

# THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11: AN UPDATE\*

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## I. INTRODUCTION

My goal in this article is to provide a fairly complete summary of the work of the Third Circuit Task Force<sup>1</sup> on Federal Rule of Civil Procedure 11,<sup>2</sup> anticipating some of the questions

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† Professor of Law, University of Pennsylvania. The author was the reporter of the Task Force and principal author of its report. This text is adapted from remarks delivered to the Third Circuit Judicial Conference on September 19, 1988. They introduced a program, put together by a committee chaired by Judge Sarokin, that was devoted entirely to the work of the Task Force, which was then reflected in a discussion draft. Following the Conference, and in the light of the discussion there and other comments received, the report was revised. It has now been published by, and is available from, the American Judicature Society. See RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

It is important to acknowledge the extraordinary efforts of the district court clerks and their staffs, led by Mike Kunz of the Eastern District of Pennsylvania, and of Sally Mrvos, the Clerk of the Court of Appeals, and her staff, who were instrumental in the collection of the most important empirical data.

<sup>1</sup> The members of the Task Force were:

Honorable John P. Fullam, Chair  
Professor Stephen B. Burbank, Reporter  
Alice W. Ballard, Esq.  
Honorable Alan N. Bloch  
Edmund N. Carpenter, II, Esq.  
Barry H. Garfinkel, Esq.  
Professor A. Leo Levin  
S. Gerald Litvin, Esq.  
W. Thomas McGough, Jr., Esq.  
David H. Marion, Esq.  
Melville D. Miller, Jr., Esq.  
Robert G. Rose, Esq.  
Professor Linda Joy Silberman  
William K. Slate, II, Esq.  
Jerold S. Solovy, Esq.  
Henry W. Sawyer, III, Esq.  
Richard J. Seidel, Esq.

In addition, Chief Judge Gibbons, who appointed the Task Force, was an active participant in its discussions. Judge Gibbons' retirement from the Third Circuit is the bench's loss and Seton Hall Law School's gain.

<sup>2</sup> As amended in 1983 and, to make it gender neutral, in 1987, Rule 11 provides:

readers of its report may have as well as highlighting some of the more difficult choices we faced. I will not be able to cover all of the territory, including in particular all of our empirical findings. I hope, however, that by the end of this piece the reader will have a good sense not only of what we recommend but of why we recommend it.

The goals of the 1988 Third Circuit Judicial Conference were to stimulate discussion and knowledge about a legal topic of great controversy and to focus attention on the matters treated in the discussion draft generated by the Task Force and on those matters that were not, but should have been, treated there.<sup>3</sup>

## II. THE STRUCTURE OF THE REPORT

The report contains, in the text, almost an equal mix of the normative and the empirical, and it may be useful to explain why it was written in this manner. We could have confined ourselves to the collection and analysis of empirical data and to recommendations supported by such data. That certainly would have marked a change in discourse about Rule 11, which has tended to

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### SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

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

FED. R. CIV. P. 11.

<sup>3</sup> See *supra* note †; see also *infra* notes 38 & 39.

be dominated by “cosmic anecdotes”<sup>4</sup> on one side (costs) and confident assertions on the other (benefits).

We chose not to do so for a variety of reasons. First, it seemed important to develop an analytical framework in order to determine what data to collect and to formulate hypotheses for testing with those data. Second, we were aware that Rule 11 jurisprudence is in a dynamic state and that it is developing in different ways in different parts of the country. We thus were aware that our empirical data—or rather some of them—would be of limited utility in evaluating the Rule in other circuits, and we wanted to assist others who might conduct similar studies in those circuits. Third, there are a number of important questions about Rule 11 that even ambitious empirical work is not likely to answer. However, the issues could be illuminated by careful analysis and broadly-based conceptual approaches. Too much of the existing literature suffers from preoccupation with discrete doctrinal questions—for instance, does Rule 11 impose a continuing obligation, or is there a duty of mitigation. As a result, there is a risk of missing the forest for the trees. We have aimed for the forest, aware, but not concerned, that we would miss some trees.

