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RULE 11 PRACTICE IN FEDERAL AND STATE COURT: AN EMPIRICAL, COMPARATIVE STUDY

GERALD F. HESS*

I. INTRODUCTION

Most of those who have observed or participated in the Rule 11[1] debate disagree about some aspects of the Rule's interpretation, impact, and future. One leading commentator recently characterized the 1983 amendment of Rule 11 as "the most controversial revision in the Federal Rules'

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This study was developed under a grant from the State Justice Institute. Points of view expressed herein are those of the author and do not necessarily represent the official position or policies of the State Justice Institute.

1. Federal Rule of Civil Procedure 11 provides:

Signing of Pleadings, Motions and Other Papers; Sanctions

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Washington version of the Rule is nearly the same. *See* WASH. SUP. CT. C.R. 11. The only substantive difference is that the Washington rule applies to a "pleading, motion or *legal*

half-century history."[2] From 1983 to 1991, more than 150 law journals published articles about Rule 11.[3] At least eight empirical studies of Rule 11 have been reported.[4] Even the popular press discovered the Rule 11 controversy.[5]

A. *The Need for This Study*

Even though there has been thoughtful empirical research on Rule 11, leading commentators and the Advisory Committee on the Civil Rules recommended additional studies of the Rule's impact and operation.[6] This

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memorandum" while the federal rule applies to a "pleading, motion or *other paper*" (emphasis added).

Throughout this article, Federal Rule of Civil Procedure 11 and the comparable state provisions will be referred to collectively as "Rule 11."

2. Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 231 (1991).

3. *See* volumes 4-12 of *Current Law Index* under the topics "Civil Procedure" and "Sanctions." *See also* COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES 9-16 (1990) [hereinafter CALL FOR COMMENTS].

4. *See generally*, AMERICAN JUDICATURE SOCIETY, RULE 11 STUDY, PRELIMINARY ANALYSIS (1991) (This study surveyed a random sample of lawyers who were lead counsel on cases filed in federal court in the Fifth, Seventh, and Ninth Circuits in 1989-90); STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989) (This study included: an analysis of every Rule 11 motion or sua sponte consideration of Rule 11 decided by the district courts in the Third Circuit between July 1, 1987, and June 30, 1988; surveys of judges in the Third Circuit; and surveys of attorneys who practice in the Third Circuit); SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985) (This study surveyed federal district court judges' reactions to 10 hypothetical Rule 11 cases); NEW YORK STATE BAR ASSOCIATION, REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEY'S FEES (1987) (This study surveyed all federal judicial officers and over 8,000 attorneys in New York state); ELIZABETH C. WIGGINS & THOMAS WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991) (This study included surveys of all federal district court judges and an analysis of Rule 11 motions and sua sponte activity in five judicial districts from 1987 to 1990 (District of Arizona, District of the District of Columbia, Northern District of Georgia, Eastern District of Michigan, and Western District of Texas)); THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS (1988) (This study included interviews of judges in six federal district courts, interviews with experienced federal practitioners in eight federal district courts, and an analysis of a random sample of published opinions involving Rule 11); Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147 (1990) (This study surveyed judges and attorneys in the Northern District of California); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (This study was based on reported decisions).

5. *See, e.g.*, L. Gordon Crovitz, *Lawyers Make Frivolous Arguments at Their Own Risk*, WALL ST. J., June 20, 1990, at A1; Stephen Labaton, *Courts Rethinking Rule Intended to Slow Frivolous Lawsuits*, N.Y. TIMES, Sept. 14, 1990, at B18, Col. 3; Ruth Marcus, *Rule 11: Does It Curb Frivolous Lawsuits or Civil Rights Claims?*, WASH. POST, Apr. 12, 1991, at A17.

6. The first recommendation of the Third Circuit Task Force was additional empirical study of Rule 11. BURBANK, *supra* note 4, at 96. In a list of empirical research that needs to be done,

article will examine a study that produces additional data on the topic and will present data on several subjects that prior empirical research on Rule 11 did not address: (1) impact and operation of Rule 11 in state court; (2) the changes in the use of the Rule in one federal court over a seven-year period; and (3) a comparison of the effect of Rule 11 in state and federal court systems serving the same city. This article provides additional information relevant to policymakers at a critical time.

The Advisory Committee on the Civil Rules has proposed amendments to Federal Rule 11[7] and that proposal is proceeding through the amendment process. Regardless of the outcome of the federal process, the sixteen states that have provisions modeled on the pre-1983 Federal Rules of Civil Procedure (F.R.C.P.) 11[8] and the thirty-four states that substantially fol-

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Maurice Rosenberg includes: "What is the impact of Rule 11? There are many efforts to gauge the effect of Rule 11 on civil litigation practices, but no study has yet gotten to the bottom of the issue." Maurice Rosenberg, *The Impact of Procedure—Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 30 (1988); *see* CALL FOR COMMENTS, *supra* note 3.

7. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 43-49 (1992) [hereinafter PROPOSED AMENDMENTS].

8. Before the 1983 amendments, Federal Rule 11 provided:

> Signing of Pleadings
>
> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1982).

The following states have provisions modeled on the pre-1983 version of Fed. R. Civ. P. 11: Alabama (ALA. R. CIV. P. 11); Connecticut (CONN. SUPER. CT. CIV. R. § 119); Georgia (GA. CODE ANN. § 9-11-11); Indiana (IND. ST. TRIAL P. R. 11); Maine (ME. R. CIV. P. 11); Maryland (MD. ST. GEN. R. 1-311); Massachusetts (MASS. R. CIV. P. 11); Mississippi (MISS. R. CIV. P. 11); Nebraska (NEB. REV. STAT. § 25-824); New Hampshire (N.H. SUPER. CT. R. 15); New Jersey (N.J. ST. CT. R. 1:4-8); New Mexico (N.M. STAT. ANN. R. 1-011); Ohio (OHIO R. CIV. P. 11); Pennsylvania (PA. R. CIV. P. 1023); South Carolina (S.C. R. CIV. P. 11); Texas (TEX. STAT. tit. 2, §§ 9.011, 9.012).

lowed the post-1983 version of F.R.C.P. 11[9] should independently assess the impact and future of Rule 11 in their jurisdictions.

B. The Purpose, Nature, Methodology, and Organization of This Study

The purpose of this study is to provide and analyze data about the impact of Rule 11 in state and federal courts. It was designed to assess the costs and benefits of Rule 11 and to help inform the Rule 11 debate.

This article focuses on a comprehensive study of the impact of Rule 11 on one geographic location—emphasizing depth over breadth. Its focus is the lawyers, judges, and courts in Spokane County, Washington. Spokane County has a population of approximately 360,000 and is the 101st largest metropolitan area in the United States.[10] The Spokane County Superior Courts (the state courts of general jurisdiction) and the main office of the United States District Court for the Eastern District of Washington are located in the City of Spokane.

Three sources provided the data that measured the impact of Rule 11: (1) surveys[11] of judges, magistrate judges, and attorneys (hereinafter, judges and magistrate judges will be referred to collectively as "judges"); (2) case files in the United States District Court for the Eastern District of Washington (hereinafter "federal court" or "Eastern District"); and (3) case files at the Spokane County Superior Court (hereinafter "state court" or "Superior Court").

The surveys were designed to provide data on judges and attorneys' experiences with Rule 11, their attitudes toward the rule, and their assessment

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9. *See supra* note 1 for the post-1983 amendment version of Fed. R. Civ. P. 11. These states substantially follow the post-1983 version of the Rule: Alaska (ALASKA R. CIV. P. 11); Arizona (ARIZ. R. CIV. P. 11); Arkansas (ARK. ST. R. CIV. P. 11); California (CAL. CIV. PRO. CODE § 447) (applicable to Riverside and San Bernadino Counties only); Colorado (COLO. R. CIV. P. 11); Delaware (DEL. SUPER. CT. R. 11 and DEL. CH. CT. R. 11); Hawaii (HAW. R. CIV. P. 11); Idaho (IDAHO ST. R. CIV. P. 11); Illinois (ILL. SUP. CT. R. 137); Iowa (IOWA STAT. tit. 31 § 619.19); Kansas (KAN. R. CIV. P. § 60-211); Kentucky (KY. ST. R. CIV. P. 11); Louisiana (LA. CODE CIV. PROC. art. 863); Michigan (MICH. CT. R. 2.114); Minnesota (MINN. R. CIV. P. 11); Missouri (MO. R. CIV. P. 55.03); Montana (MONT. R. CIV. P. 11); Nevada (NEV. ST. R. CIV. P. 11); New York (UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS § 130-1.1); North Carolina (N.C. R. CIV. P. 11); North Dakota (N.D. R. CIV. P. 11); Oklahoma (OKLA. STAT. tit. 12, § 2011); Oregon (OR. ST. R. CIV. P. 17); Rhode Island (R.I. GEN. LAWS § 9-29-21); South Dakota (S.D. CODIFIED LAWS ANN. § 15-6-11(a)(b)); Tennessee (TENN. R. CIV. P. 11); Utah (UTAH ST. R. CIV. P. 11); Vermont (VT. ST. R. CIV. P. 11); Virginia (VA. CODE ANN. §§ 8.01-271.1); Washington (WASH. SUPER. CT. CIV. R. 11); West Virginia (W. VA. ST. R. CIV. P. 11); Wisconsin (WIS. STAT. § 802.05); Wyoming (WYO. STAT. § 1-14-128).

10. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 31 (1991).

11. *See infra* Appendix A for the Judge/Magistrate Survey and Appendix B for the Attorney Survey.

of its impact. In 1990, surveys were mailed to all six judges at the federal district court, all ten judges at the Superior court, and all 1,095 attorneys with offices or residences in Spokane County. The survey was mailed a second time to those who did not initially respond. Six federal judges (100%), nine of the ten state judges (90%), and 506 of the 1,095 attorneys (46%) answered the survey.[12]

Data were gathered from civil cases filed in the federal court from August 1, 1983 (the effective date of the 1983 amendments to federal Rule 11), through December 31, 1990. The docket sheet for each civil case was reviewed manually or electronically to identify cases with documents containing "Sanctions," "Fees," "Attorney's Fees," "Terms," or "11." The file for each identified case was reviewed and information was gathered from each case that involved a Rule 11 order or a Rule 11 request in a motion or brief.

In the state court, data were gathered from civil cases[13] filed after September 1, 1985, the effective date of the 1985 amendments to the state version of Rule 11. It was impossible to use docket sheets to identify potential Rule 11 cases in state court because of the abbreviated manner in which docket entries were made. Consequently, the file of every civil case in which any type of motion was made in 1990 was reviewed to identify the civil cases that involved a Rule 11 request, motion, or order. Because the process of identifying Rule 11 cases in state court was more time consuming than those in federal court, data were gathered only from those cases that initiated the Rule 11 activity between January 1, 1990, and December 31, 1990.

The remainder of this article is divided into three main sections: Part II, Data Presentation; Part III, Comparison With Other Empirical Studies; and Part IV, Implications of the Data. Part II presents data on three topics for both state and federal court. First, the amount and nature of Rule 11 activity is described. Second, figures are presented on the following potential benefits or goals of the Rule: increased pre-filing fact and law inquiry by attorneys; reduced litigation delay; reduced litigation costs; reduced abusive litigation tactics; reduced frivolous suits, claims, or defenses; and increased suit settlements. Third, figures are presented on the following potential costs or criticisms of the Rule: the satellite litigation problem (the cost of Rule 11 motions to the court and parties); the aggravation of rela-

12. Attorney survey data reported in this article is based on the responses of attorneys whose practice included some civil litigation: 385 respondents met this criteria.

13. The Office of the Spokane County Clerk of Superior Court distinguishes civil cases (tort, property, commercial, administrative review) from domestic relations and paternity cases. The term "civil cases" in this study follows that distinction. Thus, Rule 11 activity in domestic relations and paternity cases is not part of this study.

tionships between opposing attorneys, between attorneys and clients, and between attorneys and judges; the chilling effect on novel theories and growth in the law; the disproportionate impact of the Rule on plaintiffs, civil rights plaintiffs, and solo practitioners; and the overuse of monetary, fee-shifting sanctions. In Part III, data from the federal court portion of this study are compared to data from other empirical studies of Rule 11. Part IV discusses the implications of the data for policymakers who will decide the fate of the proposed amendment to Federal Rule 11 and the future of state versions of the Rule.

II. DATA PRESENTATION

A. Rule 11 Activity

This section presents a broad overview of the level and nature of Rule 11 activity in federal and state court. It includes case-file data regarding the incidence and disposition of Rule 11 activity in court and survey data concerning the formal and informal use of Rule 11 by judges and lawyers.

