

The 1993 Revision of Federal Rule 11

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The 1983 revision of Rule 11 of the Federal Rules of Civil Procedure ("Rule 11" or the "Rule") proved to be the most controversial amendment in the long history of the Federal Rules. Many federal judges inconsistently interpreted the provision's language and inconsistently applied the Rule. The 1983 version fostered much costly, unwarranted satellite litigation over its phrasing and the magnitude of sanctions that courts imposed while increasing incivility among lawyers. Rule 11 motions were filed and granted against civil rights plaintiffs more frequently than any other class of litigant, and numerous judges vigorously enforced the provision against the plaintiffs, levying large sanctions on them. Most of these complications arose from the Rule as applied, not as written.

These difficulties led numerous members of the legal profession and some federal judges to urge amendment of the 1983 version. Now that the lengthy revision process has concluded and the new Rule has become effective, it is important to analyze that provision and to afford suggestions for minimizing the problems which attended implementation of the 1983 Rule. This Article undertakes that effort.

Part I examines implementation of the 1983 version. Part II then traces the amendment process that resulted in promulgation of the new Rule, identifying and employing the most reliable sources of the Rule revisers' intent. Finally, Part III evaluates the new Rule, particularly those aspects which promise to be most controversial or difficult to implement. Part III also provides suggestions for rectifying or ameliorating the complications which may attend the implementation of the new Rule by offering guidance for courts which will be applying the new Rule and for lawyers and litigants who must comply with it.¹

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1. I have written two articles that examine Rule 11's amendment. The first evaluated and recommended improvements in a 1991 preliminary draft proposal. See Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992) [hereinafter Tobias, *Reconsidering*]. The second article analyzed and suggested improvements in the draft that became the new Rule. See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992) [hereinafter Tobias, *Proposed*]. Although the Rule's revisers incorporated some of the first article's recommendations in the draft which became the new Rule, they adopted none of the second article's suggestions. This Article, therefore, provides suggestions for facilitating the new Rule's implementation.

Because the 1983 revision of Rule 11 disadvantaged civil rights plaintiffs and lawyers the most, I emphasize such plaintiffs and lawyers throughout this Article. Insofar as the new Rule does not improve upon the 1983 version, it would disadvantage all litigants and attorneys, but particularly those who bring civil rights actions. Much about the Rule's impacts on civil rights plaintiffs applies to all resource-poor litigants. These plaintiffs, therefore, are a surrogate for them. See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89) [hereinafter Tobias, *Rule 11*]; see generally Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

I. IMPLEMENTATION OF THE 1983 AMENDMENT OF RULE 11

Rule 11's implementation following its significant amendment in 1983 warrants comparatively brief treatment here, because that background has been thoroughly canvassed elsewhere.² The United States Supreme Court promulgated revised Rule 11 as an important component of an integrated package of rules which the Court intended to expand attorneys' duties in, and courts' control over, civil litigation, especially during the pretrial phase.³ The 1983 modification mandated that lawyers and litigants perform reasonable prefilings inquiries into the facts and the law while certifying that their papers were factually well grounded and legally warranted. The 1983 version of Rule 11 also required that judges impose sanctions on attorneys and parties who failed to comply with these responsibilities.⁴

During the first half-decade after Congress and the Court adopted the 1983 revision, courts differed over numerous issues which were integral to the amendment's effectuation, inconsistently construing and enforcing the new version.⁵ The 1983 alteration of Rule 11 correspondingly fostered much expensive, unnecessary satellite litigation over, for example, its terminology and the kind and size of sanctions levied.⁶ Throughout this five-year time frame, Rule 11 motions were filed, and sanctions imposed, against civil rights plaintiffs more often than any other category of civil litigants,⁷ while many judges stringently applied the Rule against these plaintiffs or imposed large sanctions on them when they contravened Rule 11.⁸ Many civil rights

2. See, e.g., Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 946-49 (1992); Tobias, *Reconsidering*, supra note 1, at 855, 858-64; Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 478-92 (1991). The original 1938 Rule, which fell into disuse because of a reluctance on the part of attorneys to invoke it and a reluctance on the part of judges to impose sanctions, had not been amended prior to 1983. See generally D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976) (reviewing Rule 11's pre-1975 history).

3. See ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 291-92 (1989).

4. FED. R. CIV. P. 11 (1983 revision), reprinted in 97 F.R.D. at 167-68.

5. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 207 (1988).

6. Compare *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987) (holding that there exists no continuing duty to comply with Rule 11 on individual papers after the initial filing of those papers) with *Harris v. Marsh*, 679 F. Supp. 1204, 1386-87 (E.D.N.C. 1987) (finding that there is a continuing duty), *aff'd*, *Blue v. United States Dep't of Army*, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). See, e.g., *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir.) (involving satellite litigation regarding sanctions imposed), *cert. denied*, 484 U.S. 918 (1987); see Burbank, supra note 5, at 1930-31; Tobias, *Rule 11*, supra note 1, at 514.

7. See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986); Vairo, supra note 5, at 200-01.

8. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987) (providing an example of vigorous enforcement), *cert. dismissed*, 485 U.S. 901 (1988); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194 (7th Cir. 1985) (providing an example of vigorous enforcement); *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) (involving a \$1,000,000 sanction), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

plaintiffs and their counsel possess relatively limited money and time, which can make them risk averse, and a number of judges, lawyers, and writers have contended that the way in which courts implemented the 1983 version of Rule 11 had a chilling effect on these parties and attorneys.⁹

Most of the difficulties in implementing Rule 11 can be ascribed to judicial uncertainty about the principal purpose of the 1983 amendment. The Advisory Committee Note which attended the 1983 revision intimated that the primary objective was to deter litigation abuse.¹⁰ A 1985 study of the early implementation of the 1983 version of Rule 11, which was conducted under the auspices of the Federal Judicial Center ("FJC"), however, suggested that the revisers' goals were to punish offenders, to compensate those harmed by the violation, and to deter future abuse.¹¹ In implementing the 1983 revision, courts, by failing to concentrate on Rule 11's deterrent objective and by making attorney fees the overwhelming sanction of choice,¹² afforded parties enormous financial incentives to invoke the Rule and led numerous lawyers and parties to consider it a fee-shifting mechanism.¹³

These developments correspondingly generated a gigantic increase in filings of Rule 11 motions, creating an entirely new type of civil litigation. Courts published nearly seven hundred Rule 11 opinions in the initial three and one-half years after the 1983 amendment¹⁴ and issued hundreds of additional unpublished determinations.¹⁵ Indeed, there were more than three thousand reported Rule 11 cases by the end of 1990.¹⁶

A considerable amount of the early commentary on the revised Rule was favorable. For instance, Professor Arthur Miller, the Advisory Committee reporter, authored a FJC report that generally lauded the 1983 amendments to the Federal Rules of Civil Procedure, including the amendment to Rule 11.¹⁷ Judge William Schwarzer of the Northern District of California wrote a 1984 article which praised the modified Rule and urged federal judges to enforce

9. See Nelken, *supra* note 7, at 1327, 1340; Tobias, *Rule 11, supra* note 1, at 495-98, 503-06; Vairo, *supra* note 5, at 200-01; *cf.* ADVISORY COMM. ON THE CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., 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, 347 (1990) [hereinafter CALL FOR COMMENTS] (stating that there may be disagreement as to whether the 1983 version of Rule 11 had actually chilled such plaintiffs).

10. See FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted* in 97 F.R.D. 198, 199.

11. See SAUL M. KASSIN, FEDERAL JUDICIAL CTR., AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985). The Federal Judicial Center is the research arm of the federal courts.

12. ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES § 1B, at 9 (1991) [hereinafter FJC REPORT]; Nelken, *supra* note 7, at 1333.

13. See Vairo, *supra* note 2, at 479-80. *But cf.* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 409 (1990) ("Rule 11 is not a fee-shifting statute . . .").

14. Vairo, *supra* note 5, at 199.

15. See Tobias, *Rule 11, supra* note 1, at 485-86; Tobias, *supra* note 3, at 301.

16. See Vairo, *supra* note 2, at 480 (citing NEW YORK BAR ASS'N, COMMENTS ON RULE 11 OF FEDERAL RULES OF CIVIL PROCEDURE 4 (Nov. 1990)).

17. See MILLER, *supra* note 3.

it vigorously.¹⁸ Many courts relied upon and cited Professor Miller's report and Judge Schwarzer's article when writing Rule 11 opinions in the half-decade following the 1983 change.¹⁹ Some observers, however, were critical of the revision. For instance, Professor Stephen Burbank primarily challenged the Supreme Court's authority to adopt the amendment,²⁰ while Professor Edward Cavanagh cogently questioned how the revision would operate in practice.²¹

It was only after the judiciary had been implementing the 1983 provision for several years that some of the major difficulties mentioned above became clear, and commentators began addressing those problems. During 1986, Professor Melissa Nelken wrote a very important article in which she claimed that courts were seriously and improperly overemphasizing the Rule's compensatory purpose, that judges chose attorney fee shifting as the sanction in the vast majority of cases, and that the Rule's implementation was disadvantaging and probably chilling the enthusiasm of civil rights plaintiffs.²² Two years later, Professor Georgene Vairo authored an equally influential paper in which she made similar assertions.²³ That same year, even Judge Schwarzer expressed some reservations, relating primarily to satellite litigation and the Rule's invocation for compensatory purposes.²⁴ Near the end of 1988, the FJC completed a Rule 11 study which confirmed some of these assertions and reservations, such as the amount of Rule 11 activity, but disagreed with others, such as the contention that the Rule had a chilling effect on civil rights plaintiffs.²⁵ During 1989, the Third Circuit Task Force on Rule 11 issued its report stating that judges were inconsistently enforcing the 1983 Rule, that the provision was engendering satellite litigation, and that its application could be disadvantaging resource-poor litigants, such as civil rights plaintiffs.²⁶

Ironically, at about the same time that criticism of Rule 11 was growing, the lower federal courts began improving its implementation. For instance, judges began construing and enforcing Rule 11 with greater consistency, and the quantity of satellite litigation declined.²⁷ Courts and lawyers apparently

18. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

19. See, e.g., *Knop v. Johnson*, 667 F. Supp. 512, 519 (W.D. Mich. 1987); *Holley v. Guiffrida*, 112 F.R.D. 172, 174 (D.D.C. 1986).

20. Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983).

21. Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986).

22. See Nelken, *supra* note 7.

23. See Vairo, *supra* note 5.

24. William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

25. See THOMAS WILLGING, FEDERAL JUDICIAL CTR., *THE RULE 11 SANCTIONING PROCESS* 67-81, 157-68 (1988).

26. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION, THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 13-24, 60-61, 68-72 (1989).

27. See Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 110-22 (1991); see also Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 By Harmonizing It With Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 266-67 (1991).

employed Rule 11 against civil rights plaintiffs less frequently,²⁸ and judges evidenced an increasing concern for the needs of these litigants in determining whether they had violated the provision and in levying sanctions.²⁹

The Supreme Court's Rule 11 jurisprudence unfortunately did not reflect the improvements witnessed in the federal circuit and district courts.³⁰ In a series of four opinions,³¹ the Court construed Rule 11 literally and in ways that disregarded the complications of both satellite litigation and chilling. This literal interpretation, emphasizing stringent deterrence, discouraged plaintiffs from pursuing novel legal theories.³² It also encouraged satellite litigation by permitting the pursuit of sanctions after a plaintiff had voluntarily withdrawn a complaint.³³ Moreover, literal construction allowed and could have encouraged Rule 11's invocation as a fee-shifting measure.³⁴

Despite the apparent improvements in implementation by the federal circuit and district courts, the Advisory Committee on Civil Rules decided to begin assessing the possibility of amending the 1983 version of Rule 11 during 1989.³⁵ The next Part traces the amendment process, emphasizing those sources which seem to evidence the Rule revisers' intent and which appear most reliable in ascertaining that intent.

28. This assertion is premised on an informal survey of reported opinions, and unreported opinions available on computerized services, since January 1, 1991. See generally Tobias, *Reconsidering*, *supra* note 1, at 861 n.22.

29. See, e.g., *Foster v. Mydas Assoc.*, 943 F.2d 139, 145-46 (1st Cir. 1991); *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990); *Solberg v. Inline Corp.*, 740 F. Supp. 680, 686 (D. Minn. 1990).

30. See *supra* notes 27-29 and accompanying text.

31. See *Willy v. Coastal Corp.*, 112 S. Ct. 1076 (1992); *Business Guides v. Chromatic Communications Enters.*, 498 U.S. 533 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989).

32. In all four opinions cited *supra* at note 31, the Court interpreted Rule 11 literally and emphasized strict deterrence. The opinion in *Willy* discouraged plaintiffs because the Court held that a federal district court could impose Rule 11 sanctions on an employment discrimination plaintiff even when that court was later found to lack subject-matter jurisdiction. Cf. *Vairo*, *supra* note 2, at 487-90 (including analysis of how the opinions in *Pavelic* and *Cooter* discouraged plaintiffs from pursuing novel legal theories).

33. *Willy*, 112 S.Ct. 1076; *Cooter & Gell*, 496 U.S. 384.

34. In upholding Rule 11 against a Rules Enabling Act challenge, the *Business Guides* Court ignored the reality that attorney fees had been the sanction of choice and thus retained that incentive for invoking the Rule. *Business Guides*, 498 U.S. at 551-54.

35. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 854 (1991). The Advisory Committee is a twelve-member entity consisting of judges, law professors, and attorneys, which Congress has authorized to study the Federal Rules of Civil Procedure and to formulate proposals for change as warranted. See 28 U.S.C. § 2073 (1988). See also Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1509-11 (1987) (reviewing congressional involvement in the federal civil rulemaking process); Mullenix, *supra*, at 797 n.2 (describing the composition of the Advisory Committee and providing citations to other useful authority); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464-69 (1993) (reviewing the history and powers of the Advisory Committee).

II. THE RULE REVISION PROCESS

A. The Initial Advisory Committee Decision

Many developments, including those discussed in Part I of this Article, apparently coalesced in 1989 and convinced the Advisory Committee to begin examining the prospect of revising the 1983 version of Rule 11. Judge Sam C. Pointer, Jr., the Advisory Committee's chairman during most of the revision process, observed that "[t]he Committee had received various requests, formal and informal, for further amendment or abrogation of [the 1983 version and was] . . . aware of several studies of the rule undertaken by various individuals, bar associations, and courts" but was uncertain whether it should propose any modifications and, if so, what kind of modifications should be made.³⁶

The Advisory Committee's resolve to explore the possibility of amendment apparently crystallized at its November, 1989 session.³⁷ The Committee examined the 1983 revision for half a day during that session. Two public interest attorneys contended that the 1983 version was disproportionately affecting civil rights plaintiffs and other public interest litigants and encouraged the Committee to undertake additional study of the Rule's impact on these parties.³⁸ Judge John Grady, then Advisory Committee chairman, urged these lawyers to conduct their own empirical analysis of Rule 11's operation for the purpose of educating the Committee, while the Committee agreed to commission another FJC study.³⁹

At the November, 1989 session, Judge Grady also named a subcommittee consisting of Professor Paul Carrington, the Committee's reporter, Magistrate Judge Wayne Brazil of the Northern District of California, and Thomas Willging, Deputy Research Director of the FJC, who were to designate significant issues relating to Rule 11's operation and to plan an empirical study.⁴⁰ In December, Willging assembled a document which examined the state of existing empirical work on Rule 11, concentrating on those issues which Professor Carrington had designated as important.⁴¹ When the FJC Research Division received the subcommittee's suggestions, Willging and other division personnel began implementing an empirical assessment of Rule 11.⁴²

36. See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Attachment B to Letter to Hon. Robert E. Keeton, chairman, Standing Committee, from Hon. Sam C. Pointer, Jr., chairman, Advisory Committee 2-5 (May 1, 1992)), reprinted in 146 F.R.D. 519, 522-25 (1993) [hereinafter 1992 Pointer Letter]. Judge Pointer was chairman from early 1991 until mid-1993.

