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## Rule 11 and Rule Revision

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## RULE 11 AND RULE REVISION

*Margaret L. Sanner\* and Carl Tobias\*\**

Numerous observers of modern civil practice, whose views range across a comparatively broad spectrum, consider the 1983 amendment to Federal Rule of Civil Procedure 11 the most controversial revision since the United States Supreme Court promulgated the original Federal Rules of Civil Procedure in 1938.<sup>1</sup> Counsel and litigants overused and abused the 1983 modification to Rule 11 by inappropriately stressing the compensatory goal of the proviso and improperly deemphasizing the stricture's deterrence objective. Many judges vigorously enforced Rule 11, often finding violations and imposing burdensome sanctions which frequently included large attorney's fees. This activity of lawyers and parties, as well as courts' implementation, was responsible for considerable unnecessary and expensive litigation that was unrelated to the substantive merits of disputes. The overuse, abuse and judicial application of the 1983 change had detrimental consequences for individuals and groups with relatively little time, money or power, such as those who pursue civil rights actions.

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\*\* Williams Professor, University of Richmond School of Law. I wish to thank Sherry Churchill and Pam Smith for processing as well as Russell Williams for generous, continuing support. I was a member of the Civil Justice Reform Act Advisory Group of the United States District Court for the District of Montana and of the Study Committee to Review the Nevada Rules of Civil Procedure. However, the views expressed here and errors that remain are ours.

1. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930-31 (1989); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 207 (1988); see also FED. R. CIV. P. 11 (1983) (amended 1993) (adding new language intended to reduce the reluctance of courts to impose sanctions), reprinted in 97 F.R.D. 167 (1983). See generally Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992) (reviewing and analyzing the controversy surrounding the 1983 amendment, and offering suggestions for the future).

These complications prompted the federal rule revision entities, such as the Judicial Conference of the United States Advisory Committee on the Civil Rules (Advisory Committee), to formulate and propose significant amendments to the 1983 revision of Federal Rule 11. The Supreme Court accepted the recommendation tendered by the Judicial Conference, the courts' policymaking arm, and by its Committee on Rules of Practice and Procedure (Standing Committee) that the 1983 version be substantially amended and, thus, instituted a revision that became effective during 1993. Notwithstanding the unusually expeditious attempt to rectify or temper the difficulties created by the 1983 modification—a purpose which the 1993 alteration has seemingly realized—the experience with the 1983 amendment may have undermined confidence in the rule revision process of judges, counsel and litigants.

Two critical examples illustrate this phenomenon. One is the increasing willingness of the ninety-four United States District Courts to prescribe and apply local practice requirements that depart from the Federal Rules of Civil Procedure. Another is the growing amenability of the fifty states to promulgate and enforce strictures regulating civil practice within their jurisdictions which deviate from the Federal Rules of Civil Procedure.

All of the propositions recounted above mean that the 1983 amendment to Rule 11, the version's deployment by attorneys and litigants, the revision's effectuation by courts, and its modification warrant scrutiny on the twentieth anniversary of the 1983 revision. The article undertakes that effort. This article first descriptively traces the background of the 1983 amendment to Rule 11. Part I emphasizes the difficulties accompanying the revision's invocation by lawyers and litigants, as well as judicial implementation, which made the proviso the most disputed alteration over the civil rules' five-decade history, and which eventually led to its fundamental reform. The article then surveys efforts to modify the controversial 1983 amendment only ten years after the Supreme Court prescribed it. The article next attempts to derive lessons from the experience with the 1983 version. The article concludes by offering numerous recommendations, a majority of which implicate the federal rule revision process.

## I. THE 1983 AMENDMENT TO FEDERAL RULE 11

The origins and development of the 1983 amendment to Federal Rule of Civil Procedure 11, its employment by counsel and parties, and the judicial application of the stricture have received much analysis elsewhere.<sup>2</sup> Nevertheless, a brief overview will enhance understanding of the 1983 modification, why that revision became so controversial, and how it was ultimately altered a decade thereafter.

### A. Amendment of the Original Federal Rule 11

The United States Supreme Court promulgated the 1983 amendment as a major constituent of an integrated set of revisions. The High Court and the amendment entities meant to increase attorneys' responsibilities in, and judicial control over, civil litigation, especially during the pretrial phase.<sup>3</sup> The 1983 amendment required lawyers and litigants to conduct reasonable pre-filing factual and legal inquiries, while certifying that their papers were factually well grounded and legally warranted. The 1983 revision to Rule 11 also mandated that judges levy sanctions on counsel and parties who did not discharge these responsibilities.<sup>4</sup>

### B. The 1983 Amendment's Invocation and Implementation

Throughout the initial half-decade after the Supreme Court prescribed the 1983 amendment, judges differed on many questions which were central to the revision's effectuation. They

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

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

4. See FED. R. CIV. P. 11 (1983) (amended 1993), *reprinted in* 97 F.R.D. at 167-68.

inconsistently interpreted and applied the nascent version.<sup>5</sup> Rule 11's 1983 amendment promoted much costly, unwarranted satellite litigation which implicated its phrasing as well as the type and magnitude of sanctions.<sup>6</sup> During this five-year period, Rule 11 motions were filed and sanctions were imposed against civil rights plaintiffs more frequently than any other classification of civil litigants.<sup>7</sup> Many courts vigorously applied the revision or levied substantial sanctions against parties that did not comply with Rule 11.<sup>8</sup> Numerous civil rights plaintiffs and their attorneys possess comparatively few resources, making them risk averse. Certain judges, lawyers, and legal scholars asserted that judicial implementation of the 1983 version had chilling effects on these litigants and attorneys.<sup>9</sup>

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5. See, e.g., Burbank, *supra* note 1, at 1930; Vairo, *supra* note 1, at 207. See generally Tobias, *supra* note 1 (reviewing and analyzing the controversy surrounding the 1983 amendment, and offering suggestions for the future).

