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FJC Directions

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Special issue on Rule 11

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THE FEDERAL JUDICIAL CENTER

Errata

On page 33 of *FJC Directions no. 2* there is an error. The paragraph under the heading "The rule's effect on settlement" and Table 20 should read as follows:

The rule's effect on settlement

A smaller but still significant percentage of judges also find that Rule 11 has had an adverse effect on settlement negotiations. As shown in Table 20, 20% of 429 respondents said a request for Rule 11 sanctions impedes settlement in more cases than not. Over two-thirds, however, said a Rule 11 request has no impact on settlement or has no net effect because it impedes settlement in some cases while encouraging it in others.

Table 20
Judges' assessment of the effect of a request for Rule 11 sanctions on the likelihood of settlement

Effect on Settlement	Percentage of 429 Respondents
Impedes settlement in more cases than not	20.3%
Encourages settlement in more cases than not	11.0%
Impedes in some cases, encourages in others	31.7%
Has no impact	37.1%

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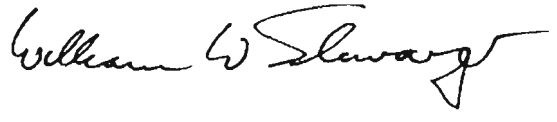
TO OUR READERS:

In response to criticism of Rule 11, Fed. R. Civ. P., the Judicial Conference's Advisory Committee on Civil Rules in 1990 undertook a review of that rule. The committee called for comments from the legal community and also asked the Federal Judicial Center to make an empirical study of the operation and impact of the rule. Center staff presented a preliminary report on its study to the Advisory Committee at the time of its February 1991 meeting and hearing in New Orleans. The Center's final report, documenting its findings, was presented at the time of the May 1991 meeting. After considering written comments, testimony, and empirical evidence, the Advisory Committee drafted a proposed revised rule, which is now out for comment. (The text of that rule appears on the last page of this issue.) A hearing on the proposed rule has been scheduled by the Advisory Committee on Civil Rules for November 21, 1991, at Los Angeles. A second hearing will be scheduled for early next year in the East or Midwest. Written comments will be received until February 15, 1992.

The Center's final report on Rule 11 is summarized in this issue of *Directions*. We hope that it will assist readers in analyzing the issues and making judgments, and that it will inform the discussion concerning revision of Rule 11.

Sincerely yours,



Notes on methodology

Survey of district court judges

We designed a survey to ascertain judges' experiences with Rule 11 and to determine their overall evaluation of the rule's effectiveness in cases in which both sides were represented by counsel. Questionnaires were sent in November 1990 to all active and senior United States district court judges. Of the 751 judges to whom the questionnaire was sent, 583 (78%) responded. Nineteen responses contained only comments or explained why the questionnaire had not been returned. The findings reported here are based on the 564 judges who provided completed questionnaires.

Most questions offered a "can't say" option, which resulted in a lower number of substantive responses for some questions. The number of substantive responses may be found in the text or tables. In most instances, the "can't say" option was disproportionately selected by recently appointed judges. This was not the case, however, for the questions about the conduct of litigation, where the fairly high number of "can't say" responses may indicate that judges lack information about attorney–client and attorney–attorney relationships. Likewise, many judges did not rate the deterrent effect of fee-shifting statutes, possibly because they do not use these statutes or because they do not use them to deter groundless litigation.

Study of Rule 11 activity in five district courts (the case file study)

We examined the case files of cases in which Rule 11 activity had occurred in the district courts for Arizona, the District of Columbia, Northern Georgia, Eastern Michigan, and Western Texas. Although these courts are located in five different circuits, are geographically diverse, and each include at least one major metropolitan area, it is important to note that these courts may not be representative of all courts. They were selected because their computerized docketing system provided for a comprehensive and quick identification of all Rule 11 cases.

We identified Rule 11 activity by electronically searching the courts' ICMS civil docket databases and included in the study all cases filed between the date ICMS was fully implemented and the date we conducted the electronic searches. The ICMS docketing system has been fully implemented in the Eastern District of Michigan since June 15, 1988, and in the four other districts since January 1, 1987; the electronic searches were conducted in late spring and summer of 1990.

The docket searches produced a sample of between 10,000 and 12,000 pending or terminated cases from each of the five districts, for a total of 55,328 cases. We then identified the subset of all cases with any Rule 11 activity before the date of the electronic search. Across the five districts, 980 cases involved Rule 11 activity. After identifying the Rule 11 cases, we examined the case files to extract information about the nature of the Rule 11 activity and the case in general.

The reader should bear in mind the limitations of using recent cases to study current issues in litigation. The inclusion of pending cases in the sample skews the analysis in the direction of activity occurring early in litigation. Furthermore, in districts with a substantial number of pending Rule 11 motions, information about rulings and post-ruling activity is representative of all Rule 11 activity only if the pending motions are not different in important ways from the non-pending motions. Very few of the motions in Arizona and Northern Georgia were pending at the time of data collection, compared with between 15% and 18% of the motions in the other three districts.

Review of published opinions

We reviewed all opinions involving Rule 11 activity that were published in *Federal Supplement, Federal Reporter 2d,* and *Federal Rules Decisions* from 1984 through 1989. The opinions were identified by searching the WESTLAW district and appellate court databases for references to Rule 11. Unpublished decisions appearing on WESTLAW were not included in the review. We used both key-numbered and text-based searches to identify opinions that might involve Rule 11 activity. The key numbers used were 45K24, 92K317(1), 45K32(11), 170AK2721, and 170AK661. Because the key number categories reference many opinions involving sanctions and attorneys' fees unrelated to Rule 11, the body of opinions identified by the key number searches was narrowed by searching the text of the opinions for references to Rule 11. After the combined key number and text search, we conducted a simple text-based search, independent of key numbers, again looking for references to Rule 11. The searches of the district court database identified 1,731 opinions that potentially involved Rule 11 activity. The search of the appellate database identified 959 such opinions. All of these opinions were read by law students to determine if the case actually involved Rule 11 activity and, if so, to extract information about the nature of the Rule 11 activity and the case in general. Slightly less than half (835) of the 1,731 district court opinions involved motions for or sua sponte considerations of Rule 11 sanctions; the remaining opinions discussed Rule 11 by way of analogy or as an incidental point to the application of other sources of authority. Similarly, only 36% (346) of the 959 appellate court opinions directly reviewed Rule 11 issues.

The Federal Judicial Center's Study of Rule 11

Elizabeth C. Wiggins, Thomas E. Willging, and Donna Stienstra

The purpose of this article is two-fold: (1) to present the findings of the Center's empirical study of Rule 11, which was designed to examine several of the salient questions about the effects of the rule, and (2) to describe the Advisory Committee's actions and proposed rule revisions. Before we enter into the details, we present brief summaries of these two topics.

During 1990, the Center conducted three separate analyses of the effects of Rule 11.[1] The first was an in-depth study of Rule 11 activity in cases filed in five federal district courts: Arizona, the District of Columbia, Northern Georgia, Eastern Michigan, and Western Texas. We also reviewed all opinions involving Rule 11 activity that were published in federal reporters from 1984 through 1989. And we surveyed all United States district court judges about their experiences with Rule 11. Our research methods are described on page 2.

On the basis of our study of case files and published opinions, we reached the following conclusions:

- Rule 11 issues were raised or could be expected to be raised in 2% to 3% of all cases.
- Rule 11 has imposed modest, but not insignificant, burdens on judges.
- There was significant variation in the number of motions before each judge in five districts and significant variation in the imposition rate of sanctions between judges in three districts.
- There is a moderate to high level of inter-judge agreement in reviewing sanctions decisions.
- The majority of those targeted by Rule 11 activity had an opportunity to oppose the imposition of sanctions; however, judges sometimes failed to provide procedural safeguards when acting sua sponte.
- Rule 11 sanctions have typically taken the form of monetary fees payable to an opposing party.
- Rule 11 sanctions are sought more frequently against plaintiffs than defendants.
- Motions for sanctions against the plaintiff are more likely to be granted than those against the defendant.
- The incidence of Rule 11 motions or sua sponte orders is higher in civil rights cases than in some other types of cases.

1. Our findings are presented in more detail in E. Wiggins, T. Willging & D. Stienstra, Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States (Federal Judicial Center 1991). The details of our analyses, including limitations of our data sources, are described in that report. The issues we addressed parallel those identified by the Advisory Committee of Rules in its call for written comments on Rule 11. The call for comments was published at 59 U.S.L.W. 2117 and 131 F.R.D. 344.

- The imposition rate of sanctions in civil rights cases was not out of line with that in other types of cases.
- Rule 11 has not been applied disproportionately against represented plaintiffs or their attorneys in civil rights cases, nor has it been applied to reasonable arguments advanced by plaintiffs' attorneys in civil rights cases.

Our survey of district judges revealed that most judges:

- find that groundless litigation presents only a small problem on their dockets;
- think Rule 11 has been moderately effective in deterring groundless papers, but have found other methods more effective for handling such litigation;
- order Rule 11 sanctions in a small number of cases;
- think the rule has not adversely affected development of the law;
- find that Rule 11 has not had a negative impact on attorney–client or attorney–attorney relationships or on the likelihood of settlement (though a sizable minority do find such effects);
- believe the rule has had a positive effect on litigation in the federal courts;
- think the benefits of the rule outweigh any additional requirements of judge time; and
- wish to retain the rule in its current form (recall that the survey was conducted before the recent rule revisions were proposed).

The Center's findings were part of the information used by the committee in deciding to recommend revisions of Rule 11. When transmitting the proposed revisions to the Judicial Conference's Standing Committee on Rules, Judge Sam C. Pointer, Jr., Advisory Committee Chairman, noted his committee's "extensive consideration of practice under current Rule 11" and highlighted its conclusion that "the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, are not without some merit."[2] Relying on written comments, testimony at a hearing in New Orleans, various articles and reports, as well as the Federal Judicial Center study, the committee found support for the propositions that Rule 11

- "in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants";
- "occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from

2. Attachment to transmittal letter from Honorable Sam C. Pointer, Jr., to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules, June 13, 1991, at 2 [as revised after the Standing Committee's July 18–20 meeting, to take into account actions taken at that meeting]. Quotes in the next two paragraphs are from the same source.

other persons to determine if the party's belief about the facts can be supported with evidence";

- "has too rarely been enforced through non-monetary sanctions, with cost-shifting having become the normative sanction";
- "provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law"
- "sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel"; and
- caused litigants and court to spend a "not . . . insignificant" amount of time to deal with Rule 11 motions, the great majority of which were not granted.

Overall, according to the transmittal letter, the Advisory Committee's proposed changes were "designed to increase the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while at the same time actually reducing the frequency of Rule 11 motions." The changes retain the original purpose of the rule, namely to encourage lawyers and parties to "stop and think" before filing pleadings, motions, or other papers in a case. At the same time, the proposed changes would adjust the sanctioning process in response to empirical findings and criticisms.