37. In the remainder of this Part, I substantially rely on Mullenix, *supra* note 35, at 854, and Tobias, *Reconsidering*, *supra* note 1, at 861-62.

38. See Mullenix, *supra* note 35, at 854; Tobias, *Reconsidering*, *supra* note 1, at 861-62.

39. See Mullenix, *supra* note 35, at 854.

40. Tobias, *Reconsidering*, *supra* note 1, at 861-62 n.28.

41. *Id.*

42. *Id.*

During January of 1990, Representative Robert Kastenmeier (D-WI), then the chair of the House Judiciary Subcommittee responsible for oversight of rules revisions, conveyed to Judge Grady and the subcommittee his concern about Rule 11's effect on civil rights plaintiffs and sought information about the Advisory Committee's proposed study of Rule 11.⁴³ In February, Judge Grady responded to Representative Kastenmeier by suggesting that the 1983 version required additional evaluation.⁴⁴

B. FJC Preliminary Report

Before the Advisory Committee met in the spring of 1991, the FJC concluded its compilation and preliminary evaluation of data on Rule 11; the Committee had employed computerized docket information from five federal districts and responses to questionnaires circulated to every federal district judge.⁴⁵ The data gleaned from the five courts indicated that, on the average, civil rights plaintiffs were no more likely to be found in violation of the Rule than parties who file other kinds of suits in which there is a high rate of Rule 11 activity.⁴⁶ The FJC also determined that attorney fees were the sanction of choice, even though numerous nonpecuniary options were also available to courts.⁴⁷

The FJC detected two major themes in the judicial responses to the survey. Approximately four-fifths of the respondents thought that Rule 11 had a positive impact on civil litigation, that the Rule's benefits warranted the judicial time expended on its implementation, and that the 1983 version should be retained.⁴⁸ A comparable number of judges considered groundless litigation to be a minor problem and believed that prompt rulings on motions to dismiss and for summary judgment, Rule 16 pretrial conferences, and informal warnings were more effective than Rule 11 for treating such cases.⁴⁹ Half of the respondents thought that "Rule 11 exacerbate[d] contentious behavior between counsel."⁵⁰

The information in the FJC's preliminary report may have been important to Rule 11's revision, especially insofar as the Rule revisers depended on it when amending the Rule, although such reliance is impossible to verify. For

43. Telephone Interview with Charles Geyh, professor of law, Widener University, former counsel, U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Administration of Justice (Sept. 13, 1993); see also Tobias, *Reconsidering*, *supra* note 1, at 862.

44. Letter from Judge John F. Grady to Rep. Robert W. Kastenmeier (Feb. 9, 1990) (copy on file with author); see also Tobias, *Reconsidering*, *supra* note 1, at 862.

45. See ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CTR., RULE 11: JUDGES SURVEY AND FIELD STUDY PRELIMINARY REPORTS (1991). Because the FJC made no changes relevant to this Article in compiling its final report, cited *supra* at note 12, I rely on the preliminary report in this Part. See Tobias, *Reconsidering*, *supra* note 1, at 864; see also *infra* note 65 and accompanying text.

46. FJC REPORT, *supra* note 12, § 1C, at 1-8.

47. *Id.* § 1B, at 9.

48. *Id.* § 1A, at 1.

49. *Id.* § 1A, at 1-2.

50. *Id.* § 1A, at 2. These are the survey results most relevant to the issues treated in this Article, although the FJC Report includes much additional information.

instance, the finding in the five-court study that Rule 11 did not disproportionately affect civil rights plaintiffs may indicate that the Rule revisers considered the Rule's other detrimental impacts, such as satellite litigation, sufficient to warrant an amendment proposal.⁵¹ The study's finding that attorney fees were the sanction of choice may have correspondingly influenced the Rule revisers' determination to amend the Rule in ways that would substantially reduce such awards.⁵²

Moreover, the similar percentage of judges who believed that Rule 11 should be retained in its 1983 form, that groundless lawsuits were a minor difficulty, and that the 1983 Rule was relatively ineffective in treating such litigation apparently reflected judicial ambivalence about the Rule. This ambivalence and the Rule revisers' decision to propose an amendment to Rule 11, despite the finding that the 1983 version did not disproportionately affect civil rights plaintiffs, may suggest that certain revisers and judges had concluded that Rule 11 had achieved all that could reasonably be expected. Apparently, these individuals felt their efforts would be better spent on preventing discovery abuse, which many judges had come to believe was the most important problem confronting the courts.⁵³

C. *The Call for Comments and Public Responses*

In the summer of 1990, the growing criticism of Rule 11 apparently prompted the Advisory Committee to announce publicly that it was reconsidering Rule 11.⁵⁴ The Committee published a Call for Comments, which solicited written public responses to ten questions regarding the provision's functioning that were due in November; the Call for Comments also announced that the Committee would hold a hearing on the issue in February of 1991.⁵⁵ The Call for Comments included questions regarding whether Rule 11 had encouraged lawyers to "stop and think" before filing papers, whether the benefits of that behavior outweighed the costs in terms of satellite litigation, and whether the Rule had "been administered unfairly to any particular group of lawyers or parties."⁵⁶ The Committee also stated that it would evaluate all of this public input and the results of the FJC's

51. See Tobias, *Reconsidering*, *supra* note 1, at 864-65.

52. See also *infra* notes 98-99 and accompanying text.

53. See, e.g., COMMITTEE ON DISCOVERY, N.Y. BAR ASS'N, REPORT ON DISCOVERY UNDER RULE 26(b)(1), reprinted in 127 F.R.D. 625 (1990); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992). The revisers and judges may have also concluded that Rule 11's disadvantages outweighed its benefits or that the expenditure of federal judicial resources, especially for Rule 11 appeals, was not cost effective.

54. See CALL FOR COMMENTS, *supra* note 9, at 344; see also Mullenix, *supra* note 35, at 854; Vairo, *supra* note 2, at 492-93.

55. CALL FOR COMMENTS, *supra* note 9, at 345. The controversial character of the proposal to amend Rule 11 prompted the Committee to invert the ordinary sequence of soliciting public comment after developing a proposal.

56. See *id.* at 346-47.

examination of Rule 11 in making its determination of whether to propose an amendment of Rule 11 during its spring 1991 meeting.⁵⁷

Approximately 125 persons and organizations responded in writing to the Advisory Committee's Call for Comments, and the vast majority criticized the 1983 version and its implementation.⁵⁸ The major criticisms were that the Rule promoted too much expensive satellite litigation, that courts inconsistently applied Rule 11, that the Rule's invocation detrimentally and disproportionately affected civil rights plaintiffs and their counsel, and that the Rule fostered incivility among attorneys.

The Advisory Committee invited sixteen experts to testify at the public hearing it held during its meeting in February of 1991 in New Orleans.⁵⁹ These witnesses consisted of three federal judges, nine bar members who testified on behalf of certain groups such as the American Bar Association Litigation Section and the American College of Trial Lawyers, and three law professors.⁶⁰ In selecting these witnesses, the Committee deliberately chose a disproportionate number of Rule 11 critics, because the Committee was principally interested in guaranteeing that it fully comprehended the different amendment proposals.⁶¹ The critics' testimonies resembled the responses to the Call for Comments; for example, the critics cited the costly satellite litigation that Rule 11 engendered and the Rule's adverse effects on civil rights plaintiffs.⁶² The Advisory Committee participated in wide-ranging dialogue with the sixteen experts, emphasizing those queries that it had included in the Call for Comments.⁶³

After the hearing, the Advisory Committee informally agreed that an amendment to the 1983 version of Rule 11 was warranted and asked that the FJC refine some dimensions of its preliminary assessment, particularly those regarding Rule 11's application in civil rights actions.⁶⁴ Upon considering the written and oral public input and the results of the FJC's preliminary study, the Committee decided that the widespread criticism of the 1983 version had some merit, although the Committee thought that such criticism was often exaggerated or based on flawed assumptions.⁶⁵ The Committee also believed that the amendment's purpose—to require that parties stop and

57. See *id.* at 345; see also Mullenix, *supra* note 35, at 854.

58. See Tobias, *Reconsidering*, *supra* note 1, at 862-63; Vairo, *supra* note 2, at 492-93. The public responses are on file at the Administrative Office of the United States Courts in Washington D.C.

59. See Tobias, *Reconsidering*, *supra* note 1, at 863; Vairo, *supra* note 2, at 492-93.

60. See Vairo, *supra* note 2, at 492 n.100.

61. See ADVISORY COMM. ON CIVIL RULES, INTERIM REPORT ON RULE 11, at 2 (1991) [hereinafter INTERIM REPORT].

62. See Tobias, *Reconsidering*, *supra* note 1, at 863; Vairo, *supra* note 2, at 492-93.

63. See Vairo, *supra* note 2, at 492-93.

64. See Tobias, *Reconsidering*, *supra* note 1, at 863.

65. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Attachment to Letter to Hon. Robert E. Keeton, chairman, Standing Committee, from Hon. Sam C. Pointer, Jr., chairman, Advisory Committee (June 13, 1991)), reprinted in 137 F.R.D. 63, 64 (1991) [hereinafter 1991 Pointer Letter]; see also 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 523.

think before filing papers—remained appropriate and warranted retention. The Advisory Committee also concluded that case law had resolved many of the complications which Rule 11 had earlier posed.⁶⁶ Nevertheless, the Committee found support for five important ideas:

(1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.⁶⁷

After the Advisory Committee had reached these conclusions and informally decided that Rule 11 should again be amended, Judge Pointer and Professor Carrington undertook principal responsibility for developing and drafting the proposed modifications of the Rule for the Advisory Committee to consider at its meeting in May of 1991.⁶⁸ Judge Pointer and Professor Carrington drafted a proposal which was intended to increase the Rule's fairness and efficacy in deterring lawyers and parties from presenting and maintaining frivolous positions while simultaneously decreasing the Rule's invocation.⁶⁹

D. The Advisory Committee's Interim Report and Preliminary Draft of the Proposed Amendment

The Advisory Committee incorporated several of the issues discussed in Part II.C in the findings of an Interim Report issued during April of 1992.⁷⁰ The most important component of the Interim Report was the Committee's decision that there had been adequate experience with the 1983 version, especially given its intense criticism, to warrant consideration of amendment of Rule 11.⁷¹ It concomitantly determined that those criticisms were sufficiently meritorious to support examination of particular suggestions for modification.⁷²

66. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 64; see also 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 523.

67. 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 64-65; see also 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 523 ("In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.")

68. See Tobias, *Reconsidering*, *supra* note 1, at 863-64.

69. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 65.

70. See INTERIM REPORT, *supra* note 61.

71. *Id.* at 2; see generally Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223 (1991) (asserting that there had been adequate experience with the 1983 version of the Rule to warrant consideration of its amendment). *But see* Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990).

72. INTERIM REPORT, *supra* note 61, at 2.

The Interim Report included a number of significant preliminary observations relating to the ten questions posed by the Call for Comments.⁷³ For instance, the Committee admonished that Rule 11 should not be considered as the major vehicle for deterring groundless lawsuits; stated that Rule 11 motions exacerbate contentious conduct; found that judges differ substantially in their enforcement of the Rule; and expressed concern that financial sanctions for Rule 11 violations had become the norm.⁷⁴ The Interim Report also observed that Rule 11 sanctions had been levied more often upon plaintiffs in certain types of cases and had a stronger effect upon some groups, although it found insufficient evidence that the provision was being employed unfairly in civil rights cases or that it had a chilling effect on civil rights litigants.⁷⁵

Before the Advisory Committee considered the proposal for amending the 1983 Rule drafted by Judge Pointer and Professor Carrington, Elizabeth Wiggins and Thomas Willging, two researchers who had primary responsibility for conducting the FJC's preliminary assessment, reported on the additional work that they had undertaken at the Committee's request.⁷⁶ The FJC's attempts to refine its earlier analysis yielded few new results. For example, Willging reported that judges had imposed relatively few Rule 11 sanctions on civil rights plaintiffs who were represented by counsel in the five districts studied and that the litigation in which judges found that Rule 11 had been violated rarely "presented good faith arguments for changes in the law."⁷⁷

The FJC researchers' efforts to document the amount of Rule 11 activity essentially confirmed the work of other evaluators. For instance, Wiggins and Willging discovered 835 reported district court and 346 reported appellate court opinions applying Rule 11 between 1984 and 1989,⁷⁸ while they suggested that reported determinations probably comprised only one to ten percent of the total court consideration of Rule 11 motions.⁷⁹

Willging also distributed and explained to the Advisory Committee the preliminary results of a Rule 11 study conducted under the auspices of the American Judicature Society ("AJS").⁸⁰ He observed that the evaluation of Rule 11 activity in the Second, Fifth, and Ninth Circuits over a one-year period included the "most systematic data to date on attorneys' experiences with Rule 11 in their daily practices [and] promised to be an informative final report."⁸¹ The AJS had published its "Preliminary Report" in July of

73. *See id.* at 6-15.

74. *See id.* at 6-11.

75. *See id.* at 6-7.

76. *See supra* text accompanying note 64.

77. *See* Tobias, *Reconsidering*, *supra* note 1, at 864.

78. *Id.* at 865; *see also* Vairo, *supra* note 5, at 199 (finding nearly 700 reported opinions between 1983 and 1987).

79. *See* Tobias, *Reconsidering*, *supra* note 1, at 865; *see also* BURBANK, *supra* note 26, at 59 (suggesting that only 10% of all Rule 11 decisions appear in the federal reporter system).

80. HERBERT KRITZER ET AL., *RULE 11 STUDY: PRELIMINARY ANALYSIS* (1991).

81. *See* Tobias, *Reconsidering*, *supra* note 1, at 865 n.53.

