, part of a considerably broader problem. The federal judiciary has enforced other Rules in ways that disadvantage civil rights plaintiffs. For example, all of the circuits now require that plaintiffs plead with particularity in civil rights cases under Rule 8.³⁹ The courts have done so, although only Rule 9 specifically demands such pleading and little judicial authority or empirical data support the application of stricter pleading requirements in civil rights cases.⁴⁰ The Supreme Court's interpretation of Rules 23(e) and 68 in conjunction with the Civil Rights Attorneys' Fees Awards Act of 1976 and lower court application and extension of that precedent also may be reducing the pool of lawyers who are willing to take civil rights cases by limiting their prospects for recovering attorneys' fees.⁴¹ These developments were *230 exacerbated by numerous Supreme Court rulings, particularly involving procedural provisions, during the 1988 Term which were adverse to civil rights plaintiffs.⁴² Although many members of Congress believed that those interpretations eroded Congressional intent and proposed corrective legislation, Congress failed last year to override President Bush's veto of a tepid version of the bill which was originally introduced.⁴³

Professor Miller's admonitions may convince some observers, especially those authorized to propose revisions in, or to amend, the Rule that there is little wrong with Rule 11's application and that the federal judiciary simply needs a few more years to refine the implementation of this new concept. Numerous problems, however, remain substantial and some may be intrinsic or even irremediable, while certain litigants, especially civil rights plaintiffs, cannot afford to wait.

I trust that Professor Miller's suggestions will not limit debate on Rule 11, which thus far has been robust and productive, thoroughly ventilating most of the relevant issues. Lively, comprehensive discussion should continue, as the Advisory Committee and participants in the debate analyze the new Rule 11 studies, the written public comments submitted last November, and the oral testimony presented at the February hearing, and as the Advisory Committee considers revision of Rule 11.

Concerted effort must be devoted today and in the coming months to exploring and devising workable solutions to the problems that Rule 11 now poses. Numerous observers are concerned about the substantial disagreement and lack of common ground that currently appear to exist. With certain exceptions, it seems that many in the civil rights and public interest law communities and numerous law professors support repeal or significant amendment of Rule 11. With some exceptions, the federal judiciary apparently wishes to retain Rule 11 essentially intact principally because judges believe that the Rule is a valuable mechanism for combatting the litigation explosion and litigation abuse. Indeed, Professor Paul Carrington, who is the Advisory Committee Reporter, recently expressed his belief that the Committee would recommend only minor modification: "I'd be surprised if the judicial branch were to savage the Rule."⁴⁴ Few viable compromises have been developed to date. Work *231 should proceed apace on finding such middle ground. A valuable starting point for reform would be one idea on which there apparently is a modicum of consensus: narrowly limiting the availability of attorneys' fees as an appropriate sanction. There also may be equally effective alternatives to Rule 11 as it is now written and applied. Options include civil contempt, vigorous case management, invocation of sanctioning power under 28 U.S.C. § 1927 or courts' inherent authority, or reliance on state bar ethics requirements.⁴⁵

These and other possibilities should be rigorously explored as the Advisory Committee considers amendment of Rule 11, a provision which has proved to be the most controversial revision in the Federal Rules' half-century history. Professor Miller has analyzed judicial application of the certification requirement and aired numerous disputed issues that have arisen over certification since the Rule's 1983 amendment. All who are concerned about the fair, effective operation of the federal courts must now participate actively in determining whether additional revision of Rule 11 is warranted and, if so, how it can be achieved most efficaciously.⁴⁶

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

Footnotes

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^{aa} Professor of Law, University of Montana. I wish to thank Peggy Hesse, Bill Luneburg, Melissa Nelken and Peggy Sanner for valuable suggestions, Sheryl Foxman and Cecelia Palmer for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

¹ Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990). Professor Miller was the Reporter for the Civil Rules Advisory Committee when it recommended the revision of Rule 11 in 1983, and he is currently a member of that Committee.

² I rely substantially in this piece on my work on Rule 11 and civil rights litigation. *See* Tobias, *Rule 11 and Civil Rights Litigation*, 37 *Buffalo L.Rev.* 485 (1988-89) [hereinafter *Buffalo*]; Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 *How.L.J.* 161 (1990) [hereinafter *Howard*]; Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 *Vill.L.Rev.* 105 (1991) [hereinafter *Villanova*].

³ *See* Committee on Rules of Practice and Procedure 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*, reprinted in 131 F.R.D. 344 (1990) [hereinafter *Call for Comments*]. That meeting was held on May 22-24. In fairness, some assertions in the conclusion of Professor Miller's article are

supported in, and the tone employed in the article is moderated by, the recent revision of the sections covering Rule 11 of the treatise for which Professor Miller is an author. *See, e.g.*, 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil, § 1332, at 34-35 (2d ed. 1990). *See generally id.* at §§ 1331-40. Moreover, other sections of that treatise are solicitous of the needs of civil rights plaintiffs. *See, e.g.*, 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil, § 2732.2 at 340-51 (2d ed. 1983).