### III. NORMATIVE PERSPECTIVES

The first half of the report proceeds from our view that both the interpretation of amended Rule 11 and practice under it are likely to be affected, if not driven, by alternative normative perspectives—alternative purposes or goals that those invoking or applying the amended Rule impute to it, including deterrence, punishment, professional responsibility and compensation.

We start with a fairly traditional, although rigorous, analysis of the Rule’s language and drafting history, with particular attention devoted to the Advisory Committee Note. Our conclusion is that the goal of the amended Rule is to deter abuse of the civil litigation process through the detection and punishment (or discipline) of violators. Compensation is merely a subsidiary objective that may, but need not, be furthered through the choice of sanctions and should be so pursued only to the extent that it can be consistently with the goal of deterrence. Similarly, professional responsibility is not a goal of the Rule, although the

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<sup>4</sup> A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 11 (1984).

rulemakers did hope to curb specific professional abuses by defining more precisely the duties of a lawyer who signs a paper filed in federal district court.

Recognizing that this view of the Rule's language and drafting history is not shared by all commentators or courts and that the Rule has proved to be an irresistible invitation to some of both to pursue their own normative preferences, we consider at length the effect of the alternatives on the interpretation and implementation of the Rule.

#### *A. The Rule's Certification Standard*

As we discuss, the so-called "frivolousness" clause of Rule 11's certification standard focuses on the conduct of the person signing the paper that is filed. It would appear to require reasonable inquiry into the facts and the law and a good faith (honest) conclusion based on such inquiry that the paper 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."<sup>5</sup> The Advisory Committee Note to Rule 11 also focuses on conduct.<sup>6</sup>

Most courts, however, have interpreted this language to impose not just a duty of objectively reasonable inquiry and reflection on the results of that inquiry but also a duty of objectively reasonable conclusions.<sup>7</sup> In the Task Force's view, this supposed requirement of reasonable conclusions is not supported by the language of the Rule or the Advisory Committee Note. More important, focusing on product (is the paper frivolous?) holds little promise of advancing the goal of deterrence (specific or general), or of upgrading the legal profession. It does, however, provide maximum scope for fee-shifting if that is the judge's goal. Decisions imposing Rule 11 sanctions for signing a frivolous paper are likely to tell the signer—and others—little that is useful in avoiding future violations. The resulting unpredictability can lead to over-deterrence, the kind of chilling effect that concerned both critics of proposals to amend the Rule and the Advisory

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<sup>5</sup> FED. R. CIV. P. 11.

<sup>6</sup> "The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances." FED. R. CIV. P. 11 advisory committee note.

<sup>7</sup> See, e.g., *Eastway Const. Co. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

Committee.<sup>8</sup>

In the hard case where the lawyer has done a reasonable job of investigating the facts and researching the law and has reached an honest conclusion that the paper is “well grounded, etc.,” to impose Rule 11 sanctions is to define as an “abuse” disagreement about the significance of the facts or the tenor of the law. We question whether Rule 11 is an appropriate, let alone the best, way of dealing with professional incompetence that is not deterrable.<sup>9</sup>

The report’s dichotomy between conduct and product is drawn more sharply than the case law supports. Many courts follow both approaches, sometimes in the same case. Others use product as a basis for inference about conduct. The Task Force concluded that drawing the inference is appropriate in many cases, so long as a demonstration that the Rule’s stated requirements were met suffices to defeat the imposition of sanctions for a product that the court regards as frivolous. Moreover, when a court is engaging in a process of inference, it should so state, making clear that the person sanctioned has failed to rebut the inference.

The report does not devote much attention to the Rule’s “improper purpose” clause.<sup>10</sup> The Task Force does, however, question the approach taken by some courts, which would insulate from sanctions a complaint that satisfies the “frivolousness clause,” no matter what purpose animated its filing.<sup>11</sup>

### B. Procedure

The Advisory Committee was concerned about the costs of litigating and adjudicating Rule 11 issues—so-called satellite litigation—and in their Note to the amended Rule encouraged procedural minimalism. The Committee recognized, of course, the

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<sup>8</sup> A product approach need not have this result, if, as in the Third Circuit, trial judges are instructed that Rule 11 sanctions are reserved for “exceptional circumstances.” *See, e.g.,* *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). However, as indicated in the text, results (sanctions vs. no sanctions) are not the only basis for choosing an approach, and a conduct approach is more likely to advance the goal of deterrence (without over-deterrence) and to promote professional responsibility than is a product approach.