The proposed rule changes are discussed in greater depth on pages 35–40. In brief, the changes

- impose a continuing duty to modify or withdraw legal and factual assertions as the litigation proceeds;
- create a "safe harbor" for litigants who withdraw challenged papers after notice of the alleged deficiencies;
- require that a motion for sanctions be in a separate pleading;
- require notice and an opportunity to be heard in all cases;
- limit sanctions to what is necessary for deterrence;
- encourage nonmonetary sanctions;
- limit the power of the court to impose monetary awards on a party that is represented by counsel;
- prohibit monetary sua sponte sanctions after settlement or voluntary dismissal; and
- permit awards against law firms.

Rule 11 Activity in the Federal Courts

One of the issues important to the Advisory Committee was whether the financial cost in satellite litigation exceeded the benefits of the rule. Although we were unable to directly measure the financial cost of sanctions-related litigation to the courts, we could determine the amount of litigation generated by Rule 11. We examined the frequency of Rule 11 activity and the demands that the rule has made on judge time. We estimated the demands on judge time by counting the number of pleadings, hearings, rulings, and written opinions related to Rule 11.

How much Rule 11 activity is there?

Our most reliable information about the amount of Rule 11 activity comes from the case file study. Table 1 shows, for each district, the total number of cases filed during the time period studied and the number of those cases involving Rule 11 activity (as shown on the docket sheets). It also shows the number of Rule 11 motions and sua sponte orders (referred to throughout as motions/orders); these numbers include all motions for Rule 11 sanctions whether or not the motion led to the imposition of sanctions.

Table 1
Rule 11 activity in five districts

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
District civil caseload	10,776	11,695	11,809	10,946	10,102
Cases involving Rule 11 activity	182	175	166	204	253
Rule 11 motions/orders filed	257	227	233	268	351

The percentage of cases in which Rule 11 activity occurs cannot be calculated directly from the information in Table 1 because of the large number of pending cases included in the study, but it can be *estimated* as described in the box at left. The percentage of such cases is modest, although not insignificant, as shown in Table 2.

Table 2
Incidence of Rule 11 activity

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Estimated percentage of cases in which Rule 11 activity will occur	2.2%	2.0%	2.0%	2.4%	3.1%

The information in Table 2 is estimated by life-table analyses. Life-table analyses control for the pending cases in our sample by incorporating information about the size of a court's caseload, the age of each case when the study commenced, the number of cases involving a Rule 11 motion/order, and the age of a case when the first Rule 11 motion/order was filed. The method projects the percentage of cases that will involve Rule 11 activity within a particular number of months from filing; the number of months is equal to the oldest case included in the analysis. For Arizona, Northern Georgia, and Western Texas, the oldest case included in the analysis was thirty-nine months old; for the District of Columbia, it was thirty-eight; for Eastern Michigan, it was significantly shorter—twenty-two months. The estimate for these districts reflects the percentage of cases that are expected to involve Rule 11 activity within the given time period.

To what extent does Rule 11 place demands on judges?

Pre-ruling activities

The number of initial and opposition pleadings filed and the number of hearings held provide indirect measures of the demands placed on judges. As seen in Table 3, most of the sanctions activity began with a motion by an opposing party rather than by judicial action. Motions for reconsideration and objections to magistrates' recommendations accounted for a small number of the motions/orders in each district.

Why not calculate Rule 11 activity from the published opinions?

The amount of Rule 11 activity in published opinions is not an accurate measure of all Rule 11 activity because it is highly dependent on the publication policies of individual judges, courts, and publishers. We found evidence of this two different ways.

First, the published district court opinions appear to misrepresent the amount of Rule 11 activity in the five districts that we studied in depth. From 1983 through 1989, there were only sixty-six published opinions addressing Rule 11 issues from those five districts, but within the shorter time frame of our case file study, we found almost a thousand cases involving Rule 11 activity. If we restrict our measure to the number of Rule 11 rulings, we still find 769 rulings on Rule 11 motions in the five districts. We also examined the percentage of published opinions from 1987–1989 that involved Rule 11 activity and found that these percentages were not comparable with the incidence figures in the case file study. The percentage of published opinions involving Rule 11 activity is lower than the incidence of Rule 11 activity from the case file study in three districts and is higher in one district. (We could not calculate the percentage for Eastern Michigan because the number of published opinions was unavailable for that district.)

Second, we found that 58% of the published Rule 11 opinions were published by just ten districts, with 38% being published by only two districts, which further distorts any measure derived from published opinions. (We did not determine what accounts for the concentration of Rule 11 activity in relatively few districts; possible explanations include inter-district or even inter-judge differences in publication policies, filing rates, or underlying Rule 11 activity.)

The amount of Rule 11 activity in published opinions is best interpreted as an indirect measure of the judicial time devoted to writing *precedential* opinions concerning Rule 11 rather than as an estimate of the frequency of Rule 11 activity. We found that Rule 11 issues were addressed in 835 (2.3%) of all district court opinions published from 1984 through 1989. At the appellate level, 346 published opinions reviewed Rule 11 issues during the same years. These numbers are lower than those advanced by others, presumably because we excluded from our count cases that mentioned Rule 11 only by analogy or as an incidental point to the application of other sources of authority.

Table 3
Source of Rule 11 activity

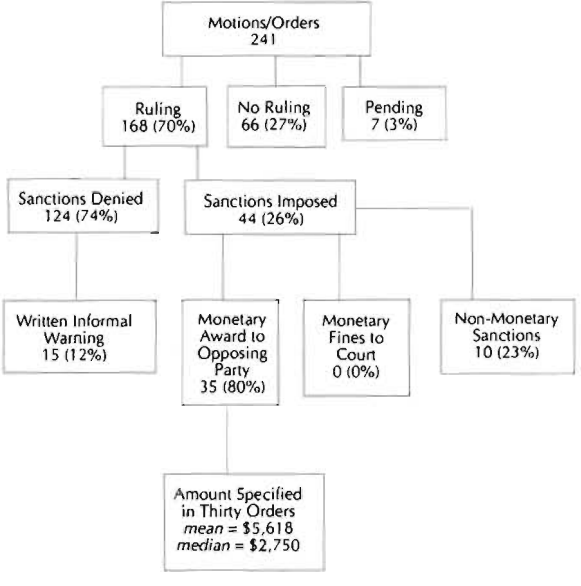
Source	Number of Rule 11 Motions/Orders				
	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Motion	223	219	200	247	308
Sua sponte order	18	7	13	6	23
Subtotal	241	226	213	253	331
Motion for reconsideration of judge's order	13	1	18	10	13
Appeal or objection to magistrate judge's order or recommendation	3	0	2	5	7
Total	257	227	233	268	351

Opposition papers were filed in response to 65% to 74% of the Rule 11 motions/orders in the five districts. The number of Rule 11 motions/orders subject to a hearing was more variable across the districts, ranging from between 10% and 13% of the motions/orders in the District of Columbia, Northern Georgia, and Western Texas to 40% in Arizona and 48% in Eastern Michigan. Most of the hearings consisted of oral arguments only; very few were evidentiary, except in Western Texas, where evidence was presented at 38% of the hearings.

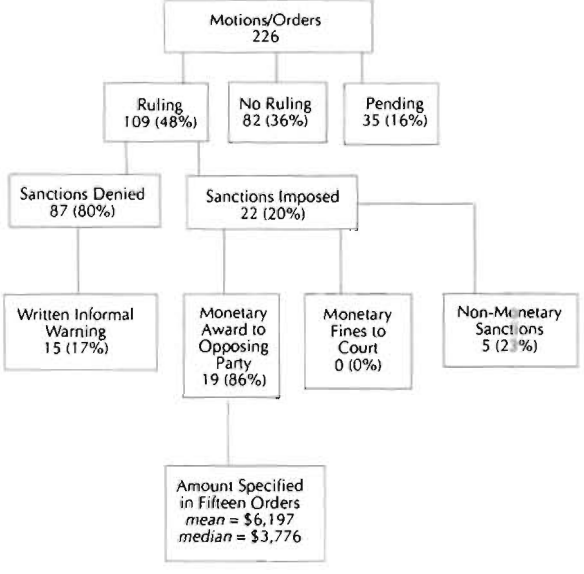
Activity associated with rulings

The figures on this and the following page depict the outcomes of the Rule 11 motions/orders, showing for each district the number of mo-

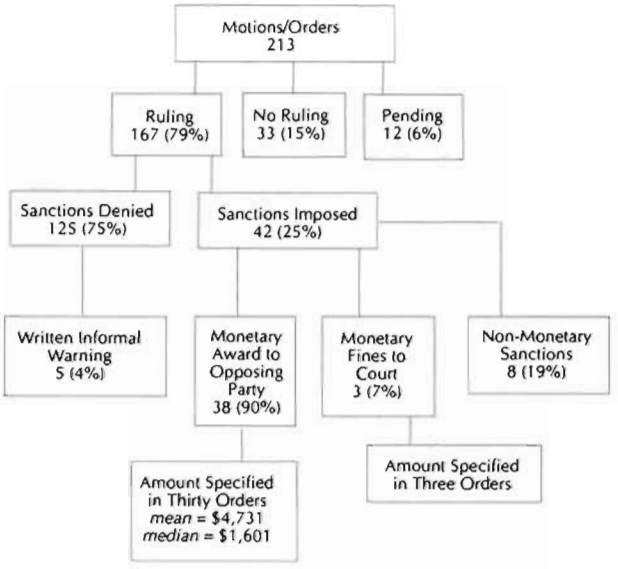
Outcome of motions/orders in D. Ariz.



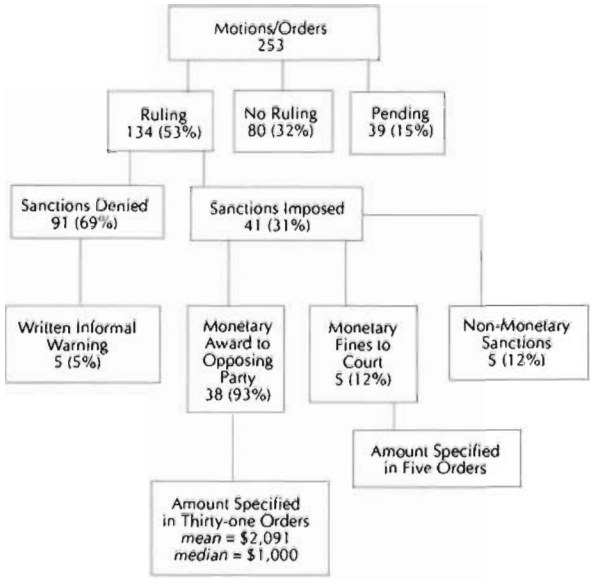
Outcome of motions/orders in D.D.C.



Outcome of motions/orders in N.D. Ga.