4 *See* Miller, *supra* note 1, at 490 n. 45.

5 *See* Howard, *supra* note 2; Villanova, *supra* note 2.

6 Recent circuit court cases include: *Mareno v. Rowe*, 910 F.2d 1043 (2d Cir.1990) *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991); *Alia v. Michigan Supreme Court*, 906 F.2d 1100 (6th Cir.1990); *Davis v. Carl*, 906 F.2d 533 (11th Cir.1990); *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir.1990); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir.1990); *Simpson v. Welch*, 900 F.2d 33 (4th Cir.1990); *Hilton Hotels Corp. v. Banov*, 899 F.2d 40 (D.C.Cir.1990); *Cruz v. Savage*, 896 F.2d 626 (1st Cir.1990); *Kraemer v. Grant County*, 892 F.2d 686 (7th Cir.1990); *Hughes v. City of Fort Collins*, 926 F.2d 986 (10th Cir.1991); *Woodrum v. Woodward County*, 866 F.2d 1121 (9th Cir.1989); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191 (3d Cir.1988). For discussion of civil rights plaintiffs and lawyers and their resources, see Buffalo, *supra* note 2, at 495-98.

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

8 *Kraemer*, 892 F.2d at 690 (quoting Fed.R.Civ.P. 11 Advisory Comm. Note, 97 F.R.D. 165, 199 (1983)); *see also Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir.1989); *Woodrum v. Woodward County*, 866 F.2d 1121, 1127 (9th Cir.1989).

9 *See Jenkins v. Missouri*, 904 F.2d 415, 420-21 (8th Cir.1990); *Gillette v. Delmore*, 886 F.2d 1194, 1199-1200 (9th Cir.1989); *accord Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir.1987) (Butzner, J., dissenting); *cf. Cruz v. Savage*, 896 F.2d 626, 633 (1st Cir.1990) (careful analysis of whether trial court considered reasonableness of lawyer's conduct when lawyer acted).

10 *See, e.g., Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C.Cir.1990); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir.1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 876-81 (5th Cir.1988). The Tenth Circuit has articulated a four-part test for assessing sanctions which includes numerous factors that are solicitous of the needs of civil rights plaintiffs. *See White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir.1990); *accord In re Kunstler*, 914 F.2d 505, 523-25 (4th Cir.1990), *cert. denied*, Nos. 90-802, 90-807 & 90-1094, ___ U.S. ___, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991).

11 *Morrison v. Lipscomb*, 877 F.2d 463, 469 (6th Cir.1989) (citing *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir.1986)).

12 *Levy v. City of New York*, 726 F.Supp. 1446, 1456-57 (S.D.N.Y.1989).

13 *See, e.g., Tarka v. Time, Inc.*, No. 90 Civ. 5348 (WK) (Southern District of New York), 1991 WL 4706 (pro se); *Moore v. Roth*, No. 90C1097 (Northern District of Illinois), 1990 WL 60735 (same); *Prochotsky v. Baker & McKenzie*, No. 90 C 4478 (Northern District of Illinois), 1991 WL 9007 (apparently weak case); *Solberg v. Inline Corp.*, 740 F.Supp. 680, 686 (D.Minn.1990); (same); *Summer v. Fuller*, 718 F.Supp. 1523, 1525 (N.D. Ga.1989) (same). Courts occasionally have granted Rule 11 sanctions to civil rights plaintiffs. *See, e.g., Byrne v. Board of Educ., School Dist. of West Allis*, 741 F.Supp. 167, 171 (E.D. Wis.1990). *Cf. Littlefield v. Mack*, 750 F.Supp. 1395, 1403, *motion for reconsideration denied*, 752 F.Supp. 1417 (N.D. Ill.1990) (sanctioning civil rights defendant).

14 *See, e.g., Costello v. Daddario*, 710 F.Supp. 1035, 1037-38 (E.D.Pa.1989) (time pressures); *Tutton v. Garland Indep. School Dist.*, 733 F.Supp. 1113, 1118-20 (N.D.Tex.1990) (difficulties of pleading and proving); *Pickens v. Children's Mercy Hosp.*, 124 F.R.D. 209, 211 (W.D.Mo.1989) (same).

15 *See, e.g., Goldberg v. Weil*, 707 F.Supp. 357, 362 (N.D.Ill.1989); the district court opinion referred to in *Banov*, 899 F.2d 40; *Cruz v. Savage*, 691 F.Supp. 549, 556 (D.P.R.1988), *aff'd*, 896 F.2d 626 (1st Cir.1990).