1991. The Report included a number of tentative conclusions analogous to the FJC's findings but warned that the AJS could not reach more conclusive determinations until it had refined the material which had been gathered.⁸² That admonition ultimately proved to be prescient. For instance, the AJS Preliminary Report found that Rule 11 had posed greater difficulty in "ordinary litigation, such as vehicular collision suits, than in controversial cases, such as civil rights actions."⁸³ The AJS determined more conclusively in 1992, however, that courts imposed Rule 11 sanctions on civil rights plaintiffs as often as any other category of litigant and that the Rule had prompted civil rights lawyers to counsel clients to abandon possibly legitimate suits.⁸⁴

The preliminary draft revision of Rule 11 which the Advisory Committee developed at its May, 1991 meeting warrants only brief treatment. The events that transpired during the seven hours in which the Committee considered Rule 11's modification and the written proposal which resulted have been examined elsewhere.⁸⁵ Moreover, the Rule revisers subsequently changed numerous constituents of the preliminary draft. Nonetheless, the major components of the proposal will be mentioned here, while those elements that remain important to the new version of Rule 11 will be analyzed in Part III of this Article.

The Advisory Committee recognized that the widespread criticism of the 1983 version had some merit, although the Committee stated that this criticism was often exaggerated or premised on incorrect assumptions. The Committee also observed that the 1983 version's insistence that parties stop and think before filing was proper and warranted retention, and that numerous problems which the 1983 amendment had initially created had been resolved.⁸⁶ The Committee also acknowledged that Rule 11 more often and more seriously affected plaintiffs, that it had occasionally posed difficulties for parties who sought to pursue novel legal theories or needed discovery to develop and prove their cases, that judges had employed fee-shifting as the sanction of choice, that the Rule afforded insufficient incentives for parties to abandon positions which became untenable, and that it had sometimes fostered attorney-client conflicts.⁸⁷ In developing the preliminary draft of the Rule 11 amendment, the Committee refused to limit Rule 11 solely to intentional violations or to make sanctioning discretionary, because Committee members believed that the preliminary draft afforded sufficient protections, such as safe harbors, and that Rule violations would rarely implicate behavior

82. See KRITZER, *supra* note 80.

83. *Id.* at 5-7.

84. Marshall et al., *supra* note 2, at 965-73.

85. See Tobias, *Reconsidering*, *supra* note 1, at 865-93; Vairo, *supra* note 2, at 495-500.

86. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 64. Committee members made these points numerous times at the meeting which this Author attended in May of 1991. See generally Tobias, *Reconsidering*, *supra* note 1, at 865-93.

87. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 64-65; see generally Tobias, *Reconsidering*, *supra* note 1, at 865-93.

which was not deceptive or willful.⁸⁸ Instead, the Committee sought to enhance the Rule's efficacy and fairness as a vehicle to deter litigants from presenting and maintaining frivolous positions while simultaneously limiting the number of Rule 11 motions filed by instituting several major changes in the 1983 version of Rule 11.

The first significant change implemented by the Committee involved the representations made to the court by attorneys or unrepresented parties. The Advisory Committee imposed a "continuing duty" on attorneys and unrepresented litigants to withdraw allegations which later research or discovery indicates are insupportable.⁸⁹ The way in which the Committee phrased this duty also seemed to parse finely the concept of a paper so that parties might have been required to withdraw rather insignificant components of an offending paper.⁹⁰ The Committee correspondingly included a "duty of candor," which required lawyers or pro se litigants to identify specific allegations or denials of facts that did not, but were likely to, have evidentiary support.⁹¹

This "duty of candor" was also a component of the Advisory Committee's second important modification, which was an attempt to equalize the responsibilities that Rule 11 imposed on plaintiffs and defendants. For example, the modification required both defendants and plaintiffs to comply with the duty of candor,⁹² while the Committee recognized that plaintiffs frequently need discovery to substantiate assertions in their papers.⁹³

Another cluster of substantial alterations to the 1983 version of Rule 11 made by the Advisory Committee involved sanctioning procedures, because the 1983 version had supplied virtually none.⁹⁴ In its preliminary draft of what became the 1993 amendment, the Advisory Committee required that litigants file Rule 11 motions independently of other papers and describe the particular behavior which allegedly violated the Rule.⁹⁵ Moreover, the Committee incorporated a "safe harbor" provision that gives those who are targets of Rule 11 motions twenty-one days in which to withdraw papers that purportedly contravene Rule 11.⁹⁶ The Committee also prescribed procedures for affording targets notice and a reasonable opportunity to respond to Rule 11 motions and for those found in violation to seek written orders from judges delineating the offending behavior and explaining why the sanction was levied.⁹⁷

88. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 65.

89. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U. S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, 137 F.R.D. 53, 75 (1991) [hereinafter PRELIMINARY DRAFT].

90. Parts of papers which are subject to the Rule's requirements include "a claim, defense, request, demand, objection, contention or argument in a . . . paper." *Id.*

91. See *id.* at 76.

92. The Rule applied to "any allegations or denials of facts." *Id.*

93. *Id.* at 78 (FED. R. CIV. P. 11 advisory committee's note).

94. See Tobias, *Proposed*, *supra* note 1, at 1784.

95. See PRELIMINARY DRAFT, *supra* note 89, at 76.

96. See *id.*

97. See *id.* at 77.

A final significant change in the 1983 version made by the Advisory Committee implicated the sanctions to be imposed when Rule 11 is contravened.⁹⁸ Observers suggest that the Advisory Committee apparently had four major goals relating to sanctioning in mind when making this change.⁹⁹ The Committee wanted to emphasize that courts could assess non-financial sanctions and that the Rule's principal purpose was to deter litigation abuse. The Committee also intended to discourage the employment of monetary assessments by judges, namely attorney fees, and courts' reliance on the Rule to compensate litigants.

Judge Pointer and Professor Carrington reduced to writing those changes upon which the Committee had agreed at its May meeting, circulated the draft for Committee approval, and forwarded a final version to the Standing Committee in June of 1991.¹⁰⁰ The Standing Committee evaluated the proposed amendment that the Advisory Committee had tendered and inserted several minor modifications in the draft during July.¹⁰¹ The Standing Committee then issued the proposed amendment of Rule 11 for public comment, which was required to be submitted by February of 1992, and heard oral testimony on the proposal at hearings held in November of 1991 and February of 1992.¹⁰²

E. Bench-Bar Proposal and Developments Between March and October of 1992

At the same time that the Standing Committee was soliciting public input on its proposal, a highly respected group of federal judges and attorneys circulated a suggestion for amending Rule 11 which was meant to respond to certain difficulties with the revisers' draft.¹⁰³ Although it remains unclear precisely what effect the bench-bar proposal had on subsequent decisions to modify the draft, the bench-bar efforts warrant brief treatment because those endeavors probably had some influence on the Rule revisers, the effects of these efforts were controversial at the time, and they offer helpful insights on implementation of the new Rule.¹⁰⁴ The bench-bar group was primarily concerned that the preliminary draft parsed the idea of a paper too finely, that imposition of a continuing duty could convert litigation "into a retroactive exercise in perfected pleadings," and that the prescription of safe harbors

98. See *id.*

99. See Tobias, *Proposed*, *supra* note 1, at 1786-88; Tobias, *Reconsidering*, *supra* note 1, at 880-90.
100. See 1991 Pointer Letter, *supra* note 65, reprinted in 137 F.R.D. 63, 63; see also Tobias, *Reconsidering*, *supra* note 1, at 898.

101. See PRELIMINARY DRAFT, *supra* note 89, at 74-82; see also Tobias, *Reconsidering*, *supra* note 1, at 898.

102. See PRELIMINARY DRAFT, *supra* note 89, at 53, 56.

103. See A. LEON HIGGINBOTHAM, JR. ET AL., BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11, reprinted in 137 F.R.D. 159 (1991) [hereinafter BENCH-BAR PROPOSAL].

104. Some Rule revisers apparently felt that the bench-bar efforts placed undue public pressure on them to alter the preliminary draft in ways that they would ultimately have done anyway.

would afford lawyers strategic benefits and accentuate the deterioration of professional relationships.¹⁰⁵

The bench-bar proposal incorporated certification requirements which resembled those included in the 1983 revision. The operative language provided that the signature certifies that "to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the paper taken as a whole is well grounded in fact and law, including non-frivolous arguments for possible change of law."¹⁰⁶ The bench-bar proposal also made the imposition of sanctions discretionary while it proscribed attorney fee awards and required that financial assessments be payable to the clerk of the court.¹⁰⁷ Moreover, the bench-bar proposal incorporated procedural provisions relating to notice and opportunity to be heard and to written findings of fact and conclusions of law, which are similar to the protections in the draft.¹⁰⁸

The developments relating to adoption of the new Rule which occurred between March and October of 1992 also warrant little examination here, because those that were important are treated in Part III of the Article. After the Advisory Committee reviewed the written public comments and oral testimony submitted on the preliminary draft, the Committee significantly modified the draft during an April meeting and then tendered the new proposal to the Standing Committee.¹⁰⁹ Two months later, the Standing Committee reviewed the April proposal submitted by the Advisory Committee, incorporated a few insignificant changes, and included the substantial modification of leaving the decision of whether to impose sanctions for Rule 11 violations to the courts' discretion.¹¹⁰ During September of 1992, the Judicial Conference, the policy-making arm of the federal courts, endorsed the Standing Committee proposal without alteration and forwarded that document to the United States Supreme Court, which was required to approve and transmit the proposal to Congress before May 1, 1993, in order for it to take effect in 1993.¹¹¹

105. BENCH-BAR PROPOSAL, *supra* note 103, reprinted in 137 F.R.D. 159, 162-63.

106. *Id.* at 165 (emphasis added to show new phrasing proposed by the bench-bar group).

107. *Id.*

108. *Id.* at 166; *cf. supra* text accompanying note 97 (discussing the procedural requirements of the 1991 proposal).

109. See 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 521; see also Randall Samborn, *Key Panel Votes Shift in Rule 11*, NAT'L L.J., July 6, 1992, at 13.

110. See JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 11, at 46 (July 1992) [hereinafter PROPOSED AMENDMENT]; see also Samborn, *supra* note 109, at 13.

111. See Tobias, *Proposed*, *supra* note 1, at 1778; see also 28 U.S.C. § 2074 (1988); JUDICIAL CONFERENCE OF THE U.S., AMENDMENT OF PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 134 F.R.D. 315 (1991).

F. Supreme Court Review

The United States Supreme Court reviewed the proposed amendment of Rule 11 as one component of a very ambitious package of rule revisions that the Standing Committee submitted in the autumn of 1992, and the Court transmitted the Rule 11 amendment unchanged to Congress on April 22, 1993.¹¹² Justice Byron White, who retired at the end of the Court's 1992 Term, authored a revealing statement that accompanied the proposed amendment which admonished the bench, bar, Congress, and the public that the Court plays an extremely limited role in rule revision.¹¹³ Indeed, the transmittal letter that attended the set of revisions included an even more telling disclaimer: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."¹¹⁴ Justice Antonin Scalia, joined by Justice Clarence Thomas, wrote a stinging dissent to transmittal of the Rule 11 proposal.¹¹⁵ This Rule 11 dissent is important and warrants elaboration.

Justice Scalia dissented from the Court's transmittal of the Rule 11 amendment because he believed that the amendment would "eliminate a significant and necessary deterrent to frivolous litigation."¹¹⁶ He contended that the proposal would render Rule 11 toothless by granting courts the discretion to impose sanctions, by disfavoring reimbursement for the expenses of litigation, and by prescribing a safe harbor whereby litigants accused of Rule 11 violations could escape sanctions.¹¹⁷

Justice Scalia criticized the safe harbor provision of the proposal because it was more solicitous of the attorneys and parties who abuse the litigation process than of those who are the subjects of that abuse, namely judges and opposing parties.¹¹⁸ He argued that the revision would enable litigants "to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose," as the safe harbor provision would permit them to withdraw the challenged papers upon notification.¹¹⁹

Justice Scalia also objected to making sanctions discretionary, because of his belief that courts would be reluctant to impose punishment unless their duties required it.¹²⁰ Moreover, he suggested that judges fail to appreciate the systemic advantages of levying serious sanctions, even though they are

112. See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, reprinted in 146 F.R.D. 402 (1993) [hereinafter 1993 AMENDMENTS].

113. See *id.* at 501-06 (Statement of Justice White).

114. See *id.* at 403 (Transmittal Letter).

115. See *id.* at 507-10 (Dissenting Statement of Justice Scalia).

116. *Id.* at 507.

117. *Id.* at 507-08.

118. *Id.* at 508.

119. *Id.*

120. *Id.*

acutely sensitive to the time that consideration and application of Rule 11 consumes in individual cases.¹²¹

Justice Scalia further criticized the proposed amendment's restriction on sanctioning for compensatory purposes because the restriction would reduce "the likelihood that frivolousness will even be *challenged*."¹²² He offered several examples of limitations included in the proposal which would have the effect of decreasing the incentives of those best situated to invoke the Rule and thereby alert judges to the perversion of the litigation process.¹²³

Justice Scalia observed that he would not have dissented had there been persuasive indication that the existing Rule 11 scheme was inefficacious or was fostering too much satellite litigation. The dissent neglected to mention, however, that the Rule's relative ineffectiveness in thwarting frivolous suits and its encouragement of satellite litigation were two of the very reasons on which the Advisory Committee relied in deciding to propose the amendment to Rule 11.¹²⁴ Moreover, Justice Scalia invoked the responses to the FJC survey for the proposition that there seemed to be general agreement that the 1983 Rule essentially worked. Those responses did indicate that trial judges who confront litigation abuse on a daily basis overwhelmingly favored Rule 11, and this convinced Justice Scalia that the 1983 version of Rule 11 should not be gutted as the proposed amendment envisioned.¹²⁵

Justice Scalia only selectively referred to the FJC survey results, however, neglecting the responses which showed that eighty percent of the judges believe that groundless litigation is a minor problem and that numerous other tools are more effective than Rule 11 in combatting it.¹²⁶ Moreover, had district court judges been as enamored with the 1983 Rule as Justice Scalia suggested, they probably could have orchestrated its retention, because each of the rule revision entities accords great respect to the views of those judges.¹²⁷

G. Congressional Review

Over the last two decades, Congress has evidenced an increased willingness to intercept proposed rule changes governing evidence and criminal, civil, and appellate procedures, even though Congress has frequently deferred to the

121. *Id.*

122. *Id.* at 508-09 (emphasis in original).

123. *Id.* at 509. For example, Justice Scalia asserted that fee-shifting would rarely occur because it must be warranted for effective deterrence. *Id.*

124. *See supra* note 24 and accompanying text; text following note 58; notes 62, 67, 69 and accompanying text.

125. 1993 AMENDMENTS, *supra* note 112, reprinted in 146 F.R.D. 402, 509-10 (Dissenting Statement of Justice Scalia).

126. *See supra* note 53 and accompanying text.

