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Are an Empty Head and a Pure Heart Enough? Mens Rea Standards for Judge-Imposed Rule 11 Sanctions and Their Effect on Attorney Action

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I. INTRODUCTION

"In her wildest dreams, Barbie could not have imagined herself in the middle of Rule 11 proceedings."[1] However, in 2002, Mattel's Barbie Doll found herself in the center of "acrimonious litigation."[2] Attorney James Hicks brought suit on behalf of Harry Christian, claiming that the Cool Blue Barbie infringed on the Christian Claudene Doll's copyright.[3] Hicks, however, had failed to discover that Mattel designed Cool Blue Barbie six years before Christian's Claudine Doll.[4] In light of this egregious error, the Ninth Circuit held that the district court did not abuse its discretion in finding Hicks' complaint frivolous under Rule 11.[5] Barbie breathed a sigh of relief—Rule 11 effectively halted a frivolous claim and held an attorney accountable for his lapse.

"In our adversary system, some lawyers will inevitably be tempted to act unethically to further their clients' interests. Federal Rule of Civil Procedure 11 places primary responsibility for policing litigation related lapses in the hands of district court judges, and confers on them great flexibility and discretion."[6] Despite the Rule's current importance, Federal Rule of Civil Procedure 11 has modest origins. Initially, the Rule required simply that attorneys sign all pleadings, motions, and papers filed with the court.[7] In response to systemic abuses of the litigation process, the Supreme Court amended the Rule in 1983 to serve a stronger policing function.[8] Rule 11's 1983 language required that attorneys make reasonable inquiries into facts and law before filing, and it leveled sanctions against those attorneys who failed to do so.[9] This effort to bolster Rule 11's force, however,

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1. Christian v. Mattel, Inc., 286 F.3d 1118, 1121 (9th Cir. 2002).

2. *Id.*

3. *Id.*

4. *Id.* at 1123 (finding that Mattel copyrighted its "Cool Blue" doll six years before Christian copyrighted the Claudene head sculpture).

5. *Id.* at 1121.

6. Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 132 (2006).

7. The original Rule 11 required that "[e]very pleading of a party represented by an attorney . . . be signed by at least one attorney of record in his individual name, whose address shall be stated," and that "[a] party who is not represented by an attorney . . . sign his pleading and state his address." FED. R. CIV. P. 11 (1938) (amended 1983).

8. *See* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1009-12 (1999) (explaining that the pre-1983 Rule 11 had not been effective in deterring abuses of the litigation process). For a background discussion of the rule-making process, see generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-19 (2002).

9. Hirt, *supra* note 8, at 1009-10.

swung too far in the opposite direction; after the 1983 amendments, Rule 11 spawned a "cottage-industry" of sanction litigation.[10] To quash excessive claims and endless litigation, the Court amended Rule 11 once more in 1993.[11]

Today, the Rule's tripartite structure highlights its three functions.[12] Rule 11(a) requires attorneys to sign all papers filed with

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10. *Id.* at 1010 ("Some commentators criticized the Rule as generating a veritable 'cottage industry' of sanctions practice, spawning satellite litigation that was encouraged by the Rule's provisions, which authorized litigants to recover attorneys' fees for pursuing sanctions motions."). *But see* George Cochran, *Happy (?) Birthday Rule 11: The Reality of "A Last Victim" and Abuse of the Sanctioning Power*, 37 LOY. L.A. L. REV. 691, 691-92 (2004) (arguing that attorney charges of Rule 11 inundating courts with "frivolous lawsuits" remain unproven).

11. Hirt, *supra* note 8, at 1010-12. The Rule was again amended on December 1, 2007; however, these changes are merely stylistic. *See* FED. R. CIV. P. 11 advisory committee's notes (2007) ("The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."). To maintain consistency with the cases cited herein, this Note continues to reference the 1993 version of Rule 11.

12. For reference, the Rule is reproduced here *in toto*:

> Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions
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> (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.
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> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
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> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (3) the 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; and
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> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
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> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> (1) *How Initiated.*
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> (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or

the court.[13] Rule 11(b) prohibits attorneys from submitting filings made with "any improper purpose," offering " 'frivolous' arguments," or asserting "factual allegations without 'evidentiary support' or the 'likely' prospect of such support."[14] Finally, Rule 11(c) allows the court, either on its own motion or on an opposing party's, to impose "appropriate" sanctions on attorneys who have violated 11(a) or (b).[15] Significantly, the 1993 amendments included a "safe harbor"—if an opposing party seeks sanctions, it must first serve its Rule 11 motion on the adversary without filing the motion or otherwise bringing it to the attention of the court.[16] The served party has twenty-one days to fix the problem, and disputes come before the court only if a party refuses to correct or withdraw a disputed filing within the twenty-one days.[17] Only if an attorney refuses to correct a dispute in this time and

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presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

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

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11.