1. Federal Court Rule 11 Activity

From August 1, 1983, through December 31, 1990, 6,841 civil cases were filed in the Eastern District.[14] The files of those cases contained 110 formal Rule 11 requests in eighty-nine cases. The term "formal Rule 11 requests" includes written requests in briefs or motions by parties for Rule 11 sanctions and instances where the court raised a Rule 11 sanction issue. Nearly all of the formal requests (96%) were initiated by the parties; the court formally raised Rule 11 only four times.

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14. *See* STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS A14-A15 (1984) (1,063 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS A18-A19 (1985) (1,146 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 34-35 (1986) (1,096 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 32-33 (1987) (868 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 34-35 (1988) (694 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 26-27 (1989) (857 cases); STATISTICAL ANALYSIS AND REPORTS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 34-35 (1990) (708 cases). The author reviewed the docket books for civil cases for the year 1983 and found that from August 1 through December 31, 1983, 356 civil cases were filed. Hereinafter, these reports will be referred to as JUDICIAL WORKLOAD STATISTICS.

Commentators predicted that the amount of Rule 11 activity would plateau and taper off after a "shake out" period of five years or so.[15] Arthur Miller wrote in 1990 that "there are signs that the practice under the rule has begun to stabilize and the overly enthusiastic hyperactivity of the first few years following its promulgation has begun to subside."[16] Such is not the case in the Eastern District. The number of Rule 11 requests did follow the predicted pattern from 1984 through 1988: it rose, plateaued, and tapered off. However, the formal Rule 11 activity initiated in 1989 and 1990 increased dramatically. (See Chart 1).

CHART 1
FORMAL RULE 11 REQUESTS BY YEAR
FEDERAL COURT
NUMBER OF FORMAL RULE 11 REQUESTS

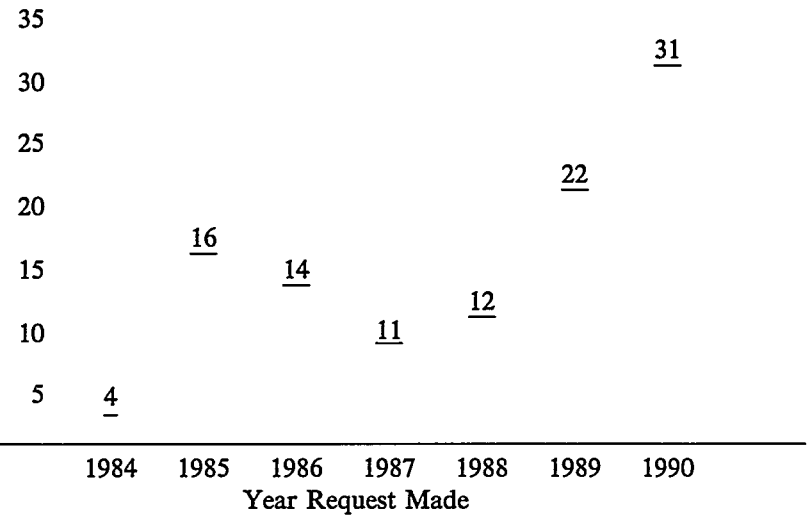

Chart 2 lists the documents that the formal Rule 11 requests targeted. Complaints and motions are by far the most common targets, while answers and discovery papers are rarely targets. Note that sanction motions are the most common type of target motion.

15. WILLGING, THE RULE 11 SANCTIONING PROCESS, *supra* note 4, at 39-40 & n.65; *see* Nancy H. Wilder, Note, *The 1983 Amendments to Rule 11: Answering the Critics' Concern With Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798, 817-18 (1986).

16. Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 506 (1990).

CHART 2
TARGET OF FORMAL RULE 11 REQUESTS
FEDERAL COURT

Target	Number[17]	Percentage(%)[18]
Complaint	55	49
Answer	5	4
Discovery	5	4
Affidavit	2	2
Cost Bill	1	1
Attorney Lien	1	1
Motion	43	38
For Sanctions	8	
Dismiss	6	
Summary Judgment	6	
Amend Judgment	4	
Reconsideration	3	
Attorneys' Fees	3	
Removal	2	
Disqualify Counsel	2	
Amend Pleadings	1	
Extend Time	1	
Compel Discovery	1	
Default	1	
Relief from Judgment	1	
Certification of Finality	1	
Joinder	1	
Suppress Deposition	1	
Recusal of Judge	1	

Chart 3 summarizes the disposition of the formal Rule 11 requests. The court imposed sanctions in nineteen instances, seventeen percent of the Rule 11 requests. Sanctions were denied in seventy-two instances. In eleven instances the court never decided the Rule 11 request because the parties settled the case. In one case, the movant withdrew the Rule 11 motion. Finally, in seven cases the files reveal no disposition of the Rule 11 requests even though the cases were terminated or the underlying issues were resolved. It is not known whether the parties orally withdrew the requests, the court orally denied them, or the court did not decide them. None of the Rule 11 requests were pending.

17. Although the total number of formal Rule 11 requests was 110, there were 112 paper targets. Two of the Rule 11 requests had multiple targets.

18. Due to rounding of percentages, the total percentage in each chart may be slightly more or less than 100.

CHART 3
DISPOSITION OF FORMAL RULE 11 REQUESTS
FEDERAL COURT

Disposition	Number	Percentage (%)
Sanctions Imposed	19	17
Sanctions Denied	72	65
Case Settled	11	10
Request Withdrawn	1	1
No Disposition	7	6
	110	

The number and rate of instances where the court imposed sanctions took a quantum leap in 1990. Chart 4 details the number of formal Rule 11 requests and the number of requests for which sanctions were imposed in years 1984 through 1990. From 1984 through 1989, sanctions were imposed in ten of the seventy-nine Rule 11 requests (13%). In 1990, sanctions were imposed in nine of the thirty-one requests (29%).

CHART 4
FORMAL RULE 11 REQUESTS GRANTED BY YEAR
FEDERAL COURT

	1984	1985	1986	1987	1988	1989	1990
Formal Rule 11 Requests	4	16	14	11	12	22	31
Requests for Which Sanctions Were Imposed	0	1	2	4	1	2	9

The survey data provide additional information about the Rule 11 activity in the Eastern District. The federal judge data throughout this report came from the survey responses of the six judges who preside in the Eastern District. The federal attorney figures were based on the survey responses of forty-one attorneys who reported that at least 75% of their civil litigation practice took place in federal court. The survey asked both judges and attorneys about their formal and informal Rule 11 activity since August 1, 1983, the effective date of the 1983 amendments to Federal Rule 11.

Most of the judges had been involved in both formal and informal Rule 11 activity. Eighty-three percent of the judges reported that they had decided Rule 11 motions raised by attorneys or parties. Eighty-three percent also said that they had warned attorneys (without formally raising Rule 11 on the judge's own motion) that they were in violation or approaching vio-

lation of Rule 11. The judges believed that the warnings were effective in fifty-nine of the sixty-four instances (92%) in which they were used.

The survey questioned attorneys about their formal (when one party or attorney asks the court to impose Rule 11 sanctions on another party or attorney) and informal (when one party or attorney warns another party or attorney that he or she is in violation or approaching violation of the Rule) involvement with Rule 11. A substantial percentage of attorneys reported formal or informal activity. Chart 5 summarizes the results.

CHART 5
ATTORNEY SURVEY
FORMAL AND INFORMAL RULE 11 ACTIVITY
FEDERAL COURT

Activity	Percentage (%)
Formal—Sought Rule 11 sanctions at least once	34
Formal—Opponent sought Rule 11 sanctions at least once	40
Informal—Warned opponent at least once	51
Informal—Warned by opponent at least once	38

2. State Court Rule 11 Activity

During 1990, forty-eight formal Rule 11 requests in forty-five cases were made in civil cases in the Spokane County Superior Court. Parties raised all of the forty-eight requests in written briefs or motions. None of the judges raised formal Rule 11 requests during 1990.

Chart 6 sets out the target of the Rule 11 requests. Complaints are by far the most common targets, with motions, discovery, and answers comprising the bulk of the remaining targets.

CHART 6
TARGET OF FORMAL RULE 11 REQUESTS
STATE COURT

Target	Number	Percentage (%)
Complaint	27	56
Answer	4	8
Discovery	6	12
Summons	1	2
Motion	10	21

CHART 6 (continued)

For Sanctions	2
Dismissal	2
Summary Judgment	1
Relief from Judgment	1
Vacate Arbitration Award	1
Compel Settlement	1
Compel Arbitration	1
Suppress Deposition	1

Chart 7 summarizes the disposition of Rule 11 activity. The court granted Rule 11 requests four times, a mere eight percent of the requests. Sanctions were denied in twenty-five instances. In five cases the parties settled before the court decided the Rule 11 request and in one instance the movant withdrew the request. Finally, in thirteen cases the files reveal no disposition of the Rule 11 request even though the cases were terminated or the underlying issues were resolved. None of the Rule 11 requests were pending.

CHART 7
DISPOSITION OF FORMAL RULE 11 REQUESTS
STATE COURT

Disposition	Number	Percentage (%)
Sanctions Imposed	4	8
Sanctions Denied	25	52
Case Settled	5	10
Request Withdrawn	1	2
No Disposition	13	27
	48	

The survey data provide additional information about the amount of Rule 11 activity in state court. The judge survey data came from the responses of nine of the ten Spokane County Superior Court judges. The state attorney data are based on the survey responses of 247 attorneys who reported that at least seventy-five percent of their civil litigation practice was in Washington Superior Courts. The survey asked both judges and attorneys about their formal and informal Rule 11 activity since September 1, 1985, the effective date of the 1985 amendments to state Rule 11.

Most of the judges (89%) had decided Rule 11 motions raised by the parties. More than half of the judges (56%) had warned attorneys or parties (without formally raising Rule 11 on the judge's own motion) that they were in violation or approaching violation of Rule 11. The judges who is-

sued warnings believed that they were effective in nineteen of the twenty-four instances (79%).

A substantial percentage of the attorneys report formal or informal involvement with Rule 11. Chart 8 summarizes the results.

CHART 8
ATTORNEY SURVEY
FORMAL AND INFORMAL RULE 11 ACTIVITY
STATE COURT

Activity	Percentage (%)
Formal—Sought Rule 11 sanctions at least once	34
Formal—Opponent sought Rule 11 sanctions at least once	31
Informal—Warned opponent at least once	46
Informal—Warned by opponent at least once	29

3. Comparison of State and Federal Court Rule 11 Activity

An examination of the survey data generally shows that the percentage of attorneys and judges reporting experience with Rule 11 activity is similar in state and federal court. The attorney survey results establish that an identical percentage of federal court and state court attorneys report that they sought formal Rule 11 sanctions. A slightly higher percentage of federal court attorneys than state court attorneys report experience with the informal use of Rule 11. Chart 9 compares the percentage of responses of federal court and state court attorneys.

CHART 9
ATTORNEY SURVEY
RULE 11 ACTIVITY
FEDERAL/STATE COMPARISON

Activity	Federal (%)	State (%)
Formal—Sought Rule 11 sanctions	34	34
Formal—Opponent sought Rule 11 sanctions	40	31
Informal—Warned opponent	51	46
Informal—Warned by opponent	38	29

The judge survey data show that most federal and state judges decided Rule 11 motions raised by parties. However, a higher percentage of federal judges than state judges had warned attorneys or parties that they were in violation or approaching violation of Rule 11. Chart 10 shows a comparison of the percentage of responses of federal and state judges.

CHART 10
JUDGE SURVEY
RULE 11 ACTIVITY
FEDERAL/STATE COMPARISON

Activity	Federal (%)	State (%)
Decided Rule 11 Motion by Parties	83	89
Warned Attorney or Party	83	56

The survey gathered case file data on formal Rule 11 activity in 1990 in state court and from 1984 through 1990 in federal court. The comparisons that follow are based on formal activity in state and federal court in 1990 only.

Rule 11 activity in state and federal court was quite similar in two ways. First, the parties, rather than the judge, initiated nearly all formal Rule 11 activity. In federal court, Rule 11 was initiated thirty times by the parties and once by the judge. In state court, all forty-eight Rule 11 requests were made by the parties. Second, the target of Rule 11 request was the complaint approximately one-half of the time in either court. Chart 11 shows a comparison of the target of formal Rule 11 activity in federal and state court.