127. *See* John Frank, Rule 11-The Need to Start Over (May 1, 1992) (unpublished manuscript, copy on file with author); *see also* Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should be Litigators*, NAT'L L.J., Aug. 27, 1992; *supra* text accompanying note 60.

entities below it in the rule revision hierarchy.¹²⁸ In June of 1993, the judiciary subcommittee in the House of Representatives, which is responsible for oversight of the rule amendment process, held a hearing on the package of proposals that the Supreme Court had transmitted, and in July its Senate counterpart conducted a similar session.¹²⁹ Few witnesses testified against the proposed revision of Rule 11; however, many witnesses expressed vociferous opposition to an automatic disclosure proposal included in the package of amendments. On July 30, 1993, Representative William Hughes (D-NJ), chair of the House subcommittee, introduced legislation which would have deleted the automatic disclosure requirement, but that measure stalled in the Senate.¹³⁰ Senator Hank Brown (R-CO) and several members of the House of Representatives introduced legislation which would have suspended the effective date of Rule 11 for one year and, therefore, would have left the 1983 version of Rule 11 intact until then. However, neither judiciary subcommittee elected to forward this bill to the full committee.¹³¹ The congressional failure to act on the Rule 11 revision meant that it became effective on December 1, 1993.¹³² Thus, this congressional inaction relating to the proposed amendment of Rule 11, permitted the new Rule to take effect exactly one decade after the 1983 revision took effect, a revision which proved to be the most controversial in the history of the Federal Rules.

III. ANALYSIS AND SUGGESTIONS FOR IMPLEMENTATION OF NEW RULE 11

A. Introduction

1. A Word About Certain Realities of Rule Revision and the Implementation of Amendments

It is important to evaluate and to make recommendations for implementing the new Rule because many difficulties that the 1983 version posed were attributable more to judicial enforcement and to lawyers' and litigants' invocation of the provision than to its actual phrasing. Nevertheless, few rule revisions, particularly revisions which attempt to remedy problems as complex as those that the revisers sought to rectify when they amended Rule 11 in 1983, and as vexing as the complications presented by that version's

128. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982); see also Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961 (1991); Tobias, *supra* note 3, at 293, 337-40. See generally Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (discussing judicial power and roles in rule reform).

129. The material in this sentence and the next is premised on conversations with numerous witnesses who testified at the two hearings.

130. See H.R. 2814, 103d Cong., 1st Sess. (1993); see also Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40.

131. See S. 1382, 103d Cong., 1st Sess. (1993); H.R. 2979, 103d Cong., 1st Sess. (1993).

132. See *supra* note 111 and accompanying text.

effectuation, can perfectly address all of these difficulties.¹³³ These assertions are true even when the Rule revisers craft amendments as carefully as the drafters of the 1993 revision of Rule 11 did.¹³⁴

There will be a certain amount of slippage between the purposes which the revision entities meant to achieve, insofar as courts can accurately discern their intent,¹³⁵ and how judges actually implement the 1993 amendment. A few novel techniques, such as safe harbors, could pose problems, because, for example, practitioners and parties may choose to employ these techniques improperly for strategic benefit, and courts cannot easily detect such activity. Other ideas or terms included in the 1993 amendment, such as “nonfrivolous,” are ambiguous, and judges could afford them multiple and/or subjective interpretations. Still additional notions or terminology, such as “reasonableness” or “appropriate sanctions,” will resist consistent application, as they are the clearest or most specific phrasing which can accommodate a wide range of factual circumstances. Some pragmatic realities, therefore, apparently required that the revisers place their trust in judicial discretion when effectuating the new Rule and perhaps in attorneys’ and litigants’ good faith and common sense when invoking it.

In short, certain complications similar to the problems experienced with the 1983 revision, as well as new, unpredictable difficulties, could attend the implementation of the 1993 Rule. Nonetheless, some guidance may remedy or ameliorate a number of these complications, and it is important to attempt to minimize them. The remainder of this Article therefore analyzes and offers suggestions for effectuating the new Rule. These recommendations are primarily meant to assist judges who will be applying and construing the 1993 amendment. Much guidance is also intended to help counsel and parties comply with the revision while persuading them to exercise restraint when employing it.

2. Generic Concepts Relating to Rule Violations

Two issues warrant brief treatment here, although they are extensively examined below in suggesting different approaches for applying the Rule’s

133. See Tobias, *Rule 11*, *supra* note 1, at 513-26 (suggesting that civil rights plaintiffs’ difficulties with the 1983 version were attributable more to application); Tobias, *supra* note 3, at 335 (including similar assertions regarding public interest litigants and Rule 11 as well as other federal rules); see generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (noting the difficulty of drafting and applying precise rules).

134. See, e.g., Carl Tobias, *Rule Revision Roundelay*, 1992 WIS. L. REV. 236; Tobias, *Reconsidering*, *supra* note 1, at 892-93.

135. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-99, 508 (1986) (acknowledging restrictions that impaired the attempt to record the intent of the drafters of the 1938 Rules); Tobias, *Reconsidering*, *supra* note 1, at 857-97 (attempting to document revisers’ intent by attending the Advisory Committee meeting at which the Committee formulated the May, 1991 proposal); cf. *id.* at 857 n.2 (acknowledging restrictions that impair attempts to record drafters’ intent).

specific components.¹³⁶ One issue involves the relative weight that judges should accord to the reasonableness of prefilings inquiries (conduct) on the one hand and to the sufficiency of legal contentions or factual assertions in papers (product) on the other. The new Rule's text is silent on this particular question, but it does impose requirements pertaining to both conduct and product. The text provides that prefilings inquiries be reasonable under the circumstances, and this implicates certain factors, such as resources and access to information, which are important to the second issue discussed below. Moreover, the revisers expressly decided to retain the inquiries and the stop-and-think duties, so that courts ought to assign prefilings inquiries considerable significance.¹³⁷ The precise value that judges should attach will depend on how seriously and why unrepresented parties or practitioners have contravened particular constituents of the 1993 Rule and how well they have satisfied the remaining components. In short, courts should perform finely calibrated assessments when considering the new Rule's discrete parts.¹³⁸

The second general issue relates to resource-deficient litigants, such as many civil rights plaintiffs, and to their lawyers as well as to certain inherent characteristics of the cases that they pursue.¹³⁹ For example, civil rights plaintiffs and attorneys, in comparison to their adversaries, which are often governmental units or in-house counsel, have little access to relevant information and possess limited resources for conducting factual investigations, assembling, analyzing, and synthesizing material, performing legal

136. The new Rule provides in pertinent part:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b), *reprinted in* 146 F.R.D. at 420-21.

137. *See infra* notes 143, 153 and accompanying text. It is important to emphasize that the new Rule retains the requirement that prefilings inquiries be reasonable under the circumstances, which include factors such as resources, access to information, and time. *See* FED. R. CIV. P. 11(b), *reprinted in* 146 F.R.D. at 420-21; *cf.* *Bradgate Assocs. v. Fellows, Read & Assocs.*, 999 F.2d 745, 751-53 (3d Cir. 1993) (providing a helpful recent example of a case in which the 1983 version was applied).

138. *See, e.g., infra* notes 161-63, 186-92 and accompanying text; *cf.* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 587 (suggesting that judges consider factors relating to product and conduct and perform similar assessments when choosing appropriate sanctions).

139. In the remainder of this part, I substantially rely on Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 457-59 (1992), and Tobias, *Rule 11*, *supra* note 1, at 495-98. *See also* Yamamoto, *supra* note 1. This treatment is necessarily general and is meant to familiarize readers with some features of civil rights litigation that can make Rule 11's application problematic for those bringing such suits. Greater specificity will attend suggestions for implementing each part of the 1993 version of Rule 11. *See infra* part III.B.

research, and drafting papers.¹⁴⁰ Civil rights suits, in contrast to private, two-party actions, correspondingly involve public issues and large numbers of individuals and entities.¹⁴¹

The intrinsic nature of civil rights actions, and the restraints under which numerous civil rights plaintiffs and attorneys labor, can cause these individuals to appear to be in violation of Rule 11. These ideas apply to Rule 11's provisions governing legal certification. For instance, a significant number of civil rights cases assert novel or relatively untested legal theories, which are at the cutting edge of the law. This means that civil rights lawyers can experience considerable difficulty formulating and supporting those theories and that they often need discovery to make their theories more precise. Moreover, these theories, once conceptualized, frequently look rather nontraditional and perhaps even unreasonable. These factors may cause the legal contentions presented and the inquiries that preceded them to seem violative of Rule 11's requirements.¹⁴²

These inherent characteristics and restrictions can concomitantly make civil rights plaintiffs and attorneys appear to contravene the factual certification requirement of Rule 11. Such litigants may not be aware of information significant to their cases or understand the importance of data that are relevant to stating their causes of action. The parties rarely possess, or have access to, material substantiating their suits because this material is in the defendants' minds or records. Even when the information is available, many civil rights plaintiffs have insufficient time and money to gather and evaluate it. These factors can cause the plaintiffs' factual investigations and their factual assertions to look deficient.

140. Individual plaintiffs may be comparatively impecunious and have little access to pertinent information. Numerous civil rights attorneys are specialized solo practitioners who rely substantially on fee-shifting and contingency fees. These attorneys may have cash flow problems and difficulties in diversifying litigation risks and handling large upfront expenses. See Tobias, *supra* note 139, at 457-59. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (asserting the unique economic position of the plaintiff's attorney when private litigants enforce substantive law). Valuable recent research also indicates that a large number of individuals who have clearly suffered discrimination are reluctant to vindicate their rights through litigation because these persons distrust the legal system or fear that they will lose even more by suing. See, e.g., KRISTEN BUMILLER, *THE CIVIL RIGHTS SOCIETY* (1988).

141. For instance, in civil rights cases, many persons may attempt to give meaning to general constitutional or statutory commands by showing that governmental employees participated in discriminatory practices over a long period and by seeking to enjoin future, similar behavior. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (contrasting the salient characteristics of private and public law litigation, of which civil rights litigation comprises a major subset).

142. To a lesser extent, the restraints that hamper those bringing civil rights actions can leave the impression that they failed to satisfy the legal certification requirements of Rule 11. For example, the plaintiff's lack of resources and access to information can make their legal research seem truncated and their legal theories unrefined. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cuhady, J., dissenting) (recognizing resource restraints), *cert. dismissed*, 485 U.S. 901 (1988); *Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting) (recognizing time restraints).

In short, the intrinsic nature of considerable civil rights litigation and the restraints which impede many civil rights plaintiffs and practitioners may make their efforts to comply with Rule 11's strictures covering pre-filing inquiries and legal and factual certifications seem inadequate. These inherent characteristics, particularly the parties' and attorneys' lack of money, time, power, and access to information involving their cases, also explain why these litigants and their counsel may be risk averse and why Rule 11's invocation might chill their efforts.

B. Evaluation and Recommendations Regarding Implementation of New Rule 11

1. Representations to Court

The 1993 Rule retains the 1983 provision's requirements that lawyers and unrepresented parties (1) perform reasonable legal inquiries and factual investigations before presenting papers to courts, (2) submit documents which have legal and factual support, and (3) not tender the papers for improper purposes. Judge Pointer observed that the Rule's text keeps the "basic requirement for pre-filing investigation" while remarking that the Advisory Committee Note clearly states that "pleading on information and belief must be preceded by an inquiry reasonable under the circumstances."¹⁴³ Nevertheless, the new Rule substantially alters some particulars of the 1983 amendment which govern representations made to the court.

a. Continuing Duty

One very significant component of the Advisory Committee's 1991 preliminary draft was its imposition of a continuing duty, which commanded attorneys and pro se litigants to withdraw any "claim, defense, request, demand, objection, contention, or argument in a pleading, written motion or other paper" as soon as it became insupportable.¹⁴⁴ Compliance with this responsibility would have been overly burdensome for numerous counsel and parties, especially those possessing limited resources or pursuing relatively nontraditional suits or close cases. For instance, the obligation parsed the concept of a paper too finely, rather than treating papers as a whole.¹⁴⁵ The duty concomitantly required that practitioners and litigants identify and meticulously follow every allegation included in their papers throughout

143. 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 524; see also FED. R. CIV. P. 11(b), reprinted in 146 F.R.D. at 420-21; FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 584-86.

144. PRELIMINARY DRAFT, *supra* note 89, at 75.

145. A number of courts had subscribed to the "paper as a whole" approach. See, e.g., *Burull v. First Nat'l Bank*, 831 F.2d 788, 789-90 (8th Cir. 1987), cert. denied, 485 U.S. 961 (1988); *Brown v. Federation of State Medical Bds. of the United States*, 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). But see *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362-65 (9th Cir. 1990).

particular cases so that they could promptly withdraw each assertion once it lost its merit.¹⁴⁶

The new Rule significantly changes the continuing obligation included in the 1991 preliminary draft, which applied to attorneys and unrepresented parties who continued championing a position in a paper after ascertaining through discovery or otherwise that it was untenable.¹⁴⁷ The Advisory Committee characterized as “well-taken” the criticism that the 1991 proposal “might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed [papers].”¹⁴⁸ The Committee responded by making “several modifications to the published language of the text,” principally by imposing the duty only on an individual “who ‘pursues’ a previously filed paper.”¹⁴⁹

The 1993 version of Rule 11 also modifies the Advisory Committee’s 1991 preliminary draft by defining the idea of a paper more broadly. The new Rule’s text replaces the narrow words “claim, defense, request, demand, objection, contention, or argument” with the phrase “pleading, written motion, or other paper.”¹⁵⁰ The Advisory Committee Note correspondingly admonishes lawyers and litigants not to file or threaten to file motions for sanctions for “minor, inconsequential violations of the standards prescribed [in Rule 11(b)] . . . or to test the legal sufficiency or efficacy of allegations in the pleadings.”¹⁵¹

Judge Pointer’s letter transmitting these alterations to the Standing Committee confirms the Advisory Committee’s intent that judges, attorneys, and parties treat the notion of a paper more expansively:

[T]he language of the [May, 1991] draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a “claim, defense, request, demand, objection, contention, or argument” and

146. These problems may explain why numerous federal appellate courts refused to impose a continuing duty. Compare *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1201 (7th Cir. 1990) (holding that there is no continuing duty) and *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc) (holding that there is no continuing duty) with *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 393 (1st Cir.) (holding that there is a continuing duty), *cert. denied*, 498 U.S. 891 (1990). Cf. *Tobias*, *supra* note 139, at 442 n.65 (providing additional primary authority).

147. Compare PRELIMINARY DRAFT, *supra* note 89, at 75 (using the phrase “presenting or maintaining”) with FED. R. CIV. P. 11(b), *reprinted in* 146 F.R.D. at 420-21 (using the phrase “presenting by . . . later advocating”). The duties include not “insisting upon a position after it is no longer tenable” and “reaffirming to the court and advocating positions in [papers] after learning that they cease to have any merit.” FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 585. Judge Pointer’s 1992 Letter confirms these ideas. 1992 Pointer Letter, *supra* note 36, *reprinted in* 146 F.R.D. 519, 523. Although Judge Pointer made this statement before the Standing Committee drafted its final proposal, the statement appears reliable, because the Standing Committee changed none of its substance. This is true whenever the Article cites to Judge Pointer’s 1992 Letter in support of specific propositions.