6. See, e.g., Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) (involving satellite litigation over the sanction imposed), *cert. denied*, 484 U.S. 918 (1987); see also Burbank, *supra* note 1, at 1930-31; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 514 (1988-89). Compare Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987) (holding that no continuing duty exists to comply with Rule 11 on individual papers after the initial filing), with Harris v. Marsh, 679 F. Supp. 1204, 1386-87 (E.D.N.C. 1987) (finding the existence of a continuing duty), *aff'd sub nom.*, Blue v. United States Dep't of Army, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied sub nom.*, Chambers v. United States Dep't of Army, 499 U.S. 959 (1991).

7. See, e.g., Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986); Vairo, *supra* note 1, at 200-01.

8. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (providing an illustration of vigorous judicial enforcement); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (providing another example of vigorous judicial enforcement); Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989) (imposing a \$1,000,000 sanction on a plaintiff), *aff'd*, 932 F.2d 1572 (11th Cir. 1991).

9. See Nelken, *supra* note 7, at 1327, 1340; Tobias, *supra* note 6, at 495-98, 503-06; Vairo, *supra* note 1, at 200-01; cf. *Advisory Comm. on the Civil Rules, Judicial Conference of the U.S., Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, as Amended in 1983*, 131 F.R.D. 344, 347 (1990) [hereinafter *Call for Comments*] (finding considerable disagreement over whether the 1983 amendment in Federal Rule 11 had actually chilled the enthusiasm of civil rights plaintiffs).

Considerable difficulty in applying Rule 11 resulted from courts' uncertainty about the principal objective of the 1983 amendment. The Advisory Committee Note accompanying the 1983 revision suggested that its major purpose was to deter litigation abuse.<sup>10</sup> Nonetheless, a 1985 study of the amendment's early implementation undertaken by the research arm for the federal courts, known as the Federal Judicial Center ("FJC"), indicated that the revision's goals were to punish offenders, to compensate those injured by Rule 11 violations, and to deter future litigation abuse.<sup>11</sup> When judges who effectuated the alteration did not focus on deterrence and made attorney's fees the sanction of choice,<sup>12</sup> this application granted lawyers and parties economic incentives to file Rule 11 motions and prompted them to consider the revision a fee-shifting device.<sup>13</sup>

These phenomena concomitantly triggered a dramatic increase in Rule 11 activity, encouraging the rise and growth of a new form of civil litigation. Federal appellate and district court judges published approximately 700 Rule 11 decisions in the first three and one-half years after the 1983 amendment<sup>14</sup> and issued hundreds of additional unpublished opinions.<sup>15</sup> Indeed, the federal courts published over 3000 reported Rule 11 determinations by the conclusion of 1990.<sup>16</sup>

Much of the early commentary that implicated the revised version was comparatively favorable. For instance, Professor Arthur R. Miller, who was the Advisory Committee reporter, wrote a

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10. See FED. R. CIV. P. 11 advisory committee's note to 1983 amendment, reprinted in 97 F.R.D. 165, 198 (1983).

11. See SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985); see also 28 U.S.C. § 620 (1994) (authorizing the Federal Judicial Center as the research arm of the federal courts and prescribing the entity's duties).

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

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

14. See Vairo, *supra* note 1, at 199.

15. See Tobias, *supra* note 6, at 485–86; Tobias, *supra* note 3, at 301.

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

Federal Judicial Center report that generally praised the 1983 amendments to the Federal Rules of Civil Procedure, including Rule 11.<sup>17</sup> Judge William W Schwarzer of the Northern District of California also penned a 1984 article which lauded the Rule 11 modification and requested that federal courts enforce it rigorously.<sup>18</sup>

Indeed, numerous appellate and district court judges employed and cited this work when authoring Rule 11 opinions in the half-decade after the 1983 revision.<sup>19</sup> However, a few observers did criticize the modification. For example, Professor Stephen Burbank questioned whether the Supreme Court possessed the requisite authority to implement the 1983 amendment,<sup>20</sup> while Professor Edward Cavanagh wondered how the revision would function in practice.<sup>21</sup>

The problems with the 1983 amendment did not become clear immediately, and judges and academicians only began suggesting ways to treat the problems after several years of experience with the proviso. Professor Melissa Nelken published an influential 1986 paper asserting that judges significantly and incorrectly overemphasized the 1983 revision's compensatory goal and notion of attorney-fee shifting as an appropriate sanction. Nelken believed that the new version was disadvantageous and chilled civil rights plaintiffs' enthusiasm for litigation.<sup>22</sup>

Professor Georgene Vairo wrote an important 1988 article in which she tendered claims analogous to Nelken's.<sup>23</sup> That same year, Judge Schwarzer also voiced concerns about satellite litigation and

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17. See MILLER, *supra* note 3.

18. William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985); see also *infra* note 24 and accompanying text.

19. See, e.g., *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 125 (2d Cir. 1987) (Pratt, J., dissenting); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986); *Knop v. Johnson*, 667 F. Supp. 512, 519 (W.D. Mich. 1987); *Holley v. Guiffrida*, 112 F.R.D. 172, 174 (D.D.C. 1986).