CHART 11
TARGET OF FORMAL RULE 11 ACTIVITY
FEDERAL/STATE COMPARISON

	Federal		State	
Target	Number	(%)	Number	(%)
Complaint	15	(48)	27	(56)
Motion	13	(42)	10	(21)
Answer	0	(0)	4	(8)
Discovery	2	(6)	6	(12)
Other	1	(3)	1	(2)
	31		48	

In two important respects, formal Rule 11 activity was much different in state and federal court. First, the likelihood that a case involved Rule 11 activity was higher in federal court than in state court. In federal court during 1990, 708 civil cases were filed, 1,013 were terminated,[19] and 28 had formal Rule 11 activity. In state court during 1990, 4,193 civil cases were

19. JUDICIAL WORKLOAD STATISTICS (1990), *supra* note 14, at 27.

filed, 3,155 were terminated,[20] and 45 cases had formal Rule 11 activity. Thus, nearly six times as many civil cases were filed in state court than in federal court and more than three times as many civil cases were terminated in state court than in federal court. However, lawyers in state court made less than twice as many Rule 11 requests as lawyers in federal court.

The second major difference between state and federal court in formal Rule 11 activity was the disposition of Rule 11 requests. Sanctions were imposed at more than three times the rate in federal court (29% of requests) than in state court (8% of requests).

A number of attorneys who responded to the survey commented on the infrequent imposition of Rule 11 sanctions in state court. For example, one lawyer stated, "I find that Rule 11 is not applied by our state court judges and no sanctions are imposed for the most blatant violations."[21] Another commented, "[T]rial court judges in Spokane County are generally disinclined to grant sanctions, including Rule 11 sanctions."[22]

It could be inferred from these comments and the data that one reason why fewer state cases involved Rule 11 than federal cases was that state court attorneys believed that Rule 11 motions would almost certainly be denied in state court. One attorney explained, "I do not seek them because I do not expect them to be granted, except in egregious circumstances . . . ."[23] In most cases, a motion for sanctions would just waste time and money."

One factor that may explain why state judges imposed Rule 11 sanctions less often than federal judges is that pre-trial motions are handled differently in state and federal court. In the Eastern District, a case is assigned to a judge when it is filed and that judge hears all subsequent motions. Most cases in Spokane County Superior Court are not assigned to a judge until they approach trial. Pre-trial motions are heard by the judges on a rotating basis. Consequently, the state judge hearing a Rule 11 request usually has not had any prior contact with the case. A judge with firsthand knowledge of the previous proceedings in a case may be more likely to award sanctions when reviewing questionable papers than a judge who is reviewing the file for the first time.

A number of lawyers suggested a different explanation:

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20. OFFICE OF THE ADMINISTRATOR FOR THE COURTS, REPORT OF THE COURTS OF WASHINGTON 10-16 (1990).

21. This comment was in response to the author's survey. The actual survey is contained in Appendixes A and B (original on file with author).

22. *Id.*

23. *Id.*

> In state court, however, we see widespread violations of CR-11 . . . . Yet we know that the court would never do anything about it, even if we ask. The judges are really nice people who want to make everyone happy; they are also elected at the state level. As such, it is difficult for them to come down hard on either attorneys or clients even though CR-11 is violated, the theory being "everyone should be able to have their day in court."[24]

B. Rule 11 Goals and Benefits

One of the goals of the drafters of Rule 11 was to have attorneys conduct a reasonable inquiry into the factual and legal basis for their claim, defense, motion, or argument before filing the relevant paper in court.[25] The proponents of the Rule hoped that the pre-filing inquiry requirement and mandatory sanctions for failure to conduct a reasonable inquiry would lead to a number of benefits: fewer frivolous claims, defenses, and motions;[26] fewer abusive litigation practices, such as filing papers for harassment or delay;[27] reduced litigation cost and delay;[28] and an increase in suit settlement.[29]

The surveys questioned attorneys and judges about their opinions of the effect of Rule 11 on each of the attorney behaviors listed above as goals or benefits of the Rule. Regarding the extent of attorneys' pre-filing fact and law inquiries, judges were asked about the impact of Rule 11 on attorneys practicing before them; attorneys were asked about the impact of the Rule on their own pre-filing inquiries. The results are summarized in Chart 12. Substantial percentages of judges and attorneys said that Rule 11 caused an

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24. *Id.*

25. FED. R. CIV. P. 11 advisory committee notes to the 1983 amendments [hereinafter, Advisory Committee Note] provide in part: "The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." *See* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking For a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385 (1990); William W. Schwartzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014 (1988).

26. Advisory Committee Note, *supra* note 25; A. Leo Levin & Sylvan A. Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U. L. REV. 587, 590-91 (1987); Schwarzer, *supra* note 25, at 1014-15.

27. Advisory Committee Note, *supra* note 25; Levin & Sobel, *supra* note 26 at 590-91; Schwarzer, *supra* note 25, at 1013; Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility,* 61 N.Y.U. L. REV. 300, 315 (1986).

28. Advisory Committee Note, *supra* note 25 (the Committee believed greater use of sanctions by judges would "help to streamline litigation"); Levin & Sobel, *supra* note 26 at 590; Kim M. Rubin, Note, *Has a Kafkaesque Dream Come True? Federal Rule of Civil Procedure 11: Time For Another Amendment?,* 67 B.U. L. REV. 1019, 1021 (1987).

29. *See* WILLGING, *supra* note 4, at 5, 115-20 (attorneys and judges report that Rule 11 tends to facilitate rather than hinder the settlement process).

increase in the extent of pre-filing fact and law inquiries. The impact of Rule 11 on attorneys who practice primarily in state court was substantial, with forty-nine percent reporting increased fact inquiry and forty-five percent reporting increased law inquiry. However, the greatest effect of the Rule as to pre-filing inquiry was on attorneys who practice primarily in federal court, with seventy-one percent reporting increased fact inquiry and sixty-three percent reporting increased law inquiry.

CHART 12
RULE 11 IMPACT ON EXTENT OF PRE-FILING INQUIRY

	Judges (%)		Attorneys (%)	
Impact	Federal	State	Federal	State
Extent of Pre-Filing Fact Inquiry				
Increased	50	67	71	49
No Effect	33	33	29	49
Decreased	17	0	0	1
Extent of Pre-Filing Legal Inquiry				
Increased	67	44	63	45
No Effect	17	56	37	53
Decreased	17	0	0	1

Increasing the extent of attorneys' pre-filing fact and law inquiry is not an end in itself. That increase is desirable only if it leads to the other purported benefits of Rule 11.[30] Judges and lawyers were asked to assess the impact of Rule 11 on the number of frivolous suits, defenses, or motions. A majority of the judges and a substantial minority of the attorneys believed Rule 11 has decreased the number of frivolous claims, defenses, or motions. The results are presented in Chart 13.

30. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1960 (1989). "[I]t is essential not to equate evidence of effects on practice as benefits . . . . Indeed, even an effect as apparently benign as enhanced pre-filing legal inquiry may be misleading. At some point, such inquiry may not be justified, particularly in light of the rate at which cases are settled." *Id.*; *see also* Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations*, 31 SANTA CLARA L. REV. 393, 411 (1991). "[T]he important issue is not whether Rule 11 has increased pre-filing inquiry, but whether it has lessened the filing of frivolous papers." *Id.*

CHART 13
EFFECT OF RULE 11 ON THE NUMBER OF FRIVOLOUS SUITS, DEFENSES, OR MOTIONS

Impact	Judges (%) Federal	Judges (%) State	Attorneys (%) Federal	Attorneys (%) State
Increased	0	0	0	2
No Effect	50	22	62	49
Decreased	50	78	38	49

The judges and attorneys were also asked to assess the effect of Rule 11 on the cost, time, and settlement of civil litigation. Chart 14 lists the results. The vast majority of judges and lawyers generally believed that Rule 11 had no effect on these aspects of litigation. The one exception is that fifty percent of the federal judges believed that the Rule decreased the amount of time for the resolution of suits. On the other hand, most attorneys who believed Rule 11 had an impact on suit cost and time thought that the impact was negative; they believed Rule 11 increased suit cost and time. It is safe to say that Rule 11 generally did not have beneficial impacts on cost, time, and settlement of civil litigation.

CHART 14
EFFECT OF RULE 11 ON THE COST, TIME, AND SETTLEMENT OF LITIGATION

Impact	Judges (%) Federal	Judges (%) State	Attorneys (%) Federal	Attorneys (%) State
Cost of Litigation				
Increased	0	11	27	24
No Effect	83	78	62	66
Decreased	17	11	11	10
Time for Resolution of Suit				
Increased	0	0	22	18
No Effect	50	89	73	74
Decreased	50	11	5	8
Likelihood of Settlement of Suit				
Increased	17	0	11	17
No Effect	67	78	78	78
Decreased	17	22	11	5

The survey asked the judges and attorneys about the impact of Rule 11 on abusive litigation practices, in particular, the filing of papers for delay or harassment. It asked judges about the impact on attorneys who practiced

before them. Attorneys were asked about the impact on their own practices and those of opposing attorneys. Chart 15 summarizes the results.

Two observations about this data are relevant. First, a slightly higher percentage of federal judges and lawyers believed Rule 11 reduced abusive litigation practices than did their state court counterparts. Second, judges were much more confident than attorneys that Rule 11 had a beneficial impact on litigation abuse. The vast majority of judges believed Rule 11 reduced the filing of papers for delay and harassment while most lawyers felt Rule 11 had no effect on those practices.

CHART 15
EFFECT OF RULE 11 ON ABUSIVE LITIGATION PRACTICES

Impact	Federal (%)	State (%)
Likelihood of Filing Papers for Delay		
Judges *re* attorneys before them		
Increased	0	11
No Effect	17	22
Decreased	83	67
Attorneys *re* own practices		
Increased	3	5
No Effect	65	79
Decreased	32	15
Attorneys *re* opponents' practices		
Increased	0	5
No Effect	73	72
Decreased	27	23
Likelihood of Filing Papers for Harassment		
Judges *re* attorneys before them		
Increased	0	0
No Effect	17	22
Decreased	83	78
Attorneys *re* own practices		
Increased	3	6
No Effect	73	77
Decreased	24	18
Attorneys *re* opponents' practices		
Increased	3	5
No Effect	63	71
Decreased	34	24

C. Rule 11 Problems and Costs

Critics of Rule 11 have raised a host of concerns about the negative impacts of the Rule. This study gathered data relevant to five types of po-

tential Rule 11 problems and costs: (1) satellite litigation; (2) tension among judges, attorneys, and clients; (3) chilling effects; (4) disproportionate impacts on certain parties and attorneys; and (5) overuse of monetary, fee-shifting sanctions.

1. Satellite Litigation

One of the most persistent criticisms of Rule 11 is that it has spawned satellite litigation necessary to decide sanction requests.[31] The satellite litigation problem has several aspects. Some Rule 11 commentators assert that Rule 11 motions have become routine; parties spend resources prosecuting or defending the motions, and courts spend time deciding them.[32] One critic pointed out that most of the resources expended on Rule 11 motions are wasted because the vast majority of the motions are denied.[33] Finally, Rule 11 motions can be used to harass an opponent rather than to respond to papers that fail to satisfy the rule.[34]

The incidence data for 1990 show that Rule 11 requests are not routine in the federal or state court; Rule 11 requests were raised in twenty-eight of the civil cases pending in federal court and in forty-five of the civil cases pending in Superior court. However, Rule 11 activity did occur in a higher proportion of federal than state cases.[35]

This study did not attempt to measure the time and money expended by parties and courts on Rule 11 matters. However, satellite litigation costs can be assessed indirectly by looking at the briefs and affidavits parties file regarding Rule 11 requests and the hearings judges hold to decide those matters. From 1984 through 1990, 110 requests for Rule 11 sanctions were raised in federal court; during 1990, forty-eight such requests were made in

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31. *E.g.*, Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 587 (1987); Nelken, *supra* note 25, at 384, 386-87; Vairo, *supra* note 4, at 195, 232-33.

32. Roger M. Barton, *Stepping on Board the Rule 11 Bandwagon*, 35 CLEV. ST. L. REV. 249, 259 (1987); Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 534-35 (1986); Vairo, *supra* note 4, at 195. The Advisory Committee was concerned about the potential costs of satellite litigation:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Advisory Committee Note, *supra* note 25.

33. Stein, *supra* note 30, at 417.

34. Cavanagh, *supra* note 32, at 533.

35. *See supra* section II.A.3.

state court. The briefs, affidavits, and hearings relevant to those Rule 11 requests are summarized in Charts 16, 17, and 18.