148. 1992 Pointer Letter, *supra* note 36, *reprinted in* 146 F.R.D. 519, 523.

149. *Id.*; see also *supra* note 147.

150. See FED. R. CIV. P. 11(b), *reprinted in* 146 F.R.D. at 420-21; see also PRELIMINARY DRAFT, *supra* note 89, at 75.

151. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 590.

has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared—or threatened—for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the “safe harbor” provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.¹⁵²

Although the Advisory Committee apparently desired the concept of a paper to be read more broadly, it also rejected the very expansive “paper as a whole” approach. In response to several comments urging adoption of this approach, Judge Pointer stated that the Advisory Committee continued to believe that the “stop-and-think” duties should apply to each assertion or allegation, not merely to a majority of them.¹⁵³ Moreover, the Standing Committee voted nine to three against incorporating the “paper as a whole” idea.¹⁵⁴ In short, the best indicators of the revisers’ intent on the issue of how finely the concept of a paper should be parsed are apparently in the new Rule’s text and the Advisory Committee Note as elaborated by Judge Pointer’s May, 1992 letter.

Therefore, courts asked to find that lawyers or pro se litigants have contravened the 1993 Rule’s continuing duty should do so only when such lawyers or litigants persist in advocating a position after learning that it is invalid. Judges should also remember that they can treat egregious conduct which occurs after parties initially file their claims by employing other Federal Rules, such as the sanctions provisions in Rules 26 and 37, measures in the United States Code (namely Section 1927 of Title 28), civil contempt, and their inherent judicial authority.¹⁵⁵

It is difficult to delineate with precision how finely the concept of a paper should be parsed under the new Rule. The revisers clearly instruct lawyers and litigants that they must not threaten or prepare Rule 11 motions for “minor, inconsequential violations” or violations based upon a “detailed parsing” of papers, and the revisers expressly inform courts that they should not entertain “motions directed at insignificant aspects” of papers.¹⁵⁶ Moreover, the Rule revisers replaced the 1991 preliminary draft’s broad textual phrase “a pleading, written motion, or other paper” with the particularized reference to a “claim, defense, request, demand, objection, contention, or argument.”¹⁵⁷ Nevertheless, the revisers did retain several constituents of the refined litany in the same subsection of the new Rule, while they

152. 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 524.

153. *Id.*

154. Memorandum of John Frank, Esq., Lewis & Roca, Phoenix, Ariz. (June 19, 1992) (copy on file with author); see also *supra* notes 145-46 and accompanying text.

155. See Tobias, *Reconsidering*, *supra* note 1, at 869, 900 (discussing this proposition and discussing citations to primary sources); Tobias, *Rule 11*, *supra* note 1, at 514 (discussing the proposing and providing citations to primary sources); cf. FED. R. CIV. P. 11(d), reprinted in 146 F.R.D. at 423-24 (observing that new Rule 11 is inapplicable to discovery).

156. See 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 524; see also *supra* note 151 and accompanying text.

157. See *supra* note 150 and accompanying text.

explicitly observed that the “stop-and-think” duties apply to every allegation and assertion and specifically rejected the “paper as a whole approach.”¹⁵⁸ The revisers, therefore, are apparently requiring attorneys and unrepresented parties to undertake reasonable prefiling inquiries as to each allegation and assertion in a paper. The revisers also suggest, however, that the Rule applies neither to unimportant violations of this obligation or of the responsibility to present legally and factually sufficient papers nor to alleged deficiencies involving insignificant portions of papers.¹⁵⁹

There are several possible responses to the difficulty inherent in assigning the optimal specificity to the notion of a paper for purposes of triggering Rule 11. The preferable approach would employ a finely calibrated assessment which considers the challenged misbehavior’s severity, defined more particularly in terms of the prefiling inquiry’s unreasonableness, and the questioned paper’s deficiency, defined more specifically in terms of the insufficiency of its legal contentions or the inadequacy of evidentiary support for its factual allegations.¹⁶⁰

The relative gravity of the misconduct in performing the prefiling inquiry and the comparative insufficiency of the legal or factual material in the paper should be the principal components of most analyses, although quantitative measures will occasionally be important. An extremely careless prefiling inquiry, the presentation of a paper with one crucial, highly deficient legal contention, or a paper containing several material factual allegations that lack much evidentiary substantiation, therefore, might be treated as significant violations which should activate Rule 11.

More specific examples clarify these suggestions for implementation. For instance, if a civil rights lawyer with two years to file expended little time researching the law and submitted a complaint that included a legal theory central to the case which clearly conflicted with a settled, unanimous Supreme Court holding, this prefiling inquiry and the legal contention could trigger Rule 11.¹⁶¹ In contrast, if an attorney, contacted by a person injured in an automobile accident two days before the expiration of the statute of limitations, then filed a complaint claiming that the collision occurred at Third and Pine when it actually happened at Third and Spruce, this factual assertion should be treated as an “insignificant [allegation] of a complaint.”¹⁶² The

158. See FED. R. CIV. P. 11(b)(2), reprinted in 146 F.R.D. at 420-21 (using the phrase “claims, defenses, and other legal contentions”); see also *supra* text accompanying notes 153-54 (discussing “stop-and-think” duties and rejection of the “paper as a whole” concept).

159. This is my best effort to harmonize the revisers’ pronouncements in this area. My attempt is not intended as a criticism of the revisers’ diligent, careful efforts, which may even appear inconsistent, but is instead meant to recognize the task’s difficulty.

160. This is an effort to consider, and assign relative weight to, both the reasonableness of the prefiling inquiry (conduct) and the sufficiency of the papers (product). These concepts are elaborated at *supra* text accompanying notes 137-38, and *infra* text accompanying notes 187-93.

161. Time is only one relevant factor and may be overemphasized in this example and the two that follow. Numerous other factors, such as the lawyers’ and litigants’ resources, good faith, and effort, may also be relevant. Moreover, the three examples provided in the text are obviously not exhaustive.

162. 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 524. I am indebted to John Frank, Esq., Lewis & Roca, Phoenix, Ariz., for the textual example. That illustration expressly emphasizes the qualitative insignificance of the factual assertion but implicitly involves the limited time available to conduct the prefiling investigation.

calculus in the second illustration would change considerably if the client had hired the lawyer twenty months earlier, but the attorney had undertaken only a rather limited factual investigation and submitted a complaint which included a substantial number of factual errors. In short, just as one egregious violation or multiple, relatively serious infractions of Rule 11's requirements governing the reasonableness of prefiling inquiries or of the legal and factual adequacy of papers can activate the new Rule, so might numerous comparatively insignificant violations.

b. Certification Respecting Law

The critical change included in the 1993 amendment of Rule 11 regarding the sufficiency of the legal certification is the requirement that attorneys and unrepresented parties present papers which are warranted by a nonfrivolous, rather than a good faith, "argument for the extension, modification or reversal of existing law or the establishment of new law."¹⁶³ One of the major complications attending this change in wording is that the "good faith" terminology had acquired certain meaning with which judges, lawyers, and litigants were familiar. Practitioners and parties could readily conform to this "good faith" standard and show that they had complied, while courts could easily enforce the requirement.¹⁶⁴

Many judges had correspondingly experienced problems interpreting and applying the term "frivolous" in the context of the 1983 version.¹⁶⁵ Numerous courts encountered difficulty defining the term, articulating consistent standards for identifying it, and providing clear guidance to counsel and litigants, partly because the legal contentions that attorneys and parties present in individual cases differ significantly.¹⁶⁶ In determining whether papers were frivolous, a number of judges overemphasized the quality of the papers or the merits of their legal arguments or the litigation (product), as contrasted with the reasonableness of prefiling inquiries (conduct).¹⁶⁷ This

163. FED. R. CIV. P. 11(b)(2), *reprinted in* 146 F.R.D. at 420-21. The new Rule, like the 1983 version, initially mandates that papers be warranted by existing law. *See id.*; FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 167-68.

164. Several Advisory Committee members voiced these concerns during the 1991 meeting. *See* Tobias, *Reconsidering*, *supra* note 1, at 871 n.90.

165. *See, e.g.*, ViON Corp. v. United States, 906 F.2d 1564, 1566 (Fed. Cir. 1990); Romero v. City of Pomona, 883 F.2d 1418, 1429 (9th Cir. 1989). Courts read "frivolousness" into, and even in the teeth of, the 1983 Rule, which does not even actually use the term. *See* FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 167-68; *see also* Burbank, *supra* note 5, at 1933-34, 1941-42.

166. *See* BURBANK, *supra* note 26, at 20-21; Tobias, *supra* note 71, at 226.

167. *See, e.g.*, Gutierrez v. City of Hialeah, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989). Even rather clear opinions emphasized the papers or the merits. *See, e.g.*, Alia v. Michigan Sup. Ct., 906 F.2d 1100, 1103 (6th Cir. 1990) (Wellford, J., dissenting); Davis v. Carl, 906 F.2d 538 (11th Cir. 1990). Conduct and product are relevant. Nonetheless, judges who unduly emphasize product could permit their views of the papers or the merits to affect their frivolousness determination. *See, e.g.*, Healey v. Chelsea Resources, 947 F.2d 611, 623 (2d Cir. 1991) (recognizing this possibility); *see also infra* notes 183-86 and accompanying text. The Supreme Court has cautioned against equating loss on the merits with frivolousness. *See* Nietzsche v. Williams, 490 U.S. 319, 329 (1989); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978); *see also infra* notes 175-76 and accompanying text. It may be preferable

last problem implicates the closely related question of whether, and if so, precisely how much, a reasonable prefiling inquiry ameliorates a legal argument that a court specifically finds to be frivolous. The Rule revisers offer little guidance for resolving these issues, although the Advisory Committee Note affords some indication of the revisers' thinking.¹⁶⁸

The problems of defining and applying the term "frivolous" remain, even though at least one court has asserted that the word has an "established legal meaning in various contexts."¹⁶⁹ When interpreting the 1983 version of Rule 11, judges formulated numerous articulations of the term, which ranged across a broad spectrum. Some courts strictly defined the concept, finding a "legally unreasonable filing to be frivolous."¹⁷⁰ A similar number of courts leniently defined the term, stating that only legal contentions which are "baseless,"¹⁷¹ "meritless,"¹⁷² or have "no chance of success"¹⁷³ can be frivolous. Most courts employed a rather moderate definition, holding that a complaint which was not "well-grounded in law" could be sanctioned as frivolous.¹⁷⁴

Courts have propounded additional definitions in contexts other than, but closely related to, Rule 11. For example, judges have characterized as "frivolous" claims which were "not colorable" or were "without arguable merit" in deciding whether to shift attorney fees against losing plaintiffs who pursued cases under statutes prescribing fee-shifting to prevailing parties.¹⁷⁵ In the context of determining whether a plaintiff could proceed *in forma pauperis*, the United States Supreme Court has similarly defined a frivolous

for courts to accord prefiling inquiries enhanced weight. See Tobias, *supra* note 27, at 108; see also Burbank, *supra* note 5, at 1933-34, 1941-42. But see Vairo, *supra* note 2, at 497.

168. Virtually all of the relevant guidance given by the revisers pertains to the issue in the sentence to which this note is appended and therefore is treated below. See *infra* notes 187-93 and accompanying text.

169. See *ViON Corp. v. United States*, 906 F.2d 1564, 1566 (Fed. Cir. 1990).

170. See, e.g., *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985), *on remand*, 637 F.Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, 484 U.S. 918 (1987). As used in this Article, the term "strict" denotes a low standard, that is, one that is easily violated.

171. See, e.g., *Townsend v. Holman Consulting*, 914 F.2d 1136, 1140 (9th Cir. 1990); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (stating that Rule 11's central purpose is to deter baseless filing). I use the term "lenient" to mean a high standard, one that is difficult to violate.

172. See, e.g., *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1555-57 (11th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1274-75 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

173. See, e.g., *Mareno v. Rowe*, 910 F.2d 1043, 1045 (2d Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Cross & Cross Proprties v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989); *Oliveri*, 803 F.2d at 1275.

174. See, e.g., *In re Kunstler*, 914 F.2d 505, 516 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

175. See, e.g., *Hawaiian Engraving v. Fujikami*, 947 F.2d 949 (9th Cir. 1991); *Geshwind v. Garrick*, 738 F. Supp. 792, 794 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 594 (2d Cir.), *cert. denied*, 112 S. Ct. 58 (1991); see also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). This articulation could have special applicability to the new Rule and to civil rights plaintiffs because it is derived from the *Christiansburg Garment* opinion. See also *infra* note 245 and accompanying text. The difficulty with *Christiansburg Garment* is that it speaks in terms of vexatiousness, meritlessness, frivolousness, and unreasonableness. *Christiansburg Garment*, 434 U.S. at 421-22. But *cf. Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (holding that, in order to shift fees, plaintiff's action must be meritless in the sense that it is groundless or without foundation).

complaint as one in which “[none] of the legal points [are] arguable on their merits.”¹⁷⁶ Judges have also described frivolous appeals as those in which the arguments were wholly without merit or those in which the results were obvious¹⁷⁷ or were “foreordained by the lack of substance of appellant’s arguments”¹⁷⁸ in deciding whether to shift fees.

In short, in determining what “frivolous,” as used in the 1993 Rule 11 amendment should mean, courts could employ all of these definitions, but none has compelling applicability. For instance, the definitions which judges formulated in the context of the 1983 Rule might seem most relevant; however, it is important to remember that the drafters of the 1983 amendment and of the 1993 revision had different purposes when amending the respective rules. Moreover, courts interpreting the term “frivolous” in connection with the 1983 Rule enunciated multiple articulations, which encompassed a wide spectrum in terms of stringency. Furthermore, most of the definitions apparently drew on other concepts in the 1983 version or have considerable potential for inconsistent or subjective application. Similarly, the definitions articulated by the United States Supreme Court in the *Christiansburg Garment* line of cases might appear particularly relevant because the Advisory Committee Note expressly refers to the *Christiansburg Garment* opinion.¹⁷⁹ Nonetheless, the numerous ways that judges defined “frivolous” in those cases, especially in terms of stringency, and the peculiar context in which courts decided these cases undermine the efficacy of these pronouncements.¹⁸⁰

In the final analysis, these definitional sources are not dispositive, and no single definition appears preferable. Indeed, one court acknowledged and championed the lack of a bright-line test for frivolousness, given the need for an “intensely fact-bound inquiry.”¹⁸¹ It is appropriate, therefore, to draw selectively on the definitions examined above and the general policies that underlie the 1993 amendment. The most important general objective that courts should keep in mind when determining the meaning of the term

176. See *Nietzke v. Williams*, 490 U.S. 319, 325 (1989) (alterations in original) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)); cf. *Watson v. Caton*, 984 F.2d 537, 539 (1st Cir. 1993) (finding that an “indisputably meritless legal theory” was frivolous); see also *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992) (holding that a factually frivolous claim must be “clearly baseless,” “fanciful,” “fantastic,” or “delusional”).