<sup>9</sup> *Cf. Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 196 n.4 (3d Cir. 1988) (“Other proceedings such as disbarment exist to weed out incompetent lawyers. Rule 11 was not [promulgated] for this purpose, but rather to provide deterrence for abuses of the system of litigation in federal district courts.”).

<sup>10</sup> *See supra* note 2.

<sup>11</sup> *See, e.g., Zaldivar*, 780 F.2d at 831-32.

obligation to provide due process.<sup>12</sup>

One of the advantages of an approach to Rule 11's certification standard that focuses on the paper (product) is its apparent amenability to procedural minimalism. The judge, after all, knows a frivolous paper when she sees it, particularly if the Rule 11 issue is reached after adjudication on the merits. A hearing would, as Judge Posner stated in the context of Appellate Rule 38, be "pointless."<sup>13</sup> Procedural minimalism may also, and independently, be encouraged by a compensation perspective, on the view that expense-shifting sanctions are only money.

The Task Force rejects the notion that judges are infallible even when the question is frivolousness. We found evidence that monetary sanctions are not regarded as "only money" by those upon whom such sanctions are imposed. We concluded that the Constitution requires prior notice and opportunity to be heard in almost all cases under Rule 11.

Apart from the requirements of due process, neither the goal of deterrence nor the perspective of professional responsibility is well served by procedural minimalism. Deterrence requires that both the court and the violator (as well as others who pay attention to sanction decisions) understand what went wrong. Dialogue may be necessary. Moreover, dialogue *is* necessary if the judge is to tailor the sanction to the facts. Perhaps the dominance of expense-shifting sanctions in reported cases and in the cases in our sanction survey reflects in part a conscious or unconscious desire to avoid the costs of dialogue.

The Task Force also rejects the view that a motion for reconsideration is an adequate substitute for prior notice and opportunity to be heard. For purposes of constitutional law, we found no exceptional circumstances of the sort that are required for such a

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<sup>12</sup> The Advisory Committee explained:

The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

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

FED. R. CIV. P. 11 advisory committee note.

<sup>13</sup> *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987).

procedure.<sup>14</sup> Moreover, we were concerned about the effects of a sanction-first-ask-questions-later approach on lawyers' attitudes, and hence on clients' attitudes, towards the civil justice system. Finally, we have evidence that, even on a narrow definition of costs, the procedure may not be efficient, spawning elaborate proceedings on reconsideration and, perhaps, appeals.

Indeed, on the same narrow view of costs the apparent efficiency of a product approach and/or of a compensatory perspective may be a mirage. Frivolousness is in the eye of the beholder, and the prospect of attorney's fees for a successful Rule 11 motion may be hard to resist.<sup>15</sup> Both a product approach<sup>16</sup> and a compensatory perspective can encourage such motions. Moreover, a compensatory perspective encourages the imputation of rights to a party making a Rule 11 motion, including the right to an explanation when the motion is denied.<sup>17</sup> Finally, a product approach may be thought to entail *de novo* appellate review<sup>18</sup> and hence lead to more appeals.

The prior "hearing" required need not in most cases be an evidentiary hearing. Most Rule 11 issues (66.4%) in our sanction survey were resolved, as they should have been resolved, on the papers. Oral argument is appropriate in some cases, particularly when the papers incline the judge to believe that a violation may have occurred.

The Task Force rejects the notion that a party making a Rule 11 motion has any rights except the right to conscientious attention to the requirements of the Rule by the trial judge. We recommend that trial judges deny perfunctory Rule 11 motions without awaiting a response and that they need not explain the denial of such a motion. The imposition of Rule 11 sanctions, on the other hand, requires explanation, which may also be important from deterrence and professional responsibility perspectives.