CHART 16
BRIEFS *RE* RULE 11 REQUESTS[36]

	Brief Filed		Movant's Briefs		Respondent's Briefs	
	Yes(%)	No(%)	Number	Average Pages	Number	Average Pages
Federal (N=110)	99(90)	11(10)	122	4.1	50	4.2
State (N=48)	45(94)	3 (6)	49	2.6	13	3.9

CHART 17
AFFIDAVITS *RE* RULE 11 REQUESTS[37]

	Affidavits Filed		Movant's Affidavits			Respondent's Affidavits		
	Yes(%)	No(%)	Number	Average Pages	Exhibit Average Pages	Number	Average Pages	Exhibit Average Pages
Federal	*47(43)	63(57)	59	3.4	6.9	28	5.4	13.1
State	**19(40)	29(60)	25	2.8	.9	6	3.0	0

* (N=110)
** (N=48)

CHART 18
HEARINGS *RE* RULE 11 REQUESTS

	Hearing Held		Nature of Hearing		Combined with Other Motion	
	Yes(%)	No(%)	Oral Arg.	Evidentiary	Yes(%)	No(%)
Federal	*54(49)	56(51)	52	2	42(78)	12(22)
State	**27(56)	21(44)	27	0	24(89)	3(11)

* (N=110)
** (N=48)

36. The figures in Chart 16 include briefs that address Rule 11 only and briefs that address Rule 11 and other matters. "Movant" means the party requesting Rule 11 sanctions and "Respondent" means the party against whom sanctions are sought. In federal court, 39% of the Movants' briefs and 46% of the Respondents' briefs addressed Rule 11 alone. In state court, 11% of the Movants' briefs and 23% of the Respondents' briefs addressed Rule 11 alone. The "Average Pages" figures are the average number of pages addressed to Rule 11 per brief.

37. In Chart 17, "Average Pages" means the average number of pages in the affidavits and "Exhibit Average Pages" means the average number of pages of exhibits attached to the affidavit.

Once a Rule 11 request was made, it was very likely that a brief addressing that request would be filed in either federal (90%) or state (94%) court. In both courts, the party requesting sanctions would probably file a brief, all or part of which would address Rule 11. The portion of the movant's brief addressed to Rule 11 averaged approximately four pages in federal court and two and one-half pages in state court. In either court, it was less likely that the respondent would file a brief. The portion of respondents' briefs addressed to Rule 11 averaged approximately four pages in either court. In either federal or state court, about forty percent of the Rule 11 requests generated affidavits. The federal court affidavits tended to be longer than those in state court. In federal court, movants' affidavits averaged approximately three and one-half pages with seven pages of exhibits, while respondents' affidavits averaged approximately five and one-half pages with thirteen pages of exhibits. In state court, both movants and respondents' affidavits averaged about three pages and usually had no exhibits.

State and federal judges had very similar experiences regarding hearings held on Rule 11 requests. In either court, a hearing was held on approximately one-half of the Rule 11 requests, the hearing was almost always limited to oral argument (rather than evidentiary), and the Rule 11 hearing was usually combined with a hearing on another motion.

To get a better idea of the extent of the burden Rule 11 requests place on judges, it may be helpful to analyze the "typical" experience of a judge in state and federal court in 1990.[38] In federal court, each judge handled nine Rule 11 requests, which generated fifteen briefs (four pages each), seven affidavits (each was four pages long and had nine pages of exhibits), and five hearings (all were limited to oral argument and four were combined with a hearing on other motions). In state court, each judge handled five Rule 11 requests, which generated six briefs (three pages each), three affidavits (each was three pages long and had a one-page exhibit), and three hearings (all were limited to oral argument and were combined with hearings on other motions). Thus, the satellite litigation burden on federal court judges was approximately twice as great as the burden on state court judges.

Most of the time and effort of judges and attorneys related to formal Rule 11 activity were expended on unsuccessful Rule 11 requests. In federal court from 1984-1990, only seventeen percent of the Rule 11 requests

38. The "typical" experience analysis is based on three factors: (1) the data presented in Charts 16, 17, and 18; (2) during 1990, there were three federal district court judges and ten state superior court judges; and (3) during 1990, 28 Rule 11 requests were addressed to the judges (rather than the judge magistrates) in federal court.

were granted. In state court, a mere eight percent of the requests were granted.

The survey data provide some insight into the problem of abusive Rule 11 motions. Attorneys and judges were asked whether they agreed with this statement: "Attorneys use Rule 11 as a tactic to harass and intimidate opponents." Chart 19 summarizes the results. Rule 11 was used for improper purposes in both state and federal court, although the problem was greater in federal court.

CHART 19
"ATTORNEYS USE RULE 11 AS A TACTIC TO HARASS AND INTIMIDATE OPPONENTS."

	Judge (%)		Attorney (%)	
Response	Federal	State	Federal	State
Agree	67	56	63	49
No Opinion	0	44	13	21
Disagree	33	0	24	30

2. Straining Relationships

Commentators have predicted that Rule 11 would strain relationships between opposing attorneys, attorneys and judges, and attorneys and their clients.[39] The survey questioned judges and attorneys about the impact of Rule 11 on these relationships. Charts 20, 21, and 22 summarize the survey results.

CHART 20
RELATIONSHIP BETWEEN ATTORNEYS FOR OPPOSING PARTIES

	Judges (%)		Attorneys (%)	
Effect	Federal	State	Federal	State
Aggravated	50	45	63	44
No Effect	33	33	34	51
Improved	17	22	3	5

39. Cavanagh, *supra* note 32, at 501; Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365-66 (1989); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1343-45 (1986).

CHART 21
RELATIONSHIP BETWEEN ATTORNEYS AND JUDGES

	Judges (%)		Attorneys (%)	
Effect	Federal	State	Federal	State
Aggravated	40	11	40	26
No Effect	40	56	49	69
Improved	20	33	11	5

CHART 22
RELATIONS BETWEEN ATTORNEYS AND CLIENTS

	Judges (%)		Attorneys (%)	
Effect	Federal	State	Federal	State
Aggravated	0	0	35	23
No Effect	100	100	54	70
Improved	0	0	11	7

Approximately one-half of judges and attorneys in both federal and state court believed Rule 11 aggravated relations between opposing attorneys. Nearly two-thirds of the lawyers who practice primarily in federal court reported this negative impact. On the other hand, about twenty percent of the judges felt Rule 11 improved relations between attorneys. Few attorneys believed Rule 11 improved attorney-attorney relations.

Forty percent of the federal judges and attorneys believed Rule 11 aggravated bench-bar relations. Much smaller percentages of state attorneys and judges felt a negative effect. In fact, one-third of the state judges believed Rule 11 improved the judge-attorney relationship. However, few attorneys felt this improvement.

All of the judges believed that Rule 11 did not affect attorney-client relationships. Approximately one-third of the federal attorneys and one-fourth of the state attorneys reported that Rule 11 aggravated attorney-client relationships.

Charts 20, 21, and 22 provide support for generalizations about the effect of Rule 11 on relationships between attorneys, judges, and clients. First, many attorneys believed Rule 11 aggravated all three types of relationships. Second, more judges than attorneys believed Rule 11 improved attorney-attorney and attorney-judge relationships. Finally, Rule 11's negative impact on these relationships was felt more strongly in federal court than state court.

Numerous attorneys commented on the negative impact of Rule 11 on their relationships with other attorneys, judges, and clients. Three such responses are as follows:

> The rule, or more specifically, increased use and enforcement of the rule, has been a major contributing factor toward more contentious relations among lawyers. It has also strained bench-bar relations. No one in this firm is allowed to use it or threaten its use.
>
> This also affects the relationship between attorneys. If I run into an attorney that likes to cite Rule 11 at every turn, I tend to want everything to be done by the book. That means no accommodation, everything in writing, only the essentials of professional courtesy and the like. The trial practice is stressful enough without this type of nonsense.
>
> The hardest thing is explaining to clients that you need independent proof of their claims or positions. Clients are—and perhaps should be—accustomed to having their attorneys believe them.[40]

3. Chilling Effects

Many commentators have expressed concern that Rule 11 would chill legitimate advocacy.[41] More specifically, critics feared that Rule 11 would reduce the number of creative claims, defenses, and arguments which in turn would limit access to courts for parties with unconventional claims or defenses and would retard growth in the law.[42] Chart 23 presents survey data regarding the chilling effects of Rule 11.

These figures suggest that the great majority of attorneys in both state and federal court did not feel the Rule 11 chill. Most attorneys reported that Rule 11 did not affect their creative advocacy or their willingness to take cases or assert claims or defenses. On the other hand, Rule 11 caused some attorneys to refuse to make arguments to change the law, to take meritorious cases, or to assert meritorious claims. It may be that those arguments, cases, or claims were the ones that would have changed the law. Thus, the figures in Chart 23 may represent a serious chilling effect of Rule 11.

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40. These comments were in response to the author's survey. The actual survey is contained in Appendixes A and B (original on file with author).

41. Elson & Rothschild, *supra* note 39, at 365; Nelken, *supra* note 39, at 1338-43; Vairo, *supra* note 4, at 200-01.

42. Grosberg, *supra* note 31, at 633-38; Nelken, *supra* note 25, at 386; Mark S. Stein, *Rule 11 in the Real World*, 132 F.R.D. 309 (1991); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987).

CHART 23
RULE 11 CHILLING EFFECTS

Effect	Federal Attorney (%)	State Attorney (%)
Decreased willingness to make arguments to extend or change law	11	20
Did not accept meritorious case because of concern about Rule 11 sanctions	15	10
Did not assert meritorious claims or defenses due to concern about Rule 11 sanctions	23	14

A number of attorneys commented on the chilling effect of Rule 11 on creative advocacy. One attorney stated:

> I believe Rule 11 chills the creativeness of lawyers to a very substantial degree. Over the past 30 years, our law has expanded on behalf of our environment and civil rights. This expansion has improved the likelihood of our society becoming more productive and safer. The benefit has, time and again, been delivered on the weary shoulders of ideas which, at the time of their initial advancement, were considered extreme, if not totally blasphemous. In keeping with a judiciary which is more enamored with efficiency than sharp, fair analysis[,] . . . Rule 11 will sanctimoniously serve to close the doors of the judiciary further.[43]

4. Disproportionate Impact

A persistent criticism of Rule 11 is that it has a disproportionate impact on certain parties and attorneys. In particular, critics believe Rule 11 has a greater impact on plaintiffs than defendants,[44] on civil rights plaintiffs than other claimants,[45] and on small firm attorneys than large firm attorneys.[46]

43. This comment was in response to the author's survey. The actual survey is contained in Appendixes A and B (original on file with author).

44. Burbank, *supra* note 30, at 1947; Susan Lawshe, *Survey Project, Attorney Sanctions: Rule 11*, 3 GEO. J. LEGAL ETHICS 71, 76 (1989).

45. Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 353 (1988); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 503-06 (1988).

46. LaFrance, *supra* note 45, at 353; Lawshe, *supra* note 44, at 76.

a. Impact on Plaintiffs

Data from case files and surveys address the impact of Rule 11 on plaintiffs and defendants. Case file data show that Rule 11 disproportionately affected plaintiffs in both federal and state court. Chart 24 summarizes the case file data. Plaintiffs were the targets of over seventy percent of the Rule 11 requests in both state and federal court. Further, the percentage of Rule 11 requests that were granted against plaintiffs was much higher than against defendants. In federal court, twenty-two percent of the requests against plaintiffs were granted but only six percent of the requests against defendants were allowed. In state court, twelve percent of the requests against plaintiffs were granted, but none against defendants were granted. Finally, plaintiffs were the targets of *all* instances in which sanctions were imposed in state court (4 of 4 instances) and the overwhelming majority in federal court (17 of 19 instances (89%)) were against plaintiffs.

CHART 24
CASE FILE DATA—IMPACT ON PLAINTIFFS

	Federal Court		State Court	
	Plaintiff N(%)	Defendant N(%)	Plaintiff N(%)	Defendant N(%)
Target of Rule 11 Request	79 (72)	31 (28)	34 (71)	14 (29)
Sanctions Imposed	17 (22)	2 (6)	4 (12)	0 (0)

The survey results provide additional information about the impacts of Rule 11 on plaintiffs and defendants. To analyze these impacts, responses of those attorneys who represent plaintiffs at least seventy-five percent of the time (141 survey respondents) were compared with those who represent defendants at least seventy-five percent of the time (81 survey respondents). Chart 25 summarizes the comparison between the responses of plaintiffs' attorneys and defendants' attorneys.

Just as the case file data show a disproportionate impact on plaintiffs in formal Rule 11 activity, the survey data reveal that defendants' attorneys were more likely than plaintiffs' attorneys to use Rule 11 informally by warning an opponent that he or she was in violation or approaching violation of the Rule. Nevertheless, the impact of Rule 11 on the extent of pre-filing law and fact inquiries was similar for plaintiffs and defendants' lawyers — about one-half of both groups reported increased pre-filing inquiry. Generally, plaintiffs' attorneys are slightly more likely to feel both the positive and negative impacts of Rule 11 than defendants' attorneys.