177. See *Kale v. Combined Ins. Co.*, 861 F.2d 746, 761 (1st Cir. 1988); see also *Hays v. Sony Corp.*, 847 F.2d 412, 417 (7th Cir. 1988).

178. *White v. General Motors Corp.*, 1 F.3d 593, 595 (7th Cir. 1993) (quoting *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) (en banc)); accord *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985), cert. denied, 493 U.S. 818 (1989).

179. See FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 588; see also *infra* note 245 and accompanying text.

180. See *supra* note 175 and accompanying text. For instance, the judges in these cases rarely considered a single legal contention and instead employed a special double standard for shifting fees between plaintiffs and defendants. Courts correspondingly enunciated four articulations of the standard for shifting fees, only one of which was frivolousness. See also *infra* note 245 and accompanying text.

181. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1142 (9th Cir. 1990). Numerous other courts stated that the 1983 version of Rule 11 required a fact-intensive or fact-bound inquiry. See, e.g., *Mars Steel Corp.*, 880 F.2d at 933; *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 873 (5th Cir. 1988).

“frivolous,” as used in the 1993 amendment, is the revisers’ clear intent to reduce significantly the new Rule’s invocation, particularly by discouraging motions premised on insignificant violations and by limiting technical judicial application.¹⁸²

One way of defining the term “frivolous” as it is used in the 1993 version of Rule 11 is to delineate what it is not. For example, the mere absence of precedent, the failure to prevail on the merits of a specific legal contention or in the entire litigation, or the presentation of an unreasonable legal argument must never alone justify a finding of frivolousness. Another way in which to define the term is to afford affirmative articulations. For instance, “frivolous” should connote that the legal contention is utterly implausible, lacks any arguable basis, is characterized by egregiousness or abuse, or is at least meritless or groundless.¹⁸³ It would also be helpful for judges to keep in mind those cases such as *Brown v. Board of Education*¹⁸⁴ and *Greenman v. Yuba Power Products*¹⁸⁵ which successfully vindicated legal theories that had little support in the law when they were employed and which courts could well have deemed to be frivolous.¹⁸⁶

When judges do ascertain that legal contentions are frivolous, the courts must then decide whether and, if so, to what extent substantially reasonable prefilig inquiries mitigate these determinations. The revisers provided rather minimal guidance to courts which must treat this question, but the Advisory Committee Note includes considerable pertinent material.

In the Advisory Committee Note, the revisers admonish that use of the term “nonfrivolous” “establishes an objective standard, intended to eliminate any ‘empty-head pure-heart’ justification for patently frivolous arguments.”¹⁸⁷ The Note also instructs that it is important to stress, and judges should

182. See, e.g., *supra* notes 147-52 and accompanying text.

183. Many courts have espoused these and similar articulations. See, e.g., cases cited *supra* notes 171-78 and accompanying text. Numerous arguments support reliance on something more than simple negligence or losing in defining and applying the term “frivolous.” See, e.g., NEW YORK STATE BAR ASS’N, REPORT OF THE SPECIAL COMMITTEE TO CONSIDER SANCTIONS FOR FRIVOLOUS LITIGATION IN NEW YORK STATE COURTS (Mar. 20, 1990), reprinted in 18 FORDHAM URB. L.J. 3, 12 (1990) (observing that the “process of winning and losing takes ample care” of frivolous papers); Vairo, *supra* note 2, at 492 (including the same assertion); see also *supra* text accompanying note 182 (noting that drafters’ general goals in adopting new Rule support elevated standard).

184. 347 U.S. 483 (1954).

185. 377 P.2d 897 (Cal. 1962).

186. Judges applying the 1983 Rule have suggested similar ideas. See, e.g., *Blue v. United States Dep’t of Army*, 914 F.2d 525, 534-35 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991); *Eastway Constr. Corp. v. New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986), on remand from 762 F.2d 243 (2d Cir. 1985), modified, 821 F.2d 121 (2d Cir. 1987), cert. denied, 484 U.S. 918 (1987).

187. FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 586-87. Despite the drafters’ use of the phrase “objective standard,” the concept of frivolousness actually has great potential to be applied subjectively. Many judges applying the concept to the 1983 Rule apparently employed a subjective approach that reflected their view of the merits or the validity of the legal theories. Courts’ perspectives on the substance of the lawsuits understandably merged with their consideration of frivolousness. See *supra* note 167 and accompanying text. For instance, judges who ruled against a litigant on the merits might well consider the party’s legal contentions with disfavor for purposes of ascertaining frivolousness. I appreciate that the drafters may have been using the term “subjective” differently to mean, for example, from the sanction target’s perspective.

remember, that "patently frivolous arguments" are much worse than merely frivolous ones. The drafters could be suggesting that courts which find contentions to be less than patently frivolous should consider the reasonableness of prefiling inquiries relevant to the frivolousness determination. Indeed, in the Note's next sentence, the revisers' emphasis on conduct sharply undercuts the significance that the "empty-head" quotation might have accorded the product approach: "However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated."¹⁸⁸ This allusion to the second paragraph of Rule 11 underscores the importance of conduct, because that paragraph includes the nonfrivolous requirement, *not* the prefiling inquiry stricture.¹⁸⁹ The drafters seem to be saying, therefore, that the reasonableness of the prefiling legal inquiry (conduct) has significance in ascertaining whether the legal contention (product) which the inquiry produced is frivolous. The Advisory Committee Note also instructs that Rule 11's text does not command lawyers or pro se litigants to designate specifically that they are arguing for a change in the law, even though a "contention that is so identified should be viewed with greater tolerance under the rule."¹⁹⁰

A fair reading of this material in the Advisory Committee Note evidences the revisers' intent that an "empty-head pure-heart" justification should not excuse "patently frivolous arguments," although parties might even mitigate such offensive filings by showing that they performed highly reasonable prefiling inquiries and by very forthrightly disclosing to courts that the contentions advocate legal change. When the legal arguments are less egregious than "patently frivolous," the reasonableness of the prefiling inquiries and the degree of the litigants' candor in revealing that contentions advocate changes in the law should be accorded much greater weight. How reasonable the prefiling inquiries are, how candid the parties are, and how frivolous the arguments are will obviously differ in particular circumstances, thereby complicating the advance assignment of the relative weight which should be given to these factors.

It may be preferable, accordingly, to utilize case-by-case assessments of the variables that comprise specific situations.¹⁹¹ For instance, a somewhat

188. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 587. The quotation principally speaks to conduct, although it may partly implicate product.

189. *See* FED. R. CIV. P. 11(b)(2), *reprinted in* 146 F.R.D. at 420-21.

190. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 587; *cf.* *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 127 (N.D. Cal. 1984) (articulating a duty of candor), *rev'd*, 801 F.2d 1531, 1539 (9th Cir. 1986) (stating that a duty of candor might chill advocacy). An early Rule 11 draft imposed the duty of candor only upon legal contentions, but it was subsequently omitted. *See* Tobias, *Reconsidering*, *supra* note 1, at 873 n.105; *see also infra* note 207 and accompanying text.

191. This suggested judicial treatment resembles that proposed earlier for judges considering how finely to parse papers. *See supra* notes 160-62 and accompanying text. Courts should extrapolate from the recommendations provided in the text and apply them there. *See also infra* notes 213-17 and accompanying text (suggesting similar treatment for compliance with factual certification requirements).

frivolous contention which results from an extremely careful prefilng legal inquiry combined with a frank admission to the judge that the litigant is attempting to create new law should not be considered violative of Rule 11's legal certification requirement. In contrast, barring a showing of extenuating circumstances, such as an exceptionally meticulous legal inquiry or an exceedingly candid revelation that an argument advocates a change in the law, a legal contention which a court deems patently frivolous should always be found to contravene the new Rule.¹⁹²

Finally, in making the frivolousness determination, judges should remember numerous factors that have peculiar applicability to resource-poor litigants, such as civil rights plaintiffs, and to their counsel.¹⁹³ Certain characteristics, which are intrinsic to the circumstances and cases of these parties and practitioners, can make the prefilng legal inquiries that the parties and lawyers conduct appear relatively unreasonable and the contentions which they assert seem rather frivolous. For example, many civil rights plaintiffs possess few resources and have comparatively little education, which means that they may provide limited assistance to their attorneys in developing legal theories. Many lawyers who represent civil rights plaintiffs and other litigants who lack time, money, and power also have relatively few resources. These attorneys, therefore, may possess insufficient time to research thoroughly and draft carefully, persuasive legal theories. The lawyers might not even have a network of colleagues from whom they can seek advice on the efficacy of draft pleadings. The legal theories that these lawyers incorporate in their papers can thus look rather frivolous. These theories are less traditional, are on the cutting edge of legal development, or are meant to establish new law. Furthermore, researching, articulating, and crafting such theories demands the kind of creativity which few attorneys possess.

c. Certification Respecting Factual Assertions

The new Rule 11 requires plaintiff's counsel, as well as pro se plaintiffs, to certify that any "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."¹⁹⁴ Defendant's attorneys and pro se defendants must correspondingly certify that all "denials of factual contentions are warranted on the evidence, or if

192. See *Summer v. Fuller*, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989) (providing an example of a legal contention in a civil rights case found "not patently frivolous"). These textual illustrations are obviously not exhaustive. For example, additional quantitative and qualitative factors relating to product can also be relevant. Four frivolous legal arguments, therefore, will ordinarily be worse than a single frivolous contention, although the latter could be violative if it were critical enough to the paper or sufficiently frivolous. Cf. *supra* note 161 and accompanying text.

193. This paragraph provides several examples more specifically related to the legal certification requirements. See also *supra* notes 139-42 and accompanying text.

194. FED. R. CIV. P. 11(b)(4), *reprinted in* 146 F.R.D. at 421.

specifically so identified, are reasonably based on a lack of information or belief."¹⁹⁵

The revisers, when modifying the provision in the 1983 amendment which required signers to certify that papers were "well grounded in fact,"¹⁹⁶ expressly acknowledged that parties could have plausible reasons to think that facts were either false or true yet might need discovery to collect and confirm evidentiary substantiation of these facts.¹⁹⁷ In the Advisory Committee Note, the revisers clearly stated that the alterations were an explicit effort "to equalize the burden of the rule upon plaintiffs and defendants."¹⁹⁸

Additional indicia of the reasons for the revisers' changes can be found in much of the new Rule's phrasing and in the other portions of the Advisory Committee Note. For example, the new Rule's text affords plaintiffs reasonable opportunities for both investigation and discovery, apparently recognizing the restraints involving time, money, and access to information, under which a number of litigants and their counsel, such as those pursuing civil rights cases, can operate.¹⁹⁹ The text similarly permits plaintiffs to present contentions that are only "likely to have evidentiary support,"²⁰⁰ even though the language demands that defendants submit denials which are "reasonably based on a lack of information or belief."²⁰¹

The Advisory Committee Note elaborates on the respective responsibilities that the rather cryptic text imposes on each party. According to the Note, plaintiffs need merely certify that there actually is or is likely to be evidentiary substantiation for their allegations, not that they will prevail on their contentions regarding specific facts.²⁰² The entry of summary judgment, therefore, would not necessarily mean that the plaintiff's allegations lacked any evidentiary support and that the plaintiff was thus in violation of Rule 11.²⁰³ The Note states that denials implicate somewhat different factors.²⁰⁴ The Advisory Committee allows a defendant not to admit contentions which the litigant thinks are false, if prefilng investigation yields inadequate information or leads to reasonable doubt about the credibility of the only evidence respecting the matter at issue.²⁰⁵

The Note also instructs both plaintiffs and defendants that the Rule's tolerance for pleading on information and belief when specifically identified neither relieves them from performing a reasonable factual investigation nor permits the joinder of parties or the presentation of claims or defenses

195. *Id.*

196. *See* FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 167-68.

197. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 585.

198. *Id.* at 586.

199. *See* FED. R. CIV. P. 11(b)(3), *reprinted in* 146 F.R.D. at 421; *see also supra* notes 139-40 and accompanying text.

200. *See* FED. R. CIV. P. 11(b)(3), *reprinted in* 146 F.R.D. at 421 (emphasis added).

201. *See id.* (b)(4), *reprinted in* 146 F.R.D. at 421 (emphasis added).

202. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 586.

203. *Id.*

204. *Id.*

205. *See id.*

“without any factual basis or justification.”²⁰⁶ This “duty of candor,” requiring litigants who make assertions that may lack evidentiary support to identify specifically that possibility, can be very burdensome, particularly for parties with limited access to information involving their allegations or few resources for gathering, assessing, and synthesizing that material which is accessible.²⁰⁷ When pertinent information is in the defendants’ minds or files, for example, plaintiffs will encounter great difficulty in specifically delineating contentions which are likely to be substantiated after reasonable opportunity for additional investigation or discovery, before they have had that opportunity.²⁰⁸ Even if the plaintiffs do not participate in unalloyed speculation, they would still experience problems designating those allegations which probably will have support, identifying them with sufficient particularity, and ascertaining what is a reasonable opportunity.²⁰⁹

Defendants may have somewhat similar, although less, difficulty delineating denials that are “reasonably based on a lack of information or belief” and identifying them with the requisite specificity. This is true because Rule 8 of the Federal Rules of Civil Procedure presently permits defendants “without knowledge or information sufficient to form a belief as to the truth of an averment” to so plead and also because most defendants have greater access to, and possess more resources for assembling and analyzing, material which supports their denials.²¹⁰

The new Rule 11’s duty of candor could well embroil courts, parties, and practitioners in precisely the kinds of fact-sensitive inquiries that bedeviled the 1983 version of Rule 11, fostering inconsistent judicial interpretation and application, promoting satellite litigation, and chilling advocacy.²¹¹ Motions for sanctions challenging the types of close judgment calls that plaintiffs may have to make will tax the abilities of those plaintiffs’ lawyers with even the sharpest memories who exercise the utmost care when investigating facts and when preparing and presenting factual contentions. For instance, the Rule’s invocation will require that these attorneys reflect back to a late night several years earlier when, hurrying to satisfy a statute of limitations, they decided which factual allegations were likely to have evidentiary support after a reasonable opportunity for more investigation, how to identify those

206. *Id.* at 585; see also 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. 519, 524.

207. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 127 (N.D. Cal. 1984) (articulating a duty of candor), *rev’d*, 801 F.2d 1531, 1539 (9th Cir. 1986) (stating that a duty of candor might chill advocacy); see also *supra* note 190 and accompanying text.

208. See, e.g., *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194 (7th Cir. 1985), *aff’g* 596 F. Supp. 13, 22 (N.D. Ill. 1984); see *supra* notes 139-40 and accompanying text.

209. See *supra* note 137 and accompanying text.

210. FED. R. CIV. P. 8(b); see also *supra* note 140 and accompanying text (discussing defendants’ information and resources). See generally *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1162-63 (1993) (articulating the Federal Rules’ pleading regime).

