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Rule 11 Gets Moderate Exercise in Montana: Part II

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RULE 11 GETS MODERATE EXERCISE IN MONTANA

SURVEY SHOWS AMENDMENTS ARE APPROPRIATELY USED TO SANCTION THOSE WHO ABUSE LITIGATION

By Cynthia Ford of the UM School of Law. Second of a two-part series. Part 1 appeared in the January issue of The Montana Lawyer.

To round out the case analysis of the available Rule 11 opinions in Montana courts, in November 1991 I sent an informal survey to all active practicing lawyers (2,028) in Montana. I designed the survey both to gather additional information about the actual operation of Rule 11 in Montana and to sample the perceptions of the bar about the use of Rule 11 and its effect on the practice of law in Montana. Three hundred fifty attorneys responded.

This study shows that Rule 11 is used actively but not excessively across the state, in both state and federal courts, by plaintiffs as well as defendants and other parties. (Note: the survey also asked for reports of Rule 11 activity in tribal courts, but none was reported. Of the seven tribal court systems in Montana, only the Blackfeet Tribal Law and Order Code and the Codes of the Crow Tribe contain provisions substantially analogous to Rule 11.) When lawyers do file Rule 11 motions, the courts are generally quite conservative both in finding that the target of the motion did indeed violate Rule 11 is fairly low, and in imposing monetary sanctions against those violators.

The practicing attorneys who responded to the survey by and large believe that Rule 11 operates fairly and efficiently, without chilling meritorious litigation, and that the bar uses the Rule appropriately. More than half of the respondents believe that the present version of Rule 11 should remain in place; only 1 in 7 think that the proposed federal amendment should be adopted here.

WHO ANSWERED THE SURVEY

In order to determine whether certain variables had any effect upon Rule 11 activity, I asked each respondent to identify him/herself according to gender, number of years in practice, and age, as well as to characterize his or her type of practice by subject matter.

Of the 350 respondents, 82.78 percent were male and 17.22 percent were female; the State Bar membership currently is 81 percent male and 19 percent female. The respondents' practice experience ranged from a matter of months to more than 30 years, with the mean being 14.87 years. The responses came from attorneys across Montana, in both urban and less-populated counties.

EXPERIENCE WITH RULE 11

★ HOW MANY?

One hundred twenty four of the 350 respondents to the survey, or 35.43 percent, had actual experience with at least one Rule 11 motion, either in filing (90 or 25.71 percent of the total respondents) or defending (71 or 20.28 percent of the total respondents). Twenty-seven of these 124 Rule 11 "veterans" (22 percent of the veterans, and 8 percent of the total respondents) reported that they had both filed at least one Rule 11 motion and defended against at least one Rule 11 motion since 1983.

Eighty-one of the attorneys who had filed any Rule 11 motion reported the number of such motions they had filed; eight did not respond to this question. Of these 81, fifty or 73 percent had filed only one such motion; eighteen or 22.23 percent had filed two motions; six or 7.40 percent had filed three such motions; and seven or 8.64 percent had filed four motions.

The survey respondents reported a total of 132 Rule 11 motions filed between 1983 and 1991 in Montana state and federal courts. Twenty-seven (20 percent) of the reported motions were federal and 105 (80 percent) were state.

★ WHEN?

The use of Rule 11 began slowly after it was amended to its present form in 1983, but has steadily increased. For 92 of the reported 132 motions, the responding attorneys listed the years of the motions as follows: 1 in 1983, 4 in 1984, 8 in 1985, 6 in 1986, 9 in 1987, 6 in 1988, 20 in 1989, 35 in 1990, and 19 in 1991. Limited use in the current Rule's early years may be attributable to lack of knowledge of the requirements and sanctions imposed by the 1983 amendment; the increasing use since then probably results from increased awareness of the Rule itself and from knowledge that other lawyers are using the Rule.

★ WHERE?

