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Subcommittee on the Constitution  
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## INTRODUCTION

Chairman Franks, Vice-Chairman Pence, Ranking Member Nadler and members of the Committee: Thank you for inviting me to testify today on H.R. 966, the Lawsuit Abuse Reduction Act.

The proposed legislation would not effectively address the problems asserted to justify its passage. Worse still, a vast body of empirical evidence relating to the 1983 version of Rule 11 of the Federal Rules of Civil Procedure—the model on which this bill is based—strongly suggests that the legislation’s passage would negatively impact the administration of justice. Indeed, there is a remarkable degree of agreement among judges, lawyers, legal scholars and litigants across the political spectrum that the 1983 amendment of Rule 11 was one of the most ill-advised procedural experiments ever tried. In proposing to disinter this ignominious rule, the legislation ignores all that we have learned from that failed experiment. Addressing costs and delays is everyone’s concern but, as prior experience shows, the proposed legislation would substantially worsen those costs and delays, not lessen them. For those concerned about improving the functioning of the civil litigation system, the sounder course is to follow the advice given by a former Solicitor General of the United States (about another recent legislative proposal) and “permit the Judicial Conference of the United States to continue to monitor the situation and respond if need be through the time-honored judicial rulemaking process established by Congress.”<sup>1</sup> Put another way, this Committee should allow judicial rulemakers to continue to do their work and explore, instead, more productive ways to improve the administration of justice.

By way of introduction, I am the George Butler Research Professor of Law at the University of Houston Law Center. My scholarship and teaching interests are focused on civil procedural law and the means by which that law influences judicial access. In addition, I am currently engaged, among other projects, in work examining how the law regulates lawyer conduct. One of my longstanding goals as a legal scholar has been to encourage legislators and courts toward greater clarity in thinking about what policy purposes ought to animate jurisdictional and procedural law, and how those objectives can best be accomplished. I have previously been invited to appear before another subcommittee of the House Judiciary Committee. On that occasion I testified with regard to H.R. 5281, the Removal Clarification Act of 2010. Thereafter, citing my comments at the hearing, the Chairman subsequently introduced a revised version of the bill that was passed by the House of Representatives. I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on, the position of the University of Houston.

On Wednesday, March 8, 2011 I was formally invited to testify before this Committee and I have submitted this written statement in advance of my oral remarks at the hearing. Because of the short time I had to prepare this statement, I have prepared a bibliography of sources at the end of my statement. I commend these sources to the Committee as a supplement to my written statement and remarks at the oral hearing.

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<sup>1</sup> Statement of Gregory G. Garre, Hearing on “Has the Supreme Court Limited Americans’ Access to Courts?” before the Senate Comm. on the Judiciary, 111<sup>th</sup> Cong., December 2, 2009, at 2.

I. FEDERAL RULE OF CIVIL PROCEDURE 11: FROM ITS ORIGINS TO ITS AMENDMENT IN 1983

To understand both the limitations with and serious dangers of enacting this Bill, it is instructive to turn back to the context in which Rule 11 was amended in 1983. The 1983 version of Rule 11 came as part of a package of amendments to the FRCP. Rulemakers intended the various changes to reduce unnecessary costs and abuses then perceived to exist in civil litigation in the federal courts. That there was little credible evidence either to support the need for these rule reforms or to justify use of the sanctions rule to manage litigation cost and abuse hardly gave pause to reformers. While we know now that the 1983 changes fundamentally and negatively impacted civil litigation practice in the federal courts, it is sobering to reflect that the proposed amendments to Rule 11 came in an empirical vacuum, as many scholars have noted.<sup>2</sup> More sobering still is that they came despite contemporary warnings of the dire consequences that would likely follow the rule's amendment.

From its original adoption in 1938, Rule 11 has always required that lawyers sign the papers they file in federal court, but before 1983 the rule was rarely used to regulate lawyer conduct. One commentator counted less than twenty reported Rule 11 decisions between the years 1938 to 1976, and even fewer occasions when sanctions were actually awarded.<sup>3</sup> Concerned by the infrequency with which the rule was utilized to regulate lawyer conduct, as well as by a perception that litigation costs and abuses were spiraling upward, rulemakers were catalyzed to act. The amended version of Rule 11 in 1983 was made applicable to every "pleading, motion and other paper" and it provided that the signature of a lawyer (or a pro se party) would constitute a certificate that the filed "to the best of the signer's knowledge, information and belief, "formed after reasonable inquiry", that the paper filed was "well grounded in fact and is warranted by existing law (or a good faith argument for the law's extension modification or reversal). Certainly, one of the most significant revisions in 1983 was to make the imposition of sanctions mandatory upon a finding the rule had been violated, a major departure from the discretionary language of the original version.