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<sup>14</sup> See *FDIC v. Mallen*, 108 S. Ct. 1780, 1787 (1988) (a certain limited class of cases demand prompt action).

<sup>15</sup> Cf. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) ("In even a close case, we think it extremely unlikely that a judge, who has already decided that the law is not as a lawyer argued it, will also decide that the loser's position was warranted by existing law.").

<sup>16</sup> But see *supra* note 8.

<sup>17</sup> See, e.g., *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083-84 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988).

<sup>18</sup> See, e.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

### C. Sanctions

The Task Force takes the position that the sanction imposed for a violation of Rule 11 should be the least severe sanction that will achieve the purpose of specific deterrence.<sup>19</sup> Routine resort to expense-shifting sanctions is inconsistent with the exercise of discretion contemplated by the Rule.<sup>20</sup> Additionally, in many cases, expense-shifting sanctions on an attorney's fee model will be heavier or lighter than deterrence requires. Moreover, the attorney's fee model brings with it a complicated jurisprudence<sup>21</sup> that can only increase the costs of satellite litigation. Again, however, it is perfectly appropriate for a court to impose an expense-shifting sanction (not necessarily full expense-shifting), if that will advance the goal of specific deterrence and is otherwise indicated by consideration of the equities, including such matters as the violator's ability to pay.<sup>22</sup>

The Task Force proposes a presumptive rule that Rule 11 sanctions be imposed on the lawyer who signs the paper found to be in violation. The proposed presumptive rule has the advantage of reducing procedural costs, in particular the occasions for evidentiary hearings to allocate responsibility between lawyer and client. More important, it should mitigate the problem of conflict of interest for the lawyer faced with a Rule 11 motion or show cause order and, as well, the problem of official invasion of a confidential relationship. The proposed presumptive rule will not, however, eliminate conflicts or the possibility of overreaching. As to the latter, the Task Force believes it appropriate for a court to forbid a lawyer whose primary responsibility is clear from collecting a monetary sanction from the client. As to the former, the question is one of comparative costs. To date, most courts have simply ignored conflict problems. A few recent decisions suggest that they can no longer do so.<sup>23</sup> Finally, the proposed presumptive rule is hardly ideal from the point of view of

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<sup>19</sup> *Accord, e.g.*, *Thomas v. Capital Sec. Serv., Inc.* 836 F.2d 866, 883 (5th Cir. 1988) (en banc); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988).

<sup>20</sup> The Advisory Committee explained that "[t]he court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has the discretion to tailor sanctions to the particular facts of the case." FED. R. CIV. P. 11 advisory committee note.

<sup>21</sup> *See, e.g.*, *Eastway Const. Corp. v. City of New York*, 821 F.2d 121, 124-25 (2d Cir. 1987) (Pratt, J., dissenting).

<sup>22</sup> *See Doering*, 857 F.2d at 194-97.

<sup>23</sup> *See In re Ruben*, 825 F.2d 977, 985 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1108 (1988); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1456 (2d Cir.),



deterrence. But neither, of course, is a system that allocates without inquiry.

#### D. Appellate Review

The Task Force favors a unitary and deferential standard of appellate review pursuant to which all Rule 11 determinations would be reviewed for abuse of discretion.<sup>24</sup> Such a standard respects the fact that the trial judge “has tasted the flavor of the litigation”<sup>25</sup> and that the question of sanctions is a matter of “judgment and degree.”<sup>26</sup> It also is less likely to stimulate appeals—satellite litigation in another orbit—than a standard which treats the question of violation as a legal question, reviewable *de novo*. The latter, of course, is a standard encouraged by a product approach. If a trial judge knows a frivolous paper when she sees it, so too do the judges on the court of appeals.