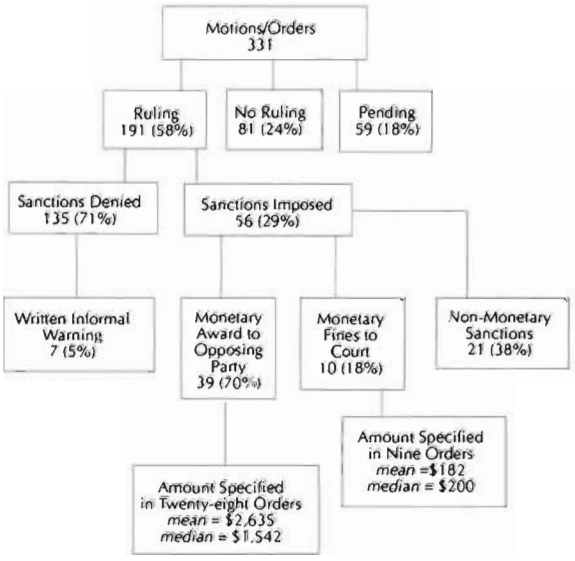
Outcome of motions/orders in E.D. Mich.



tions/orders for which there was a ruling, the number of motions/orders that were not ruled on although the underlying issue had been resolved or the case had terminated, and the number of pending motions/orders. (The numbers of motions/orders in the figures do not correspond precisely to those in Table 1 because the figures do not include sanctions-related motions for reconsideration and objections to magistrate judge orders.)

In all districts, a sizable number of motions/orders, ranging from 15% of the motions/orders in Northern Georgia to 36% in the District of Columbia, were not ruled on even though the underlying issue had been resolved or the case terminated. This suggests that judges may explicitly or implicitly postpone ruling on motions for sanctions until the associated substantive issues have been resolved, perhaps because resolution of the substantive issue often resolves the sanctions issue. It may be possible, too, that there is an increase in boilerplate motions for sanctions embedded within motions to dismiss or motions for summary judgment and that the higher percentage of nonrulings is due to such an increase. These sanctions motions may be so pro forma as to require no judicial attention at all.

Outcome of motions/orders in W.D. Tex.



We looked at two other indirect measures of the impact of Rule 11 on judge time: the number of memorandum opinions and the length of those opinions. Rulings were frequently expressed in the form of memorandum opinions in all five districts, ranging from 58% of the rulings in the District of Columbia to 85% in Northern Georgia. However, the average number of pages devoted to Rule 11 in the opinions was minimal, ranging from 1.2 pages in Arizona to 2.5 pages in the District of Columbia. The total number of opinion pages ranged from 109 in the District of Columbia to 260 in Northern Georgia.

Do the demands of sanctions-related litigation outweigh the benefits of Rule 11?

We can only approximate the demands made on judge time through the measures used above. From our data, we cannot directly determine the actual amount of judicial time expended on Rule 11 matters, nor whether the time expended is proportional to the benefits derived from use of the rule. However, the survey provides a more direct measure through the judges' own evaluations. We asked them to weigh the time needed to resolve Rule 11 issues and the benefits that may derive from the rule. Of the 452 judges who responded to this question, 72% reported that the benefits of Rule 11 outweigh the required expenditure of judge time.

Central Questions About the Use of Rule 11

Many of the central questions about the application of Rule 11 relate to the threshold issue of whether the rule hampers the ability of litigants and attorneys to present their arguments to the court. In this section, we discuss our research findings concerning five such questions: 1) Is Rule 11 too indeterminate in its application? 2) Do the procedures used in sanctions matters provide adequate procedural protections? 3) Are the nature and severity of sanctions appropriate to achieve their desired deterrent effect? 4) Has Rule 11 activity been disproportionately concentrated on particular types of litigants or in particular types of cases? and, more specifically, 5) Does Rule 11 chill the creative advocacy of lawyers in civil rights cases? We describe our research findings for each of these questions separately, although, as will become obvious, the concerns are interrelated.

Is Rule 11 too indeterminate in its application?

One criticism of Rule 11 is that there is too little predictability in its application because there are no clear standards as to what constitutes a violation of the rule. The essence of this criticism is that the rule is too indeterminate, resulting in inconsistent interpretation and use across judges and courts. Furthermore, if litigants and attorneys do not have adequate notice as to what constitutes a violation, the rule's deterrent value may be undermined.

Another criticism of Rule 11 is that it leaves too little discretion with individual judges to determine whether sanctions should be imposed once a violation has been determined. The essence of this criticism is that the rule is too determinate, giving judges too little latitude in dealing with the unique aspects of any given situation. One explicit purpose of the 1983 amendments was to make the rule more determinate by mandating the imposition of sanctions when a judge determined that a violation had occurred. The amendments could have the opposite effect if some judges, reluctant to impose sanctions, never find a violation.

In this section, we discuss whether the amendments had their desired effect or have in fact made the rule even less determinate. If there is significant indeterminacy in the application of the rule, we would expect to find several outcomes: 1) variations between district court judges in their sanctioning practices, 2) reversals of sanctions orders on review and reconsideration, and 3) a low level of agreement between district and appellate court judges.

Sanctioning practices of judges in the five districts

Within each of the five districts, there was significant variation in the number of motions before each judge. In Arizona, for example, the number of motions ranged from eight motions before one judge to thirty-two motions before another judge. Furthermore, in three districts (Arizona, Northern Georgia, and Eastern Michigan), the imposition rate of sanctions differed significantly between judges. In Arizona, for example, none of one judge's rulings imposed sanctions and only 11% of another judge's rulings did so, whereas 57% of a third judge's rulings imposed sanctions.[3]

We did not attempt to determine the reasons for variation between judges in their sanctioning practices, but a ready explanation would be that judges differ in their receptivity to Rule 11. There may, however, be other explanations. For example, variation in the number of motions before each judge may exist because the bar accurately or inaccurately perceives differences between the judges in their receptivity to Rule 11

3. We grouped as "other judges" senior judges, visiting judges, and judges appointed after the start of the study because their experience would likely be different from the experience of judges who were on active status for the entire period of the study. For purposes of these comparisons, we excluded the category of "other judges," as well as motions/orders handled by magistrate judges, motions for reconsideration of judges' orders, and appeals or objections to orders or recommendations by magistrate judges. A relationship was considered significant when the probability associated with the corresponding Fisher's Exact statistic was less than .05. (The Fisher's Exact test examines whether there is a significant relationship between two categorical variables.)

motions and acts accordingly. Or judges may differ in the amount of sanctions activity they delegate to the magistrate judges working with them. Some judges, through early and active case management, may reduce counsel's incentive to file a Rule 11 motion; if a judge, for instance, dismisses a groundless complaint at the Rule 16 conference, counsel may decide not to pursue a Rule 11 motion because the cost could exceed any potential recovery. We could advance similar explanations for variations observed between judges in their imposition rates. Our data, however, are insufficient to examine the causes of the variation found.

Judges' reports of their sanctioning practices

From the survey, we were able to obtain judges' perceptions of the nature of their sanctioning practices. We asked the judges to estimate the number of orders for Rule 11 sanctions they had imposed during the past twelve months, including orders imposed after review of a magistrate judge's report and recommendations. Our findings are shown in Tables 4 and 5.[4]

4. Please keep in mind that the numbers reported by the judges are estimates and were not obtained from records or files. The case file study provides the most objective measure of the frequency of Rule 11 activity.

Table 4
Judges' reports of the numbers of Rule 11 sanctions they ordered in the past twelve months

Number of Orders	Percentage of 551 Respondents	Cumulative Percentage	Number of Orders	Percentage of 551 Respondents	Cumulative Percentage
0	26.9	26.9	5	8.5	84.3
1	11.5	38.4	6	5.6	89.9
2	15.3	53.7	7–9	3.1	93.0
3	14.5	68.2	10	3.8	96.8
4	7.6	75.8	11 +	3.1	99.9

The median number of sanctions shown in Table 4 is a little less than two orders (that is, half the judges said they had issued fewer than two orders and half said they had issued two or more orders).

Table 5 shows how few of these orders were issued sua sponte. As shown, the vast majority of judges issued no sua sponte orders at all.

Table 5
Judges' reports of the numbers of Rule 11 sanctions they imposed sua sponte in the past twelve months

Number of Orders	Percentage of 549 Respondents	Cumulative Percentage	Number of Orders	Percentage of 549 Respondents	Cumulative Percentage
0	69.2	69.2	4	2.3	97.3
1	16.2	85.4	5	1.5	98.8
2	6.0	91.4	6 +	1.1	99.9
3	3.6	95.0			

We found that the number of orders issued, either sua sponte or in response to a motion, is related to the judges' assessment of whether there is a problem with groundless litigation. That is, judges who see no problem or a slight problem report fewer orders for sanctions than do judges who see a greater problem. This suggests that variations in judicial use of Rule 11 are rationally related to the rule's purpose of deterring groundless litigation, or in the alternative, that some judges see a problem where other judges do not.

We also asked the judges about the pattern of their use of Rule 11 in the years since August 1983, when amended Rule 11 was adopted. This information is important because attorneys can more reliably assess the receptivity of individual judges to Rule 11 if judges' use of the rule is stable over time. Table 6 shows that 58% of the judges said they have imposed Rule 11 sanctions and have done so with about the same frequency over the years. Twenty-nine percent said they have changed their practice since 1983, while 13% said they have never imposed Rule 11 sanctions. Judges who have been recently appointed fall disproportionately into the group that has never imposed sanctions.

Table 6
Judges' description of their pattern of Rule 11 use since 1983 (or since date of appointment)

	Percentage of 546 Respondents
I impose Rule 11 sanctions more frequently now than I used to	18.5
I impose Rule 11 sanctions less frequently now than I used to	10.1
I have imposed Rule 11 sanctions with about the same frequency over the years	58.2
I have never imposed Rule 11 sanctions	13.2

It is instructive to look at the judges' explanations for changes in their practice. Some of more frequently mentioned reasons for increased use of Rule 11 sanctions are these:

> The court of appeals has mandated or I would rarely impose sanctions.
>
> With growing experience on the bench, I generally am less accepting of groundless pleadings.
>
> I sanction more because of increased and greater violations.
>
> Since Rule 11 was amended, sanctions orders are more likely to be affirmed on appeal.

Among the reasons given for decreased use were these:

> The necessity for sanctions has decreased over the years, as attorneys have learned to comply with the rule in order to avoid sanctions.
>
> The grant of a Rule 11 motion is a time-consuming task. The diversion of such time is not worthwhile, except in more serious cases.
>
> There is no support from the court of appeals.

Reconsideration and review of sanctions orders

Across the five districts, a motion for reconsideration was filed pursuant to fifty-five rulings. On reconsideration, the judges modified the type or amount of sanctions they imposed four times and reversed themselves three times. (The imposition of sanctions was reversed once in Arizona and once in Eastern Michigan. The denial of sanctions was reversed once in Northern Georgia.) Objections or appeals were filed pursuant to seventeen recommendations or orders by magistrate judges.[5] The type or amount of sanctions imposed by a magistrate judge was modified four times, but only one ruling by a magistrate judge was reversed (the sanctions imposed in that ruling were set aside). Thus, judges seldom reversed themselves on reconsideration, nor did they often disagree with the decisions of magistrate judges about whether sanctions were warranted.