Before the 1983 amendments to Rule 11 were enacted, a number of critics prophesized that the proposed changes would result in satellite litigation over how to correctly interpret the new rule. From where we sit today, we know that these dire predictions turned out to be true, exceeding even the critics' worst fears.

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<sup>2</sup> There has since been extensive research calling into doubt the perceptions of the problems that were said to justify the 1983 amendments. *See, e.g.*, Marc Galanter, *The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days*, 1988 WISC. L. REV. 921 (1988); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83-90 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109-12 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992). *See also generally* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993).

<sup>3</sup> Peter A. Joy, *The Relationship Between Civil Rule 11 & Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 765-66 (2004), in *Symposium: Happy (?) Birthday Rule 11*, LOY. L.A. L. REV. (Winter 2004)

## II. WHAT WE KNOW OF THE 1983 RULE 11 EXPERIENCE

“Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11,” observed Georgene Vairo (Loyola Los Angeles School of Law), a legal scholar at the forefront of Rule 11 study for the last quarter century, at the outset of her much-relied upon 2004 treatise.<sup>4</sup> As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been nine major empirical studies of the 1983 version of Rule 11.<sup>5</sup> Several books, a great many law review articles, and a myriad of legal and lay newspaper stories have also examined it.<sup>6</sup> Of course, there were also literally thousands of reported judicial opinions on the subject, though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience.

### A. The 1983 version of the rule produced an avalanche of unwelcome satellite litigation.

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated over 7,000 reported sanctions decisions. And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfs the reported figures, as the country’s most respected legal practitioner on the subject, Gregory P. Joseph has emphasized in his acclaimed treatise.<sup>7</sup> Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found definitive proof that the reported cases were far from the entire story. The task force discovered that in the Third Circuit less than 40% of the Rule 11 decisions were published.<sup>8</sup> The contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendment to Rule 11 went into effect (more on that, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the new rule, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer’s (or both lawyers’) alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable. And on and

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<sup>4</sup> GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES* 2 (A.B.A. 2004).

<sup>5</sup> See authorities cited in Appendix: Bibliography of Additional Sources to Consult, Reports, Surveys and Studies (at the end of this statement).

<sup>6</sup> See authorities cited in Appendix: Bibliography of Additional Sources to Consult, Books; Law Review Symposia and Articles.

<sup>7</sup> GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (3<sup>rd</sup> ed. 2000 & Supp. 200x).

<sup>8</sup> *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (American Judicature Society 1989) (Stephen Burbank, principal author) (hereinafter “THIRD CIRCUIT TASK FORCE REPORT”).

on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Georgene Vairo summarized the “avalanche” of satellite litigation unleashed by the 1983 amendment:

Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.<sup>9</sup>

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers’ intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule’s strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that the frequent award of monetary damages was producing, were greatly troubling developments. *See, e.g.,* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017-18, 1020 (1988) (observing that the 1983 version of Rule 11 has “spawned” an “excessive amount of litigation activity” and that while the drafters warned about this “satellite litigation” nevertheless the “avalanche of rule 11 cases suggests that the warning is being ignored” and separately critiquing courts that regard the rule as having a “straight fee-shifting” purpose).

B. The 1983 Rule was applied inconsistency and inequitably.

1. Civil rights and employment discrimination plaintiffs, in particular, were impacted the most severely under the 1983 version of Rule 11.

The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the rule’s existence. In a study conducted in 1988, researchers with the Federal Judicial Center found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 28% of the time, well out of proportion to the percentage of such cases filed.<sup>10</sup> Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time in which sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.<sup>11</sup>

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<sup>9</sup> Georgene M. Vairo, *Rule 11 and the Profession*, 67 *FORD. L. REV.* 589, 598 (1998).

<sup>10</sup> THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (Fed. Jud. Ctr. 1988) at 74 (noting, *e.g.*, that civil rights cases accounted for 22.3% of the published Rule 11 cases, but comprised only 7.6% of all case filings) (hereinafter “FJC 1988 Study”).