CHART 25
COMPARISON OF PLAINTIFFS AND DEFENDANTS' ATTORNEYS

Rule 11 Experience or Impact	Plaintiff (%)	Defendant (%)
Informal Use of Rule 11		
Warned opponent in federal court case	23	37
Warned opponent in state court case	38	45
Rule 11 Benefits		
Increased pre-filing fact inquiry	51	47
Increased pre-filing legal inquiry	43	46
Less likely to file papers for delay	20	11
Less likely to file papers for harassment	25	10
Rule 11 Costs		
Aggravated relations between opposing attorneys	47	39
Aggravated relations between attorneys and judges	28	20
Aggravated relations between attorneys and clients	24	19
Less willing to make arguments to extend or change law	21	18
Did not accept meritorious case due to Rule 11		
Federal Court	8	3
State Court	15	5
Did not assert meritorious claim or defense due to Rule 11		
Federal Court	9	11
State Court	10	18

b. Impact on Civil Rights Claimants

The data lead to several conclusions about the impact of Rule 11 in civil rights cases. First, this is a minor concern in state court. The state court case file data show that in 1990 only one of the forty-eight Rule 11 requests was targeted at a civil rights plaintiff. That request was denied. The survey data also support this conclusion. Only eleven percent of the lawyers who practice primarily in state court reported that Rule 11 decreased their willingness to assert civil rights claims. The other conclusions arise out of the federal court data. Chart 26 summarizes case filings and Rule 11 activity in civil rights cases in the Eastern District from 1984 to 1990.

CHART 26
IMPACT IN CIVIL RIGHTS CASES—FEDERAL COURT
(1984-1990)

		Prisoner Civil Rights		Non-Prisoner Civil Rights	
	Number	Number	(%)	Number	(%)
Civil Cases filed[47]	6379	1193	(19)	341	(5)
Rule 11 requests	110	15	(14)	22	(20)
Rule 11 requests against represented plaintiffs	56	10	(18)	8	(14)
Sanctions imposed	19	3	(16)	4	(21)
Sanctions imposed against represented plaintiffs	9	2	(22)	1	(11)

Rule 11 did not disproportionately impact prisoners who filed civil rights cases. Prisoner civil rights cases made up nineteen percent of the civil cases filed in the Eastern District from 1984 to 1990. The percentage of Rule 11 requests and sanctions against prisoner plaintiffs, regardless of whether they are represented or proceeding pro se, was consistent with the nineteen percent figure.

Non-prisoner civil rights plaintiffs have been the target of a disproportionately high degree of Rule 11 requests. Civil rights cases brought by non-prisoners constituted five percent of the civil cases filed in the Eastern District from 1984 to 1990. However, those plaintiffs were the target of twenty percent of all Rule 11 requests. Represented civil rights plaintiffs were the target of fourteen percent of the Rule 11 requests against all represented plaintiffs.

The sanction rate in non-prisoner civil rights cases and the sanction rate against represented non-prisoner civil rights plaintiffs are consistent with the rates in other cases. Sanctions were granted in four of the twenty-two requests (18%) in non-prisoner civil rights cases and fifteen of the eighty-eight requests (17%) in all other cases. Sanctions were granted in one of the eight requests (12%) against represented non-prisoner civil rights plaintiffs and eight of the fifty-six requests (14%) against all other represented plaintiffs.

The survey data offer evidence of the chilling effect of Rule 11 in civil rights cases. One-fourth of the lawyers who practice primarily in federal

47. The figures for the number of civil cases, prisoner civil rights cases, and non-prisoner civil rights cases filed in the Eastern District from 1984 through 1990 are derived from the sources cited at *supra* note 14.

court reported that Rule 11 decreased their willingness to assert civil rights claims.

It appears from the data that the impact of Rule 11 on civil rights plaintiffs is much greater in federal court than in state court. One possible explanation is that few civil rights cases are filed in state court. However, anecdotal evidence (the author's conversations with experienced civil rights plaintiff's attorneys in Spokane) suggests that attorneys are at least as likely to file civil rights cases in state court as in federal court. A second possible reason is that Rule 11 sanctions are requested and granted in a higher proportion of cases of any type in federal than state court. Of course, that difference does not help explain why represented, non-prisoner civil rights plaintiffs were the target of a disproportionately high percentage of Rule 11 requests in federal court.

c. Impact on Solo Practitioners

The survey respondents can be categorized by the nature of their practice. Chart 27 presents the results for three categories of attorneys: government attorneys (34 respondents), solo practitioners (51 respondents), and lawyers in firms with over twenty attorneys (63 respondents).

Two general observations can be made based on this data. First, although Rule 11 did not have a disproportionate impact on solo practitioners as opposed to large firm lawyers, it deterred solo practitioners more from taking cases. Second, Rule 11 affected government lawyers much less than private attorneys.

Several of the comparisons in Chart 27 should be highlighted. Regarding experience with Rule 11, similar percentages of each category of lawyer had formally requested Rule 11 sanctions. However, private attorneys were more likely to use Rule 11 informally (to warn an opponent) than their government counterparts. Less than one-third of the government lawyers reported that they increased their pre-filing fact and law inquiry, while nearly one-half of the solo practitioners and over half of the large firm lawyers said they increased their inquiries. Regarding Rule 11's negative impact on relations among attorneys, judges, and clients, substantial percentages of private attorneys felt that these relationships had been aggravated by the Rule, while few of the government attorneys agreed. Finally, a significant minority of large firm lawyers and solo practitioners reported feeling the chill of Rule 11 on their creative advocacy and choice of cases, claims, and defenses; very few government attorneys felt those chilling effects.

CHART 27
IMPACT ON GOVERNMENT LAWYERS, SOLO PRACTITIONERS, AND LARGE FIRM ATTORNEYS

Experience or Impact	Government (%)	Solo (%)	Large Firm (%)
Experience with Rule 11			
Sought sanctions in federal court	21	18	18
Warned opponent in federal court case	14	26	40
Sought sanctions in state court	25	34	26
Warned opponents in state court case	25	52	36
Rule 11 Benefits			
Increased pre-filing fact inquiry	32	43	59
Increased pre-filing legal inquiry	21	46	64
Less likely to file papers for delay	18	10	20
Less likely to file papers for harassment	17	8	24
Rule 11 Costs			
Aggravated relations between opposing attorneys	28	50	48
Aggravated relations between attorneys and judges	9	25	39
Aggravated relations between attorneys and clients	10	29	30
Less willing to make arguments to extend or change law	4	28	26
Did not accept meritorious case due to Rule 11			
Federal Court	0	16	5
State Court	4	18	5
Did not assert meritorious claim or defense due to Rule 11			
Federal Court	0	12	30
State Court	11	18	20

5. Overuse of Monetary, Fee-Shifting Sanctions

Many commentators have suggested that once a Rule 11 violation is found, courts too often award monetary rather than nonmonetary sanctions.[48] Further, many critics have argued that monetary sanctions should not be used as a fee-shifting device but instead should be gauged by the Rule's primary purpose of deterrence and should be paid to the court rather

48. Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 126 (1991); Vairo, *supra* note 4, at 231.

than the opponent.[49] Judges and lawyers simply disagree with the commentators who believe that the primary sanction for Rule 11 should be nonmonetary. An overwhelming ninety-three percent of the judges and seventy-one percent of the lawyers who responded to the survey said that the primary Rule 11 sanctions should be monetary. Judges' sanctioning behavior reflected their preference for monetary sanctions. In state court, all four sanctions were monetary. In federal court, the judges awarded sixteen monetary sanctions and five nonmonetary sanctions (dismissing the suit three times and twice striking the offending paper). Three of the monetary sanctions were payable to the court and thirteen were payable to the opposing party.

Judges and attorneys were asked to identify appropriate nonmonetary sanctions. Eleven judges and 226 attorneys suggested from one to three appropriate nonmonetary sanctions. Chart 28 lists the nonmonetary sanctions mentioned by more than ten attorneys or more than two judges.

CHART 28

NONMONETARY SANCTIONS SUGGESTED BY ATTORNEYS AND JUDGES

Sanction	Attorneys	Judges
Judgment against the violator	85	2
Strike the paper, claim, or defense	76	4
Public or private reprimand	32	3
Limit or suspend attorney's practice	30	0
Report violation to state bar	20	2
Prohibit proof on the issue	20	3
Limit issues, pleadings, discovery	14	2
Order violator to do pro bono work	14	0
Change or enforce time limits	11	2
Warning to violator	10	2

A wide variety of other nonmonetary sanctions were suggested, including "pillory," "decapitation," and "picking up garbage."

D. Summary of Rule 11 Activity, Benefits, and Costs

1. Federal Court

From 1984 to 1990, 110 formal requests were made for Rule 11 sanctions and nineteen (17%) of those requests were granted. Almost all of the

49. BURBANK, *supra* note 4, at 36-41 (Rule 11 is not a fee-shifting statute and its purpose is deterrence, not compensation); Vairo, *supra* note 4, at 231 (use of fines payable to the court will reduce Rule 11 litigation because the prevailing party will not be lured by the chance of recovering its fees).

110 requests (96%) were raised by parties rather than judges; about half of the requests were targeted at complaints. The number of Rule 11 requests did not level off; instead it increased markedly in 1989 and 1990. Further, the percentage of requests that were granted increased from thirteen percent in 1984 through 1989 to twenty-nine percent in 1990. For informal use of Rule 11, most judges and half of the attorneys reported using Rule 11 warnings.

Most of the attorneys increased the extent of their pre-filing fact and law inquiry as a result of Rule 11. Nevertheless, a majority of the lawyers who practice primarily in federal court believed that the Rule had not led to the benefits that the Rule's proponents hoped would flow from the increased inquiry. In particular, very few attorneys reported that Rule 11 had a positive impact on litigation cost, the time for the resolution of suits, and the likelihood of suit settlements. Substantial minorities of attorneys and a majority of federal judges believed that the Rule reduced abusive litigation practices (filing papers for harassment or delay) and reduced the number of frivolous suits, defenses, or motions.

None of the potential negative impacts of Rule 11 appeared to be an overwhelming problem in the Eastern District. However, the question is whether the cumulative weight of the costs of the Rule may constitute a significant problem. The study looked at five potential costs or problems of Rule 11. First, regarding satellite litigation, Rule 11 requests were not routine in the federal court. However, the burden Rule 11 imposed on each judge in 1990 was not minuscule; the typical judge had to decide nine requests which generated fifteen briefs, seven affidavits, and five hearings. Further, most of the Rule 11 requests were denied. Finally, nearly two-thirds of the judges and attorneys believed attorneys used Rule 11 to harass and intimidate opponents.

The second potential cost of the Rule is that it increased tension among attorneys, judges, and clients. Most of the attorneys and half of the judges believed Rule 11 aggravated relations between opposing attorneys. A little less than half of the attorneys and judges reported that the Rule strained attorney-judge relations. All of the judges and a majority of the lawyers believed Rule 11 had no impact on relations between attorneys and clients.

Third, the chilling effects of Rule 11 were evident. Eleven percent of the attorneys reported that the Rule decreased their creative advocacy and willingness to make arguments to extend or change law. About one-fourth of the attorneys did not assert claims or defenses they believed were meritorious due to concerns over Rule 11. Further, one-fourth of the attorneys said they were less likely to take civil rights cases as a result of the Rule.

Fourth, Rule 11 had a disproportionate impact on some litigants. Most Rule 11 requests were targeted at plaintiffs and almost all requests that were granted were against plaintiffs. Rule 11 sanctions were not requested or imposed disproportionately against prisoner civil rights plaintiffs. On the other hand, represented, non-prisoner civil rights plaintiffs were the target of a disproportionately high number of Rule 11 requests. However, judges imposed sanctions against represented non-prisoner civil rights plaintiffs at about the same rate as against other represented plaintiffs.

Fifth, the vast majority of Rule 11 requests that were granted resulted in monetary rather than non-monetary sanctions and most monetary sanctions were payable to the opposing party rather than the court.

2. State Court

In 1990, forty-eight formal Rule 11 requests were made. All of the requests were raised by parties rather than judges and about half were targeted at complaints. Only four of the requests (8%) were granted. Approximately one-half of the judges and parties reported using Rule 11 warnings.

Nearly half of the attorneys who practiced primarily in state court increased their pre-filing legal and fact inquiries due to Rule 11. About half of the attorneys and over three-fourths of the judges believed Rule 11 caused a decrease in the number of frivolous suits, defenses, and motions, which was the main goal of Rule 11 proponents. Few of the attorneys and judges believed Rule 11 had a positive impact on litigation cost, the time for resolution of suits, or the likelihood of suit settlement. Regarding abusive litigation practices, over two-thirds of the judges believed Rule 11 had a positive impact, but less than one-fourth of the attorneys agreed.