The use of Rule 11 has been widespread but not surprisingly, the attorneys who had filed Rule 11 motions tended to come from more populated counties. In order of the residence of the attorneys who reported filing one or more Rule 11 motions, Yellowstone County ranked first with 22 or 16.67 percent of the filers; Flathead County and Cascade Counties tied for second with 12 or 9.09 percent of the filers each; Lewis and Clark County ranked third with 9 or 6.82 percent of the filers. Other counties in which Rule 11 movants practiced were Hill, Toole, Lincoln, Missoula, Valley, Custer, Prairie, Dawson, Gallatin, Richland, Madison, Silverbow, Fergus, Park, Beaverhead, Pondera, Wibaux, Ravalli, Glacier, Carbon, Jefferson, Lake, Granite, Mineral, Sweet Grass, Judith Basin, Deer Lodge, and Sanders.

★ WHO?

Length of Experience

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Generally, less experienced attorneys appear most likely to invoke Rule 11. The average length of practice experience for the lawyers who answered the survey is 14.87 years. (The State Bar is unable to readily calculate the mean practice experience of its membership). Of the lawyers who had filed one or more motions, over half had practiced less than 15 years; the mean was 12.15 years of experience. Exactly the opposite appears to be true for attorneys who have been the target of one or more Rule 11 motion: those attorneys who have practiced the longest constitute the largest group of targets. The amount of practice experience among the "target" group averaged 15.66 years.

Age of Respondents

Examining chronological age rather than years in practice similarly shows that younger lawyers constitute more of the filing group, while older lawyers are a larger percentage of the target group.

The fact that the youngest age group, those 25 to 30 years old, included only 16.7 percent of the movants and 5.6 percent of the targeted attorneys probably is due to the relatively small number of lawyers in this age group, both in terms of the number of survey respondents and number of lawyers in this age group in the state. The mean age of all active lawyers in Montana is 46 years. The average age of female lawyers is 40 years; the average male lawyer is 47 years old. Significantly, the oldest age group, over sixty, also constitutes a small percent age of both the number of respondents and the bar as a whole, yet it is disproportionately represented in the targeted category.

These experience and age correlations suggest several conclusions. First, the newer attorneys were most recently in law school, and thus most likely to have formally studied Rule 11 in its present, mandatory, form. Second, less experienced lawyers may be less self-confident and feel the need to rely on technical rules more than those with more seasoning. Lawyers with more practice experience may file fewer Rule 11 motions either because they lack familiarity with the Rule or because their experience indicates that such a motion may in the long run be more detrimental than beneficial, or both, while newer attorneys may be less able to put the heat of litigation into perspective. An alternative explanation is that attorneys who have practiced longer might have less rigorous practice standards, causing them to overlook less serious violations.

	MALE	FEMALE
Percentage of respondents who are	82.0%	17.2%
Percentage of Montana lawyers who are	81.0%	19.0%
Percentage of responding filers who are	78.9%	21.1%
Percentage of respondents of this gender who had filed a Rule 11 motion	22.0%	33%
Percentage of responding targets who are	21.7%	78.3%
Percentage of respondents of this gender who had been a target	22.3%	17.5%

Gender of Attorneys

The survey revealed that a higher percentage of the women attorneys responding to the survey had filed Rule 11 motions than their male counterparts, but the women respondents were less likely than the men to have had Rule 11 motions filed against them.

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While these results may be due solely to gender, it is also true that the women who responded to the survey were generally younger than the men, both in terms of age and years in the profession, and thus fall into the age and experience categories where all lawyers are most likely to file and least likely to be filed against.

Isolating gender from age and experience factors requires a comparison of the filing rates of men and women in the same age and experience categories. This analysis shows that of the respondents in each gender for each age group, a higher percentage of women respondents had been filers and a lower percentage of the women respondents had been targets than of the men respondents. When women did file Rule 11 motions, they tended to be more successful than men. Women obtained a finding of Rule 11 violations by their opponents in 33.33 percent and awards of sanctions in 22.22 percent of their motions, compared with a 22.77 percent rate of success in having a violation declared and a 5.94 percent rate of sanction award by male attorneys filing Rule 11 motions.

These success rates for women mostly involve situations in which women lawyers brought Rule 11 motions against male colleagues. Perhaps because of the smaller number of women lawyers in Montana, the survey only showed three woman vs. woman Rule 11 motions. The male success rates reflect cases in which male attorneys filed Rule 11 cases against both men (86.5 percent of the cases were filed by male attorneys against other males) and women (13.5 percent of the cases filed by males) opponents.