<sup>11</sup> VAIRO, *RULE 11 SANCTIONS*, *supra* note 4, at 50 & n.68.

One reason why civil rights claimants and other resource-poor claimants, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create “in cases involving litigants with greatly disparate financial resources.”<sup>12</sup> Further to this point, the 1993 Advisory Committee Notes make reference to the problems posed by cost-shifting for “an impecunious adversary.”

The 1983 experience also reflects that judges disproportionately enforced the prefiling factual investigation requirement of the rule against civil rights plaintiffs and their lawyers.<sup>13</sup> In many of these decisions, sanctions were awarded even though factual information vital to asserting a claim was in the sole possession of the defendant. There are many illustrations of this perverse problem, as Professor Carl Tobias (University of Richmond School of Law) carefully documented in a series of penetrating articles about the Rule’s disparate impact on civil rights claimants.<sup>14</sup> Professor Tobias recognized that lack of access to proof was a problem that bedeviled these claimants especially:

Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.<sup>15</sup>

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the Rule. One illustration of this is *Johnson v. U.S.*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had ‘committed past offenses or manifested previous aberrant behavior that his employers should have detected.’ ... Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda's personnel file, is in the government's control, but it usually would be regarded as quasi-confidential

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<sup>12</sup> See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 Iowa L. Rev. 1775, 1787 (1992) (quoting letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee to Judge Robert E. Keeton, Chairman, Standing Committee 2-5 (May 1, 1992)).

<sup>13</sup> See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buff. L. Rev. 485, 493-94 (1989).

<sup>14</sup> See, e.g., *id.* at 493-94 and 495-96; see also The 1993 Revision of Federal Rule 11, 70 Ind. L.J. 171 (1994); *Environmental Litigation and Rule 11*, 33 Wm. & Mary L. Rev. 429 (Winter 1992); *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855 (1992); *Rule Revision Roundelay*, 1992 Wis. L. Rev. 236 (1992); *Certification and Civil Rights*, 136 F.R.D. 223 (1991); *Rule 11 Recalibrated in Civil Rights Cases*, 36 Vill. L. Rev. 105 (1991); *Reassessing Rule 11 and Civil Rights Cases*, 33 How. L.J. 161 (1990); and *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989).

<sup>15</sup> *Id.* at 495-96.

and unavailable to an outsider. As a practical matter, therefore, plaintiffs' attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.<sup>16</sup>

Beyond the Catch 22 problem of "no information until litigation, but no litigation without information," a still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rule, but for reasons that are perhaps still not entirely well understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.<sup>17</sup> As discussed below, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule which ameliorates at least some of the harsh effects of the rule's inherent indeterminacy.

Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as "novel," the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate pre-filing investigations. What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule's amendment.<sup>18</sup>

Further, and relatedly, the empirical evidence also suggests reason to be concerned that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (approximately 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11 they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.<sup>19</sup> Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that "whether it can be classified as chilling or not, lawyers reported a cautionary effect of Rule 11."<sup>20</sup>

A last, related lesson from the 1983 experience with Rule 11 to mention here is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule

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<sup>16</sup> Johnson v. U.S. 788 F.2d 845, 856 (2d. Cir.) (Pratt, J., dissenting), *cert. denied*, 479 U.S. 914 (1986).

<sup>17</sup> VAIRO, RULE 11 SANCTIONS, *supra* note 4, at 12-14; *see also* Tobias, *supra* note 13 at 495.

<sup>18</sup> *See generally* 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, 11 (2002); *see also* Tobias, *supra* note 13 at 492-93.

<sup>19</sup> Lawrence C. Marshall, Herbert M. Kritzer, & Frances Kahn Zemans, The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992) (hereinafter "AJS 1992 Study").

<sup>20</sup> FJC 1988 Study, *supra* note 10, at 167.

further exacerbated the rule's discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of "hindsight bias," as it is often called. In his study of Rule 11 for the Federal Judicial Center, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the merits, "there may be a tendency to merge the sanctions issue with the merits," and that "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."<sup>21</sup> Another keen observer, Professor Charles Yablon (Benjamin N. Cardozo School of Law), made the same point some years later:

A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.<sup>22</sup>

"Like a reader who already knows how the mystery turns out," Yablon analogized, "she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge's view of what constitutes 'reasonable inquiry.'"<sup>23</sup> By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendment and, specifically, the addition of the safe harbor provision in Rule 11(c).