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

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

22. See Nelken, *supra* note 7.

23. See Vairo, *supra* note 1.

the amendment's use for purposes of reimbursement.<sup>24</sup> During late 1988, the Federal Judicial Center finished a Rule 11 study which accepted some of these ideas, such as the enormous reliance on the provision, and rejected others, such as the assertion that the revision discouraged civil rights plaintiffs from vigorously pursuing their actions.<sup>25</sup> In 1989, the Third Circuit Task Force on Rule 11 published a report observing that courts were inconsistently applying the stricture, that Rule 11 was fostering litigation unrelated to disputes' merits, and that judicial enforcement could detrimentally affect resource-poor litigants.<sup>26</sup>

Ironically, near the time when criticism of the proviso's implementation first developed and was growing, federal appeals and district courts improved how they effectuated the 1983 amendment. For instance, numerous judges began interpreting and applying Rule 11 in a more uniform way, while the amount of satellite litigation generated by the revision declined.<sup>27</sup>

Notwithstanding this apparently improved effectuation realized by the federal appellate and district courts, the Advisory Committee began considering the prospect of altering Rule 11's 1983 version six years after its promulgation.<sup>28</sup> The next section of this article

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24. See William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); see also Tobias, *supra* note 6 (responding to Judge Schwarzer's article); Schwarzer, *supra* note 18 (affording Judge Schwarzer's earlier Rule 11 article).

25. See THOMAS E. WILLGING, FEDERAL JUDICIAL CTR., THE RULE 11 SANCTIONING PROCESS 67-81, 157-68 (1988); see also KASSIN, *supra* note 11 (affording earlier FJC study); WIGGINS ET AL., *supra* note 12 (affording later FJC study).

26. See STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 13-24, 60-61, 68-72 (1989); see also Burbank, *supra* note 1.

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

28. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 854 (1991). The Advisory Committee is a twelve-member entity comprising judges, law professors, and attorneys, which Congress has authorized to study the Federal Rules of Civil Procedure and to formulate proposals for change as warranted. See 28 U.S.C. § 2073 (1994); see also Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85



canvasses the measure's amendment and emphasizes those sources which evince the rule revisers' intent.

## II. THE 1993 RULE AMENDMENT PROCESS

Many developments, especially numerous propositions traced in the article's first segment, apparently coalesced during 1989 and may have persuaded the Advisory Committee to evaluate a possible amendment to the 1983 Rule 11 modification. Federal District Court Judge Sam C. Pointer, Jr.<sup>29</sup> stated that "[t]he Committee had received various requests, formal and informal, for further amendment or abrogation of [the 1983 version] of Rule 11" and "was aware of several studies of the rule undertaken by various individuals, bar associations, and courts," but the members were not certain whether the group should propose alterations and, if so, what their exact nature should be.<sup>30</sup>

In 1989, the Advisory Committee decided to consider revisions to the 1983 version. It resolved to commission another Federal Judicial Center Rule 11 evaluation.<sup>31</sup> District Judge John Grady, who was then serving as Advisory Committee Chair, appointed three people to plan this empirical assessment.<sup>32</sup>

During 1991, the FJC finished its compilation and preliminary review of data implicating Federal Rule 11 premised on computerized docket information that the Federal Judicial Center had

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MICH. L. REV. 1507, 1509-11 (1987) (reviewing congressional involvement in the federal civil rulemaking process); Mullenix, *supra*, at 797 n.2 (describing the composition of the Advisory Committee and providing citations to other useful authority); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464-69 (1993) (reviewing the history and powers of the Advisory Committee).

29. Pointer, who was the Advisory Committee's chair from early 1991 until mid-1993, served as chair over almost the whole period when the 1993 revision of Rule 11 transpired.

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

31. See Mullenix, *supra* note 28, at 854; Tobias, *supra* note 1, at 861-62.

32. District Judge John Grady appointed the following three people: Professor Paul Carrington, the Advisory Committee reporter; Magistrate Judge Wayne Brazil of the Northern District of California; and Thomas Willging, Deputy Research Director of the Federal Judicial Center.

gathered from five representative federal district courts and responses to questionnaires which the Judicial Center had circulated to all federal district judges.<sup>33</sup> The data gleaned from the five courts indicated that, on average, judges were no more likely to find civil rights plaintiffs in violation than litigants who filed other types of cases that prompted substantial Rule 11 activity.<sup>34</sup> However, courts did impose attorney's fees as the sanction of choice.<sup>35</sup> Two principal themes emerged from the judicial survey responses. Eighty percent of respondents believed that Rule 11 had a positive impact on civil litigation, that the advantages derived warranted the time spent on judicial implementation, and that the 1983 alteration should be retained.<sup>36</sup>

A similar number of judges thought that baseless lawsuits were a minor concern and that expeditious rulings on motions to dismiss and for summary judgment, pretrial conferences conducted under Federal Rule 16, and informal warnings were more effective.<sup>37</sup> Half of those jurists who responded believed that "Rule 11 exacerbate[d] contentious behavior between counsel."<sup>38</sup>

In the summer of 1990, the mounting criticism that judges, attorneys, parties and scholars leveled at Rule 11's 1983 alteration seemingly persuaded the Advisory Committee to announce publicly that it was reconsidering Rule 11.<sup>39</sup> The Committee issued a Call for Comments which asked for written responses to ten questions about how the proviso was actually operating.<sup>40</sup> These included whether

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33. See ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CTR., RULE 11: JUDGES SURVEY AND FIELD STUDY PRELIMINARY REPORTS (1991). Because the FJC made no changes relevant to this article in compiling its final report, cited *supra* at note 12, I rely on the preliminary report in this part. See Tobias, *supra* note 1, at 864.

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

35. See *id.* § 1B, at 9.

36. See *id.* § 1A, at 1.

37. See *id.* § 1A, at 1-2.

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

39. See CALL FOR COMMENTS, *supra* note 9, at 344; see also Mullenix, *supra* note 28, at 854; Vairo, *supra* note 2, at 492-93.