When the overall success rates are broken down by gender, it appears that women who brought Rule 11 motions against men obtained violation findings in 36.4 percent of the motions, and sanctions awards in all of these cases in which violations were found. Male filers reported that they obtained findings of a violation against women attorneys in only 14.28 percent of their cases, although they too obtained sanctions in 100 percent of the cases against women where violations occurred.

Race

The survey requested that respondents categorize both their clients and opponents in the Rule 11 motions as white or non-white. (Non-white covers a wide variety of ethnic backgrounds. However, Montana as a whole is 92.7 percent Caucasian; the remaining 7.3 percent of the population is comprised primarily of people of Native American descent and several other groups to a lesser extent. I decided to look at the application of Rule 11 to Caucasians as one group and to members of any minority as another.)

Not surprisingly in view of the large proportion of white people in the state and in the bar (the State Bar estimates its membership to be 99.9 percent white), 94 percent of the

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Rule 11 motions reported in the survey involved whites against other whites. In the eight cases involving persons of different racial backgrounds, the white party brought the Rule 11 motion against the non-white party twice, or 25 percent of the time; the converse occurred in five or 62.5 percent of the cases; and in 1 case, a non-white party filed another Rule 11 motion against another non-white party.

The number of "mixed-race" motions is so small that comparison of their results is inconclusive. Furthermore, because these reports relate to the ethnic background of the party, rather than the attorney, and because motions are often resolved without any actual appearance by the party, the party's ethnicity may have had no effect at all on the results of the motions.

Not withstanding these disclaimers, the success rates for these few motions differed dramatically according to the race of the moving party. White movants did not win either a finding of a Rule 11 violation or a sanction award in the either of the two motions they filed against non-whites — a success rate of 0 percent. Non-whites who filed Rule 11 motions against white parties obtained findings of violations in 60 percent and sanction awards in 40 percent of their five motions — much higher than the overall success rates for all reported motions.

For both women and minority members who filed Rule 11 motions, the success rates in having a violation of the Rule declared and in obtaining a sanction award were significantly higher than the overall success rates of all reporting respondents. These differentials could be explained by a number of factors, including judicial favor towards women and minorities, a higher skill and preparation among the women and minorities who filed such motions (including more discretion in selecting Rule 11 issues), and more egregious conduct practiced against women and minorities motivating the Rule 11 motion. Given the unlikelihood of the first in view of the uniform findings of the 35 state and 9th Circuit Gender Fairness in the Courts Task Forces, the remaining two factors in combination probably account for the differences in both filing rates and success rates.

Status of Party Represented

Defendants made Rule 11 motions more often than plaintiffs did, but won them less often. The attorneys who reported filing Rule 11 motions represented defendants in 64 or 48.48 percent of the motions, plaintiffs in 52 or 39.39 percent of the motions, and other parties in 16 or 12.13 percent of the motions. Surprisingly, in view of the commonly expressed perception that Rule 11 practice discriminates unfairly against plaintiffs, overall the survey showed that a larger percentage of the plaintiffs who filed Rule 11 motions against defendants obtained findings that their opponents had violated the rule (28.85 percent) than defendants who filed against plaintiffs (26.56 percent). Other parties who filed Rule 11 motions were successful in 12.5 per-

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cent of their motions. The overall success rate in achieving a finding of a violation of the rule for reported Rule 11 motions without regard to party status was 25.76 percent.

The overall rates reported above apply to all Rule 11 motions reported by survey respondents. Breakdown of these reports between motions brought in state as opposed to federal courts reveals that plaintiffs do much better in state court, and that defendants do much better in federal court. In federal court, the overall success rate was 15.38 percent. Plaintiffs won their federal Rule 11 motions only 9.1 percent of the time, while defendants prevailed in federal motions 27.3 percent of the time. In state court, the movants' overall success rate was 27.45 percent; plaintiffs won state Rule 11 motions 35 percent of the time, and defendants succeeded only 27.45 percent of the time. (The success rate for those not indicating the party status was lower than 27.45 percent, which explains why the average rate and defendants' rate are both lower than the plaintiffs' rate.)