2. Plaintiffs were targets of sanctions far more often than defendants and were sanctioned at strikingly higher rates.

The evidence also shows that under the 1983 version of Rule 11 plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Even leaving to one side possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study by the Federal Judicial Center found that plaintiffs were the target of the sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).<sup>24</sup> Of the reported Rule 11 cases, a violation was found 57.8% of the time.<sup>25</sup> However, the 1988 FJC study found that plaintiffs were more frequently ruled to be in violation of Rule 11 (46.9%) than defendants

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<sup>21</sup> FJC 1988 Study, *supra* note 10, at 87-88.

<sup>22</sup> Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11*, 37 Loy. L.A. L. Rev. 599 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>23</sup> *Id.*

<sup>24</sup> FJC 1988 Study, *supra* note 10, at 160, 175 & n.153.

<sup>25</sup> *Id.*

(10.9%).<sup>26</sup> The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).<sup>27</sup> The starkest disparities were revealed by a later study conducted by the Federal Judicial Center in 1991 which looked both reported and unreported cases in five different judicial districts.<sup>28</sup> Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below, which is drawn from the 1991 FJC findings,<sup>29</sup> graphically illustrates the disparities:

District 1		District 2		District 3		District 4		District 5	
P	D	P	D	P	D	P	D	P	D
80%	7%	77%	23%	81%	9%	80%	20%	61%	38%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version of the rule was applied.

C. The 1983 version of the rule increased costs and delays by encouraging Rambo-like litigation tactics.

Yet another unfortunate result of the 1983 amendment is that it increased costs and delays by encouraging “the Rambo-like use of Rule 11 by too many lawyers,” as Professor Georgene Vairo explained.<sup>30</sup> Similarly, in their treatise on the Law of Lawyering, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it “has been a major contributing factor in the rise of so-called ‘Rambo tactics’ and the breakdown of civility and professionalism.”<sup>31</sup>

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators “to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court’s primary function.”<sup>32</sup> Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that “[t]he amendment of Rule 11 ... has called forth a flood of ... collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves.”<sup>33</sup> The sentiment was widely felt. The Federal Judicial Center’s 1991 study found that more than

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<sup>26</sup> *Id.*

<sup>27</sup> THIRD CIRCUIT TASK FORCE REPORT, *supra* note 9, at 65.

<sup>28</sup> ELIZABETH C. WIGGINS & THOMAS E. WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Fed. Jud. Ctr. 1991) (hereinafter “FJC 1991 Study”).

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Georgene M. Vairo, Rule 11 and the Profession, 67 Fordham L. Rev. 589, 647 (1998).

<sup>31</sup> GEOFFREY HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 3.1: 205 (Supp. 1994).

<sup>32</sup> *Morandi v. Texport Corp.*, 139 F.R.D. 592, 594 (S.D.N.Y. 1991).

<sup>33</sup> *Hot Locks, Inc. v. Ooh La La, Inc.*, 107 F.R.D. 751, 751 (S.D.N.Y. 1985).

half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.<sup>34</sup> The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.<sup>35</sup>

In light of the rulemakers' professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merits resolution of cases.

D. The 1983 version of Rule 11 was not an effective means for reducing cost and delay and abusive litigation activity.

Finally, and independently of the unintended consequences the rule's amendment produced, the empirical evidence also shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay and abuse problems that prompted reformers to act. A 1991 Federal Judicial Center study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.<sup>36</sup> The Federal Judicial Center's 1995 study of Rule 11 similarly found that most federal judges and lawyers opposed to returning Rule 11 to its 1983 version.<sup>37</sup> As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs, delays and addressing abusive litigation conduct. Instead, what judges and others in the profession report is that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost and delay and groundless litigation.

### III. ABANDONMENT OF THE 1983 VERSION AND ITS REPLACEMENT BY THE 1993 AMENDMENTS TO RULE 11

In the years after the 1983 amendments of Rule 11 went into effect, criticisms of it grew in volume and intensity. By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the Federal Judicial Center to evaluate the rule. Then, in the summer of 1990, the committee put out a "Call for Comments" from the bench and bar. That produced more criticisms and suggestions than the committee had ever received before in its half-century existence. One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case. A second frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges. A third and fourth theme echoed over and over again was, respectively, that the rule

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<sup>34</sup> FJC 1991 Study, *supra* note 28 at 9-10.