40. CALL FOR COMMENTS, *supra* note 9, at 345. The controversial nature of the proposal to amend the 1983 revision of Rule 11 prompted the Advisory Committee to invert the ordinary sequence of soliciting public comment after developing a proposal.

the 1983 amendment had encouraged counsel to “stop and think”<sup>41</sup> before they filed papers, whether the benefits of that conduct outweighed the expenses in terms of satellite litigation, and whether Rule 11 had “been administered unfairly to any particular group of lawyers or parties.”<sup>42</sup>

Some 125 individuals and groups responded, and a significant percentage of them criticized the 1983 modification as well as its invocation by attorneys and clients and judicial effectuation.<sup>43</sup> The principal assertions were that the version fostered excessive and costly litigation unrelated to the merits, that judges inconsistently applied Rule 11, that the measure’s implementation detrimentally and disproportionately affected civil rights plaintiffs and their counsel, and that the Rule promoted incivility among lawyers.<sup>44</sup>

The Committee also invited sixteen experts to give their viewpoints at a February 1991 public hearing. These witnesses’ testimony resembled the responses to the Call for Comments. For instance, they spoke about the expensive satellite litigation which Rule 11 frequently generated and the measure’s deleterious impact on civil rights plaintiffs.<sup>45</sup>

After the public hearing, the Advisory Committee informally agreed to revise the 1983 proviso and acknowledged that the widespread criticism of the amendment had merit even though it was frequently exaggerated or premised on flawed assumptions.<sup>46</sup> The Advisory Committee also thought the 1983 version’s goal—to demand that litigants stop and think before filing papers—remained appropriate and should be maintained, while the evolving precedent

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41. *See id.* at 346–47.

42. *See id.*

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

44. *See id.*

45. *See* Tobias, *supra* note 1, at 863; Vairo, *supra* note 2, at 492–93.

46. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence* (Attachment to Letter to Hon. Robert E. Keeton, chairman, Standing Committee, from Hon. Sam C. Pointer, Jr., chairman, Advisory Committee (June 13, 1991), *reprinted in* 137 F.R.D. 63, 64 (1991) [hereinafter 1991 POINTER LETTER]; 1992 POINTER LETTER, *supra* note 30.

had resolved many difficulties which Rule 11 had created earlier.<sup>47</sup> However, the Committee did find substantiation for five integral propositions:

- (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants;
- (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence;
- (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction;
- (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and
- (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.<sup>48</sup>

Once the Advisory Committee reached these determinations and informally concluded that Rule 11 should again be revised, Judge Pointer and Professor Carrington assumed substantial responsibility to develop and craft the proposed modifications for the Advisory Committee's consideration at its May 1991 meeting.<sup>49</sup> They drafted a proposal meant to enhance the Rule's fairness and effectiveness in deterring counsel and litigants from proffering and maintaining frivolous positions while simultaneously limiting the stricture's use.

The preliminary draft revision of Rule 11 that the Advisory Committee assembled at its May 1991 meeting deserves somewhat limited treatment in this article.<sup>50</sup> Moreover, various entities in the

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47. See 1991 POINTER LETTER, *supra* note 46, at 64–65; see also 1992 POINTER LETTER, *supra* note 30, at 523 (“In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.”)

48. See *id.*

49. See Tobias, *supra* note 1, at 863–64.

50. The developments which occurred in the day-long session throughout which the Committee reviewed Rule 11's change and the document that

rule revision hierarchy later changed certain significant aspects of the preliminary draft. However, this article evaluates the important features, particularly the alterations that have greatest relevance to the 1993 amendment, showing their final resolution, when indicated.

One central modification prescribed by the Advisory Committee implicated representations tendered to the court by lawyers or parties. The Advisory Committee imposed a continuing duty on both represented and unrepresented litigants to withdraw allegations that subsequent research or pretrial discovery showed were unsupported.<sup>51</sup>

The Advisory Committee described as "well-taken" criticism that this proposal "might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed [papers]."<sup>52</sup> The Committee responded by making "several modifications to the published language of the text," which essentially imposed the duty only on anyone "who 'pursues' a previously filed paper."<sup>53</sup>

A significant change in the 1993 amendment of Rule 11 related to the legal certification's sufficiency. That change required counsel and unrepresented litigants to offer papers warranted by a nonfrivolous (rather than a good faith) "argument for the extension, modification or reversal of existing law or the establishment of new law."<sup>54</sup> One important difficulty with this alteration was that the "good faith" phraseology had acquired certain meaning among judges, attorneys and parties. Lawyers and litigants could thus easily satisfy the "good faith" standard, while judges enforced the stricture felicitously.<sup>55</sup>

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members fashioned have received assessment elsewhere. See Tobias, *supra* note 1, at 865-93; Vairo, *supra* note 2, at 495-500.

51. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 75 (proposed August 1991) [hereinafter PRELIMINARY DRAFT].

52. 1992 POINTER LETTER, *supra* note 30, at 523.

53. See *id.*

54. FED. R. CIV. P. 11 (b)(2), reprinted in 146 F.R.D. at 420-21. The 1993 amendment, like the 1983 version, initially mandates that papers be warranted by existing law. See *id.*; FED R. CIV. P. 11 (amended 1983), reprinted in 97 F.R.D. at 167-68 (1983).

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

The amended Rule 11 correspondingly requires attorneys who represent plaintiffs as well as pro se plaintiffs to certify that any “allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>56</sup> Defendants’ lawyers and pro se defendants must similarly certify that all “denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief.”<sup>57</sup>

When changing the proviso in the 1983 amendment, the rule revision entities required signers to certify that papers were “well grounded in fact,” and expressly admitted that litigants might have plausible reasons to think such facts were true or false, yet needed discovery to assemble and confirm evidentiary support.<sup>58</sup> The Advisory Committee Note observed that the modifications were a specific attempt to equalize the burden of the rule upon plaintiffs and defendants as well as to impose a “duty of candor.”<sup>59</sup>

The 1993 revision in Rule 11 also significantly changed the 1983 amendment’s mandate that judges levy an appropriate sanction to include monetary assessments, namely attorney’s fees, when they find Rule 11 violations.<sup>60</sup> Perhaps the most important change was leaving the decision of whether to sanction within the trial court’s discretion, as it had been before the 1983 revision.