Residency of Parties

The survey also tried to determine whether there is any hometown advantage or disfavor in Rule 11 practice, by asking the respondents to indicate whether their clients were residents or non-residents of Montana. Of the reported motions, 51.5 percent were filed on behalf of Montana residents; 12 percent were for nonresident parties. (In the remaining 36.5 percent of the motions reported, the respondents did not indicate residency.)

The resident movants won findings of violation of Rule 11 in 19 percent of their motions overall — in 14.3 percent of the cases when they moved against nonresident targets and in 15.6 percent of the cases when moving against other resident parties. Nonresident movants won 18.8 percent of their motions overall, and 21.4 percent of the motions they filed against resident parties.

Practice Area

Each respondent was asked to describe his or her type of practice by subject area. Of the group that had filed at least one Rule 11 motion, the largest percentage indicated that they were civil litigators. The smallest subgroup of filers emphasized administrative law. Of those who had been a target of a Rule 11 motion, again the largest segment practiced primarily in civil litigation; the smallest segment of target lawyers described themselves as tax lawyers.

✯ WHY? SUCCESS RATES OF REPORTED RULE 11 MOTIONS

Success, in Rule 11 terms, is measured in two steps. First, the moving party must convince the judge that the target indeed violated Rule 11 in some way. Second, and only after the first step is achieved, the moving party must obtain an appropriate sanction for the violation. The Rule presently requires some sanction if the court

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finds a violation occurred, but the judge has discretion to determine both the form and the amount of that sanction. The survey asked respondents to describe their experience at both steps of the Rule 11 process.

Respondents who filed Rule 11 motions reported an overall rate of success of 25.76 percent in obtaining a court finding that the opponent had violated the Rule. Overall, plaintiffs were slightly more successful (28.85 percent) than defendants who filed Rule 11 motions (26.56 percent), and both plaintiffs and defendants fared better than other parties who won violation findings in only 12.5 percent of their motions. Combining the reports of both filers and targets lowers these success rates considerably: 16.38 percent overall, plaintiffs 23.59 percent successful, defendants 15.78 percent successful. (This discrepancy suggests that those who have prevailed on either side of a Rule 11 motion were more likely to report their victories than their opponents were to report their defeats).

The results of Rule 11 motions varied considerably according to the court which acted on the motion. The state court success rate (27.45 percent) overall was much higher than the federal court success rate of 15.38 percent. The system in which the motion was filed also affected the success rates of the filers by party denomination: in state court, plaintiffs won their Rule 11 motions 35 percent of the time and defendants 27.45 percent of the time; in federal court, defendants outperformed plaintiffs who filed Rule 11 motions by 27.3 percent to 9.1 percent.

The highest success rate for Rule 11 motions occurred in corporate law cases; in these cases, the movant won a finding of violation in 56 percent of the motions. The lowest rate occurred in domestic relations cases, where the success rate was 6 percent. When further broken down by party designation of the movant, the survey showed that both plaintiffs and defendants lost Rule 11 motions most often in lawsuits involving domestic relations issues.

As noted above, gender and race may affect the likelihood of success of Rule 11 motions in a surprising way. Women attorneys filing such motions won these motions about 50 percent more often than male attorneys. Minorities filing Rule 11 motions enjoyed a high (60 percent) rate of success in obtaining court accord that their opponents had violated Rule 11, whereas white parties filing against minorities lost both the reported motions.

Success in Obtaining an Award of Monetary Sanctions

Of the 33 cases reported in which courts found violations of Rule 11, the court went on to impose monetary sanctions in 21 or 61.76 percent of the cases. In nine of the remaining twelve cases, the courts reportedly did not impose any sanction. In the other three of the twelve cases, the court gave a warning but imposed no present punishment on the violator.

Again, there was a difference in rates between state and federal courts: monetary sanctions were awarded in 75 percent of the federal court cases in which Rule 11 violations were found and in 11.1 percent of the total number of federal motions filed. In state court cases, monetary sanctions were awarded less often (69 percent) when Rule 11 violations were found, but this constituted a higher ultimate sanction rate (19.0 percent) per number of Rule 11 motions filed. This difference is due to the higher success rate in state court in obtaining a court finding that a Rule 11 violation had occurred.