<sup>35</sup> AJS 1992 Study, *supra* note 19, at 964.

<sup>36</sup> FJC 1991 Study, *supra* note 28.

<sup>37</sup> John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 2 (Fed. Jud. Ctr. 1995) (hereinafter "FJC 1995 Study").

disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.<sup>38</sup>

In February 1991, the committee held public hearing in which testimony from judges, lawyers and academics was taken. The criticisms had a powerful effect on the committee, which promptly issued an interim report that concluded that “in light of the intensity of criticism” the process of possible revisions should not be delayed.”<sup>39</sup> The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, “have sufficient merit to justify considering specific proposals for change.” Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects the 1983 version of Rule 11 impacted plaintiffs more frequently and severely than defendants; all too often resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* “cost shifting” rule, a result that incentivized lawyers to abuse the sanctions rule; occasionally proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary; disincentivized lawyers from backing off of positions they could no longer support; and sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.<sup>40</sup>

In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule but instead sought “to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than Rule 11 motions.”<sup>41</sup> Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent. Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation. This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the “safe harbor” provision which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions (or from the various other rules, statutes and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation). Nevertheless, the addition of the safe harbor has been credited with successfully reducing the

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<sup>38</sup> See generally VAIRO, RULE 11 SANCTIONS, *supra* note 4, at 15-20.

<sup>39</sup> *Id.* (citing sources).

<sup>40</sup> *Id.*

<sup>41</sup> Letter from Leonidas Ralph Mecham to Hon. F. James Sensenbrenner, Jr., July 9, 2004 at 2 (addressing a prior version of the legislation now before this Committee).

incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.<sup>42</sup> The addition of the safe harbor is also significant because it fundamentally alters one key problem observed with the 1983 version of Rule 11: namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, “parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”<sup>43</sup>

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well, and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.<sup>44</sup> At the same time, this drop off in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrate that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. §1927 and pursuant to the court’s inherent powers.<sup>45</sup> Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred §1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.<sup>46</sup> This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary law are available for addressing wrongful lawyer conduct. Finally, as I discuss further in the concluding section, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation and are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The Federal Judicial Center’s 1995 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the rule.<sup>47</sup> Then a 2005 survey conducted by the Federal Judicial Center even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.<sup>48</sup> More than 80% of the 278 district judges surveyed shared the view that “Rule 11 is needed and it is just right as it stands now.” An even higher percentage (87%) preferred the existing rule to the

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<sup>42</sup> Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11*, 37 Loy. L.A. L. Rev. 599 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>43</sup> Advisory Committee Note, 1993 Amendment, *reprinted in* 146 F.R.D. 577, 591 (1993).

<sup>44</sup> *See generally* VAIRO, RULE 11 SANCTIONS, *supra* note 4, at 36-37.

<sup>45</sup> Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. 1927 and the Court’s Inherent Power*, 37 Loy. L.A. L. Rev. 645 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>46</sup> *Id.* at 661 (Table 1).

<sup>47</sup> *See supra* note 37.

<sup>48</sup> David Rauma & Thomas E. Willging, Report of a Survey of United States District Judges’ Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure (Fed. Jud. Ctr., 2005) (hereinafter “FJC 2005 Report”).

1983 version. Equally strong support (85%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation. Rather than citing to specific sections of that report, I include below a link for the Committee to access these, and many other relevant, findings from that 2005 survey.<sup>49</sup>

### CONCLUDING COMMENTS AND OBSERVATIONS

There are many lessons to be drawn from the experience of the 1983 version of Rule 11. Perhaps one of the most important is that “premissing modification [of Rule 11] 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 Professors Margaret Sanner and Carl Tobias have observed.<sup>50</sup> Instead of acting based on anecdote, this Committee has the opportunity to decide what course to follow in light of the extensive study and examination that has been done of the 1983 version of Rule 11.