The 1993 revision also included numerous particular sanctioning procedures, in contrast to the 1983 modification, which offered virtually no specific guidance.<sup>61</sup> Some of the most significant

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56. FED. R. CIV. P. 11 (b)(3), *reprinted in* 146 F.R.D. at 421 (1993).

57. *See* FED. R. CIV. P. 11 (b)(4), *reprinted in* 146 F.R.D. at 421 (1993).

58. *See* FED. R. CIV. P. 11 advisory committee’s note to the 1983 amendment, *reprinted in* 97 F.R.D. at 167–68 (1983); FED. R. CIV. P. 11 advisory committee’s note to the 1993 amendment, *reprinted in* 146 F.R.D. 583, 585 (1993).

59. *See* FED. R. CIV. P. 11 advisory committee’s note to the 1993 amendment, *reprinted in* 146 F.R.D. 583, 586 (1993); *see also* PRELIMINARY DRAFT, *supra* note 51, at 76 (examples of subsections that attempt to equalize the amendment’s burdens).

60. I rely in this paragraph on FED. R. CIV. P. 11 (amended 1983), *reprinted in* 97 F.R.D. at 167–68; FED. R. CIV. P. 11 (amended 1993), *reprinted in* 146 F.R.D. at 421–23.

61. For additional explanation of these procedures, see Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 206–09 (1994).

requirements inserted in the 1993 alteration mandated that: parties file Rule 11 motions independent of other papers; litigants receive notice and an opportunity to respond; judges explicate their sanctioning decisions; "safe harbors" be provided; and courts exercise their discretion to sanction.<sup>62</sup>

A final substantial change to the 1983 amendments related to the sanctions that judges levied when they found that counsel or parties had violated Rule 11.<sup>63</sup> The amendment seemed to have four critical objectives which involved sanctioning: to emphasize that courts might assess non-financial sanctions; to deter litigation abuse; to discourage reliance on monetary awards, in particular attorney's fees; and to reduce judicial enforcement of Rule 11 for compensatory objectives.<sup>64</sup>

After Judge Pointer and Professor Carrington reduced the propositions agreed upon by the Advisory Committee in the May 1991 session to writing, they circulated the document to the entity's members for approval and transmitted a final version to the Standing Committee the following month.<sup>65</sup> The Standing Committee assessed the draft and incorporated minor changes in the proposal during July 1991.<sup>66</sup> The Standing Committee then issued the suggested revision, solicited public comment and held two public hearings.<sup>67</sup>

Once the Advisory Committee examined every written comment proffered and each oral submission tendered, the group substantially changed the draft in April 1992 and submitted that new proposal to the Standing Committee.<sup>68</sup> In June of that same year, the Standing Committee inserted numerous alterations. One major change left

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62. See FED. R. CIV. P. 11 advisory committee's note to the 1993 amendment, *reprinted in* 146 F.R.D. 583.

63. I rely in this paragraph on Tobias, *supra* note 1, at 880-90.

64. See FED. R. CIV. P. 11 advisory committee's note to the 1993 amendment, *reprinted in* 146 F.R.D. 583.

65. See 1991 Pointer Letter, *supra* note 46, at 1, *reprinted in* 137 F.R.D. 63, 63 (1991); see also Tobias, *supra* note 1, at 898 (discussing the procedures for the amendment to become effective).

66. See PRELIMINARY DRAFT, *supra* note 51, at 74-82; see also Tobias, *supra* note 1, at 898 (observing that the standing committee made some modifications in July).

67. See PRELIMINARY DRAFT, *supra* note 51, at 53, 56.

68. See 1992 POINTER LETTER, *supra* note 30, at 1; see also Randall Samborn, *Key Panel Votes Shift in Rule 11*, NAT'L L. J., July 6, 1992, at 13.

sanction decisionmaking to the courts' discretion.<sup>69</sup> In September 1992, the Judicial Conference endorsed this recommendation without further alterations and forwarded it to the Supreme Court.<sup>70</sup>

The Supreme Court evaluated the proposed revision to Rule 11 as one important constituent in an ambitious set of rule amendments proffered by the Standing Committee during autumn 1992. The Justices transmitted the suggested Rule 11 alterations unchanged to Congress on April 22, 1993.<sup>71</sup> Justice Antonin Scalia, joined by Justice Clarence Thomas, authored a vociferous dissent to the High Court's submission of the Rule 11 revision.<sup>72</sup> Justice Scalia thought that the proposed amendment would "eliminate a significant and necessary deterrent to frivolous litigation," because it granted courts discretion in sanctions determinations, disfavored compensatory assessments, and prescribed a safe harbor.<sup>73</sup>

Although senators and representatives frequently deferred to the other entities in the rule revision hierarchy, Congress had exhibited substantially greater willingness since 1980 to intercept proposed federal rule amendments that covered evidence as well as criminal, civil, and appellate procedures.<sup>74</sup> Some House members opposed the

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69. See JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 11, at 46 (July 1992) [hereinafter PROPOSED AMENDMENT]; Samborn, *supra* note 68, at 13 (discussing the change which left sanctions decisionmaking to the courts' discretion).

70. See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1778 (1992). The Supreme Court was required to approve and transmit the amendment to Congress before May 1, 1993, for the revision to take effect in 1993. See *id.*; see also 28 U.S.C. § 2074 (2001) (establishing time parameters for approval by the Supreme Court); Judicial Conference of the U.S., *Amendment of Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure*, 134 F.R.D. 315, 317 (1991) (explaining the time parameters and process for submitting changes to the rules).

71. See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *reprinted in* 146 F.R.D. 402, 403 (1993) [hereinafter 1993 AMENDMENTS].

72. See *id.* at 507–10 (Scalia, J., dissenting).

73. *Id.* at 507–08; see also *supra* notes 58–60 and accompanying text.

74. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018–20 (1982); see also Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961 (1991) (discussing Congress's deference to other authorities for rule revision); Tobias, *supra* note 3, at 293, 337–40 (discussing willingness of Congress to remain involved with rulemaking). See generally Jack H. Friedenthal, *The*



1993 Rule 11 amendment tendered by the Supreme Court. However, the alteration took effect on December 1, 1993 because Congress passed no amendatory legislation.<sup>75</sup>

### III. LESSONS

Numerous significant lessons, mainly implicating the federal rule revision process, can be gleaned from the experiences detailed in the previous sections of this article. One important lesson learned from the 1983 amendment is that premising modification on anecdotal information, rather than empirical data systematically gathered, analyzed and synthesized by experts, can have unintended and often detrimental consequences for judges, lawyers and parties as well as the rule revision process.<sup>76</sup> For example, the 1983 amendment was an integral feature of a package the High Court meant to enlarge attorneys' duties and judicial control by requiring sanctions imposition for rule violations (namely deficient prefiling inquiries).<sup>77</sup>

Moreover, the rule revisers apparently did not learn from this experience because they grounded the 1993 change in Rule 26 on limited empirical data. Rule 26 imposed mandatory pre-discovery or automatic disclosure. This disclosure requirement provoked even greater controversy than the 1983 amendment of Federal Rule 11.<sup>78</sup>

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*Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 673-77 (1975) (discussing judicial power and roles in rule reform).

75. See *supra* notes 67-70 and accompanying text. For information that documents the various congressional machinations, see H.R. 2814, 103d Cong. (1993); Tobias, *supra* note 61, at 188; *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40.

76. See, e.g., Burbank, *supra* note 1, at 1927-28; Mullenix, *supra* note 28, at 813-20. See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS., Summer 1988, at 67.

77. Virtually no empirical data showed that meritless cases were a grave problem or that sanctioning was the best way to address frivolous litigation. See Burbank, *supra* note 1, at 1927-28; *supra* notes 3-4 and accompanying text.

78. Indeed, Justice Scalia found it "most imprudent to embrace such a radical alteration that has not . . . been subjected to any significant testing on a local level." See 1993 AMENDMENTS, *supra* note 71, at 511 (Scalia, J., dissenting). Accord Mullenix, *supra* note 28, at 813-20; Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665,

Perhaps the most valuable lesson that implicates the questions treated here is that overly frequent revision in substantial numbers of rules complicates practice and undermines respect for the amendment process. For instance, when the revisers make numerous, frequent alterations to strictures, judges may have difficulty interpreting and applying them, while lawyers and parties must spend time and money finding, understanding and satisfying these changes.

The disadvantages imposed by rule modification's quickened pace and the numerous amendments witnessed in the 1983 and 1993 revisions were exacerbated by a pair of interrelated actions. During 1990, Congress passed the Civil Justice Reform Act (the "CJRA"). The statute requested that all ninety-four districts experiment with local cost and delay reduction techniques.<sup>79</sup> Three years later, the Supreme Court authorized those districts to eschew or change important 1993 federal rules amendments in deference to this testing.<sup>80</sup>

The problems fostered by the speed and quantity of revisions at the national and district court levels actually encouraged scholars to urge a moratorium on federal civil rule amendment.<sup>81</sup> Despite their importuning, the rule revisers modified the discovery provisos seven years after the 1993 amendments.<sup>82</sup> That modification was the fourth

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667 (1993); see also Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992) (analyzing the proposed revision imposing automatic disclosure).

79. See 28 U.S.C. §§ 471–78 (1994). For analysis of the CJRA, see Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994).

80. See FED. R. CIV. P. 26 (a) (amended 1993), reprinted in 146 F.R.D. 431, 437; see also Donna Stienstra, *Implementation of Disclosure in United States District Courts with Specific Attention To Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26*, 182 F.R.D. 304 (1998) (affording empirical data related to the federal district courts that rejected or modified the federal discovery amendments).

81. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435 (1994).

82. See, e.g., John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513–20 (2000); Elizabeth G. Thornburg, *Giving*

revision in two decades, causing some observers to question the need for and wisdom of the 2000 changes.<sup>83</sup> In short, the rule amendment entities not only ignored the admonitions directed at the rate and number of modifications, but also compounded the situation by prescribing more revisions with even greater alacrity. These developments, alone and synergistically, may have discredited the federal amendment process. They have at least eroded confidence in the federal amendment process, although those notions resist definitive proof.<sup>84</sup>

Two phenomena strongly indicate that participants in modern civil practice and rule revision believe that the national process has undergone a loss of stature, if not credibility. One is the tendency among the ninety-four federal districts to promulgate and enforce measures governing local practice that conflict with or reiterate the Federal Rules of Civil Procedure.<sup>85</sup> This development received substantial impetus from the CJRA, encouraging the courts to prescribe and apply disuniform local strictures, and 1993 federal rule amendments which specifically empowered districts to reject or modify applicable federal discovery rules.<sup>86</sup> Despite commands in the 1985 and 1995 revisions of Federal Rule 83 and in the 1988 Judicial Improvements and Access to Justice Act (requesting that the district courts scrutinize and eliminate or alter conflicting or

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*the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 233–36 (1999).

83. *See id.*

84. For example, it is difficult to identify cause-effect linkages and to isolate all relevant variables, such as local legal culture, a phenomenon which itself may partly explain the developments. *See, e.g.*, Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944–49 (1996); Robel, *supra* note 79, at 1484. Several observers have expressly proffered the contentions asserted in the text. *See, e.g.*, Mullenix, *supra* note 28, at 855–57; sources cited *supra* note 81.

85. *See, e.g.*, Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 557–64 (1996); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2011–26 (1989); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (2002).