211. See *Tobias, Reconsidering*, *supra* note 1, at 874. The revisers of the 1993 Rule meant to minimize these complications. *Id.*; see also *Tobias, Proposed*, *supra* note 1, at 1782.

contentions with adequate specificity, and how courts would subsequently judge their assessments of these issues.²¹²

Resolution of these questions will in turn implicate many technical issues. Numerous controversies will arise which will involve refined questions about the following issues: how diligently attorneys investigated the facts, how carefully they employed their predictive powers and drafted factual allegations on the basis of limited information some years ago, how accurately they can now reconstruct their earlier activities, and how persuasively they can explain those efforts. Because these disputes frequently will implicate credibility determinations, they could necessitate oral proceedings, a number of which may devolve into swearing matches over what reasonably might have been foreseen years before. The disposition of these controversies promises to consume scarce time, money, and energy of judges, parties, and attorneys and to exacerbate growing incivility among practitioners, while contributing nothing to, and perhaps actually reducing, resolution of lawsuits based on their merits.

The intrinsically fact-specific nature of most disputes involving Rule 11's factual certification requirements makes it difficult to provide particularized guidance regarding their implementation.²¹³ Nonetheless, I afford general suggestions by employing examples of factual assertions which are based on information and belief, and by relying substantially on two of the revisers' expressly enunciated purposes for amendment: (1) accommodating litigants who might require additional discovery to confirm the allegations or denials in their papers, and (2) equalizing the responsibilities which Rule 11 places on plaintiffs and defendants. These explicitly articulated goals, together with the Rule revisers' use of several important yet open-ended terms, such as "reasonable" and "likely," evidence the revisers' intent to impose relatively minimal requirements with which practitioners and parties can rather readily comply and to encourage courts to enforce the strictures of Rule 11 realistically, flexibly, and leniently.²¹⁴

An example illustrates these ideas more concretely. Judges who must ascertain whether plaintiffs specifically identified factual contentions which were "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" should consider "specifically," "likely," and "reasonable" as low, easily met standards, treating the efforts of such plaintiffs to satisfy the requirements of particularity, likelihood, and

212. I mean to emphasize the difficulty of making the assessments at the time lawyers made them and of reconstructing those thought processes at a later date. The Advisory Committee apparently intended to retain the admonition of the revisers of the 1983 Rule that judges are not to employ hindsight in ascertaining whether the Rule was violated. *See* FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. 198, 199.

213. I realize that disputes over compliance with the legal certification requirements can also be fact-specific. *See supra* notes 166, 181 and accompanying text.

214. *See supra* notes 194-201 and accompanying text. The propositions regarding parties' satisfaction and judicial enforcement apply with special force to plaintiffs because the drafters clearly meant to equalize plaintiffs' and defendants' burdens and because most plaintiffs need more extensive discovery.

reasonableness in a realistic manner.²¹⁵ Courts, therefore, might permit plaintiffs to identify factual allegations with little specificity and allow them considerable time for investigation and discovery if, before filing, the plaintiffs lacked access to, or had limited time or money for collecting, information to substantiate their factual contentions.²¹⁶

Judges should correspondingly assign great weight to these circumstances, relating to the availability of relevant information and to plaintiffs' resources, when gauging the reasonableness of plaintiffs' prefiling factual inquiries. The example in the preceding paragraph also emphasizes the reasonableness of prefiling investigations *less than* the sufficiency of the factual allegations.²¹⁷ Courts should consider both factors to be important and treat them with a finely calibrated analysis similar to those previously recommended for parsing papers and for legal theories.²¹⁸ Indeed, judges may well want to assign particular significance to prefiling inquiries in the factual certification context, because the revisers clearly conditioned parties' opportunities to plead on information and belief on their completion of appropriate prefiling factual investigations.²¹⁹

By comparison, the revisers' specifically stated goal of equalizing Rule 11's burdens, and their use of the adverb "reasonably" instead of "likely" to describe a defendant's duty when pleading on information and belief, indicate that the revisers meant to impose comparatively rigorous requirements on defendants which would be relatively difficult to meet and intended that courts enforce the factual certification strictures against defendants rather technically and strictly.²²⁰ Judges should also remember that most defendants can, with comparative ease, specifically identify those denials which "are reasonably based on a lack of information or belief" because Rule 8(b) of the Federal Rules of Civil Procedure currently permits defendants "without knowledge or information sufficient to form a belief as to the truth of an

215. Judges making the reasonable opportunity determination should draw on the analogous Rule 26(b)(1) inquiry employed in tailoring discovery to the needs of a particular case. *See* FED. R. CIV. P. 26(b)(1).

216. These examples pertaining to litigants' circumstances obviously are not exhaustive. For instance, numerous factors relevant to legal theories are similarly applicable to factual contentions. *See, e.g., supra* notes 139-40 and accompanying text.

217. The example in the text also emphasizes the factual certification provision of Rule 11 which permits pleading on information and belief, because it was this example which propelled the drafters' changes in this part of the Rule and will be integral to plaintiffs' compliance. Guidance regarding the reasonableness of prefiling factual investigations appears in the preceding textual sentence and the following two textual sentences.

218. *See supra* notes 160-62, 187-92 and accompanying text.

219. *See supra* note 206 and accompanying text.

220: *See supra* notes 194-95, 198 and accompanying text. These ideas are reinforced by important reasons which influenced the revisers' decision to revise the 1983 Rule: to ameliorate the disproportionate invocation of Rule 11 against plaintiffs and its general overuse. *See, e.g., supra* notes 75, 87 and accompanying text. The inclusion of the safe harbor provision attests to these reasons for the revision. *See infra* notes 228-29. These ideas also derive support from the revisers' second major goal relating to factual certification: the accommodation of litigants needing additional discovery, because most plaintiffs need more discovery. *See supra* notes 140, 216 and accompanying text.

avertment" to so plead and because defendants typically have greater access to, and resources for collecting, information involving their denials.²²¹

An example more pointedly illustrates these propositions.²²² In determining whether defendants specifically identified denials which were "reasonably based on a lack of information or belief," courts should consider "specifically" and "reasonably" as relatively stringent standards, viewing defendants' attempts to comply with them in a comparatively strict manner. Judges, accordingly, might require that defendants identify denials with considerable particularity and demand much of their representation that those denials were *reasonably* premised on a lack of information or belief.²²³

2. Sanctions

The 1993 amendment to Rule 11 substantially changes the 1983 version's command that courts impose an appropriate sanction, which might encompass monetary assessments, including attorney fees, when they ascertain that attorneys or pro se litigants had contravened Rule 11. Perhaps most significant was the revisers' determination to leave the decision of whether to sanction within the trial court's discretion, as it had been before the 1983 amendment. Moreover, the revisers expressly prescribed numerous specific procedures which now govern the sanctioning process. The revisers also made several alterations which were primarily intended to reduce further the probability that judges will levy pecuniary awards when they determine that Rule 11 has been violated.

a. Sanctioning Procedures

The new Rule includes numerous particular sanctioning procedures, in sharp contrast to the 1983 amendment, which afforded few such procedures.²²⁴ The most important procedures included in the 1993 amendment provide for

221. FED. R. CIV. P. 8(b); *see also supra* note 210 and accompanying text.

222. This example is similar to that provided for plaintiffs. *See supra* notes 215-16 and accompanying text.

223. *See supra* notes 215-16 and accompanying text. The ideas pertaining to the rest of the example relating to plaintiffs, such as those regarding the reasonableness of prefiling inquiries, similarly apply here, and judges should extrapolate from them. *See supra* notes 217-18 and accompanying text. Judges, therefore, should remember that most defendants will have more access to, and resources for collecting, information relevant to denials. These illustrations obviously are not exhaustive. For instance, additional quantitative and qualitative factors can be relevant. Four factual assertions that lack substantiation, therefore, will normally be worse than one, although a single assertion could be violative if it is material.

It is virtually impossible to afford very detailed guidance that will limit the inconsistent judicial application and satellite litigation which may inhere in the fact-specific inquiries that Rule 11 motions challenging factual certifications will present. *See supra* note 211 and accompanying text; *see also supra* note 214 and accompanying text (discussing the fact that open-ended terms exacerbate the problem). However, courts obviously should attempt to implement the Rule with maximum consistency while treating like situations as similarly as possible.

224. *See* FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 167-68; *see also* INTERIM REPORT, *supra* note 61, at 17.

Rule 11 motions to be filed separately, for parties to receive notice and to have an opportunity to respond, the requirement of judicial explanations for sanctioning decisions, the creation of “safe harbors,” the allowance of judicial discretion, and provisions which contemplate appellate review.

The 1993 Rule requires counsel as well as unrepresented litigants to submit sanctions motions independently of other documents that they file and to describe the specific infraction alleged to violate the Rule. These strictures are, in part, intended to make the pursuit of sanctions more onerous, thereby reducing Rule 11 activity.²²⁵ Courts must also give sanction targets “notice and a reasonable opportunity to respond” to the moving party’s allegations, and when judges decide to impose sanctions, they must explain their decisions in written orders or on the record, unless the party sanctioned waives this right.²²⁶ The Advisory Committee Note states that the procedures which courts provide “will depend on the circumstances”; however, judges should tailor procedural protections to the perceived severity of the offense and the potential gravity of the sanction contemplated.²²⁷

The new Rule affords a “safe harbor,” which allows parties to file Rule 11 motions only twenty-one days after they have served a description of the purported offense on the alleged violator, giving the alleged violator the opportunity to amend or withdraw the objectionable paper.²²⁸ Should the safe harbor provision operate in the way that the revisers contemplated, it might protect resource-deficient litigants or other parties who bring less traditional, politically charged litigation, or cases which could go either way under existing law. This might also decrease the Rule’s chilling effect.²²⁹

Some attorneys, however, may be tempted to employ the safe harbor device for inappropriate tactical benefits. For instance, counsel could base notice of potential violations on the refined parsing of a paper or questionable challenging of a factual contention which might ultimately have evidentiary support. Service of notice would require that targets unnecessarily expend substantial resources in order to respond within three weeks. Upon receipt, targets are given only twenty-one days to conduct a great deal of activity, such as analyzing the notification afforded, reconsidering the allegedly offensive behavior or papers, and undertaking greater research.

The provision of a safe harbor may worsen one of the Rule’s most problematic dimensions: the “threat and retreat” aspect, which deflects attention from the substance of lawsuits to attorneys’ abilities, thereby

225. See FED. R. CIV. P. 11(c)(2)(A), *reprinted in* 146 F.R.D. at 423; *see also* Tobias, *Reconsidering*, *supra* note 1, at 877 (discussing the Advisory Committee’s intent to reduce Rule 11 activity).

226. See FED. R. CIV. P. 11(c)(3), *reprinted in* 146 F.R.D. at 423; *see also* FED. R. CIV. P. 11 advisory committee’s note, at 589 (discussing the issue of waiver).

227. See FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 589; Tobias, *Reconsidering*, *supra* note 1, at 877-78 (advocating tailored procedures).

228. See FED. R. CIV. P. 11(c)(1)(A), *reprinted in* 146 F.R.D. at 422-23.

229. The Advisory Committee substantially relied on the safe harbor provision in responding to criticisms of Rule 11 and recognized that it might permit parties to conduct less prefilling investigation. The Committee believed, however, that the benefits of the device outweighed this risk. 1992 Pointer Letter, *supra* note 36, *reprinted in* 146 F.R.D. 519, 523-24.

increasing incivility and the quantity of paper produced.²³⁰ Courts must be aware of the likelihood that practitioners will improperly use the safe harbor provision for strategic gain and should punish those who abuse it.²³¹

The 1993 Rule commits to the discretion of trial judges the determination of whether litigants or lawyers have contravened the Rule and, if so, whether to impose sanctions.²³² Appellate courts are to review these decisions for abuses of discretion pursuant to the standard articulated by the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*²³³ The Advisory Committee Note instructs that there would be such abuse when a court premised its "ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."²³⁴

This approach leaves district judges with too much discretion while providing for insufficiently rigorous appellate review. This discretion and the appellate review standard will inadequately protect civil rights plaintiffs from trial courts that strenuously enforce the Rule against them. Because such plaintiffs and others who lack resources or power are risk averse, this approach makes them vulnerable to chilling. The very deferential appellate court oversight of district judges' Rule 11 determinations in three controversial civil rights suits resolved during the revision process exemplifies these difficulties.²³⁵

Trial courts, which the new provision vests with broad discretion to declare violations and levy sanctions, should exercise that discretion very judiciously, particularly when requested to sanction civil rights plaintiffs or other parties with few resources. For example, if district judges entertain reasonable doubts that these litigants have contravened Rule 11, they should be extremely reluctant to find violations or should at least exercise their discretion in favor

230. I wish to thank John Frank, Esq., Lewis & Roca, Phoenix, Ariz., for these ideas. See also INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 20-21 (1992) (discussing Rule 11 and civility).

231. FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 591 (including admonitions similar to those in the text). Targets can raise the argument that their opponents have abused the safe harbor provision by filing motions with the court.

232. See FED. R. CIV. P. 11(c), reprinted in 146 F.R.D. at 421-23.

233. 496 U.S. 384, 405 (1990); see FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 590; see generally *supra* notes 31-34 and accompanying text (discussing the Court's literal interpretation of Rule 11).

234. See FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 590.

235. See *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 (1992); *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), cert. denied, 499 U.S. 969 (1991). Selection of the abuse of discretion standard may reflect a balancing of the needs of parties for appellate reconsideration on the one hand and judicial economy on the other. See generally Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982) (suggesting that the "abuse of discretion" standard does not give complete immunity to trial court rulings and that appellate courts should consider whether the lower courts' superior opportunities for observation or other reasons of policy require greater deference than conclusions of law or application of law to fact); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840 (1984) (identifying the various aspects of procedure, how those aspects influence court decision-making, and exploring different procedural models, each with varying levels of review on previous decisions).

of not awarding sanctions.²³⁶ Appellate courts should also monitor the application of Rule 11 by trial judges and reverse overzealous enforcement.

b. Appropriate Sanctions

The revisers had four primary goals in mind when providing judges with guidance for selecting appropriate sanctions once they have determined that lawyers or unrepresented parties have contravened Rule 11 and that the imposition of sanctions is appropriate. The revisers wished to emphasize that courts might assess nonfinancial awards and that the Rule's principal purpose is to deter abuse of the litigation process. The revisers also sought to limit the imposition of pecuniary sanctions, particularly attorney fees, and to discourage reliance on Rule 11 as a compensatory mechanism.

The revisers' intent finds expression in numerous sources. Indicia of the Advisory Committee's thinking, for instance, appear in the text of its May, 1991 and April, 1992 drafts; in the proposed Advisory Committee Notes which attended those documents; in Judge Pointer's May, 1992 letter submitting the April, 1992 draft to the Standing Committee; and in records of Committee deliberations. Over the course of the rule revision process, the revisers' resolve to attain their four goals seemed to intensify, their admonitions to courts applying the new sanctioning guidelines became clearer and more insistent, and the means which they devised for accomplishing the objectives gained increasing efficacy. The Standing Committee's controversial decision to eliminate mandatory sanctioning epitomized these features of the amendment process.