13. FED. R. CIV. P. 11(a).

14. Young v. City of Providence, 404 F.3d 33, 39 (1st Cir. 2005) (quoting FED. R. CIV. P. 11(b)).

15. FED. R. CIV. P. 11(c).

16. *See id.*; *see also Young*, 404 F.3d at 39 (discussing the difference between party-initiated and court-initiated Rule 11 motions in terms of the "safe harbor" provision).

17. FED. R. CIV. P. 11(c); *Young*, 404 F.3d at 39.

only upon a finding of "objective unreasonableness"—"i.e., liability may be imposed if the lawyer's claim to have evidentiary support is not objectively reasonable"[18]—may courts issue sanctions. This solution allows attorneys to self-police, easing the burden of excessive Rule 11 litigation on courts.

Importantly, Rule 11 permits judges to initiate sua sponte sanction proceedings. However, these sanction proceedings frequently lack the twenty-one day "safe harbor" provided for attorney-initiated sanctions, and courts disagree as to the mens rea standard an attorney must exhibit to warrant judge-initiated sanctions. In 2003, the Second Circuit held that where there is no twenty-one-day "safe harbor," the appropriate standard for judge-initiated sanction invocation should be "subjective bad faith."[19] That is, as long as a judge determined that an attorney acted in good faith, a district court judge could not issue sanctions—even if a judge classified the attorney's behavior as objectively unreasonable. To bolster this interpretation, the Second Circuit drew on the "Advisory Committee's expectation that court-initiated sanction proceedings will ordinarily be used only in situations that are 'akin to a contempt of court.' "[20] While the Second Circuit is currently the only court to adopt this "subjective bad faith" standard, several other courts appear to be moving in that direction.[21] The First Circuit, however, is among those courts rejecting the Second Circuit's bad faith requirement. In *Young v. City of Providence*, the court determined that the liability standard for judge-initiated sanctions is the same as that for attorney-initiated sanctions—objective unreasonableness.[22] The *Young* court specifically

18. *In re* Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003) (citing Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 96 (2d Cir. 1997)).

19. *Id.* at 87.

20. *Id.* at 90. Reference to two cases illustrates the difference between "good faith" and "bad faith." An example of an attorney's bad faith actions can be found in *MHC Investment Co. v. Racom Corp.*, where the court found that an attorney deliberately filed motions to impede the trial's progress. 323 F.3d 620, 621-27 (8th Cir. 2003). An example of an attorney's negligent but "good faith" action can be found in *In re Pennie & Edmonds LLP*, where the attorneys relied on their client's word that he had not fraudulently created documents. 323 F.3d at 87. There, the court found that while the attorneys may have believed their client when logic dictated otherwise, they had not deliberately misled the court. *Id.*

21. *See* Sherry, *supra* note 6, at 137 (interpreting Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251 (11th Cir. 2003); MHC Investment Co. v. Racom Corp., 323 F.3d 620 (8th Cir. 2003); and Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002), as adopting heightened standards of review for sanctions imposed sua sponte).

22. 404 F.3d at 40 (noting that the specific purpose of the 1993 revision was to reject a bad faith requirement); *see also* Jenkins v. Methodist Hosps. of Dallas, 478 F.3d 255, 264 (5th Cir. 2007) ("[A]n attorney's good faith will *not*, by itself, protect against the imposition of Rule 11 sanctions.").

noted that "nothing in the language of Rule 11(c) says that, if the court initiates the inquiry, something more than a Rule 11(b) breach of duty is required."[23]

The distinction between these standards is no small issue. Rule 11 sets the bar for attorney behavior, and confusion among lower courts results in confusion among attorneys. Judges worry that too strict an adherence to the Rule will chill effective advocacy;[24] however, judges must remain cognizant that too forgiving an interpretation will open the floodgates to attorney abuses.