5. These figures include only situations in which a party appealed or objected to a magistrate judge's order or recommendation or in which a judge sua sponte decided to alter a magistrate judge's finding. If a motion for reconsideration or an appeal/objection was not ruled on and the case was not pending, the original sanctions decision was treated as affirmed. Three motions for reconsideration and one objection to a magistrate judge order were pending at the time of data collection.

Agreement between district courts and circuit courts

There also appears to be a high level of agreement between district and circuit courts. Table 7 shows the number and disposition of sanctions rulings that were appealed in the case file study. Orders imposing sanctions were reversed four times on appeal (one order from the District of Columbia, two orders from Northern Georgia, and one order from Eastern Michigan). No orders that denied sanctions were reversed on appeal. For two reasons these numbers probably underestimate the true figures. First, many of the appeals were still pending at the time of data collection. In addition, some of the rulings on Rule 11 were in pending cases and these rulings may be appealed after the cases terminate.

Table 7
Appellate court decisions in the case file study

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Affirmed imposition of sanctions	2	0	3	1	2
Reversed imposition of sanctions	0	1	2	1	0
Affirmed denial of sanctions	1	2	1	3	3
Reversed denial of sanctions	0	0	0	0	0
Appeal dismissed	3	5	6	4	2
Other	0	2	1	0	1
Pending	10	6	10	11	2
Total	16	16	23	20	10

As seen in Table 8, the level of district court-circuit court agreement was not as high in the published opinions as in the case file study, possibly because appellate decisions reversing the district court may have

more precedential value and therefore be more likely to be published than those affirming the district court. The majority of the opinions affirmed the district court — 31% affirmed the imposition of sanctions and 25% affirmed the denial of sanctions. Even so, twenty-six percent of the published Rule 11 opinions reversed the district court — 20% reversed the imposition of sanctions and 6% reversed the denial of sanctions. It is unclear whether the number of reversals will remain high, however, given the Court's recent endorsement of an "abuse of discretion" standard for review of Rule 11 orders. [Cooter & Gell v. Hartmax, 110 S. Ct. 2447 (1990)].

Table 8
Published appellate court decisions involving Rule 11 sanctions, 1984 through 1989

Court Decision	Number of Opinions	Percentage of All Published Rule 11 Opinions
Affirmed imposition of sanctions	108	31%
Reversed imposition of sanctions	69	20%
Affirmed denial of sanctions	87	25%
Reversed denial of sanctions	21	6%
Remanded to adjust amount of sanction	15	4%
Remanded to clarify/specify grounds for ruling	13	4%
Sua sponte remanded to consider Rule 11 sanctions	5	1%
Sua sponte imposed Rule 11 sanctions	8	2%
Denied request for Rule 11 sanctions at appellate level	2	1%
Appeal dismissed for procedural grounds	9	3%
Other	15	4%
Total	352	100%

We grouped the sixty-nine reversals of sanctions orders into three broad categories, reversals based on: 1) the merits of the decision to sanction, 2) Rule 11 procedural grounds, and 3) the merits of the substantive claim or defense underlying the sanctions order.

Eighty percent of the reversals were based on the merits of the sanctions. These appellate decisions found that there was adequate inquiry into the law or facts, that an incorrect standard (e.g., bad-faith standard) had been used, or that the sanctioned activity (e.g., trial misconduct or failure to attend a conference) was beyond the scope of Rule 11. Ten percent of the reversals were based on Rule 11 procedural grounds; the only procedural ground discussed in the opinions was failure to give notice and opportunity to respond to the sanction motion or sua sponte order. Nineteen percent of the reversals were based on the merits of the underlying substantive claim.[6] In these cases, the court of appeals reversed the district court ruling on the substantive issue related to the sanctioned pleading or paper. Despite their scarcity,

6. It was possible for a reversal to be based on more than one ground, which is why the percentages do not add to 100.

these cases are particularly troublesome: Not only was the claim or defense underlying the sanctions motions arguable, the appellate court found it to be meritorious.

Conclusion

The above information sheds some light on, but does not give the final answer to, the question of whether Rule 11 is too indeterminate in its application. Several of our findings could support the argument that the rule is indeterminate. In five districts, there was significant variation in the number of motions before each judge and in three of five districts, the imposition rate of sanctions differed significantly between judges. Furthermore, a substantial number of published appellate court decisions reversed the district court.

Other findings, however, support the conclusion that variations in judicial use of Rule 11 are rationally related to the rule's purpose. The reported use of Rule 11 by district court judges was relatively stable over time and was related to their assessments of the severity of the problem with groundless litigation on their own dockets. And in the case file study, the level of agreement between magistrate judges and district court judges and between district court judges and circuit court judges was high.

Do the procedures used in sanctions matters provide adequate procedural protections?

The Advisory Committee also questioned whether the procedures used in sanctions matters provide adequate procedural protections. We have already presented some information (about opposition papers and hearings) relevant to the committee's concerns about procedural fairness. Recall that opposition papers were filed in response to a majority of the motions/orders across all five districts, but the number of motions/orders subject to a hearing was more limited, particularly in the District of Columbia, Northern Georgia, and Western Texas. Few of the hearings were evidentiary, possibly because judges believe that pleadings and oral arguments provide all the information necessary to rule on most Rule 11 motions and are concerned that the introduction of evidence would create attorney-client conflicts.

Also relevant to concerns raised about procedural fairness is the number of show cause orders issued when judges were acting sua sponte. Judges initiated sanctions activity infrequently. In the few in-

stances in which they did so, however, they sometimes failed to issue a show cause order before entering the sanctions order (see Table 9). Thus, the sanctioned attorney or party was presumably denied written notice and an opportunity to respond.

Table 9
Rule 11 activity initiated by judicial action

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Number of Rule 11 sua sponte orders	18	7	13	6	23
Number of sua sponte orders unaccompanied by a show cause order	10	1	4	4	15
As percentage of Rule 11 sua sponte orders	56%	14%	31%	67%	65%

In Arizona, the target of the sua sponte order was a prisoner in all ten instances in which a show cause order was not issued. All ten of these orders required pro se prisoners to supply additional certification of compliance with Rule 11 when filing papers with the court. In Western Texas, the target was a prisoner in four such instances and a pro se party in another instance; and in Northern Georgia, the target was a pro se party in all four instances when a show cause order was not issued. The remaining fifteen sua sponte orders for which there was no show cause order (one from the District of Columbia, four from Eastern Michigan, and ten from Western Texas) involved represented parties or attorneys.

The procedures needed to protect the substantive rights of litigants depends heavily on the circumstances of individual cases and thus it is difficult, based on the information available to us, to definitively conclude whether the procedures used in the cases we reviewed were sufficient. Were there motions for which opposition papers should have been filed but were not because of court action? Were there motions that should have been the subject of a hearing (perhaps, an evidentiary hearing) but were not? To some extent, these questions are unanswerable without a more detailed look at individual cases. Two findings, however, are clear. First, the majority of those persons targeted by a motion/order for sanctions had an opportunity to oppose the imposition of sanctions in writing and did so. Second, judges sometimes failed to provide procedural safeguards when imposing sanctions sua sponte.

Are the nature and severity of sanctions appropriate to achieve their desired deterrent effect?

The Advisory Committee expressed concern that the size of monetary sanctions might over-deter lawyers, making them reluctant to assert marginally well-founded contentions for fear of a large sanction. They also questioned whether non-monetary sanctions would serve the deterrent purpose of the rule and at the same time fall evenly on lawyers of different financial means. From the case file study and the survey, we obtained information relevant to concerns about the nature and size of sanctions awarded.

In the five districts, between 20% and 31% of the rulings imposed sanctions (see the figures on pages 8–9). The overwhelming majority of these orders included monetary fees payable to the opposing party, from a low of 70% of such orders in Western Texas to a high of 93% in Eastern Michigan. The median amount awarded ranged from $1,000 in Eastern Michigan to $3,776 in the District of Columbia. Across the districts, the smallest award to an opposing party was $10; the largest was $50,000. Twenty-nine awards exceeded $5,000; eight of these exceeded $15,000. Very few orders imposing sanctions included a fine payable to the court. Indeed, in two districts no such fines were imposed.

Relatively few orders included non-monetary sanctions, ranging from 12% of all orders imposing sanctions in Eastern Michigan to 38% in Western Texas. Most of the non-monetary sanctions were either (1) reprimands, admonitions, or warnings or (2) prohibitions against or conditions on future filings. Other non-monetary sanctions included dismissal of the complaint or striking parts thereof, striking other documents, requiring continuing legal education, ordering production of documents or appearance for deposition, and precluding testimony. One ruling led to disciplinary proceedings and subsequent suspension of the attorney from the practice of law. Except in the District of Arizona, non-monetary sanctions often supplemented rather than supplanted monetary sanctions. In Arizona, all of the non-monetary sanctions were requirements imposed on pro se prisoner plaintiffs to supply additional certification of compliance with Rule 11 when filing papers with the court.

In the survey, we asked the judges whether they had imposed non-monetary sanctions in counseled cases under Rule 11. Seventy-six percent said they had not. The 24% of the judges who said they had imposed non-monetary sanctions reported the use of a great variety of such sanctions. Mirroring the findings of the case file study, the non-monetary sanctions most frequently mentioned were dismissal of the case; striking of pleadings, claims, witnesses, or evidence; verbal or written reprimands; censure in a court order or opinion; warnings that sanctions might be imposed; and orders to attend continuing legal education courses. A few judges noted that violations had led to suspension from practice, either temporarily or indefinitely.

To summarize, Rule 11 has operated predominantly as a cost-shifting device, with little emphasis on non-financial sanctions. We cannot determine from the available information, however, whether the monetary awards were larger than necessary to serve the rule's purpose of deterring groundless litigation.

Has Rule 11 activity been disproportionately concentrated on particular types of litigants or in particular types of cases?

A perennial criticism of Rule 11 is that it has had a disproportionate impact on particular types of litigants and in particular types of cases, specifically on represented plaintiffs and their attorneys in civil rights cases. By *disproportionate impact,* we mean a level of activity out of proportion with the activity targeting other types of litigants or in other types of cases. To address the validity of this criticism, we examine the following questions: 1) Are plaintiffs more likely than defendants to encounter motions/orders for Rule 11 sanctions and to have such motions granted? 2) Is the incidence of Rule 11 motions/orders in civil rights cases relatively higher than in other types of cases and are such motions more likely to be granted? 3) Are represented plaintiffs' and their attorneys in civil rights cases more likely to encounter motions for Rule 11 sanctions and have such motions granted? [7]

Are plaintiffs subject to Rule 11 activity more frequently than defendants?