That experiential evidence provides powerful reasons to anticipate that by returning to a model similar to the 1983 version of Rule 11 the proposed legislation would not address effectively the problems asserted to justify its passage. Even worse, the vast body of empirical evidence strongly suggests that the bill’s passage would negatively impact the administration of justice by again making it likely that Rule 11 would be abused. If this legislation is enacted, the 1983 experience shows that there is a real danger that Rule 11 would again be treated as a compensatory, fee-shifting rule, and thus a trigger for much of the same kind of unwelcome, inefficient and frivolous satellite litigation over sanctions that plagued the 1983-1993 decade. It is difficult to see how anyone who is concerned over litigation costs and abuses could support legislation that is likely lead to substantially greater litigation costs, abuses and delays.

Perhaps the direst concern raised by the prior experience with the rule is that the legislation, if enacted, may again usher in inconsistent and inequitable applications of the rule, with similar discriminatory effects to be felt by the same civil rights and employment discrimination claimants who suffered the most under the 1983 version of the rule.

Any decision by this committee to repeat the same mistake of the 1983 judicial rules committee in assuming a need for the proposed legislation is lamentable. That is especially so because there is no credible proof that problems with groundless litigation have gotten worse as a result of the 1993 amendments to Rule 11, despite bald assertions to the contrary.<sup>51</sup> Instead, the

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<sup>49</sup> The report is available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/\\$File/Rule1105.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/$File/Rule1105.pdf).

<sup>50</sup> Margaret L. Sanner and Carl Tobias, *Rule 11 and Rule Revision*, 37 *Loy. L.A. L. Rev.* 573, 588 (2004), in *Symposium: Happy (?) Birthday Rule 11*, *Loy. L.A. L. Rev.* (Winter 2004).

<sup>51</sup> Of course, much of the problem with this discussion is that those who urge that we regressively return to the 1983 experience under Rule 11 make, with the same irresponsible reliance only on anecdote, wildly exaggerated claims regarding groundless litigation. Even leaving aside all that has been said about the failure of these regressive reformers to show that the 1983 version of the rule would adequately ameliorate these perceived problems, the most reliable evidence gathered by neutral observers does not support the assertions of rampant litigation costs and abuse that are frequently asserted.

Consider, as one important example, the recent closed-case study by the Federal Judicial Center of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. Emery G. Lee

continued imposition of sanctions against lawyers under the current Rule 11—as well as pursuant to other sanctions rules and statutes, and the judges’ inherent powers—contradicts the assertion that existing sanctions law is inadequate for regulating lawyer conduct in the federal courts.

Moreover, and even more critically, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committees. It remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules. That conference exemplifies the Advisory Committee’s serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference, as its chair subsequently put it, “as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation.”<sup>52</sup> The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The Report of the Advisory Committee following the conference makes this point:

Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.<sup>53</sup>

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice),

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III and Thomas E. Willging, Federal Judicial Center, *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (2009). The researchers intentionally drew their sample to not include the kinds of cases in which discovery is rarely used. Instead, they sought to include every case that had lasted for at least four years and every case that was actually tried. The purpose of drawing the sample this way was to look at cases in which one would reasonably predict there would have been significant discovery. What the study showed, however, is that plaintiffs reported \$15,000 as the median total costs in cases that had at least some discovery. The corresponding figure for defendants was \$20,000. These findings are consistent with a prior FJC study completed in 1997.

There are many other high-quality studies to which one may refer, including the 2010 study by the nonpartisan National Center for State Courts, as well as to statistics reported by the government’s Bureau of Justice Statistics regarding case filings in both state and federal court. Time and space do not permit further discussion of this point. It is enough to say here that while problems with costs and delays in federal court remain a subject of reasonable discussion, the best empirical evidence provides no basis on which to credit the greatly exaggerated assertions often heard from regressive reformers.

<sup>52</sup> Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, at 1.

<sup>53</sup> *Id.* at 5.

though even here most participants recognized that the existing procedural framework was fundamentally sound.<sup>54</sup> What may be most relevant, for present purposes, is that although the two-day conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for strengthening Rule 11 along the lines contemplated by the proposed legislation.

The lack of any serious discussion at the conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee’s decision in 1983 was an “ill-considered, precipitous step,” as Professor George Cochran once succinctly described it.<sup>55</sup> I urge this Committee not to take the same ill-considered, precipitous step backward in time to that unfortunate period.

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<sup>54</sup> *Id.* (“Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.”).

<sup>55</sup> George Cochran, *The Reality of “A Last Victim” and Abuse of the Sanctioning Power, Rule 11 and Rule Revision*, 37 Loy. L.A. L. Rev. 691, 692 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

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