The five costs of Rule 11 analyzed in this study were not as prevalent in state court as in federal court. First, satellite litigation is not a serious problem in state court. Rule 11 requests are not routine and the burden on each judge is relatively small (five requests which generated six briefs, three affidavits, and three hearings, all of which were combined with hearings on other motions). However, since only eight percent of the requests were granted, most of the judges and attorneys' Rule 11 efforts were directed at unsuccessful requests. Second, Rule 11 did not cause as much of an increase in tension between attorneys, judges, and clients in state court. While about half of the judges and attorneys believed Rule 11 aggravated relations between opposing attorneys, only one-fourth of the attorneys and almost none of the judges believed Rule 11 aggravated attorney-judge or attorney-client relationships. Third, Rule 11's chilling effect in state court was similar to its effect in federal court. One-fifth of the attorneys reported

that Rule 11 decreased their willingness to make arguments to extend or change the law. Ten to fifteen percent of the attorneys said that Rule 11 caused them to refuse to take meritorious cases or assert meritorious claims or defenses. Fourth, Rule 11 had a disproportionate impact on plaintiffs. Plaintiffs were the targets of over seventy percent of the Rule 11 requests and all of the requests that were granted. However, only one of the Rule 11 requests targeted a civil rights plaintiff. Fifth, all of the four sanctions awarded in state court were monetary and payable to the opposing party.

3. Attorneys and Judges' Evaluations of Rule 11

Attorneys and judges were asked whether they agreed or disagreed with this statement: "The advantages of Rule 11 outweigh its disadvantages." Chart 29 presents the results.

CHART 29
RULE 11 ADVANTAGES OUTWEIGH DISADVANTAGES

Respondent	Agree (%)	No Opinion (%)	Disagree (%)
Judges — federal	83	17	0
Judges — state	78	22	0
Attorneys — federal	71	5	24
Attorneys — state	60	19	21
Plaintiffs' attorneys	56	19	25
Defendants' attorneys	64	13	23
Government attorneys	77	13	10
Solo practitioners	39	31	31
Large firm attorneys	69	5	26

The vast majority of judges believed the advantages of Rule 11 outweigh its disadvantages. The attorneys were less certain. About a quarter of most groups of attorneys disagreed with the statement. Certain groups of attorneys were more favorably disposed toward the Rule (government attorneys, defendants' attorneys, and attorneys who practiced primarily in federal court) than other groups (solo practitioners, plaintiffs' attorneys, and state court attorneys). However, no matter how the attorneys are categorized, more members of each group agree with the statement than disagree.

A number of attorneys commented that the Rule 11 cost/benefit analysis would be more favorable if judges were more likely to impose Rule 11 sanctions. One stated, for example, that "until CR-11 sanctions are regularly imposed, the rule can be expected to have little effect on the practice of

law. I strongly encourage vigorous enforcement of the rule."[50] Another believed that "the advantages of the rule would greatly outweigh its disadvantages if it were actually applied by the courts."[51]

The data do not appear to support the thesis that more vigorous enforcement of Rule 11 will increase the benefits realized from the Rule. The incidence data from case files and the attorneys' comments on the surveys show that Rule 11 sanctions were imposed much more often in federal than state court. The survey results also reveal that more federal court lawyers increased their pre-filing fact and law inquiry than state court lawyers. However, the benefits that the Rule's proponents hoped would flow from the increased pre-filing inquiry occurred about equally in state and federal court. In fact, the greatest single positive impact of the Rule was the decrease in frivolous suits, defenses, and motions reported by state judges and attorneys. On the other hand, the data support the inference that judicial hesitancy to impose sanctions reduces some of the negative impacts of Rule 11. Satellite litigation, disproportionate impacts on civil rights plaintiffs, and the aggravation of relations between attorneys, judges, and clients are more serious problems in federal than state court.

III. COMPARISON TO OTHER EMPIRICAL STUDIES

The Eastern District case file and survey data from this study can be compared to empirical studies of Rule 11 in other federal courts. Comparisons will be made to the relevant data from four other studies. The Third Circuit Task Force study included case file data for all formal Rule 11 activity decided by the district courts in the Third Circuit between July 1, 1987, and June 30, 1988, and surveys of attorneys who practiced in the Third Circuit.[52] The Nelken study consisted of surveys of judges and attorneys in the Northern District of California.[53] The Federal Judicial Center (FJC) study included surveys of all federal district court judges and case file data for formal Rule 11 activity in cases filed from January 1, 1987, through mid-1990 for four district courts (District of Arizona, District of District of Columbia, Northern District of Georgia, and Western District of Texas) and cases filed from mid-1988 to mid-1990 for the Eastern District of Mich-

50. This comment was in response to the author's survey. The actual survey is contained in Appendixes A and B (original on file with author).

51. *Id.*

52. BURBANK, *supra* note 4, at 5-6.

53. Nelken, *supra* note 4, at 147.

igan.[54] The American Judicature Society (AJS) study consisted of surveys of lawyers in the Fifth, Seventh, and Ninth Circuits.[55]

A. Amount, Nature, and Disposition of Formal Rule 11 Activity—Comparison With Other Studies

The amount, nature, and disposition of formal Rule 11 activity in the Eastern District are quite similar to the Rule 11 activity reported by other empirical studies of federal courts. The amount of formal Rule 11 activity in the Eastern District is roughly comparable to the Rule 11 activity in other parts of the country. The Third Circuit Task Force reported that approximately one-half of one percent (0.5%) of the civil cases pending in the Third Circuit from July 1, 1987, through June 30, 1988, involved Rule 11 motions during that time.[56] Approximately one percent (1.0%) of the civil cases pending in the Eastern District during the same time period involved Rule 11 motions.[57] The FJC study compared the number of cases involving Rule 11 motions and sua sponte consideration of Rule 11 to the number of civil cases filed from the beginning of 1987 to mid-1990 for four districts.[58] The percentages of filed cases involving formal Rule 11 activity were: Northern District of Georgia (1.4%); District of Columbia (1.5%); District of Arizona (1.7%); and Western District of Texas (2.5%).[59] In the Eastern District, (1.3%) 89 of 6735 of the civil cases filed from August 1983, through December 31, 1990, involved formal Rule 11 activity. In summary, the percentage of cases involving formal Rule 11 activity was twice as high in the Eastern District than in the Third Circuit. However, the Eastern District was on the low end of the spectrum compared to the districts in the FJC study.

The nature of the formal Rule 11 activity in the Eastern District is consistent with the formal activity in other courts in two respects. First, the vast majority of formal Rule 11 activity is raised by parties rather than by judges. In the Eastern District, judges raised only four percent of the formal Rule 11 requests. The percentages of the formal Rule 11 activity raised

54. WIGGINS & WILLGING, *supra* note 4, § 1A, at 1, § IB, at 1-2.

55. AMERICAN JUDICATURE SOCIETY, *supra* note 4, at 1-2.

56. BURBANK, *supra* note 4, at 60.

57. The one percent figure is based on the following. The number of civil cases pending in the Eastern District was 1,346 on the last day of 1986; 1,089 on the last day of 1987; and 1,069 on the last day of 1988. JUDICIAL WORKLOAD STATISTICS (1987), *supra* note 14, at 27; JUDICIAL WORKLOAD STATISTICS (1988), *supra* note 14, at 29. Therefore, an average of 1,168 cases were pending at any time during the period. In 1987 and 1988, 11 Rule 11 motions were made in the Eastern District in each year.

58. WIGGINS & WILLGING, *supra* note 4, § IB, at 2.

59. *Id.* The percentages in the text were calculated from figures in Table 1.

by judges as reported in the FJC study were: District of Arizona (7%); District of District of Columbia (3%); Northern District of Georgia (6%); Eastern District of Michigan (2%); and Western District of Texas (7%).[60] Second, the most common paper target of formal Rule 11 activity was complaints. Complaints were the target of the following percentages of formal sanction requests: Eastern District (49%); Third Circuit (50%);[61] District of Arizona (40%); District of District of Columbia (39%); Northern District of Georgia (37%); Eastern District of Michigan (54%); and Western District of Texas (34%).[62]

The disposition of formal Rule 11 requests is remarkably similar in all federal courts in which data has been gathered. The percentage of formal Rule 11 requests that are granted is nearly identical in federal courts across the country: Eastern District (17%); district courts in the Third Circuit (19%);[63] district courts in the Fifth, Seventh, and Ninth Circuits (17%);[64] and the Districts of Arizona, the District of Columbia, Northern Georgia, Eastern Michigan, and Western Texas (18%).[65]

B. Rule 11 Benefits—Comparison With Other Studies

The beneficial effects of Rule 11, or lack thereof, in the Eastern District were measured in part through surveys of lawyers who regularly practice civil litigation in the Eastern District. Those survey results were compared to the Nelken study's surveys of lawyers in the Northern District of California and the Third Circuit Task Force's surveys of attorneys in the Third Circuit. Chart 30 summarizes the results.

The comparison between the effects of Rule 11 in the Eastern District of Washington and the effects in the Northern District of California reveal conflicting results. When assessing the Rule's impact on their own practices, the Washington lawyers consistently reported greater effects than did the California lawyers. However, when assessing the Rule's impact on opposing counsel, the California attorneys observed greater effects in every category than the Washington lawyers. The California and Washington lawyers are consistent in one respect—they felt the impact of Rule 11 much more than lawyers in the Third Circuit.

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60. *Id.* § IB, at 5, Table 5.
61. BURBANK, *supra* note 4, at 66.
62. WIGGINS & WILLGING, *supra* note 4, § IB, at 13.
63. BURBANK, *supra* note 4, at 110-12 (26 of 140 requests).
64. AMERICAN JUDICATURE SOCIETY, *supra* note 4, at 8.
65. WIGGINS & WILLGING, *supra* note 4, § IB, at 7, 9, Tables 9, 12. The 18% figure is based on 205 requests granted (total from Table 12) and 1,111 requests resolved with or without a ruling (total requests not pending from Table 9).

CHART 30
RULE 11 BENEFITS
RESULTS FROM THREE EMPIRICAL STUDIES[66]

	E.D. Wash. (%)	N.D. Cal. (%)	3d. Cir. (%)
Effect on Attorney's Own Practice			
Increased pre-filing fact inquiry	71	46	44
Increased pre-filing legal inquiry	62	33	35
Filing papers for delay	35	14	3
Filing papers for harassment	27	14	4
Effect on Opposing Attorney's Practice			
Increased pre-filing fact inquiry	40	59	24
Increased pre-filing legal inquiry	31	36	18
Filing papers for delay	27	82	13
Filing papers for harassment	37	82	17

The types of effects that the Rule drafters hoped would flow from Rule 11 were reported by a much higher percentage of Eastern District lawyers than their Third Circuit counterparts. Two factors may produce this difference. First, the Eastern District survey was conducted in 1990; the Third Circuit study was conducted in 1987 through 1988. Thus, the Eastern District lawyers had more years of experience with Rule 11 when they were surveyed. Second, Rule 11 activity was more common in the Eastern District than the Third Circuit. In 1987 and 1988, cases in the Eastern District were twice as likely to contain Rule 11 requests than cases in the Third Circuit.[67] Further, Rule 11 requests in the Eastern District increased dramatically in 1989 and 1990.[68]

Finally, the effect of Rule 11 on the settlement of civil litigation was addressed in the AJS study. The AJS study reported that 12% of the lawyers believed Rule 11 facilitated the settlement of a case while 11.6% believed the Rule interfered with settlements.[69] Nearly identical results were found in the Eastern District: 11% of the attorneys believed Rule 11 increased the likelihood of settlement and 11% believed it decreased the likelihood of settlement.

66. The figures for the Northern District of California and Third Circuit are taken from Tables 1 and 2 of the Nelken Study. Nelken, *supra* note 4, at 152.

67. *See supra* Chart 1.

68. AMERICAN JUDICATURE SOCIETY, *supra* note 4, at 17.

69. BURBANK, *supra* note 4, at 85-96.

C. *Rule 11 Costs—Comparison With Other Studies*

Several of the costs of Rule 11 in the Eastern District were compared to costs in other federal courts. Comparisons will be made to relevant data from three empirical studies: the Nelken study, the Third Circuit Task Force report, and the FJC study of five federal district courts.

Three studies asked lawyers whether Rule 11 aggravates relationships between opposing attorneys, between attorneys and judges, and between attorneys and clients. Chart 31 lists the results.

CHART 31
WHETHER RULE 11 AGGRAVATES RELATIONSHIPS
ATTORNEY SURVEYS

Relationship	E.D. Wash. (%)	3d. Cir. (%)[70]	N.D. Cal. (%)[71]
Between opposing attorneys	63	40	49
Between attorneys and judges	40	16	29
Between attorneys and clients	35	12	(NA)

The studies are consistent in one respect: Rule 11 aggravated relations between attorneys to a greater extent than attorney-judge or attorney-client relationships. However, a higher percentage of Eastern District attorneys reported these negative effects than attorneys in the Third Circuit or California.