16 *See* Miller, *supra* note 1, at 505.

17 *See id.* at 505-06.

- 18 *Id.*
- 19 Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U.Pa.L.Rev. 1925, 1930 (1989).
- 20 *See, e.g., Gutierrez v. City of Hialeah*, 723 F.Supp. 1494, 1500-01 (S.D.Fla.1989). Even some of the clearest Rule 11 opinions emphasize the merits of the litigation or the quality of the papers. *See, e.g., Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1103 (6th Cir.1990) (Wellford, J., dissenting); *Davis v. Carl*, 906 F.2d 533 (11th Cir.1990); *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir.1989).
- 21 *See* S. Burbank, *RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 15, 20-25, 96-97 (1989) [hereinafter *TASK FORCE REPORT*]; Burbank, *supra* note 19, at 1933-34, 1941-42. This is not to say that the conduct approach which considers the reasonableness of prefilings inquiries is perfect; it simply is preferable to the product approach. *Cf.* Burbank, *supra*, at 1931-32 (uniformity of result may be impossible to attain in Rule 11 context). A corpus of opinions that levies Rule 11 sanctions for not conducting sufficient legal research or factual investigation is more likely to provide attorneys aware of them bases for conforming their behavior to the standards prescribed in the future and to “yield consistent directions than a corpus of opinions” sanctioning for frivolousness. *TASK FORCE REPORT*, *supra*, at 20-21, reprinted in Burbank, *supra*, at 1942. *Cf. ViON Corp. v. United States*, 906 F.2d 1564, 1566 (Fed.Cir.1990) (recent examination of “frivolous”).
- 22 *See* Burbank, *supra* note 19, at 1933-34, 1942, 1948; Villanova, *supra* note 2, at 131 n. 11; Howard, *supra* note 2, at 168 n. 37. *Cf. Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1143 (9th Cir.1990) (district court confronted with solid evidence of pleading's frivolousness may in appropriate circumstances infer that pleading filed for improper purpose).
- 23 For opinions that afford a sense of intra-circuit disagreement, compare *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1067 (7th Cir.1987) and *Paine Webber v. Canadian Am. Fin. Group*, 121 F.R.D. 324, 330 (N.D.Ill.1988), *aff'd*, 885 F.2d 873 (7th Cir.1989), with *Vista Mfg. v. TRAC-4, Inc.*, 131 F.R.D. 134, 140 (N.D.Ind.1990) and see *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1140-43 (9th Cir.1990) (en banc), overruling, *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir.1989) and *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir.1988). *See also In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir.1991).
- 24 For inter-circuit disagreement, compare *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 536-37 (4th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1580, 113 L.Ed.2d 645 (1990) (continuing duty) and *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 393 (1st Cir.1990) with *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*, 493 U.S. 1079, 110 S.Ct. 1133, 107 L.Ed.2d 1038 (1990) (same); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 874-75 (5th Cir.1988) (en banc) (same). *Thomas* overruled *Robinson v. Nat'l Cash Register Co.*, 808 F.2d 1119, 1125-32 (5th Cir.1987). *See generally* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 207-11 (1988). For intra-circuit confusion, compare *Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir.1988) (continuing duty) with *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir.1989) (casting doubt on continuing duty). *See generally* Solimine, *Rule 11 Litigation in the Sixth Circuit*, 21 U. Toledo L.Rev. 425, 433-35 (1990).
- 25 For more discussion of additional examples of inconsistency, see Burbank, *supra* note 19, at 1930-31.
- 26 *See* Howard, *supra* note 2, at 170 (between mid-1988 and early 1990, number of Rule 11 motions filed against civil rights plaintiffs remained comparatively constant). *Cf. Vairo, supra* note 24, at 200-01 (data showing high rate of motions from August 1983 to December 1987).
- 27 *See* Howard, *supra* note 2, at 170 (percentage of motions granted against plaintiffs between mid-1988 and early 1990 seemed to have declined somewhat). It is important to understand that these are approximations. *Cf. TASK FORCE REPORT, supra* note 21, at 69 (civil rights plaintiffs sanctioned at significant rates from July 1, 1987, to June 30, 1988 in Third Circuit).
- 28 Appellate courts are to apply the abuse of discretion standard in reviewing all district court determinations under Rule 11. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).