The amount of the reported monetary awards ranged from $100 to $20,000. The mean award overall was $1,186.19; the median award was $500. Again, a significant difference exists between state and federal awards: the state court mean award was $2,095, but the federal court mean award was $7,650. One explanation for this difference in amount may be the higher stakes in federal court cases where diversity jurisdiction is predicated on an amount in controversy of more than $50,000. Also, to the extent that the cream of the bar is involved in federal court civil practice, the hourly rates of the aggrieved attorney may be higher in federal court.

In cases where monetary sanctions were imposed, the residents' mean award against other residents was $710 and $0 against nonresident parties. No reported motions were found in which nonresidents obtained any award against other nonresidents. The mean award to a nonresident against a resident was $1,000.

The award amounts also varied according to the gender of the filing and target attorneys. Women tended to obtain sanctions awards in Rule 11 cases much more frequently (22.2 percent) than male lawyers (5.9 percent), but the mean amount of sanctions awarded to women lawyers ($820.00) was lower than that awarded to men ($1,406.00). This may be due to gender bias, and/or to the fact that women tend to have fewer years of experience, and thus lower billing rates, than male lawyers.

★ At What Price Glory? Time and Cost Factors

Rule 11 motions add time and expense to litigation. The survey respondents with Rule 11 experience reported spending a mean of 8.1 hours to bring and prosecute a motion, and a mean of 10.7 hours to defend against a motion. Obviously, the fees spent can be valued by multiplying the hours spent times the attorney's hourly rate. For attorneys who bill by the hour, this amount may be billed to and recovered from the client, depending on the circumstances. In contingent fee cases, however, such a motion generally represents uncompensated attorney time.

These costs are not necessarily recoverable, even if a Rule 11 sanction is imposed. Indeed, the mean cost of prosecuting a motion, assuming an hourly rate of $100, is $810. The mean monetary award obtained in the 15.9 percent of motions where sanctions are awarded is just $1186.19, leaving

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little to ameliorate the detriment suffered by the violation in the first place. If the court does not impose any sanction, with or without a finding of a violation, both parties are out-of-pocket: costs of successfully defending against a Rule 11 motion are rarely recovered.

★ The Hidden Cost: Effect on Lawyer Relations

Rule 11 motions often are directed at an opposing attorney personally, accusing him or her of a violation of duty. Given the passion that the adversarial process often raises between counsel in a hard-fought case, threats of Rule 11 motions may exacerbate already strained relationships. The heat of the moment may also fog the judgment of the attorney who believes himself or herself to have been wronged, causing that attorney to file a weak or unfounded Rule 11 motion. Because Rule 11 precepts apply to Rule 11 motions themselves, filing a Rule 11 motion against an opponent may in fact lead to liability for the filer, (e.g., *National Farmers Union Ins. Co. v. Crow Tribe*, No. CV 82-230-BLG, D.Mont. filed March 16, 1986; In Matter of Belue, 232 Mont. 365, 766 P.2d 206 (1988)), and/or further damage relations between counsel, perhaps adversely impacting their clients in this and other litigation.

The future effect of the impact on the relationship between attorneys on opposite sides of a Rule 11 motion would seem to be inversely proportional to the amount of contact between them which in turn is related to the size of the legal community in which they practice.

The survey asked Montana lawyers with Rule 11 motion experience to describe their relationships with their opponents prior to the motion, and to discuss the impact of those motions on those relationships. Of those responding, 68.3 percent indicated that prior to the filing of the Rule 11 motion, they had poor or no relationships with their opponents; only 31.7 percent had been involved in Rule 11 motions against opponents with whom they previously maintained relationships they characterized as "good." When asked about the impact of the filing of the Rule 11 motion, the respondents stated that 35.9 percent of the motions caused the relationship to worsen; 4.3 percent of the motions caused it to improve; and 59.8 percent of the motions did not affect the relationship either way.

Of those reporting no change caused by the motion, 73.8 percent described their previous relationship with their opponents as poor or non-existent and only 26.2 percent felt that their previous relationship was good. Interestingly, 28.6 percent of those who observed an adverse impact on their relationship had had a good relationship with their opponents to begin with, while 32.2 percent believed that their prior relationship had been poor anyway.