Three courts of appeals have held or suggested that expenses of appeal are available for defending a Rule 11 sanction successfully and/or for successfully challenging a denial of Rule 11 sanctions.<sup>27</sup> The Task Force rejects such a rule, finding mandatory expenses inconsistent with the Rule’s grant of discretion to the trial judge to fashion an appropriate sanction<sup>28</sup> and discretionary expenses too great a threat to the exercise of a statutory right.<sup>29</sup> Expenses for challenging a denial will encourage appeals, and both rules are of doubtful validity, either because they conflict with 28 U.S.C. § 1912 and Federal Rule of Appellate Procedure 38 or because they turn Rule 11 into a fee-shifting Rule in violation of the Rules Enabling Act.<sup>30</sup> Finally, the data

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*cert. granted sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 109 S. Ct. 1116 (1988).

<sup>24</sup> *Accord, e.g.*, Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 128 (1988); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 871-73 (5th Cir. 1988) (en banc). *But see, e.g.*, Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985).

<sup>25</sup> *Westmoreland*, 770 F.2d at 1174.

<sup>26</sup> O’Connell v. Champion Int’l Corp., 812 F.2d 393, 395 (8th Cir. 1987).

<sup>27</sup> *See* Hays v. Sony Corp. of America, 847 F.2d 412, 419 (7th Cir. 1988); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988); *Westmoreland*, 770 F.2d at 1179-80. *See also* S.A. Auto Lube, Inc. v. Jiffy Lube Int’l, Inc., 842 F.2d 946, 950-51 (7th Cir. 1988).

<sup>28</sup> *See supra* note 20.

<sup>29</sup> *Cf.* Webster v. Sowders, 846 F.2d 1032, 1040 (6th Cir. 1988) (“Appeals of district court orders should not be deterred by threats [of Rule 11 sanctions] from district judges.”).

<sup>30</sup> *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

from our appellate survey do not support the argument that expenses for successfully defending a monetary Rule 11 sanction are necessary to secure the participation on appeal of the party to whom the sanction was awarded by the district court.

#### IV. EXPERIENCE UNDER RULE 11

The Task Force's empirical studies permit us to shed light on questions that have been raised, and assertions that have been made, about Rule 11 in judicial opinions and in the literature. Some of our findings are of considerable interest nationally; others are of limited utility outside the Third Circuit.

##### *A. Findings of National Interest*

##### 1. The Unreliability of Statistics Based on Reported Cases

By comparing the data from our sanction survey with data available from published opinions and computerized data banks, we were able to confirm the suspicion that available opinions represent the tip of the iceberg. Published decisions account for only 9.1% of Rule 11 dispositions in our survey and LEXIS for only 39.1%. Moreover, published decisions suggest a ratio of sanctions to cases (40%) far higher than the actual ratio (19.8%).

In addition, statistics based on reported decisions cannot capture informal adjustments of Rule 11 issues, the role that Rule 11 plays in the settlement or voluntary dismissal of cases, or the role that warnings under Rule 11 play in advancing the goal of deterrence. Twenty-two of the 132 Rule 11 motions in our sanction survey were settled, withdrawn, resolved as part of the settlement or dismissal of the case or otherwise mooted. We know that in some cases a price was paid for settlement or withdrawal of the motion and that in others it played a causal role in the termination of the case. We also know that about 50% of the district judges responding to our questionnaire warn about possible Rule 11 violations and that the great majority of them believe that these warnings are effective.

##### 2. Rule 11 Motions are Neither a Cottage Industry Nor an Urban Phenomenon in the Third Circuit

We found, on the basis of our sanction survey, that Rule 11 motions were made in only approximately 1/2 of one percent of civil cases pending during the survey period (July 1, 1987 to June

30, 1988). Although it would be a mistake to extrapolate from this finding to activity in other circuits, it should cause some change in the rhetoric of the debate. More important, we hope that our work will prompt further inquiry into the causes of high or low rates of activity.

The Task Force suggests that contributing factors to high or low rates of Rule 11 activity may include local legal culture (e.g., general attitudes towards sanctions and cooperation and collegiality), doctrine, and individual judicial attitudes towards Rule 11 sanctions as a case management device. Local legal culture, and in particular the infiltration of New York's legal culture, seems to play a part in the relatively high level of activity in New Jersey.<sup>31</sup> Individual attitudes towards Rule 11 as a case-management device may help to explain the very high sanctioning rate in the Middle District of Pennsylvania.<sup>32</sup> In any event, the Task Force does not find urbanism a powerful explanatory concept in this context.