Notwithstanding the Rule's importance and the 1983 and 1993 amendments, the appropriate attorney liability standard for judge-issued sanctions remains elusive.[25] Should Rule 11 punish and deter knowing rule violations or aim to deter attorney carelessness? This Note contends that judges must have the discretion to deter negligence as well as punish bad faith—to decide otherwise permits attorney behavior that is harmful to the profession's reputation and discourages law firms from seeking the necessary institutional reforms to deter careless error.

Of course, there are multiple approaches to strengthening Rule 11's force: for example, courts could apply harsher sanctions or sanction more frequently. This Note, however, argues that interpreting Rule 11 broadly to allow judges to sanction both negligence and bad faith is the easiest and most effective way to strengthen the rule. The Note draws on recent tort research indicating that it is both desirable and possible to deter attorney negligence. Moreover, federal judges are especially well-suited to police the profession because of their unique position in our legal system. As such, the Advisory Committee or the Supreme Court should adopt the First Circuit's "objective unreasonableness" standard.

In order to put Rule 11's current incarnation in perspective, Part II focuses on the Rule's history and highlights the Advisory Committee's continued struggle to articulate liability standards. Part III analyzes the Circuits' diverse interpretations of the liability standard for judge-initiated sanction proceedings. Part IV argues that Rule 11 should police both bad faith and negligence and draws on

23. *Young*, 404 F.3d at 39.

24. *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 587-88 (9th Cir. 1987) (discussing the " 'understandable' concern of the bar that vigorous advocacy not be chilled").

25. *See* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 10-16 (1989) (explaining that while courts "have agreed that deterrence is the most important goal of amended Rule 11," they cannot agree on what liability standard to apply).

recent tort law studies indicating that legal rules can effectively deter negligence where a regulatory framework, like the bar, is already in place. Deterring negligence is not only possible, but desirable, and courts "on the front lines of litigation" are singularly well-positioned to do so.[26]

II. THE MANY PERMUTATIONS OF RULE 11

A. 1938: Rule 11's Modest Roots

In 1938, Rule 11 debuted as a minor procedural rule frequently overlooked by attorneys and courts alike.[27] The Rule " 'consolidated and unified' two previous Equity Rules—Rule 24 on 'Signature of Counsel' and Rule 21 on 'Scandal and Impertinence.' "[28] The original Rule 11 placed "on the attorney the burden of ensuring that the pleadings were accurate."[29] Attorneys certified the pleadings' reasonableness, and courts could strike "sham" pleadings.[30] To prove a violation by opposing counsel, courts demanded a showing of subjective bad faith.[31] This high standard provided attorneys with viable defenses if they proved good faith reliance on their client's statements or their understanding of the law.[32] Even when the court found bad faith, the Rule did not *require* the court to issue sanctions.[33] As a result, "courts rarely used [Rule 11] as a basis for sanctioning lawyers."[34]

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26. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990) (discussing the court's ability to control the behavior of the litigants before it).

27. Hirt, *supra* note 8, at 1009.

28. *Id.* The Federal Equity Rules pre-dated the Federal Rules of Civil Procedure. Promulgated by the Supreme Court in 1822, the Equity Rules contained "thirty-three very concise rules of practice and procedure. A few of the rules were mandatory, but most generously accorded federal judges with broad discretionary authority." Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 469 (2003).

29. Debbie A. Wilson, Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343, 349 (1988).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 945-53 (1992).

34. *Id.* at 946.

The good faith loophole doomed Rule 11's ability to deter abuses in the litigation process.[35] Moreover, judges and attorneys did not agree as to the circumstances that triggered sanctions;[36] the subjective standard of conduct was ambiguous. And judges were unsure about the types of sanctions they could issue.[37] As the 1983 Advisory Committee notes explained, "[e]xperience shows that in practice Rule 11 [was] not . . . effective in deterring abuses."[38] The Advisory Committee began exploring ways to increase the Rule's relevance and utility. The 1983 amendments provided Rule 11 with bite, but, as the next section will demonstrate, they swung it too far in the opposite direction.