Across the five districts, Rule 11 motions/orders targeted the plaintiff slightly or significantly more frequently than the defendant (see Table 10). And in all districts, orders that imposed sanctions also targeted the plaintiff more frequently than the defendant (see Table 11). Given that more of the motions targeted the plaintiff, it is to be expected that more of the orders that imposed sanctions would also target the plaintiff. In all districts, however, it appears that the difference in the number of motions filed against the plaintiff and defendant do not fully account for the difference in the number of sanctions imposed. There appears to be a significantly higher imposition rate for plaintiffs in Arizona, the District of Columbia, Northern Georgia, and Western Texas and a slightly higher imposition rate in Eastern Michigan (see the last two lines of Table 11).[8] We calculated the imposition rate by dividing the number of rulings that imposed sanctions by the total number of rulings, including those that granted and those that denied Rule 11 motions.

7. Showing that the level of sanctions activity is disproportionate across different types of litigants or cases would not necessarily indicate that the sanctions activity was warranted or unwarranted. To make such a determination, one would need to examine the specific factual or legal arguments underlying the sanctions activity. We have done this type of analysis for civil rights cases (see pages 23–26).

8. We used the *z*-statistic to compare the percentage of motions that targeted the plaintiff with the percentage that targeted the defendant. In the text, we describe a difference between the two percentages as "significantly more frequent" when the *z*-statistic is significant at the traditional .05 level and a difference as "slightly more frequent" when the *z*-statistic approaches the .05 level. We also used the *z*-statistic to compare imposition rates between different types of litigants or different types of cases. We describe a difference between two imposition rates as "significantly higher" or "significantly lower" when the *z*-statistic is significant at the traditional .05 level and describe a difference as "slightly higher" or "slightly lower" when the *z*-statistic approaches this level. We took this approach in describing the results so that one could better see the relative positions of the percentages. For example, the percentage difference between plaintiffs and defendants is the same for Eastern Michigan and Western Texas. The difference for Western Texas is statistically significant whereas that for Eastern Michigan is not because of differences in the sample size from the two districts.

Table 10
Rule 11 motions/orders: targeted "side" of litigation

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Number of motions/orders that targeted:					
Plaintiff's side	134	133	125	182	173
Defendant's side	97	87	74	64	145
Other	10	6	14	7	13
Total	241	226	213	253	331
As percentage of all motions/orders					
Plaintiff's side	56%	59%	59%	72%	52%
Defendant's side	40%	39%	35%	25%	44%
Other	4%	3%	7%	3%	4%

Table 11
Orders imposing Rule 11 sanctions: targeted "side" of litigation

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Number of rulings imposing sanctions against:					
Plaintiff's side	35	17	34	33	34
Defendant's side	3	5	4	8	21
Other	6	0	4	0	1
Total	44	22	42	41	56
As percentage of all rulings imposing sanctions					
Plaintiff's side	80%	77%	81%	80%	61%
Defendant's side	7%	23%	9%	20%	38%
Other	14%	0%	9%	0%	2%
Imposition rate					
Plaintiff's side	35%	27%	34%	35%	36%
Defendant's side	5%	12%	7%	22%	23%

Examining the same issue from a different angle, we found that the complaint was the most frequently targeted pleading, being the primary target of 40% of the motions/orders in Arizona, 39% in the District of Columbia, 37% in Northern Georgia, 54% in Eastern Michigan, and 34% in Western Texas. The relatively higher percentage in the Eastern District of Michigan should be interpreted cautiously because that sample consisted of younger cases than the other samples did. In contrast, answers were targeted relatively rarely, by only 4% of the

motions/orders in Arizona, 4% in the District of Columbia, 4% in Northern Georgia, 5% in Eastern Michigan, and 4% in Western Texas.

Furthermore, in all districts except Eastern Michigan, more of the orders imposing sanctions targeted complaints than would be expected even given the higher proportion of motions that targeted the complaint. In Arizona, Northern Georgia, and Western Texas, the imposition rate for complaints was significantly higher than the overall imposition rate for all other types of pleadings or papers; in the District of Columbia, the imposition rate for complaints was only slightly higher.

Is Rule 11 activity disproportionately high in civil rights cases?

Another criticism of the rule is that it hampers effective advocacy of plaintiffs in civil rights cases. We first examined the overall level of Rule 11 activity in civil rights cases compared to other types of cases, by addressing the following questions for each district: 1) In which types of cases were most of the motions/orders concentrated? 2) How does the incidence of Rule 11 motions/orders, as estimated by the life-table analyses, compare between the types of cases in which most of the motions/orders were concentrated? 3) Compared with other types of cases in which the motions/orders were concentrated (excluding prisoner petitions), was the court more likely to grant motions in civil rights cases? That is, was the imposition rate in civil rights cases higher compared with other types of cases? Recall that we calculated imposition rate by dividing the number of rulings that imposed sanctions by the total number of rulings, including those that granted Rule 11 motions and those that denied them. Our findings for each district are summarized in Table 12.

In all five districts, Rule 11 motions/orders were concentrated in contract, torts, and civil rights cases. A substantial number of motions/orders were also filed in prisoner petitions in Arizona and Western Texas, in labor cases in Eastern Michigan, and in cases involving miscellaneous federal statutes in all districts except Northern Georgia.

The incidence of Rule 11 motions/orders, as estimated by life-table analysis, was higher in civil rights cases than in many of the other types of cases in which the motions were concentrated (see the second column of figures in Table 12). Within each district except Northern Georgia, however, the imposition rate for civil rights cases was not out of line with that for other types of cases (see the third column of figures in Table 12), and if we eliminate rulings on motions that targeted a pro se party, the same is true for Northern Georgia.[9] This is not to say that the *absolute* number of Rule 11 sanctions imposed in civil rights cases does not differ from other types of cases.

To make the comparisons, we combined similar types of cases into twelve groups, using the nature of suit codes listed on the civil cover sheet (JS 44). The twelve groups were contract, real property, torts, civil rights, prisoner petitions, forfeiture/penalty, labor, property rights, bankruptcy, Social Security, federal tax, and miscellaneous federal tax. We excluded cases classified as recovery of overpayment and enforcement of judgment, the Medicare Act, recovery of defaulted student loans, and recovery of overpayment of veterans benefits from our categorization.

9. In Arizona, the imposition rate was comparable for civil rights, contract, and miscellaneous statutes, but was significantly higher for torts. In the District of Columbia, the imposition rate in civil rights was in the middle range, compared with contract, torts, and other statutes. Slightly fewer or significantly fewer of the rulings in contract and miscellaneous statutes imposed sanctions and slightly more of the rulings in torts imposed sanctions. In Eastern Michigan, the imposition rate was comparable for civil rights and contract, and significantly lower for labor. Too few orders were issued in torts and other statutes to make meaningful comparisons for these categories. In Texas, the imposition rates were fairly comparable across the natures of suit. In contrast, the imposition rate was slightly higher for civil rights than for contract and torts in Northern Georgia. If we eliminate rulings on motions that targeted a pro se party, however, the imposition rates for contracts, torts, and civil rights are comparable.

Table 12
Rule 11 activity by type of case

District	Type of Case	Percentage of Motions/Orders	Incidence from Life-table Analyses	Imposition Rate
Ariz.	Contract	21%	3.4	26%
	Torts	10%	2.3	56%
	Civil Rights	14%	6.9	27%
	Other Statutes	21%	5.7	24%
	Prisoner Petitions	17%	1.3	26%
D.C.	Contract	28%	3.5	10%
	Torts	19%	1.9	43%
	Civil Rights	21%	3.6	25%
	Other Statutes	14%	1.5	0%
N.D. Ga.	Contract	26%	2.6	19%
	Torts	15%	2.0	21%
	Civil Rights	34%	5.6	32%
E.D. Mich.	Contract	21%	2.4	37%
	Torts	9%	1.4	-
	Civil Rights	22%	6.3	41%
	Other Statutes	14%	5.4	-
	Labor	20%	4.5	17%
W.D. Tex.	Contract	23%	3.4	31%
	Torts	12%	3.5	23%
	Civil Rights	26%	6.7	31%
	Other Statutes	15%	4.7	32%
	Prisoner Petitions	12%	2.1	35%

In Eastern Michigan, too few rulings were issued in torts and other statutes for an imposition rate to be reliably calculated.

Has Rule 11 had a disproportionate impact on represented plaintiffs and attorneys in civil rights cases?

The main focus of the debate over the disproportionality of Rule 11 has been the impact of the rule on represented plaintiffs and their attorneys in civil rights cases. Analyzing the overall incidence of Rule 11 motions/orders and the imposition rate of sanctions in civil rights cases does not give a complete picture of the impact of the rule. The incidence figures and imposition rates shown in Table 12 include cases in which the targets of the sanctions activity were unrepresented plaintiffs, defendants, or defense attorneys, thus overstating the effect on represented plaintiffs and their attorneys. We therefore examined how frequently represented plaintiffs and their attorneys in civil rights cases encounter Rule 11 motions/orders and at what rate courts grant such motions.

We found that the percentage of motions/orders that targeted represented plaintiffs or their attorneys in civil rights cases was similar to or

was slightly to significantly lower than that in the other types of cases with substantial Rule 11 activity in four of the five districts. In the fifth district, the percentage in civil rights cases was slightly to significantly higher than that in other types of cases.

We also found that in each district, the imposition rate for represented civil rights plaintiffs and their attorneys was comparable with or slightly to significantly lower than that for all other types of litigants and cases (see Table 13).

Table 13
Rate at which Rule 11 sanctions are imposed

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Represented plaintiffs and their attorneys in civil rights cases	7%	12%	17%	26%	23%
All other types of litigants and cases	28%	22%	28%	32%	33%

The substantial number of sanctions imposed in civil rights cases against pro se plaintiffs and defendants (both pro se and represented) may account for the comparable or lower imposition rates against represented plaintiffs and their attorneys. Such sanctions are not relevant, however, to the concern about chilling the creative advocacy of lawyers for plaintiffs. We found that in Arizona, five of six of the rulings that resulted in the imposition of sanctions involved pro se plaintiffs or defendants, both pro se and represented; in the District of Columbia, three of five; in Northern Georgia, twelve of nineteen; in Eastern Michigan, six of twelve; and in Western Texas, five of fifteen.

Does Rule 11 chill effective advocacy by plaintiffs' lawyers in civil rights cases?

The findings concerning disproportionate impact detailed above do not provide sufficient evidence to conclude that Rule 11 has no adverse effect on represented plaintiffs and their attorneys in civil rights cases. Rule 11 would still have an adverse impact on civil rights plaintiffs if reasonable arguments for the application or extension of law were sanctioned. Many critics of the rule have argued that plaintiffs' attorneys in civil rights cases are likely to be aware of cases in which sanctions have been imposed and may hesitate to present arguable claims if they perceive that reasonable arguments have been sanctioned.