The three studies also asked lawyers about the chilling effect of Rule 11 on legitimate advocacy. The responses of Eastern District lawyers are quite similar to those of the lawyers in California and the Third Circuit. Chart 32 shows the results.

CHART 32
WHETHER RULE 11 CHILLS ADVOCACY
ATTORNEY SURVEYS

Chilling Effect	E.D. Wash. (%)	3d. Cir. (%)[72]	N.D. Cal. (%)[73]
Seeking to extend or change law	11	5	13
Did not accept meritorious case	15	(NA)	14
Did not assert meritorious claim or defense	23	(NA)	15

70. Nelken, *supra* note 4, at 150.
71. BURBANK, *supra* note 4, at 84.
72. Nelken, *supra* note 4, at 150.
73. BURBANK, *supra* note 4, at 57.

The case file data from the Eastern District and two other studies show that Rule 11 had a disproportionate impact on plaintiffs. Plaintiffs are much more likely than defendants to be the targets of Rule 11 requests. Further, a greater percentage of requests is granted against plaintiffs than against defendants. Chart 33 summarizes the results.

CHART 33
RULE 11 IMPACTS ON PLAINTIFFS AND DEFENDANTS
CASE FILE DATA

Impact	E.D. Wash. (%)	3d. Cir. (%)[74]	FJC (%)[75]
Target of Rule 11 request			
Plaintiff	72	67	59
Defendant	28	33	37
Percent of requests against that party that are granted			
Plaintiff	22	16	(NA)
Defendant	6	9	(NA)

The case file data from the Eastern District and two other studies show that Rule 11 had a disproportionate impact in civil rights cases. However, the nature of the disproportionate impact varies from study to study. The Third Circuit Task Force reported that the percentage of civil rights cases involving Rule 11 requests (18% of requests) was proportionate to the percentage of civil rights cases on the docket (16% of cases filed were civil rights cases). However, represented civil rights plaintiffs were sanctioned at a much higher rate (45%) than other represented plaintiffs (9%).[76] The FJC study found that a disproportionately high percentage of civil rights cases involved Rule 11 requests but that represented civil rights plaintiffs were sanctioned at a rate similar to all other types of litigants.[77] The Eastern District data is consistent with that of the FJC. A disproportionately high percentage of Rule 11 requests were made in civil rights cases (34%) compared to the portion of civil rights cases on the docket (24%). However, represented civil rights plaintiffs were sanctioned at a similar rate (12% of requests) as other represented plaintiffs (16%).

74. WIGGINS & WILLGING, *supra* note 4, § IB, at 14, Table 9. The figures in Chart 33 are based on totals derived from Table 9.

75. BURBANK, *supra* note 4, at 69-71.

76. Elizabeth C. Wiggins et al., *The Federal Judicial Center's Study of Rule 11*, 2 FJC DIRECTIONS 1, 21 (1991).

77. BURBANK, *supra* note 4, at 112-14.

Finally, the types of sanctions imposed in the Eastern District are consistent with the sanctions reported by the Third Circuit Task Force and the FJC. By far the most common sanction is a monetary one, payable to the opposing party. The results are in Chart 34.

CHART 34
TYPES OF RULE 11 SANCTIONS
CASE FILE DATA

Sanction	E.D. Wash. (%)	3d. Cir. (%)[78]	FJC (%)[79]
Monetary—pay to opposing party	62	67	71
Monetary—pay to court	14	11	8
Non-monetary	24	22	21

78. PROPOSED AMENDMENTS, *supra* note 7. The proposal would amend Rule 11 to provide:

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(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 or maintained 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.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) HOW INITIATED

(A) BY MOTION. A motion for sanctions under this rule shall be made separately from other motions or requests, and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with, or presented to, the court unless, within 21 days after service of the motion, the

IV. IMPLICATIONS OF THE DATA

This study sought to comprehensively assess the costs and benefits of Rule 11 in state and federal courts in one geographic location — Spokane County, Washington. However, as Part III demonstrates, the effect of Rule 11 in federal court in the Eastern District of Washington is similar to the Rule's impact in other federal district courts. Unfortunately, no other empirical research has been done in state courts so it is impossible to tell whether the impact of Rule 11 in Spokane County Superior Courts is typical of other state courts. Nevertheless, this study provides information relevant to the ongoing Rule 11 debate.

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challenged paper, claim, defense, contention, or argument is not withdrawn or corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) ON COURT'S INITIATIVE. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTION; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) ORDER. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this role and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

79. WIGGINS & WILLGING, *supra* note 4, § IB, at 8. The figures in Chart 34 are based on totals derived from Table 13.

A. *The Proposed Amendment to Federal Rule of Civil Procedure 11*

In August 1991, the Advisory Committee on the Civil Rules published proposed amendments to Federal Rule 11.[80] The Advisory Committee listed the criticisms of Rule 11 that it believed had merit.

> (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. 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.[81]

All of the criticisms are supported by the federal court data in this study, except the fourth because that issue was not studied.

After receiving comments on the 1991 proposed amendment, the Standing Committee on Rules of Practice and Procedure published a revised proposed amendment to Rule 11 in 1992.[82] The Committee Note identifies the purpose of the proposed amendments: "The revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the Rule. . . . The revision . . . should reduce the number of motions for sanctions presented to the court."[83]

These are laudable goals. The results of this study suggest that they are attainable goals. A much higher percentage of federal court cases contained Rule 11 requests than state court cases.[84] Further, the negative impacts of the Rule were generally higher in federal court.[85] However, state court ex-

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80. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 1-9 (1991).

81. *Id.* at 4.

82. PROPOSED AMENDMENTS, *supra* note 7.

83. *Id.* at 49-50.

84. *See supra* section II.B.

85. PROPOSED AMENDMENTS, *supra* note 7, at 2, 5-6.

perienced the greatest single positive impact of Rule 11—the reduction of frivolous suits, defenses, and motions.[86]

The difficult question is whether these revisions to Rule 11 will reduce the number of Rule 11 motions and address the problems the Rule caused. Three of the proposed revisions hold the keys to answering this question: (1) the scope of the attorney's certification; (2) the motion procedure; and (3) the choice of sanction.

1. Scope of the Attorney's Certification

In one respect, the proposal narrows the scope of the attorney's certification under Rule 11. The amendment allows the attorney to make factual allegations that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery,"[87] whereas the existing Rule requires the attorney to certify that the paper has a factual basis.[88] The Advisory Committee states that this change will "equalize the burden of the Rule upon plaintiffs and defendants" by allowing both parties to rely on information and belief in their pleadings.[89] This revision should reduce the disproportionate impact that Rule 11 has on plaintiffs, an effect found in this and other empirical studies of the Rule.[90] This proposed change should also reduce the number of Rule 11 motions.

But other revisions significantly expand the certification standard. As the Rule is currently interpreted by most courts, the certification applies to the paper as a whole.[91] The 1991 proposal extends the certification to the presentation of "claims," "defenses," "other legal contentions," "allegations," "denials," and "other factual contentions."[92] This proposal significantly expands the potential targets of a Rule 11 motion. It would be quite surprising if this revision results in fewer Rule 11 motions. In fact, it could greatly increase them. Consequently, the expanded certification standard may increase satellite litigation, the chilling effects on creative advocacy, and the tension among attorneys, judges, and clients. The Advisory Committee may be more likely to achieve its goals of reducing the number of Rule 11 motions and reducing the negative effects of the Rule if it kept the

86. *See supra* section II.C.

87. PROPOSED AMENDMENTS, *supra* note 7, at 45-46.

88. FED. R. CIV. P. 11, *supra* note 1.

89. *See supra* section III.B.

90. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §§ 6.C.4., 14.D.2. (1989).

91. PROPOSED AMENDMENTS, *supra* note 7, at 45-46.

92. *Id.*

certification standard applicable only to the paper as a whole at the time it was filed.

2. Motion Procedure

The proposed revision sets forth the procedure to be followed when a party requests Rule 11 sanctions. The party must make the Rule 11 motion separately from other motions, must serve it on the alleged offender, and cannot file it with the court if within twenty-one days of service the offending matter is corrected or withdrawn.[93] The Advisory Committee hopes this provision will encourage offenders to withdraw matters that constitute violations of the Rule.[94] If these hopes are realized, the satellite litigation burden on judges described in this study[95] should be reduced because they would not have to decide as many Rule 11 motions.

3. Choice of Sanction

The proposed revision makes several changes in the Rule's language dealing with appropriate sanctions. First, the proposed revision gives the court discretion whether to award sanctions after finding a Rule 11 violation. The revision provides that if a court determines that the certification standard has not been met, it "may impose . . . an appropriate sanction,"[96] whereas the current version of the Rule provides that "the court . . . shall impose . . . an appropriate sanction" in the same circumstance.[97] Second, the revision makes clear that the sanction is "limited to what is sufficient to deter comparable conduct by persons similarly situated."[98] Third, the proposal mentions three types of sanctions: a nonmonetary penalty, a monetary penalty payable to the court, or an order to pay to the movant some or all of the reasonable costs and attorneys fees directly caused by the violation.[99]

These changes could have salutary effects on judges' choice of sanctions. They may reduce the heavy reliance on monetary sanctions payable to the opposing party, which was found in this and other empirical studies of Rule 11.[100] Further, if judges exercise their discretion not to award sanctions, to award more nonmonetary sanctions, and to limit monetary sanctions to the expenses directly caused by the Rule 11 violation, the rule may lose its al-

93. *Id.* at 3.
94. *Id.* at 8.
95. *See supra* section II.C.1.
96. PROPOSED AMENDMENTS, *supra* note 7, at 46.
97. FED. R. CIV. P. 11, *supra* note 1.
98. PROPOSED AMENDMENTS, *supra* note 7, at 4.
99. *Id.*
100. *See supra* section III.B.

lure as a fee-shifting device and the number of Rule 11 motions may decline.

B. State Action on Rule 11

This study has implications for policymakers involved with Rule 11 in state court. The most important generalization from the data is that the impact of Rule 11 may be very different in federal and state court. The level of Rule 11 activity, the benefits of the Rule, and its costs may vary in state and federal court. As a result, studies of the impact of Rule 11 in federal court may have limited value to policymakers dealing with Rule 11 at the state level. For example, this and other empirical studies found that Rule 11 has a disproportionate impact on civil rights plaintiffs and a chilling effect on civil rights lawyers in federal court.[101] However, Rule 11 had very little impact on civil rights plaintiffs and lawyers in state court.[102] Consequently, revisions in Rule 11 designed to address problems with the Rule in federal court may be inappropriate for states, where the negative effects of Rule 11 may be altogether different.

Those states that have never adopted the 1983 amendments to Rule 11 may have two sets of issues to address. Are there abuses that significantly burden the civil litigation process, such as abusive litigation practices or frivolous claims, defenses, or motions, that delay or raise the cost of suit resolution? If so, is any version of Rule 11 likely to eliminate those civil litigation problems without creating more significant problems of its own?

For states that adopted the 1983 version of Rule 11, the issues are slightly different. First, what are the benefits and costs of Rule 11 in the state court? Second, will the benefit/cost ratio be improved by returning to the pre-1983 version, by adopting the Standing Committee's proposed revision, or by following some other means?

Regardless of the current status of a state's Rule 11, each state should decide the future of the Rule for its courts. To make an informed decision, a state should assess the significance of its abusive and frivolous litigation problems and the costs and benefits of Rule 11 as a solution to those problems. That process will not be easy. However, the stakes are great enough in the Rule 11 debate to make the effort worthwhile.

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101. *Id.*

102. *See supra* section II.C.4.

APPENDIX A
RULE 11 PROJECT
JUDGE/MAGISTRATE SURVEY

Gonzaga University School of Law
P.O. Box 3528
Spokane, WA 99220-3528

I. BACKGROUND INFORMATION

1. In which court do you preside? (Circle Answer)
   a. United States District Court for the Eastern District of Washington
   b. Spokane County Superior Court
2. In what capacity do you currently serve? (Circle Answer)
   a. Judge
   b. Magistrate

II. EXPERIENCE WITH F.R.C.P. 11 OR C.R. 11

Questions 3-6 concern your experiences with F.R.C.P. 11 or C.R. 11 (hereinafter "Rule 11") during the last four years.