★ Other Devices

At least two mechanisms other than Rule 11 motions are

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available to counsel whose opponents act wrongfully during the course of litigation (and, of course, at other times). First, a client or attorney can file a complaint with the Commission on Practice. Second, if the problematic conduct appears to be related to substance abuse, the opponent can make a referral to the State Bar Drug and Alcohol Assistance Program. These mechanisms both can be used in addition to, or in lieu of, Rule 11 motions. In cases where a particular attorney often does, or at least is accused of, violating Rule 11, either or both of these mechanisms may provide a more comprehensive solution to a wide-ranging problem than repeated Rule 11 motions.

The survey respondents with actual Rule 11 experience did not take advantage of these other routes. In only 2.5 percent of the motions reported, the moving party also complained to the Commission on Practice. This reluctance to use the Commission on Practice may stem from the formality of proceedings and adverse long-range impact on the career of the opponent.

However, these fears do not apply to referrals to the State Bar Drug and Alcohol Assistance Program; its assistance is informal, and completely confidential. Some experts estimate that between 40 percent and 60 percent of lawyers who appear before disciplinary boards nationwide have some type of chemical dependency problem. See, Spanhel, The Impact of Impaired Attorneys on the Texas Grievance Process, Tex. Bar Journal, Vol. 52, No. 3, 312, (1989), citing N. Blodgett, "Helping Alcoholic Lawyers", *ABA Journal.*, Nov. 1, 1986, at 22. Nonetheless, none of the survey respondents had made any referral to the Committee with regard to behavior that purportedly violated Rule 11.

★ Review of Rule11 Matters

Formal in-house review of proposed Rule 11 motions before they are filed ensures that such motions are not filed improvidently. President Bush's Executive Order and Attorney General Barr's guidelines do just that by specifically requiring the Justice Department and other federal agencies to appoint a sanctions officer. Similarly, many large firms in urban areas outside Montana have their own in-house committees which must pass on all Rule 11 motions before they are filed. This cool-head approach accomplishes dual purposes: it prevents the waste of judicial and law firm resources that would result from the filing of doubtful Rule 11 motions, and it prevents unnecessary liability to the proposed filer's firm.

'BY AND LARGE . . . RULE 11 IS IN BALANCE IN MONTANA.'

Montana lawyers mostly lack such institutional protection. Three hundred and four of the survey respondents answered a question about whether their firms had formal procedures for in-house review. Of these respondents, only 82 or 26.9 percent , had such procedures; 222 (73.1 percent) indicated that they did not.

Despite the relative rarity of formal in-house procedures, it appears that many Montana lawyers do follow some informal review process before filing Rule 11 motions. One hundred and fourteen of the 169 (67.4 percent) lawyers who had considered but did not file one or more Rule ll motions indicated that they had another lawyer review the opponent's troublesome conduct and give a second opinion as to whether a Rule 11 motion should be filed.

Montana lawyers and their clients would be better protected from Rule 11 motions if more firms, both large and small, did require formal prefiling review of such motions. Even for lawyers in relatively small firms, where an in-house review may not be available from an attorney sufficiently removed from the emotion of the case, lawyers contemplating filing such motions should ask an independent, disinterested colleague to review the motion they file. The present informal process is a step in the right direction; it should become the standard of practice.

CHILLING EFFECT OF RULE 11

Most lawyers responding to the survey did not believe that the present form of Rule 11 chills meritorious litigation. Only 46 attorneys, or 15.54 percent of those who answered this question, believed that Rule 11 has a chilling effect on meritorious litigation; 250 attorneys, or 84.46 percent of those who answered this question, believed that it does not. The percentage of those who did not think that Rule 11 chilled meritorious suits was higher among lawyers who had moved for Rule 11 sanctions (82 percent) than among lawyers who had been targets of Rule 11 motions. Even a large majority (65 percent) of the target group believed that Rule 11 does not have a chilling effect.

Overall, about one-third of those lawyers who did perceive a chilling effect nonetheless felt that the Rule's benefits outweighed its detriments; the remaining two-thirds felt the detriments overshadowed the benefits.

PRACTITIONERS' OPINIONS ABOUT RULE 11AND ITS FUTURE

All survey respondents, regardless of their level of experience with Rule 11, were asked to describe their perceptions of the current operation of the rule in Montana courts. Thirty-one, or 9.74 percent of those answering the question, thought that Rule 11 does not have any impact on the way Montana lawyers practice; 152, or 47.8 percent of the respondents to the question, thought there was "a little" impact; 127, or 39.94 percent perceived "some" impact. Only 8, or 2.52 percent , characterized the impact as "a lot.