We examined this issue by scrutinizing all civil rights cases in which sanctions had been imposed in the five districts to determine whether Rule 11 was being applied to reasonable arguments. One of the authors (Willging) read the files of all the civil rights cases in which sanctions

had been imposed and compiled case summaries. The summaries can be found in Section 4 of our final report to the Advisory Committee on Civil Rules.

Some commentators on Rule 11 have minimized the effect of Rule 11 on the development of law by assuming that sanctions are typically imposed for inadequate factual rather than legal inquiries. We found in all five districts, however, that by far the most common reason given for imposing sanctions in civil rights cases was an inadequate legal inquiry.

To illustrate the type of arguments that were sanctioned, we present brief synopses of four cases, two of which the reviewer believed presented more persuasive arguments than the others that were sanctioned and two of which the reviewer believed presented arguments typical of those sanctioned. (Labeling an argument *more persuasive* does not mean that the argument should not have been sanctioned; in each case, the court articulated a reasonable basis grounded in Rule 11 for imposing sanctions.) The descriptions concentrate on objective facts and arguments found in the record of the cases and are designed to permit the reader to make an independent judgment.

The two arguments the reviewer considered more persuasive in represented-plaintiff civil rights cases were these:

- Plaintiff submitted a bid to defendant, a general contractor, to serve as a minority subcontractor and thereby satisfy defendant's obligations under a statutory minority business set-aside program. Defendant informed plaintiff that *T*, another minority subcontractor, would serve that role for the construction contract in question and that plaintiff should submit a more realistic bid to participate as a regular (i.e., non-minority) subcontractor. Plaintiff submitted a bid that was $208,000 less than the original bid, which defendant accepted. Later, *T* no longer satisfied the statutory requirement, and defendant pressed plaintiff to submit papers as a minority contractor. Plaintiff sued for the $208,000 as lost profits, claiming that defendant deprived plaintiff of a statutory entitlement to the larger amount of the original bid and that defendant's action deprived plaintiff of civil rights in violation of 42 U.S.C. § 1985(3) and § 2000d. Plaintiff's president and plaintiff's project manager each testified in depositions that there was no racial animus in defendant's actions and they were solely motivated by economic concerns. Nevertheless, plaintiff's attorney argued against summary judgment, asserting that plaintiff had been deprived of a statutory benefit under the minority set-aside program. The court granted summary judgment for defendant and awarded defendant $15,000 attorneys' fees and costs as sanctions. The stated reasons for the sanctions were that the attorneys had failed to investigate the factual basis for the claim and that plaintiff's argument for an inflated economic benefit under the minority set-aside program was not a good faith argument to extend existing law. [Hunter Grading Contracting v. Columbus Co., Docket No. 88-617 (N.D. Ga. 1988).]

- Plaintiff sued to enjoin the operation of a state statute that provides an "almost automatic continuance" for members of the state legislature. Pursuant to the custody terms of her divorce decree, plaintiff sought permission to move the children of the marriage to a different county. Defendant, her ex-husband and a state legislator, invoked the statute and the state court of appeals denied plaintiff's petition for mandamus. Plaintiff sued in federal court claiming a denial of procedural due process and an interference with her constitutional right to (re)marry and raise a family. Plaintiff joined two judges of the state district court "with great hesitancy, if not regret" on the theory that they would be essential parties to give complete injunctive relief. Plaintiff did not seek damages against the judges. The federal district court ruled that plaintiff had failed to exhaust state remedies and awarded sanctions of $1,500 in favor of the state judges. The stated reason for the sanctions was that plaintiffs had failed to uncover and follow a Fifth Circuit decision requiring the exhaustion of state remedies. The court refused to award sanctions in behalf of the ex-husband. [Shine-Lagow v. Shine, Docket # 87-00147 (W.D. Tex. 1987).]

The two arguments the reviewer considered typical in represented-plaintiff civil rights cases were these:

- Plaintiff sued for violation of constitutional rights, trespass, and intentional infliction of emotional distress. The gist of the claim was that the police did not have probable cause to enter plaintiff's apartment in response to an anonymous tip that a woman was being beaten. When the police arrived, they reported hearing sounds of furniture being moved around. They also knew that plaintiff had been involved in prior domestic disturbances. The court noted that defendant had provided plaintiff with a tape of the anonymous call and awarded fees of $6,000 against plaintiff and his attorney on the grounds that plaintiff had not conducted an adequate legal inquiry (citing both Rule 11 and 42 U.S.C. § 1988). Ruling on a motion to reconsider, the court vacated the award against the attorney to avoid a chilling effect on plaintiffs' attorneys in civil rights cases and entered a reverse fee-shifting award against the plaintiff under 42 U.S.C. § 1988. [Hopkins v. City of Sierra Vista, Docket # 88-00723 (D. Ariz. 1989).]
- An attorney attempted to intervene as a plaintiff in a case that involved a claim by a parent on behalf of a child for review of an individual education plan (IEP) under the Education for the Handicapped Act. Plaintiffs were represented by attorneys for the Atlanta Legal Aid Society. The intervening attorney claimed that the State Hearing Officer had erroneously ruled that the School District could stop a meeting with a parent about an IEP and call for a hearing. The issue in the case was whether or not the school system has a right to call for a hearing. The court found that neither the attorney nor his clients had standing or

a cause of action and that the "motion is so frivolous as to offend the policies against frivolous pleadings set down in Rule 11." The court imposed sanctions sua sponte in the amount of the fees of plaintiffs and defendants, a total of $1,041. The attorney was sanctioned in another case and was suspended from practice in 1990. [Jackson v. Atlanta School District Docket # 87-1245A (N.D. Ga. 1987).]

Do the above cases provide a reasonable basis for asserting a chilling effect on creative advocacy in civil rights litigation? In the opinion of the author who read all of the cases, no good faith arguments for changes in the law were sanctioned. The lawyers in these cases did not identify their arguments as arguments for change in the law, nor did they confront adverse precedent; they tended to ignore it or to be ignorant of it. The sanctions in these cases should not intimidate an attorney who investigates the law and facts and then makes a good faith argument to extend, modify, or reverse existing law.

We also examined the issue of Rule 11's possible effects on creative advocacy by asking judges "Do you think Rule 11 has in any way impeded development of the law?" We found that of 503 judges who responded to the question, only 5% answered that Rule 11 had impeded development of the law. Judges who answered in the affirmative were especially likely to write comments with their responses to this question; nineteen did so. A few typical comments were:

> It has had a somewhat chilling effect on innovative theories, such as in 1983 civil rights cases and in *Bivens*-type cases.
>
> I suspect it has made lawyers unwilling to risk pushing for changes in legal doctrine, but I am not in a position to prove this.
>
> It may curtail originality of legal theories — probably in civil rights and toxic torts.

Judges who found that Rule 11 had not impeded development of the law were far less likely to write comments on this question, but eleven did so. Typical comments were:

> I view the fact that a groundless pleader can be made to suffer for his dereliction or vindictiveness to be a positive [outcome] of Rule 11-type sanctions.
>
> Counsel can also preface pleadings that a new approach or theory is being advanced.
>
> Basically factual allegations are now more carefully asserted.

In brief, while a small number of district judges appear to feel strongly that Rule 11 has impeded the development of the law, an overwhelming majority disagree. On this evidence and our reading of the sanctioned civil rights cases, we cannot conclude that Rule 11 has interfered with creative advocacy or impeded the development of the law. We recognize, however, that attorneys may perceive this issue differently and expect that important information will emerge from the

survey of attorneys' experiences with Rule 11 being conducted by the American Judicature Society.

Summary and Conclusions

In exploring these five central issues we looked for effects of Rule 11 that would interfere with effective advocacy, especially by plaintiffs' attorneys in civil rights cases. The common feature of all five criticisms of Rule 11 is that its misapplication can overdeter lawyers and inhibit them from pursuing reasonable arguments for the application of existing law as well as for change in the law.

We searched for objective, empirical manifestations of these effects, including the (in)determinacy of Rule 11's application, the nature and severity of monetary and nonmonetary sanctions, procedural safeguards, a comparison of its application to different types of litigants and cases, and its application to arguments in civil rights cases. We found evidence of

- indeterminacy in the form of variations in the frequency of Rule 11 motions presented to judges and, in some districts, in the frequency of imposition of Rule 11 sanctions by judges;
- determinacy in the form of a moderate to high level of inter-judge agreement in reviewing sanctions decisions;
- widespread monetary fee-shifting sanctions and infrequent nonmonetary sanctions;
- use of procedural safeguards in response to most motions and of a lack of such use in some sua sponte impositions of sanctions; and
- disproportionate filing of motions and disproportionate imposition of sanctions against plaintiffs and their attorneys.

Finally, on two of the most salient issues raised concerning the use of Rule 11 in civil rights cases, we found

- little evidence that Rule 11 has been invoked (in four of five districts) or applied disproportionately against represented plaintiffs and their attorneys in civil rights cases; and
- little evidence that Rule 11 has been applied to reasonable arguments by plaintiffs' attorneys in civil rights cases.

In conclusion, our data tend to show that Rule 11 is working as intended despite some evidence of problems relating to indeterminacy, disproportionate application of the rule to plaintiffs, overuse of monetary sanctions, and lack of procedural safeguards. These problems in the administration of Rule 11 are each addressed by the Advisory Committee's proposed amendments.

Judicial Assessments of Rule 11: Its Effectiveness and Its Impact on Litigation in Federal Court

In this section we report the district judges' evaluations of Rule 11's impact in counseled cases. Specifically, we examine whether they have found the rule an effective deterrent to groundless pleadings, whether they believe it has had any adverse effects on the conduct of litigation, what they see as the rule's overall impact on federal litigation, and whether they wish to retain the rule's current language.

Most judges find the rule moderately effective as a deterrent but have found other case management devices more useful in deterring groundless litigation. In addition, a sizable minority have seen some negative impact on the conduct of litigation. Yet a great majority of judges believe that overall Rule 11 has had a positive effect on litigation in the federal courts and wish to retain the 1983 language of the rule. Recall that the judges were surveyed before the Advisory Committee proposed the new revisions, so this last finding does not reflect the judges' preference for the 1983 language over the proposed revised language.

Groundless litigation and Rule 11

Judicial estimates of the amount of groundless litigation in federal courts

Most judges do not find groundless litigation to be a problem in counseled cases in their districts. We asked the judges to provide both a general evaluation of the problem and specific estimates of the number of groundless papers ("groundless" was defined as "papers that do not conform to the requirements of amended Rule 11" and "counseled" cases were defined as "cases in which both sides are represented by counsel.").

Although approximately nine out of ten judges said there is some degree of groundless litigation in counseled cases in their district, 65% of 546 respondents said the problem is small or very small, and an additional 22% said it is moderate. Consistent with this general assessment, most judges estimated only a small number of groundless pleadings, motions, or other papers on their dockets during the past twelve

months: 61% of 505 respondents estimated ten or fewer groundless papers; 79%, twenty or fewer; and 89%, thirty or fewer.