### 3. The Impact of Rule 11 on Plaintiffs and on Civil Rights Plaintiffs

The Task Force's findings confirm conclusions based on reported decisions that the Rule has disproportionate impacts on all plaintiffs and on civil rights plaintiffs in particular. Although our findings are less striking than those previously published, they are nonetheless cause for further inquiry.

Plaintiffs (and/or their counsel) were the targets of approximately two-thirds of the Rule 11 motions in our sanction survey, and they were sanctioned at a rate (15.9%) higher than the rate for defendants (9.1%). Moreover, plaintiffs were the object of 77.8% of all sanctions imposed, on motion and *sua sponte*, in the survey period.

The Task Force regards this differential impact as wholly predictable. Rule 12(a), providing 20 days for a defendant to file an answer,<sup>33</sup> creates circumstances in every case akin to the limitations time bind facing some plaintiffs. Complaints are thus, a

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<sup>31</sup> The District of New Jersey accounted for forty-three of 132 Rule 11 motions during the survey period. The Eastern District of Pennsylvania had the next highest level of activity, forty-two requests.

<sup>32</sup> The district judges in the Middle District of Pennsylvania imposed sanctions, on motion, at a rate (9/20 or 45%) far higher than that of the next highest district (New Jersey - 8/36 or 22.2%).

<sup>33</sup> The Rule provides:

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—

*priori*, more likely targets than answers,<sup>34</sup> and where expense-shifting sanctions are the norm, they may be an irresistible target, at least for lawyers whose clients will pay for the motion. Contingency contracts are predominantly for plaintiffs, and contingent-fee lawyers have special reason to file Rule 11 motions only when they are cost-justified.

Civil rights cases did not loom as large in our sanction survey as in the statistics based on reported decisions. Yet, civil rights plaintiffs and/or their lawyers were sanctioned at a rate (47.1%) far higher than plaintiffs as a whole (15.9%) and higher still than plaintiffs in non-civil rights cases (8.45%). The same was true of counselled civil rights plaintiffs.<sup>35</sup>

The Task Force regards these findings as a matter for serious concern, and we have only begun the search for possible explanations. In aid of that process, we suggest that it may be useful to break down the category of "civil rights" cases, as by discretely considering prisoner cases, *pro se* cases and section

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BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

FED. R. CIV. P. 12(a).

<sup>34</sup> Complaints were the target of 50% of the motions for sanctions and *sua sponte* impositions during the survey period. By contrast, answers accounted for only 5.3%, and answers and Rule 12(b) motions to dismiss together for only 12.1%, of the motions.

<sup>35</sup> Counselled civil rights plaintiffs were sanctioned on motion at a rate (45.5%) far higher than the rate for counselled plaintiffs in non-civil rights cases (8.7%). The findings of disproportionate impact on civil rights plaintiffs and counselled civil rights plaintiffs are statistically significant at a level of less than 1%.

1983 actions. Moreover, we regard section 1983 actions as particularly ill-suited for a product approach to Rule 11, because the law under section 1983 is particularly "underdeterminate,"<sup>36</sup> and for a compensatory perspective, because expense-shifting sanctions pose a special risk of overdeterrence in this context.

*B. Findings of More Limited Utility*

The Task Force recognizes that some critics of Rule 11 will be alarmed by its findings and conclusions about the benefits and costs of the Rule in the Third Circuit<sup>37</sup> and that some supporters of the Rule will take those findings and conclusions as proof that they were right all along. Both groups should recognize that there is no bottom line in the report and should heed our cautions that any such assessment (1) is hardly the product of exact science and (2) cannot, or at least should not, be exported to other circuits. We know that the law is developing in different ways in different parts of the country and that, apart from doctrine, judicial attitudes towards the Rule differ, as do local legal cultures. In considering the benefits and costs of the Rule in the Third Circuit, it is important to take account of attitudes towards sanctions in general and towards collegiality and of the restrained approach to the Rule that has been encouraged by our court of appeals.