- 29 See *In re Kunstler*, 914 F.2d 505 (4th Cir.1990), *cert. denied*, Nos. 90-802, 90-807 & 90-1094, ___ U.S. ___, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991); *Blue v. U.S. Dep't of Army*, 914 F.2d 525 (4th Cir.1990). *Accord White v. General Motors Corp.*, 908 F.2d 675, 683 (10th Cir.1990).
- 30 See *In re Kunstler* (close scrutiny and vacating large sanctions); *Blue* (same); *Avirgan v. Hull*, 705 F.Supp. 1544 (S.D.Fla.1989), order clarified by 125 F.R.D. 189 (S.D.Fla.1989), appeal docketed, No. 89-5515 (11th Cir.1989) (\$1,000,000 sanction).
- 31 See Howard, *supra* note 2, at 169; Villanova, *supra* note 2, at 117 nn. 57-60 and accompanying text.
- 32 See Howard, *supra* note 2, at 169; Villanova, *supra* note 2, at 117 n. 60 and accompanying text.
- 33 The principal focus of the two major studies has not been informal Rule 11 activity. Conversation with Thomas Willging, Deputy Research Director, Federal Judicial Center, and Director, Rule 11 Project (Nov. 2, 1990). See American Judicature Society Rule 11 Project (1990) (copy on file with author). See also Studies Examine Rule 11's Impact, Nat'l L.J., July 30, 1990, at 32, col. 4. Data collected from five federal district courts with computerized docket data, however, indicate that civil rights plaintiffs on the average are more than 2.5 times as likely to be sanctioned as other litigants. See FEDERAL JUDICIAL CENTER PRELIMINARY REPORT ON RULE 11, Summary of Field Study, Tables 18, 20, 22 (Feb. 27, 1991). Moreover, in the questionnaire that the Judicature Society sent out to attorneys in early March, two of the ten major categories of questions principally addressed informal Rule 11 activity and several others partially did so. See American Judicature Society Rule 11 Study (1991).
- 34 Miller, *supra* note 1, at 505.
- 35 I recognize that the issue of chilling effects is controversial, although there is rather widespread agreement that the enthusiasm of many plaintiffs has been dampened, if not chilled. See, e.g., Howard, *supra* note 2, at 169-70; Vairo, *supra* note 24, at 200-01, 232-33. See also Call for Comments, *supra* note 3, 131 F.R.D. at 345.
- 36 See Miller, *supra* note 1, at 505 n. 120. See also Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem," 92 Harv.L.Rev. 664 (1979).
- 37 See The Rise and Fall of the Class Action Lawsuit, N.Y. Times, Jan. 8, 1988, at C8, col. 1.
- 38 See, e.g., *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.1989); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir.1988); Ten Federal Judges Agree on Plan to Consolidate Asbestos Cases, N.Y. Times, Aug. 11, 1990, A1, col. 1. See generally Mullenix, Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act, 64 Tex.L.Rev. 1039 (1986).
- 39 See *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C.Cir.1984). *Accord Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir.1985). For a recent example, see *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305 (11th Cir.1989). Cf. 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil, § 1230 at 236-48 (2d ed. 1990) (acknowledging development and suggesting that normal pleading requirements should apply to civil rights cases). See generally Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 Cornell L.Rev. 270, 296-301 (1989).
- 40 See Fed.R.Civ.P. 9(b); *Elliott*, 751 F.2d at 1482 (Higginbotham, J., concurring) (little authority); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 925-27 (3d Cir.1976) (Gibbons, J., dissenting) (same); *Rotolo*, 532 F.2d at 927 (little data); Wingate, A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?, 49 Mo.L.Rev. 677, 692 (1982) (same).
- 41 See *Evans v. Jeff D.*, 475 U.S. 717, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) (Rule 23(e)); *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Rule 68); *Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir.1990) (recent example of Rule 68's problematic application by lower federal court). See generally Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemp. Probs. 13 (1988); Tobias, *supra* note 39, at 310-17. Professor Miller has suggested that cases based on alleged violations of plaintiffs' civil rights often are inappropriate for summary judgment under Rule 56. See 10A C. Wright, A. Miller, & M. Kane, *supra* note 3, § 2732.2, at 340-350.

- 42 *See, e.g., Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). *See generally* Blumoff & Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C.L.Rev. 1 (1990).
- 43 The Senate failed to override President Bush's veto by one vote. *President's Veto of Rights Measure Survives By One Vote*, N.Y. Times, Oct. 25, 1990, A1, col. 3. *See generally* H.R. 4000, 101st Cong., 2d Sess.; Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 Harv.C.R.C.L.L.Rev. 475 (1990). Strong, new legislation has been introduced in the 102nd Congress. *See* H.R. 1, 102nd Cong., 1st Sess.; *New Battle Looming as Democrats Reintroduce Civil Rights Measure*, N.Y. Times, Jan. 4, 1991.
- 44 Rule 11 Snags Lawyers, 77 A.B.A.J. 16, 17 (Jan.1991).
- 45 *See* Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Rules of Civil Procedure*, 43 Rutgers L.Rev. No. 4, at 25 (forthcoming 1991) (copy on file with author).
- 46 As this article went to press, the Advisory Committee agreed to propose changes to Rule 11, several of which are solicitous of civil rights plaintiffs and attorneys.

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