The impact of Rule 11 on the amount of groundless litigation

To assess the impact of amended Rule 11 on the amount of groundless litigation, we asked the judges whether that amount has changed since August 1983. Table 14 shows the results. Slightly more than 40% of the judges said the problem with groundless litigation has gotten better since amended Rule 11 was adopted, while a nearly equal percentage of the judges said the problem has stayed the same. Few judges believe groundless litigation has become a greater problem since 1983. These findings suggest that amended Rule 11 may have achieved some of the deterrent effect sought by the Advisory Committee.

Table 14
Judges' assessment of problem with groundless litigation in their districts since Rule 11 was amended

Type of change	Percentage of 455 Respondents
Problem has gotten worse or slightly worse	8.2%
Problem has stayed the same	42.6%
Problem has gotten slightly better or better	41.4%
There has never been a problem	7.9%

For a more direct measure of the effectiveness of Rule 11, we asked the judges for their evaluation of the rule's effectiveness in deterring seven types of groundless papers. As Table 15 shows, at least 60% of the judges think Rule 11 has been slightly to moderately effective in deterring attorneys from filing all seven types of pleadings. Few judges rate the rule as very effective as a deterrent to these pleadings. In only one instance—groundless factual allegations in the complaint—did more than 10% of the judges rate the rule as very effective.

Table 15
Judges' assessment of the effectiveness of Rule 11 in deterring attorneys in their districts from filing groundless factual or legal assertions

Type of Groundless Filing	Not Effective	Slightly Effective	Moderately Effective	Very Effective	Dete rence Unn eded
Groundless factual allegations in complaint (N = 480)	9.8%	29.6%	41.0%	11.7%	7.9%
Groundless legal claims in complaint (N = 492)	15.4%	33.5%	37.2%	8.7%	5.1%
Groundless denials in answer (N = 464)	28.7%	36.0%	22.0%	6.5%	6.9%
Groundless affirmative defenses in answer (N = 468)	27.6%	37.0%	23.1%	6.8%	5.6%
Groundless summary judgment motion by defendant (N = 481)	22.5%	34.1%	28.1%	7.5%	7.9%
Groundless summary judgment motion by plaintiff (N = 474)	22.6%	30.2%	28.3%	8.4%	10.5%
Groundless motion to dismiss under Rule 12(b) (N = 483)	23.8%	36.2%	23.8%	6.6%	9.5%

Some eighty judges offered comments on the deterrent effect of Rule 11. Following are several examples of comments on specific types of pleadings.

A very substantial number of summary judgment and Rule 12 motions are "fee churning." In addition, a large number of these motions are designed to "educate" the judge. Rule 11 hasn't done much with these types.

Rule 11 is not much used against defendants, although the threat has caused many defendants to admit liability. I believe the rule has had a substantial effect on pre-filing investigations by plaintiffs.

A higher standard seems to apply to facts. Lawyers are not objecting enough to the "general denials."

The judges appear to find the rule more effective in deterring groundless complaints than in deterring groundless answers or motions. For example, 41% of the judges—the greatest concentration of judicial opinion on the rule's deterrent effect—rate the rule moderately effective in deterring groundless factual allegations in the complaint, whereas only 22% find it moderately effective in deterring groundless denials in the answer. These differences are most clearly seen by looking at the percentage of judges who find Rule 11 ineffective as a deterrent. Whereas only 10% to 15% of the judges say the rule is ineffective in deterring groundless pleadings in the complaint, 22% to 29% find it ineffective in deterring groundless pleadings in the answer or in motions.

Judicial use of Rule 11 as a warning against filing groundless litigation

Rule 11 may serve as a deterrent through the imposition of sanctions, but its deterrent effect may be felt as well when judges advise counsel that a particular filing may lead to sanctions. As Table 16 shows, two-thirds of the judges have used Rule 11 in this way, although most estimate having done so in only a few cases.

Table 16
Judges' reports of the numbers of cases in which they advised counsel that a particular filing might lead to Rule 11 sanctions

Number of Cases	Percentage of 549 Respondents
In no cases	32.4%
In a few cases	46.1%
In some cases	21.1%
In about half of the cases	.2%
In more than half of the cases	.2%

The effectiveness of Rule 11 compared with other methods for controlling groundless litigation

Rule 11 is one of several devices available for controlling groundless litigation. Table 17 shows that most judges find each of the devices at least somewhat effective for controlling groundless litigation; excepting fee shifting, fewer than 10% of the judges said any one method was "not effective." However, when we look at the judges' assessment of the *degree of effectiveness* of each device (i.e., the three columns on the right), we find that Rule 11 does not compare especially well with most other tools for managing groundless litigation.

Although the judges find Rule 11 more effective than fee shifting, they find it less effective than the other devices we listed. The methods seen as most effective for controlling groundless litigation are prompt rulings on motions to dismiss and prompt rulings on motions for summary judgment (51% said "very effective" for each). Also effective are Rule 16 conferences to narrow issues (40% said "very effective"). In contrast, only 23% of the judges said Rule 11 is "very effective." For this method, the judges' responses cluster in the "slightly" and "moderately" effective categories (70%). For all other methods except fee shifting, the judges' responses cluster in the "moderately" and "very" effective categories.

Table 17
Judges' ratings of the effectiveness of different methods for managing groundless litigation on their dockets

Management method	Not Effective	Slightly Effective	Moderately Effective	Very Effective
Informal admonitions ($N = 515$)	4.5%	24.9%	39.8%	30.9%
Rule 16 conferences to narrow issues ($N = 496$)	5.8%	18.8%	35.7%	39.7%
Rule 11 sanctions ($N = 480$)	7.3%	33.3%	36.7%	22.7%
Rule 26 & 37 sanctions ($N = 427$)	3.7%	24.6%	49.6%	22.0%
28 U.S.C. § 1927 fee shifting ($N = 343$)	17.2%	38.8%	26.2%	17.8%
Reverse fee shifting ($N = 332$)	27.1%	35.8%	25.0%	12.0%
Prompt rulings on motions to dismiss ($N = 492$)	8.9%	12.4%	27.2%	51.4%
Prompt rulings on motions for summary judgment ($N = 493$)	8.1%	12.8%	28.0%	51.1%

Taken together, the findings presented in Tables 15 and 17 suggest that judges think Rule 11 has met its purpose of deterring groundless litigation, but modestly so. An alternative explanation is that judges find Rule 11 less effective as a deterrent because they have occasion to use it far less frequently than other management devices such as Rule 16 conferences or rulings on motions to dismiss or for summary judgment.

Judicial Assessments of the Effects of Rule 11 on the Conduct of Litigation

Critics of Rule 11 have asserted many negative effects on attorneys and on the conduct of litigation. We were able to examine only a few of the issues raised by the critics, and those issues are examined in a limited way—that is, we see them only through the judges' opinions, not the opinions of litigants or attorneys.

The rule's effect on litigation costs

One of the most common concerns voiced about Rule 11 is that the rule has created new opportunities for conflict and thus has increased the cost of litigation. Because we limited our inquiry to matters that would be within the ambit of judicial experience, we were able to examine only one aspect of the cost issue: the filing of groundless Rule 11 requests. Ninety-five percent of 534 respondents said at least some of these requests are groundless, with 31% of the judges saying many or most are groundless. This suggests a significant additional cost to parties due to unnecessary sanctions requests.

The rule's effect on attorney–client and attorney–attorney relations

Many critics have asserted that Rule 11 has damaged relationships between counsel and their clients, as well as between counsel representing opposing parties. Tables 18 and 19 show the judges' responses to questions about these effects.

Of the judges who evaluated the impact of Rule 11 on attorney–client relationships, nearly two-thirds said a request of Rule 11 sanctions creates a conflict of interest between attorney and client in at least a few or some cases. Most of these judges, however, said this conflict arises in only a few cases. Half the judges also said that in more cases than not a request for sanctions exacerbates unnecessarily contentious behavior between opposing counsel. Altogether we see that of the judges who evaluated the impact of Rule 11 on attorney–client and attorney–attorney relationships, a sizable portion believe Rule 11 has had some negative effects.

Table 18
Judges' assessment of number of cases in which filing a request for Rule 11 sanctions by opposing counsel creates a conflict of interest between attorney and client

Frequency of Conflicts	Percentage of 534 Respondents
In no cases in which sanctions were requested	32.2%
In a few cases in which sanctions were requested	42.8%
In some cases in which sanctions were requested	16.3%
In half or more of the cases in which sanctions were requested	8.7%

Table 19
Judges' assessment of the effect of a request for Rule 11 sanctions on the interactions between opposing counsel

Effect on Interactions	Percentage of 483 Respondents
Exacerbates contentious behavior in more cases than not	50.3%
Curtails contentious behavior in more cases than not	7.9%
Exacerbates in some cases, curtails in others	34.0%
Has no impact	7.9%

The rule's effect on settlement

A significant percentage of judges also find that Rule 11 has had an adverse effect on settlement negotiations. As shown in Table 20, 50% of the 429 respondents said that a request for Rule 11 sanctions impedes settlement in more cases than not.

Table 20
Judges' assessment of the effect of a request for Rule 11 sanctions on the likelihood of settlement

Effect on Settlement	Percentage of 429 Respondents
Impedes settlement in more cases than not	50.3%
Encourages settlement in more cases than not	7.9%
Impedes in some cases, encourages in others	34.0%
Has no impact	7.9%

Judicial Assessments of the Overall Value of Rule 11

Although most judges have found Rule 11 at least moderately effective as a deterrent to groundless litigation, the findings presented so far do not suggest a strong judicial endorsement for amended Rule 11. While only a minority of judges see a negative impact on the conduct of litigation, it is a sizable minority and suggests that at least some problem exists. In addition, as we saw above, our study of case files in five dis-

tricts documented significant costs and burdens associated with ruling on Rule 11 matters.

Nevertheless, despite the misgivings many judges may have about Rule 11's costs and its impact on litigation, a great majority believe the rule has had a positive impact overall and should be retained in its present form. And as already noted in the discussion on page 10, most judges think Rule 11 is beneficial despite whatever burdens it may have imposed on judicial time. Below we present additional information about the judges' overall evaluation of the rule.

The overall effect of Rule 11 on litigation in the federal courts

To assess the rule's broadest effect, we asked judges to weigh the positive and negative effects of Rule 11. As Table 21 shows, the great majority of judges (81%) say Rule 11 has had a positive effect overall.

Table 21
Judges' assessment of overall effect of Rule 11 on litigation in federal courts

Effect of the Rule	Percentage of 472 Respondents
Overall, amended Rule 11 has had a positive effect	80.9%
Overall, amended Rule 11 has had a negative effect	8.7%
Overall, amended Rule 11 has had no effect	10.4%

Preferences for the future of Rule 11

In keeping with their assessments of the overall effect of Rule 11, 80% of the judges say the rule should be retained in its current form. Few would return it to its pre-1983 language. The judges' responses are shown in Table 22.