86. *See supra* notes 79–80 and accompanying text.

duplicative local provisos),<sup>87</sup> numerous tribunals have not implemented these mandates.<sup>88</sup> Some have even continued to adopt and enforce new inconsistent or redundant local strictures.<sup>89</sup> Therefore, district unwillingness or reluctance to follow the Federal Rules of Civil Procedure evinces decreasing confidence in the national amendment process. Indeed, observers attribute those phenomena to belief by local judges, lawyers and parties that the federal rule revisers “got it wrong” or that districts can fashion superior rules.<sup>90</sup>

A second indicium is the fifty states’ growing willingness to deviate from the Federal Rules of Civil Procedure as a model. A 1986 nationwide assessment revealed that many jurisdictions based all or most essential features of their state civil rules (such as discovery) on federal analogues soon after 1938.<sup>91</sup> However, jurisdictions with larger populations often did not invoke the national rules template.<sup>92</sup> Although the attorneys and law professors who drafted the original Federal Rules of Civil Procedure hoped these requirements might serve as a paradigm that jurisdictions would emulate, thus fostering uniform intrastate civil practice,<sup>93</sup> since the

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87. See FED. R. CIV. P. 83 (amended 1995); FED. R. CIV. P. 83 (amended 1985); 28 U.S.C. §§ 332 (d)(4), 2071 (1994).

88. See Tobias, *supra* note 85, at 556–68; see also Heiser, *supra* note 85, at 557–64.

89. See *id.*

90. See, e.g., John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 359 (2003); Robel, *supra* note 79, at 1484; see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992). One respected federal district court judge has astutely remarked: “[A]s a trial judge myself perhaps I will be forgiven for stating the point bluntly—nationally uniform rules protect . . . against the tyranny of any unduly willful renegades among us trial judges.” Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860 (1989).

91. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986).

92. See *id.*

93. See Subrin, *supra* note 85, at 2011–19; Tobias, *supra* note 85, at 536–39; see also Oakley, *supra* note 90, at 354–56, 384.

96. See *id.*

1980s, state reliance on the Federal Rules of Civil Procedure as a model has actually declined.<sup>96</sup>

In 2003, Professor John Oakley undertook a similar evaluation and ascertained that virtually no jurisdictions premised all their civil rules on the federal counterparts.<sup>97</sup> Professor Oakley also intimated that state departures could well expand over time.<sup>98</sup> More specifically and quite relevant to this article, Oakley found only one-third of the jurisdictions (which he determined substantially complied with the national paradigm during 1986) had adopted the 1993 revision in Federal Rule of Civil Procedure 11, even though eighty-five percent of the jurisdictions had previously instituted the 1983 version.<sup>99</sup> Oakley also suggested that decreasing respect for the national amendment process explained the phenomenon, and he voiced “confiden[ce] that the era of federal procedural hegemony ha[d] ended.”<sup>100</sup>

#### IV. SUGGESTIONS FOR THE FUTURE

The above considerations, especially the lessons denominated in Part III, prompt the articulation of several recommendations for the future. The major purpose of these recommendations is to restore and bolster the apparently flagging confidence in national rule revision at the federal district court level and in the procedural systems of the fifty states by improving the national amendment process itself or, at least, by responding to its most detrimental aspects.

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97. See Oakley, *supra* note 90, at 355, 383–84; see also Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400, 404–05 (2003) (suggesting ways to remedy inconsistency between federal and state civil procedure).

98. See *id.*

99. A mere ten percent of the fifty jurisdictions subscribed to the 1993 federal revision of Rule 26 that imposed automatic disclosure. See Oakley, *supra* note 90, at 382–83, 386.

100. See *id.* at 383; see also Oakley, *supra* note 81 (discussing the need to reform the federal rule revision process).

## A. The Federal System

### 1. The Rule Revisers

The federal rule revisers must seriously consider whether the frequency and number of amendments since the 1983 revision of Rule 11 were warranted (i.e., particularly by empirical data demonstrating a grave complication that necessitated treatment which an amendment would remedy). The prior analysis found that the rate and quantity of modifications with insufficient empirical justification have been detrimental and perhaps undermined a few changes' efficacy. For instance, the majority of the 1983 revisions expanded lawyers' duties and judicial control, partly through the imposition of sanctions for Rule 11 violations. However, minimal empirical data showed there was a troubling difficulty that Rule 11 would address.<sup>101</sup> Even though virtually no empirical data justified the nationwide application of this unconventional technique, the rule revisers broadly amended Rule 11 a decade later, when the 1983 amendment became controversial, as one feature of another substantial package that imposed mandatory disclosure.<sup>102</sup> The rule revisers promulgated a third large set of amendments only seven years thereafter, mainly addressing discovery provisions, with little empirical data indicating that the discovery regime experienced serious problems, or that the proposed modifications would treat any difficulties which the system imposed.<sup>103</sup> Therefore, the rule revisers

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101. *See supra* note 76.

102. The Advisory Committee did rely on experimentation with automatic disclosure by three federal districts, although this testing may have been insufficient to support the rather dramatic change instituted. *See supra* note 78 and accompanying text.

103. The Advisory Committee did commission the Federal Judicial Center and the RAND Institute for Civil Justice to perform discovery studies, which the Committee employed when deciding whether it should propose additional change in the discovery strictures. The Committee members relied in part on these evaluations' findings to prescribe the 2000 discovery amendments. *See* James S. Kakalik et al., Rand Institute for Civil Justice, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). The Committee's dependence on the studies and the revisions has been somewhat controversial. For example, the studies found discovery problematic in few, mainly complex, cases, but the

should prescribe amendments less often and institute fewer of them, while guaranteeing that valid empirical data underlie the changes. For example, the revisers might limit future alterations to situations in which experts thoroughly collect, assess, and synthesize empirical data that demonstrate a severe complication requiring treatment, which a federal rule modification can solve or temper without harmful side effects.