3. Have you decided Rule 11 motions raised by the attorneys or parties? (Circle answer)
   a. No
   b. Yes — Approximately how many times? _____
   Approximately how many times did you impose sanctions? _____
4. Have you on your own motion raised the issue of imposing Rule 11 sanctions? (Circle answer)
   a. No
   b. Yes — Approximately how many times? _____
   Approximately how many times did you impose sanctions? _____
5. In instances other than those included in Questions 3 and 4, have you warned attorneys or parties that they were in violation or were approaching violation of Rule 11? (Circle answer)
   a. No
   b. Yes — Approximately how many times? _____
   In your opinion, how many of the warnings were effective? _____
6. For the cases in which you awarded Rule 11 sanctions, approximately how many times was the sanction:
   a. Monetary only _____
   b. Non-monetary only _____
   c. Both monetary and non-monetary _____

III. OPINIONS ABOUT RULE 11

The remainder of this survey deals with your opinions *about Rule 11.*

7. The primary purpose of Rule 11 sanctions is to: (Circle one)

a. Punish attorneys of parties who violate the rule

b. Deter other attorneys and parties from violating the rule

c. Compensate parties harmed by violations of the rule

d. Other (Please specify): _____

_____

_____

8. If a court finds a Rule 11 violation, the *primary* sanction should be: (Circle one)

a. Monetary sanctions

b. Non-monetary sanctions

9. If a court decides to impose a monetary sanction, the *primary* factor the court should use to determine the amount of the sanction should be: (Circle one)

a. Expense caused by the violation

b. Violators ability to pay

c. Willfulness of the violation

d. *Pro se* violator

e. Repeat violator

f. Other (Please specify): _____

_____

_____

10. If a court decided to impose a non-monetary sanction, what types of sanctions should it consider:

a. _____

b. _____

c. _____

11. In your opinion, what effect has Rule 11 had on attorneys practicing before you in the following areas: (Please circle a number for each item.)

	Greatly Decreased	Somewhat Decreased	No Effect	Somewhat Increased	Greatly Increased
A. Extent of pre-filing factual inquiry	1	2	3	4	5
B. Extent of pre-filing legal inquiry	1	2	3	4	5
C. Willingness to make arguments to extend or change law	1	2	3	4	5
D. Willingness to assert unconventional claims or defenses	1	2	3	4	5
E. Willingness to assert civil rights claims	1	2	3	4	5

F. Likelihood of filing papers for delay	1	2	3	4	5
G. Likelihood of filing papers for harassment	1	2	3	4	5

12. In your opinion, what effect, if any, has Rule 11 had on the practice of law in the following areas? (Please circle a number for each item).

	Greatly Decreased	Somewhat Decreased	No Effect	Somewhat Increased	Greatly Increased
A. Number of Frivolous suits, defenses or motions	1	2	3	4	5
B. Cost of litigation	1	2	3	4	5
C. Amount of time for resolution of suit	1	2	3	4	5
D. Likelihood of settlement of suit	1	2	3	4	5
	Greatly Aggravated	Somewhat Aggravated	No Effect	Somewhat Improved	Greatly Improved
E. Relations between attys for opposing parties	1	2	3	4	5
F. Relations between attys and judges/magistrates	1	2	3	4	5
G. Relations between attys and clients	1	2	3	4	5
	Strongly Disagree	Somewhat Disagree	No Opinion	Somewhat Agree	Strongly Agree
H. Attys use Rule 11 as a tactic to harass and intimidate opponents	1	2	3	4	5
I. The advantages of Rule 11 outweigh its disadvantages	1	2	3	4	5

13. Please make any comments you wish regarding Rule 11.

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APPENDIX B
RULE 11 PROJECT
ATTORNEY SURVEY

Gonzaga University School of Law
P.O. Box 3528
Spokane, WA 99220-3528

I. BACKGROUND INFORMATION

1. How many years have you been admitted to the bar in any state? _____ years
2. Currently, do you practice in (circle one):
   a. Law firm
      If so, how many lawyers are in your firm? _____
   b. Corporate or private organization
   c. Government
   d. Other (please specify) _____

The remainder of the survey asks about your personal *opinions, practice, and experience with Rule 11,* not *the practice and experience of your firm.*

3. Since August, 1983, approximately what percentage of your practice was devoted to civil litigation?
   If 0%, please stop here and return survey. _____%
4. Since August, 1983, approximately what percentage of your *civil litigation* practice was in the:
   a. Federal Courts _____%
   b. Washington Superior Courts _____%
5. Since August, 1983, approximately what percentage of your *civil litigation clients* were:
   a. Private Plaintiffs _____%
   b. Private Defendants _____%
   c. Governmental plaintiffs _____%
   d. Governmental defendants _____%
   e. Other (please specify _____

II. EXPERIENCES WITH *FEDERAL* RULE OF CIVIL PROCEDURE

Questions 6-15 deal with your experience with F.R.C.P. 11 since August 1, 1983 *in civil litigation in* federal court.

A. *Questions 6-9 concern cases in federal court in which you or your opponent asked the court to impose F.R.C.P. 11 sanctions or in which the court raised F.R.C.P. 11 on its own motion.*

6. Have you sought sanctions under F.R.C.P. 11? (Circle one)
   a. No

b. Yes — Approximately how many times? _____
Approximately how many times were sanctions imposed? _____

7. Has an opposing attorney or party sought sanctions against you or your client under F.R.C.P. 11?
   a. No
   b. Yes — Approximately how many times? _____
   Approximately how many times were sanctions imposed? _____

8. Has a court on its own motion raised the issue of F.R.C.P. 11 sanctions against your or your client?
   a. No
   b. Yes — Approximately how many times? _____
   Approximately how many times were sanctions imposed? _____

9. Has a court on its own motion raised the issue of F.R.C.P. 11 sanctions against an opposing attorney or party?
   a. No
   b. Yes — Approximately how many times? _____
   Approximately how many times were sanctions imposed? _____

B. *Questions 10-13 concern those cases in federal court in which you, your opponent or the court warned a party or attorney about F.R.C.P. 11* without formally seeking sanctions.

10. Have you warned an opposing attorney or party that they were in violation or were approaching a violation of F.R.C.P. 11?
    a. No
    b. Yes — Approximately how many times? _____

11. Has an opposing attorney or party warned you that you were in violation or were approaching a violation of F.R.C.P. 11?
    a. No
    b. Yes — Approximately how many times? _____

12. Has a court warned you that you were in violation or were approaching violation of F.R.C.P. 11?
    a. No
    b. Yes — Approximately how many times? _____

13. Has a court warned an opposing attorney or party that they were in violation or were approaching a violation of F.R.C.P. 11?
    a. No
    b. Yes — Approximately how many times? _____

C. *Questions 14 and 15 deal with the direct impact of F.R.C.P. 11 on your willingness to take cases and assert claims or defenses in federal court.*

14. Have there been any cases that could have been brought in federal court and that you considered meritorious but which you did not accept because of concern of possible F.R.C.P. 11 sanctions?
    a. No
    b. Yes — Approximately how many times? _____
15. Have there been any claims or defenses that you considered meritorious but which you did not assert in federal court due to concern about possible F.R.C.P. sanctions?
    a. No
    b. Yes — Approximately how many times? _____

III. EXPERIENCES WITH *WASHINGTON* SUPERIOR COURT CIVIL RULE 11

Questions 16-19 deal with your experiences with CR 11 since September 1, 1985, *in civil litigation in Washington Superior Courts.*

A. *Questions 16-25 concern cases in Washington Superior Courts in which you or your opponent asked the court to impose CR 11 sanctions or in which the court raised CR 11 on its own motion.*

16. Have you sought sanctions under CR 11? (Circle one)
    a. No
    b. Yes — Approximately how many times? _____
    Approximately how many times were sanctions imposed? _____
17. Has an opposing attorney or party sought sanctions against you or your client under CR 11?
    a. No
    b. Yes — Approximately how many times? _____
    Approximately how many times were sanctions imposed? _____
18. Has a court on its own motion raised the issue of CR 11 sanctions against your or your client?
    a. No
    b. Yes — Approximately how many times? _____
    Approximately how many times were sanctions imposed? _____
19. Has a court on its own motion raised the issue of CR 11 sanctions against an opposing attorney or party?
    a. No
    b. Yes — Approximately how many times? _____
    Approximately how many times were sanctions imposed? _____

B. *Questions 20-23 concern those cases in Washington Superior Court in which you, your opponent or the court warned a party or attorney about CR 11* without formally seeking sanctions.

20. Have you warned an opposing attorney or party that they were in violation or were approaching a violation of CR 11?
    a. No
    b. Yes — Approximately how many times? _____

21. Has an opposing attorney or party warned you that you were in violation or were approaching a violation of CR 11?
    a. No
    b. Yes — Approximately how many times? _____
22. Has a court warned you that you were in violation or were approaching violation of CR 11?
    a. No
    b. Yes — Approximately how many times? _____
23. Has a court warned an opposing attorney or party that they were in violation or were approaching a violation of CR 11?
    a. No
    b. Yes — Approximately how many times? _____

C. *Questions 24 and 25 deal with the direct impact of CR 11 on your willingness to take cases and assert claims or defenses in Washington Superior Courts.*

24. Have there been any cases that could have been brought in Washington Superior Court and that you considered meritorious but which you did not accept because of concern of possible CR 11 sanctions?
    a. No
    b. Yes — Approximately how many times? _____
25. Have there been any claims or defenses that you considered meritorious but which you did not assert in Washington Superior Court due to concern about possible CR 11 sanctions?
    a. No
    b. Yes — Approximately how many times? _____

IV. OPINIONS ABOUT RULE 11

The remainder of this survey deals with your opinions *about F.R.C.P. 11 and CR 11, which together will be referred to as "Rule 11."*

26. The primary purpose of Rule 11 sanctions is to: (Circle one)
    a. Punish attorneys of parties who violate the rule
    b. Deter other attorneys and parties from violating the rule
    c. Compensate parties harmed by violations of the rule
    d. Other (Please specify): _____
27. If a court finds a Rule 11 violation, the *primary* sanction should be: (Circle one)
    a. Monetary sanctions
    b. Non-monetary sanctions
28. If a court decides to impose a monetary sanction, the *primary* factor the court should use to determine the amount of the sanction should be: (Circle one)
    a. Expense caused by the violation
    b. Violators ability to pay

c. Willfulness of the violation
d. *Pro se* violator
e. Repeat violator
f. Other (Please specify): _____

_____

_____

29. If a court decided to impose a non-monetary sanction, what types of sanctions should it consider:

a. _____
b. _____
c. _____

30. Has Rule 11 affected *your* practice in the following areas? (Please circle a number for each item).

	Greatly Decreased	Somewhat Decreased	No Effect	Somewhat Increased	Greatly Increased
A. Extent of pre-filing factual inquiry	1	2	3	4	5
B. Extent of pre-filing legal inquiry	1	2	3	4	5
C. Willingness to make arguments to extend or change law	1	2	3	4	5
D. Willingness to assert unconventional claims or defenses	1	2	3	4	5
E. Willingness to assert civil rights claims	1	2	3	4	5
F. Likelihood of filing papers for delay	1	2	3	4	5
G. Likelihood of filing papers for harassment	1	2	3	4	5

31. In your opinion, has Rule 11 affected *your opponent's* practices in the following areas? (Please circle a number for each item).

	Greatly Decreased	Somewhat Decreased	No Effect	Somewhat Increased	Greatly Increased
A. Extent of pre-filing factual inquiry	1	2	3	4	5
B. Extent of pre-filing legal inquiry	1	2	3	4	5
C. Willingness to make arguments to extend or change law	1	2	3	4	5
D. Willingness to assert unconventional claims or defenses	1	2	3	4	5

E. Willingness to assert civil rights claims	1	2	3	4	5
F. Likelihood of filing papers for delay	1	2	3	4	5
G. Likelihood of filing papers for harassment	1	2	3	4	5

32. In your opinion, what effect, if any, has Rule 11 had on the practice of law in the following areas? (Please circle a number for each item).

	Greatly Decreased	Somewhat Decreased	No Effect	Somewhat Increased	Greatly Increased
A. Number of Frivolous suits, defenses or motions	1	2	3	4	5
B. Cost of litigation	1	2	3	4	5
C. Amount of time for resolution of suit	1	2	3	4	5
D. Likelihood of settlement of suit	1	2	3	4	5
	Greatly Aggravated	Somewhat Aggravated	No Effect	Somewhat Improved	Greatly Improved
E. Relations between attys for opposing parties	1	2	3	4	5
F. Relations between attys and judges/magistrates	1	2	3	4	5
G. Relations between attys and clients	1	2	3	4	5
	Strongly Disagree	Somewhat Disagree	No Opinion	Somewhat Agree	Strongly Agree
H. Attys use Rule 11 as a tactic to harass and intimidate opponents	1	2	3	4	5
I. The advantages of Rule 11 outweigh its disadvantages	1	2	3	4	5

33. Please make any comments you wish regarding Rule 11.

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