Table 22
Judges' preferences for the future of Rule 11

Preference	Percentage of 526 Respondents
Rule 11 should be retained in its present form	80.4%
Rule 11 should be amended to restore its pre-1983 language	7.0%
Rule 11 should be amended in some other way	12.5%

Judges who would like to see Rule 11 amended in some other way offered a variety of possible amendments. The most frequently suggested was to make the rule permissive rather than mandatory. Among many other suggestions, the judges asked for consideration of the following amendments:

Clarify the standard of review
Change the standard of review to abuse of discretion
Place a flat cap or presumptive cap on the amount of monetary sanctions
Permit sanctioning of the firm, not just the attorney
Clarify the duty to withdraw pleading upon later knowledge
Require notice by opposing counsel
Provide that part or all of the sanction be paid to the court
Require a hearing
Clarify the role of local counsel
Require leave of court to file a Rule 11 motion
Require findings and conclusions in support of an order for sanctions

As we shall see in the next section, the Advisory Committee incorporated many of these ideas in their proposed changes.

Proposed Changes in Rule 11

After calling for and receiving empirical research and public commentary, the Advisory Committee on Civil Rules reviewed Rule 11 and proposed a number of changes. The Standing Committee on Rules, in turn, has submitted those proposals for public comment and hearing. We describe the main features of the proposed changes, grouping them into four categories: defining Rule 11 violations, invoking Rule 11's procedures, selecting the appropriate sanction, and assigning liability for violations. (The full text of the proposed amended rule is set out on page 40.)

Defining Rule 11 violations

Currently, case law in most circuits calls for judges to decide whether a paper conforms to Rule 11 by looking at the situation that existed when the paper was signed. The proposed Rule 11 expands that time frame by imposing a continuing duty on attorneys or parties to modify legal and factual assertions when new information affecting their conformity with Rule 11 becomes available. The new rule would broaden the signer's certification to include "presenting *or maintaining* a claim,

The Range of Judicial Opinion on Rule 11

Although the judges' responses to the standardized questions reveal much about their views and practices regarding Rule 11, their written comments offer an additional rich source of opinion about the rule. The following comments represent the range of views found among federal judges.

Rule 11 is useful. Though it has been abused at times by lawyers and misused by some judges, to repeal or amend it significantly would send the wrong signal and would have a very detrimental effect.

Necessary but distasteful.

If we as a profession simply followed our own canons of ethics, Rule 11 would be unnecessary. As we don't, trial judges must be encouraged to administer justice, which includes reminding lawyers of their professional obligations.

We know groundless litigation when we see it, but the mandatory nature of sanctions coupled with the objective standard combine to impose a significant burden on the courts. I would estimate that Rule 11 rears its ugly head in approximately one-third of my cases. In short, I am convinced that the current version is not worth the effort.

The amended rule has set a new standard of professional responsibility, and the bar, in general, is conforming to that higher standard.

Rule 11 appears to me to be an appropriate reaction to the lax professional standards which have developed as a result of liberal pleading rules and preference for dispositions of cases on the merits. The legal profession is in trouble; it is capable of inflicting substantial damages on adversarial clients by improper conduct of litigation. Rule 11 is one means of addressing the problem.

The problem with Rule 11 is that there is no uniform yardstick for its application. Individual judges with differing philosophies and ideologies reach contrary conclusions about the appropriateness of Rule 11 sanctions.

Rule 11 sanctions destroy the professional relationship between lawyers. Our system does not and cannot function when this relationship is damaged. Rule 11 is guaranteed to impassion lawyers. We need all the mechanisms possible to make lawyers *dis*passionate.

Although the comments reveal a great variety of views about the ways in which the rule is either helpful or harmful, we found that two types of comments were made by a significant number of judges. First, quite a few judges noted that while they do not use Rule 11 often, its existence is important to them, both as a general device for managing their caseload and as a method for handling the truly difficult attorney. The following comments illustrate this point:

I think the existence of Rule 11, not its use, has helped.

Rule 11 deters wasteful conduct by some attorneys who are otherwise undeterrable; even if the judge encounters only two such attorneys a year, Rule 11 is useful and needed.

I have found the rule most useful as a threat and have not, therefore, had to impose sanctions very frequently.

It's an excellent tool to manage the caseload.

A second type of comment focused on the role of the appellate courts in the use of Rule 11. Here the district judges generally expressed unhappiness with appellate rulings. Examples of these comments are given below:

The courts of appeals have a great deal of blame to shoulder in the almost total lack of confidence in the trial judge's ability to recognize the need for sanctions in particular cases.

It is useless to have Rule 11 when it is never enforced at the appellate level.

While I do not suggest that Rule 11 has no beneficial effect in discouraging frivolous litigation, I do feel that consistent, precedential decisions at the appeals court level will greatly assist trial courts in correctly applying Rule 11. Moreover, clear and consistent published decisions would provide guidance to attorneys practicing in federal court as to the standards they are expected to meet.

defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court." The attorney or party certifies the conformity of the assertion with Rule 11 "until it is withdrawn." [§ (b)] In its official notes, the Committee observed that the new rule would "include the failure to withdraw or abandon a position after learning that it ceases to have any merit." [Note to subdivision (b) at ¶ 2]

Under the current rule, by signing a paper or pleading, an attorney or party certifies that a "reasonable inquiry" has been conducted and that the paper or pleading "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." The committee's proposal modifies that certification. In the proposal, "good faith argument" becomes the more objective "non-frivolous argument" and a new category of argument, for the "establishment of new law," has been added.

The proposed rule also includes a new protection for factual assertions that may require further investigation or discovery. By signing a paper or pleading, an attorney or party would certify that "any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." [§ (b)(3)]. To qualify for protection, however, the assertion must be specifically identified as needing further investigation or discovery.

Invoking Rule 11

Under the current practice in many courts, a party may include a motion for sanctions within another motion. Under the proposed revision, a Rule 11 motion must be "served separately from other motions" and must "describe the specific conduct alleged to violate" the rule. [§ (c)(1)(A)] The proposed rule also gives the targeted party an opportunity to avoid a motion: It forbids the moving party to file or present the motion to the court unless the other party fails to withdraw "the challenged claim, defense, request, demand, objection, contention, or argument" within 21 days of service (or such other time as the court may prescribe). [§ (c)(1)(A)].

The committee states that the above requirement is "intended to provide a type of 'safe harbor'" which means that "a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation." [Notes to Subdivisions (b)-(c) at ¶ 13].

When a court proposes to impose sanctions on its own initiative, the rule specifies that "the court may enter an order describing the specific conduct that appears to violate . . . [the rule] and directing an attorney,

law firm, or party to show cause why it has not violated" the rule. [§ (c)(1)(B)]. The revised rule would not provide a safe harbor for withdrawing an assertion after the show cause order has been issued; however, such withdrawal "should be taken into account in deciding what sanction to impose," if the court finds a violation. [Notes to Subdivisions (b)-(c) at ¶ 15].

Under existing law, a court has the power to impose sanctions on its own initiative, even after dismissal or settlement of an action. Under the proposed revision, however, a court could impose monetary sanctions on its own initiative after voluntary dismissal or settlement of the action only if it had previously issued a show cause order. (Another limitation to the court's power to impose monetary sanctions on its own initiative is described on page 39).

Whether the process begins by motion or at the court's initiative, the attorneys, firms, or parties must be given notice and an opportunity to respond to the alleged violations before the court can impose sanctions. The proposed rule leaves the form of the opportunity to respond to the discretion of the judge: "Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances." [Notes to Subdivisions (b)-(c) at ¶ 10].

Finally, whenever sanctions are imposed, the court, upon request, "shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed." [§ (c)(3)] The committee notes clarify that the recitation may be either in a written order or on the record. The notes remove any doubt that "the court should not ordinarily have to explain its denial of a motion for sanctions." [Notes to Subdivisions (b)-(c) at ¶ 10].

Selecting appropriate sanctions

Under the current rule, courts have wide discretion to impose an "appropriate sanction" and are explicitly authorized to include awards to parties of "the reasonable expenses incurred because of the filing, . . . including a reasonable attorney's fee." As noted above, the committee found that fee awards had become the norm and that nonmonetary sanctions have been used too rarely. To reverse that trend, the advisory committee limited sanctions to "what is sufficient to deter comparable conduct by persons similarly situated." [§(c)(2)] While continuing to authorize nonmonetary directives, monetary payments to the court, and monetary awards to a party, the proposed revision would limit the latter to "*some or all* of the *reasonable* attorneys' fees and other costs *incurred* as a *direct result*" of the violation [§ (c)(2) (Emphasis added)]. The committee notes underscore the availability of nonmonetary sanctions (e.g. reprimand or censure, educational programs, referral to dis-

ciplinary authorities); point out the variety of possible sanctions; and delineate a host of factors (*e.g.*, the responsible person's intent, resources, patterns of conduct, etc.) for courts to consider in selecting an appropriate sanction. [Notes to Subdivisions (b)-(c) at ¶ 7].

To avoid possible problems under the rules' enabling act, the committee's proposal also limits the power of courts to impose a monetary penalty on a represented party. A monetary sanction may, however, be imposed on a represented party's attorney.

The committee's proposal also introduces a limit on a court's power to impose a sanction on its own initiative. Monetary awards to a party would no longer be permitted; the rule would allow only "directives of a nonmonetary nature, [or] an order to pay a monetary penalty into court." [§ (c)(2)].

Assigning liability

To "remove the restrictions of the former rule" as interpreted in *Pavelic & LeFlore v. Marvel Entertainment Gp.*, 493 U.S. 120 (1989), the proposed rule authorizes courts to impose sanctions on "the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation." [§(c)]. The committee notes that this may include "the [presenting] attorney's firm, another member of the firm, or co-counsel either in addition to, or, in unusual circumstances, instead of the person actually making the presentation to the court." [Notes to Subdivisions (b)-(c) at ¶ 8].

In sum, the committee proposals are designed to limit the number of motions, allow attorneys and parties to avoid any chilling effect on creative advocacy, establish clear, fair procedures for enforcement, and continue Rule 11's primary purpose of deterring meritless litigation.

PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 11
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
August 1991

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. It shall state such person'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 or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, 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) it is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(c) **Sanctions**. Subject to the conditions stated below, the court shall impose an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of subdivision (b)

(1) **How Initiated**.

(A) **By Motion**. A motion for sanctions under this rule shall be served separately from other motions or requests, and shall describe the specific conduct alleged to violate subdivision (b). It shall not be filed with, or presented to, the court unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or such other time as the court may prescribe) after service of the motion. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorneys fees incurred in presenting or opposing the motion.

(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 comparable conduct by persons similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded either on motion or on the court's initiative, against a represented party unless it is determined to be responsible for a violation of subdivision (b)(1).

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

(3) **Order**. If requested, the court, when imposing sanctions, shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed.

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