The Advisory Committee had explicitly expressed its four purposes as early as 1991. A critical way in which the Committee sought to achieve these goals was by defining and explicating "appropriate sanction" in the text of the 1991 preliminary draft. The text provided that sanctions "shall be limited to what is sufficient to deter comparable conduct by persons similarly situated"²³⁷ and elaborated on this definition:

[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.²³⁸

236. See Tobias, *Reconsidering*, *supra* note 1, at 885-89 (discussing other factors principally implicating the imposition of sanctions, which are not sufficiently relevant to the issues treated here to warrant examination).

237. PRELIMINARY DRAFT, *supra* note 89, at 77; *see also id.*, at 80 (advisory committee's note) ("In general, the court should select sanctions that are not more severe than are needed to deter such improper conduct by similarly situated persons."). The new Rule provides that sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. CIV. P. 11(c)(2), *reprinted in* 146 F.R.D. at 422-23.

238. PRELIMINARY DRAFT, *supra* note 89, at 77. The new Rule retained all of this language while adding that fee-shifting must be "warranted for effective deterrence." FED. R. CIV. P. 11(c)(2), *reprinted in* 146 F.R.D. at 422-23; *cf.* Tobias, *Reconsidering*, *supra* note 1, at 880-85 (including an additional examination of ways in which the Advisory Committee sought to attain its four objectives).

The Advisory Committee Note which accompanied the preliminary draft explained and expanded upon this textual material by suggesting that a plethora of potential sanctions are available to judges and by compiling a comprehensive list of possible sanctions other than attorney fee-shifting to violators.²³⁹ The Note added that the Committee had not attempted in the text to enumerate those factors which judges should consider in selecting appropriate sanctions, "but, for emphasis, it [did] specifically note that a sanction may be nonmonetary as well as monetary."²⁴⁰ Judge Pointer correspondingly observed that the Committee agreed "with the premise that cost-shifting ha[d] created the incentive for many unnecessary Rule 11 motions, ha[d] too frequently been selected as the sanction, and, indeed ha[d] led to the large awards most often cited by critics of the 1983 rule."²⁴¹ He stated that the Committee's response was to include in the proposed text and accompanying Note "language that, while continuing to permit cost-shifting awards, explicitly recited the deterrent purpose of Rule 11 sanctions and the potential for nonmonetary sanctions."²⁴²

The Advisory Committee also exhibited solicitude for the needs of litigants and lawyers who have little money or power, such as numerous civil rights plaintiffs and their counsel, by inserting three admonitions in the Advisory Committee Note. The Committee first suggested that partial fee reimbursement might be an adequate deterrent to Rule 11 violations by individuals with modest resources.²⁴³ For similar reasons, the revisers also included in the Note the following factor as one of an enumerated list which courts could properly consider in choosing appropriate sanctions: "[W]hat amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case."²⁴⁴ The Note also admonished judges against relying on Rule 11 for fee-shifting which would contravene the standards governing statutory fee awards, as required by the *Christiansburg Garment* opinion, in litigation pursued under legislation which prescribes fee awards to prevailing parties.²⁴⁵

239. These possibilities included "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities, etc." PRELIMINARY DRAFT, *supra* note 89, at 79 (advisory committee's note).

240. *Id.* The Advisory Committee Note did include a thorough list of factors. *Id.* at 80.

241. 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. at 519, 524. Although the quoted language in this sentence and the one which follows appears in the May, 1992 letter, Judge Pointer was alluding to the Committee's action in adopting the May, 1991 preliminary draft.

242. *Id.*

243. PRELIMINARY DRAFT, *supra* note 89, at 79 (advisory committee's note).

244. *Id.* at 80.

245. *Id.*, at 79; see also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). This reminder is another strong indicator of the revisers' intent to circumscribe fee-shifting even more. It apparently limits fee-shifting against plaintiffs who pursue litigation under legislation prescribing fee awards to Rule violations which could be characterized as vexatious, meritless, or frivolous. See *id.* at 421; see also *supra* notes 175, 179-80 and accompanying text. All three admonitions remain in the note that accompanies the new Rule. See FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 588.

By the spring of 1992, when the Advisory Committee had reviewed all of the public comments on its May, 1991 proposal and concomitantly revised the preliminary draft, the Committee's resolve to achieve the four goals seemed even more firm, while it evinced continuing concern for the needs of resource-poor parties. The Advisory Committee instituted some changes in the text which elucidated and accentuated its earlier attempts to decrease judicial reliance on pecuniary sanctions and to restrict Rule 11's invocation for compensatory purposes by circumscribing courts' discretion to levy monetary assessments even more than the Committee had in earlier drafts. The Committee inserted new phraseology into the proposal which prohibits fee-shifting except when "warranted for effective deterrence."²⁴⁶ The Advisory Committee Note explains that, because the purpose of sanctions "is to deter rather than to compensate, the rule provides that, *if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.*"²⁴⁷ The Note adds that judges ought to consider shifting fees only in "*unusual circumstances*, particularly for [intentional violations, when] deterrence may be ineffective unless the sanction" requires financial payment to injured parties.²⁴⁸ The Advisory Committee, even when clarifying those "unusual circumstances" in which "effective deterrence" might necessitate fee-shifting, expressed concern for resource-poor litigants by using them as an example: "The Advisory Committee remains convinced that there are situations—particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources—in which cost-shifting may be needed for effective deterrence."²⁴⁹

The Standing Committee did retain the sanction of attorney fee-shifting and the concomitant possibility that judges might order Rule 11 violators to make these payments to adversaries harmed by their violations.²⁵⁰ Yet the Committee reinstated discretionary sanctioning, thereby authorizing courts not to impose sanctions at all, even when they determine that lawyers or unrepresented parties have contravened Rule 11. The new Rule and its attendant Advisory Committee Note should thus dramatically limit the shifting of attorney fees and ought to restrict significantly financial assessments. The 1993 Rule should correspondingly reduce the incentives for filing sanctions motions to recoup the costs of litigation which had existed under the 1983 version of Rule 11.²⁵¹

246. FED. R. CIV. P. 11(c)(2), *reprinted in* 146 F.R.D. at 422-23.

247. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. at 583, 587-88 (emphasis added).

248. *Id.* at 588 (emphasis added).

249. *See* 1992 Pointer Letter, *supra* note 36, *reprinted in* 146 F.R.D. 519, 524.

250. *See* Memorandum of John Frank, *supra* note 154.

251. Many observers, including Advisory Committee members, agree that the prospect of recouping litigation expenses fostered much Rule 11 activity under the 1983 version. *See, e.g.*, 1992 Pointer Letter, *supra* note 36, *reprinted in* 146 F.R.D. 519, 524; Schwarzer, *supra* note 24, at 1015; Vairo, *supra* note 5, at 234-35.

A few incentives for invoking the new Rule remain, however. Even parties with considerably reduced exposure to liability for attorney fees could be troubled by the possibility of having to pay a penalty into court, as they will probably be indifferent to the recipient of the money. Moreover, judges can award reasonable expenses and attorney fees to those parties that prevail on sanctions motions, which makes the Rule's deployment cost-free.²⁵² Simply threatening to file a Rule 11 motion may yield important strategic benefits. Receiving notice of potential Rule violations could generally disrupt a sanction target's pursuit of litigation and require that it undertake unproductive, expensive research within twenty-one days to ascertain the notice's validity.²⁵³ These tactical advantages, together with the prospect, albeit limited, of recovering some compensation as a sanction or for prevailing on a motion, undoubtedly mean that Rule 11's invocation will remain appealing to many lawyers and litigants. Most resource-poor parties will be risk averse and susceptible to the uses and effects of Rule 11 described above.²⁵⁴

Courts, when exercising their discretion in determining whether to sanction and, if so, what sanctions to impose, should remember all of the matters previously discussed, particularly the guidance provided by the rule revisers for levying appropriate sanctions expressed in the four major objectives as well as the factors examined above.²⁵⁵ Perhaps most important, especially to the issues addressed in this Article, judges should closely examine ways of limiting incentives for employing the 1993 Rule to the maximum extent possible and of being solicitous of the needs of resource-deficient litigants.²⁵⁶

One critical means of achieving the goal of minimizing the Rule's use would be for courts to eschew sanctions in all situations involving Rule 11 violations which could be characterized as less than serious. Helpful, straightforward examples are those types of activities described as insignificant infractions when parsing papers for the purpose of ascertaining whether Rule 11 is triggered.²⁵⁷ Similarly illustrative are prefiling inquiries that implicate simple negligence, papers which include one comparatively unimportant legal contention that is rather frivolous, and papers which include

252. See FED. R. CIV. P. 11(c)(1)(A), reprinted in 146 F.R.D. at 421-22; see also 1992 Pointer Letter, *supra* note 36, reprinted in 146 F.R.D. at 519, 524-25 (stating that judges need discretion to "discourage non-meritorious Rule 11 motions without creating a disincentive to the presentation" of legitimate motions).

253. See *supra* notes 230-31 and accompanying text.

254. The Advisory Committee foresaw some of these problems and admonished courts to be aware of them and treat them accordingly. See PRELIMINARY DRAFT, *supra* note 89, at 79 (advisory committee's note); see also FED. R. CIV. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 590-91.

255. See *supra* notes 235-49 and accompanying text; see also Tobias, *Reconsidering*, *supra* note 1, at 880-88 (including a thorough treatment of guidance for sanctioning in the context of the 1991 proposal).

256. Of course, judges should achieve these objectives in a manner which is consistent with the important reasons for the revisers' amendment of Rule 11. These include reducing the Rule's invocation, deterring frivolous litigation, and retaining the "stop-and-think" duties.

257. See *supra* notes 151-52, 162 and accompanying text.

relatively few mistakes in factual allegations which are not material. These examples are intentionally overdrawn to illustrate phenomena which are clearly less than serious; judges should treat considerably worse activity as insufficiently serious to warrant sanctions.

At some point, lawyers' and litigants' violations of the new Rule will be grave enough that courts should entertain the possibility of sanctions. Because the determination of whether a violation is severe enough to warrant sanctions is fact-dependent, it is difficult to provide precise guidance on this issue. Judges deciding whether Rule violations are sufficiently severe to deserve some sanction should apply finely calibrated assessments analogous to those noted above.²⁵⁸

In determining whether sanctions are warranted, courts should consider which components of the Rule were contravened, to what extent, and why. For instance, judges should evaluate the comparative unreasonableness of the prefiling inquiries and the relative inadequacy of the legal contentions and factual assertions presented. Courts should also consult quantitative and qualitative factors. They should ask, for example, how many legal theories were deficient and how critical those theories were to the paper. Courts should also ask what number of factual assertions were erroneous and how material these assertions were. Judges must also determine the reasons for the violations, considering, for instance, the time and resources available to the parties for conducting prefiling investigations, researching legal theories, collecting and analyzing relevant factual material, and drafting papers.

When these assessments indicate that attorneys or parties have seriously contravened the new Rule, courts should consult numerous factors, most of which can be derived from the guidance provided by the revisers. Perhaps most importantly, judges should always tailor the severity of the sanctions levied to the gravity of the offense, which can be defined more specifically in terms of the parameters employed in the two preceding paragraphs for ascertaining seriousness.

Several examples illustrate these ideas. When Rule 11 violations are less than very serious, courts should carefully explore the broad array of non-monetary sanctions, possibilities that are limited only by the judiciary's creativity.²⁵⁹ Such nonmonetary sanctions are warranted when practitioners' and parties' offenses barely cross the threshold of seriousness and even when those violations are considerably more severe. Illustrations include complaints which include several inadequate legal theories that are not critical or numerous factual mistakes which are not material. Even if the legal theories or the factual assertions are more important, they might not deserve monetary sanctions, if factors such as lack of time, money, or access to relevant information explain the inadequacies.

258. See, e.g., *supra* notes 160-62, 191-93 and accompanying text. Such assessments find justification in the eight factors that the Advisory Committee Note enumerates, and several are employed below. See FED. R. CIV. P. 11 advisory committee's note, 146 F.R.D. 583, 587; see also *supra* notes 244-45 and accompanying text.

259. See *supra* notes 237-42 and accompanying text.

In contrast, courts should consider the prospect of imposing monetary sanctions only when counsel or parties contravene Rule 11 in a very serious manner. This encompasses conduct that could be described as egregious misbehavior or severe litigation abuse. More specific examples include the failure to perform any prefiling inquiry whatsoever, the submission of papers which include multiple legal theories that could be characterized as highly frivolous, or the submission of papers which proffer a number of material factual assertions that totally lack evidentiary support. Even in such circumstances, judges should remember the revisers' advice, particularly their admonition that fee-shifting awards be restricted to situations in which they are warranted for effective deterrence.²⁶⁰

Judges should apply several special factors in addition to those discussed above when resource-poor litigants are found to be in violation of the new Rule. Courts should obviously consult the revisers' guidance which specifically relates to these parties. Most importantly, courts must follow the Advisory Committee Note's express warning against fee-shifting that conflicts with statutory prescriptions in special categories of cases, particularly civil rights actions.²⁶¹ Judges should also seriously consider the litigants' financial circumstances, such as their ability to pay.²⁶² Moreover, judges should keep in mind that resource-poor litigants' lack of money, time, and power makes them risk averse and susceptible to being chilled by the imposition of any monetary sanction, but especially by fee-shifting.²⁶³ Courts, therefore, should entertain the possibility of ordering Rule 11 violators to pay fees only in the most extreme cases—essentially when no other reasonable alternative is available. An illustration might be a heinous Rule 11 violation for which the offender expresses no remorse and which causes an opponent to incur enormous expense.²⁶⁴

CONCLUSION

The 1993 revision of Rule 11 substantially improves upon the 1983 version, which proved to be highly controversial and very difficult to implement. If federal judges apply the new Rule as suggested in this Article, they can remedy or ameliorate the most significant problems that the 1983 amendment posed. Moreover, if attorneys and parties follow the recommendations, they

260. See *supra* notes 244-49 and accompanying text.

261. See *supra* note 243 and accompanying text.

262. The Advisory Committee Note expressly states that judges should treat this factor as a "proper consideration." See FED. R. CIV. P. 11 advisory committee's note, 146 F.R.D. 583, 587. Many courts made this consideration relevant under the 1983 Rule. See, e.g., *In re Kunstler*, 914 F.2d 505, 524-25 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); *White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990).

263. Courts should vigilantly police the Rule's invocation for tactical advantage and punish such activity whenever they detect it. See *supra* notes 230-31 and accompanying text.

264. Although remorse might seem more relevant to criminal law sentencing, it implicates effective deterrence and deterring frivolous litigation. The Advisory Committee Note also intimates that similar behavior can be relevant. See FED. R. CIV. P. 11 advisory committee's note, 146 F.R.D. 583, 587.

should find it easy to satisfy the 1993 Rule requirements. Such judicial enforcement and implementation, together with lawyer and litigant compliance, may reduce the invocation of Rule 11, satellite litigation, and the Rule's chilling effects and thereby meet the revisers' goals.