The Task Force found evidence of quite widespread effects on conduct of the sort hoped for by the rulemakers. Some 43.5% of those responding to our questionnaire reported an effect on pre-filing factual inquiry; 34.5% saw impact on pre-filing legal inquiry, and 22.1% experienced an effect on their practice in counselling clients not to file a complaint. It is obvious from the comments and from our attorney interviews that many lawyers in this circuit are more careful as a result of amended Rule

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<sup>36</sup> Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987). See *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 922 (1988).

<sup>37</sup> The report concludes:

(1) Rule 11 is not a cottage industry, and Rule 11 motions are not routine, in the Third Circuit; (2) Rule 11 has had effects on the pre-filing conduct of many attorneys in this circuit of the sort hoped for by the rulemakers and has yielded other benefits; (3) the costs directly associated with Rule 11's effects on conduct here do not appear to be clearly incommensurate with the probable benefits accruing from those effects; and (4) other costs are not presently, but may soon be, a source of serious concern.

RULE 11 IN TRANSITION, *supra* note 3, at 95.

11 and that many view the changes in their practice with satisfaction.

We also found evidence of benefits in connection with the settlement or dismissal of cases, and in the perceived effectiveness of warnings by judges issuing them. Both effects, however, require careful evaluation because of the danger of unjustified coercion.

The major costs of Rule 11 focused on by its critics are the costs of satellite litigation. Various data from our empirical studies led us to conclude that, in the Third Circuit, these costs are not clearly incommensurate with the Rule's probable benefits. Lawyers do not seem to be spending a great deal of time on Rule 11 motions, particularly those that are denied, and neither the procedures used nor the modes of disposition in the cases in our sanction survey suggest an undue burden on district courts. Single-issue Rule 11 appeals are, on the other hand, quite expensive, but we expect the incidence of such appeals—which were not numerous in our one year survey period—to decline.

The Task Force was also unable to conclude, on the basis of the available data, that the collateral costs of Rule 11 are presently a serious concern in the Third Circuit, although we are worried that some of them may soon be. Only approximately one-quarter of the respondents to our attorney questionnaire perceived that the amended Rule has chilled legal development, and in the same group of respondents only 5% reported an effect on their practice in seeking extension or change in the law.<sup>38</sup> Nor does it appear that the amended Rule has poisoned relations between lawyers and clients or lawyers and judges, although it has had a stronger negative effect on lawyer-lawyer relations.<sup>39</sup>

Our initial inquiries suggest, however, that the Rule may soon have an effect on malpractice insurance availability or rates that should raise considerable concern, and its impact on bar discipline and other professional aspects deserves further study. Pending such study, we believe courts imposing Rule 11 sanctions should consider possible collateral consequences and err on the side of not causing them to be incurred.

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<sup>38</sup> A number of participants at the Third Circuit Judicial Conference regarded this finding as cause for concern, pointing out that in that group might be those lawyers who were previously most disposed and best equipped to expand our legal horizons.

<sup>39</sup> Again, there were those at the Third Circuit Judicial Conference who decried the "corrosive" effects of the amended Rule.

## V. CONCLUSION

Amended Rule 11 was an experiment. It probably took too little time to conceive—certainly it was based on virtually no empirical data.<sup>40</sup> It will require a good deal of time to implement and to evaluate. The Task Force's work is an attempt to substitute facts for speculation. The report provides no definitive answers. We need more facts. If our work stimulates further studies,<sup>41</sup> I shall consider it a great success.

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<sup>40</sup> See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989).

<sup>41</sup> The Task Force's first recommendation is that "[a] similar study should be undertaken in a circuit with a different reputation regarding, and (as evidenced by case law) different normative perspectives on, Rule 11 sanctions." *RULE 11 IN TRANSITION*, *supra* note †. I have personally nominated the Seventh Circuit for such a study. See Burbank, *supra* note 40, at 1957-58.