The revisers may want to implement some of this article's recommendations by adopting a withdrawn 1991 proposed change in Federal Rule of Civil Procedure 83.<sup>104</sup> This model represents a balanced approach that would facilitate district experimentation with promising local measures which depart from the federal rules because it authorizes courts to test these procedures when districts secure Judicial Conference approval.<sup>105</sup> If the experimentation showed that particular mechanisms functioned well, the revisers could then suggest national amendments with greater confidence about how the devices operated in practice.

## 2. The Federal District Courts

There are several changes which the ninety-four federal district courts might institute to enhance the national rule revision process. Most importantly, the districts should refrain from prescribing new local strictures that conflict with or repeat, and abrogate or modify the existing Federal Rules of Civil Procedure.<sup>106</sup> This would help to restore and foster more confidence in national amendments while enlarging respect for the federal rules as a national procedure code. The action would simplify, and perhaps decrease the cost of and

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amendments apply to substantially more lawsuits. See sources cited *supra* note 76.

104. See PRELIMINARY DRAFT, *supra* note 51, at 153. See generally Walker, *supra* note 76 (suggesting that the failure to collect valid information before implementing rule amendments is the chief deficiency in federal rules development).

105. See PRELIMINARY DRAFT, *supra* note 51, at 153. See generally Levin, *supra* note 76, at 1576 (discussing the 1991 proposal and how mechanisms for challenging local rules when they are inconsistent with federal rules have rarely been invoked); Tobias, *supra* note 79, at 1633-34 (arguing that future experimentation should follow the 1991 proposal to amend Federal Rule 83).

106. For sources that impose these duties on the federal districts and on Circuit Judicial Councils, the policymaking arms of the appeals courts, see *supra* note 87.

reduce delay in, local federal practice. Hence, these changes would limit the requirements that judges must interpret and apply and that lawyers and parties must find, comprehend, and satisfy.

Should the national rule revisers adopt the rescinded 1991 proposed alteration of Federal Rule 83, the trial courts might devise and suggest innovative experiments with measures that would facilitate national and local practice.<sup>107</sup> If the amendment entities do not subscribe to the withdrawn 1991 concept, districts should assemble and evaluate relevant material on difficulties with federal rules and local techniques as well as their potential solutions and should forward this information to the rule revisers for consideration in the national amendment process.

### 3. Miscellaneous Suggestions

Fundamental to the initiatives assessed will be continuing, and perhaps expanding, dependence on the Federal Judicial Center and the Administrative Office of the United States Courts (Administrative Office).<sup>108</sup> The federal judiciary's research and administrative arms can provide valuable expertise and assistance to the rule revisers and the district courts. For example, the Federal Judicial Center and the Administrative Office now possess or have access to considerable informative material.<sup>109</sup> They might collect, review and synthesize additional instructive empirical data that could support national rule amendment.<sup>110</sup> The entities may also help districts conform their local measures to federal analogues or structure proposals for experimentation under the withdrawn 1991 recommended change to Rule 83, should this promising mechanism be implemented.<sup>111</sup>

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107. See *supra* notes 102–03 and accompanying text.

108. See *supra* note 11 and accompanying text (providing authorization for the Federal Judicial Center and the entity's duties); 28 U.S.C. §§ 601–13 et seq. (1994) (authorizing the Administrative Office as the administrative arm of the federal courts and prescribing the entity's duties).

109. Illustrative is material regarding experimentation under the 1990 Civil Justice Reform Act and with automatic disclosure. See *supra* notes 79, 86, 100 and accompanying text.

110. Illustrative are the Federal Judicial Center's collection of empirical data which supported Rule 11's 1993 revision and the discovery provisions' 2000 amendment. See *supra* notes 25, 31–37, 78, 101 and accompanying text.

111. See *supra* notes 102–04 and accompanying text.



### B. *The States*

Numerous propositions afforded in this article that implicate the federal regime apply with equal force or by analogy to the states. Most importantly, the fifty jurisdictions must seriously reconsider whether they should have deviated from the Federal Rules of Civil Procedure as a model following the 1983 amendment. This phenomenon was epitomized by the unwillingness or reluctance to promulgate state counterparts embodying the 1993 revision of Rule 11.<sup>112</sup> The growing disuniformity between federal and state civil procedures imposes expense and potentially wastes time in intrastate practice because it requires attorneys and parties to learn about, understand and comply with disparate federal and state mandates.<sup>113</sup>

These ideas mean that the fifty jurisdictions' rule amendment entities (which are similar to the federal revisers) should do the following: (1) base civil procedures as much as possible on federal strictures; (2) eschew additional, and eliminate or modify current, state requirements that are inconsistent with federal ones; and (3) at least adopt Federal Rule 11's 1993 amendment, which seemed to treat the 1983 version's worst features, namely chilling effects and satellite litigation.<sup>114</sup> Insofar as trial courts in the fifty jurisdictions apply local measures that depart from federal or state civil procedures, the judges must similarly refrain from prescription of new ones and should abolish or change existing techniques.

If rule revision entities and courts in the jurisdictions undertake efforts to implement the recommendations afforded, they should consult state institutions, which resemble the Federal Judicial Center and the Administrative Office, when available, as well as the two federal entities. The National Center for State Courts might correspondingly furnish much assistance as a valuable repository of,

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112. See *supra* note 97 and accompanying text.

113. See, e.g., John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989); Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615 (2002). See generally Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595 (2002).

114. See *supra* notes 50–51, 54–55, 58–60 and accompanying text. But see Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002).

and clearinghouse for, empirical data on the fifty jurisdictions' civil procedure systems.

#### V. CONCLUSION

The 1983 amendment to Federal Rule of Civil Procedure 11 was the most controversial revision in the half-century history of the federal rules. Counsel and litigants overused and abused the revision and judges inconsistently effectuated it partly because the amendment was grounded on minimal empirical data. The 1983 modification has undermined confidence in the national rule amendment process. If the federal rule revisers and district courts, as well as their state analogues, follow the suggestions offered, they might restore confidence in, and improve, the process.