When asked whether they believed that Rule 11 in Montana impacts all groups of litigants evenly, 49.2 percent of the 262 respondents to this question answered Yes; 50.8 percent answered "No." One hundred thirty-

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three respondents stated that they believe that Rule 11 operates to the disadvantage of particular groups, but only 40 responded to a request to identify the groups. Of these 40 respondents, 35 percent believed that plaintiffs and 17.5 percent believed that the poor were most adversely impacted.

A majority (58.2 percent) of 158 respondents felt that party designation is not a factor in judicial findings that Rule 11 has been violated. However, a significant minority of the respondents on this point do feel that the judiciary more readily finds Rule 11 violations when the alleged perpetrator is associated with a plaintiff (19.6 percent), associated with a defendant (15.2 percent), or appearing as non-resident counsel or a party (5.1 percent).

Similarly, 61.8 percent of the 144 respondents to the question felt that party designation was immaterial to the severity of the sanction imposed after the court found a violation of Rule 11. A minority of 38.2 percent, still significant but smaller than the minority which believed that party status did affect the finding that Rule 11 had been violated, felt that harsher sanctions fell on violators who are: (1) associated with a plaintiff (15.97 percent); (2) associated with a defendant (13.9 percent); (3) associated with a public interest group (34.7 percent); (4) in-state (13.9 percent); or (5) out-of-state counsel or party (34.7 percent).

Almost half (49.5 percent) of the lawyers who responded on this subject felt that the Montana bar appropriately invokes Rule 11. Thirty-four per cent felt that Montana lawyers don't use Rule 11 enough, while 16.5 percent believed that the Rule is used too often. More than half (50.96 percent) of the lawyers expressing a view on this subject felt that the judiciary did not find Rule 11 violations often enough, while a group almost as large (46.4 percent) felt that judges find Rule 11 violations appropriately. Only 2.7 percent felt that the judges in Montana find Rule 11 violations too often.

In terms of the amount of sanctions imposed, a majority (62.1 percent) felt that the sanctions imposed tend to be appropriate. Thirty-two percent felt that sanctions are too low, while only 5.8 percent thought that sanctions tend to be too high. When asked specifically about the prospect of change in Montana's Rule 11, the 254 surveyed lawyers who answered this question were divided as follows:

53.5 percent believe that Rule 11 should remain unchanged; 7.5 percent believe that Rule 11 should be abolished altogether; 8.7 percent believe that Rule 11 should be less stringent; 16.9 percent believe that Rule 11 should be more stringent;13.4 percent believe that Montana should adopt the proposed federal amendment to Rule 11.

SUMMARY

The survey results indicate that by and large, the current version of Rule 11 is in balance in Montana, successfully walking that thin line between discouraging enough meritless litigation and discouraging potentially meritorious, though perhaps unpopular, litigation. The survey respondents are generally familiar with Rule 11, although only about a third of them had actual personal experience with a Rule 11 motion, and overall, Montana lawyers appear comfortable with the operation of Rule 11.

The 1983-84 amendments to Rule 11 in the Montana and Federal Rules of Civil Procedure definitely increased the number of motions for sanctions for alleged litigation abuse in Montana's courts. The combined results of the study of formally and informally reported cases and the survey of the practicing bar indicate that the Rule is being used appropriately in Montana's courts, to make the bar "stop and think," thereby reducing meritless litigation.

In order to maintain the present equilibrium, all litigants and the courts should continue to take Rule 11 seriously, and scrupulously perform the required investigation and analysis of the law and facts of their cases prior to filing any document with the court. When any doubt exists, the attorney responsible for the filing should consult with another lawyer familiar with Rule 11 and the particular subject area of the litigation to obtain his or her unbiased view of the basis of the proposed position.

Attorneys who wish to file Rule 11 motions against opponents should remember that Rule 11 itself applies to such motions. Therefore, lawyers should be as scrupulous in self-analysis about the bases and purposes of their motions as they expect their opponents to have been in filing the targeted document. ❐

REMINDER

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