B. 1983 Amendments: Objective Reasonableness

The Rule's ineffectiveness compelled the Supreme Court to amend Rule 11 in 1983.[39] The 1983 version shifted the inquiry away from what an attorney "claimed to know" when filing court papers and focused the court instead on what an attorney "should have known" when filing.[40] The judiciary caused this shift by revising the Rule's standard of conduct: whereas the old Rule articulated an ambiguous standard requiring that an attorney have "good ground to support" papers filed with the court, the new Rule demanded "reasonableness under the circumstances."[41] The updated Rule permitted courts to impose monetary sanctions and attorneys' fees.[42] Finally, sanctions under the new Rule were mandatory rather than discretionary, instructing that courts "shall impose" sanctions on attorneys found to violate the standard.[43] Thus, the 1983 amendments dramatically expanded the Rule's scope and application.

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35. *Cf.* Hirt, *supra* note 8, at 1009 (stating that the Rule's ineffectiveness was partially attributed to confusion about the proper standard of conduct expected of attorneys).

36. *Id.*

37. *See* BURBANK, *supra* note 25, at xix (discussing the ineffectiveness of Rule 11, and explaining some of the confusing factors, including the range of available and appropriate sanctions).

38. FED. R. CIV. P. 11 advisory committee's note (1983).

39. Hirt, *supra* note 8, at 1010.

40. Marshall et al., *supra* note 33, at 948.

41. *See* FED. R. CIV. P. 11 advisory committee's note (1983) (noting that the new standard is "more focused").

42. *Id.* (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), and Hall v. Cole, 412 U.S. 1, 5 (1973), as examples of cases in which an equivalent equitable doctrine had been developing).

43. *Id.*

Despite the 1983 amendments' clarifications, Rule 11's liability standards remained ambiguous. The Rule's text seemed to impose only two duties: (1) that attorneys make a subjectively reasonable inquiry ensuring that their submissions were grounded in fact and "warranted by existing law" and (2) that attorneys reflect "upon the results of that inquiry" to form their conclusion about the submissions.[44] However, some courts interpreted the rule as imposing a third duty—to sign papers only if a "reasonably competent attorney" would conclude, after inquiry into law and facts, that the submission was appropriate.[45] Notwithstanding the Rule's silence on the matter, courts "widely embraced" an interpretation requiring that the attorney's inquiry itself be objectively reasonable.[46]

In addition to criticizing Rule 11's ambiguity regarding attorneys' duties, the amendment's detractors worried that the expanded Rule exacerbated the time, cost, and amount of litigation. While the Advisory Committee anticipated that Rule 11 claims would settle quickly at the close of the litigation or during a motion decision, critics envisioned extensive "satellite litigation," spawning an entire "cottage industry" of litigation focusing only on Rule 11 violations.[47] Even more troubling, critics expressed concern that the Rule chilled "zealous but legitimate advocacy," "hinder[ed] developments in the law," "poison[ed] relationships between lawyers and their clients, lawyers and other lawyers, and lawyers and judges," and disproportionately affected the poor.[48] However, despite these criticisms, most attorneys acknowledged that the 1983 amendments effectively stemmed attorney misbehavior.[49]

Although the 1983 Rule successfully halted attorney misbehavior, court dockets swelled with Rule 11 litigation.[50] Litigants

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44. BURBANK, *supra* note 25, at 15.

45. *Id.*

46. *Id.* at 14; *see also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986) ("[T]he conclusion drawn from the research undertaken must itself be defensible."); Eastway Constr. Co. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("[S]anctions shall be imposed against an attorney . . . *where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.").

47. Hirt, *supra* note 8, at 1010.

48. BURBANK, *supra* note 25, at 4.

49. *See* Jeff Goland, Note, In Re Pennie & Edmonds*: The Second Circuit Returns to a Subjective Standard of Bad Faith for Imposing Post-Trial* Sua Sponte *Rule 11 Sanctions*, 78 ST. JOHN'S L. REV. 449, 459 (2004) ("Both proponents and critics of the 1983 version agreed that the rule had a positive effect in deterring some litigation conduct because attorneys were required to 'stop and think' before filing papers.").

50. *Cf.* Kim M. Rubin, *Has a "Kafkaesque Dream" Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment*, 67 B.U. L. REV. 1019, 1036, 1040 n.142 (1987)

used Rule 11 as a discovery device, attempting to uncover the factual basis for opponents' claims[51] and, even more troubling, threatened sanction motions "to bully an opponent into withdrawing a paper or position."[52] By the early 1990s, it was clear that Rule 11 needed further amendment.[53]

C. 1993 Amendments: A Safe Harbor

In response to the excessive litigation, the Advisory Committee amended the Rule in 1993 both substantively and procedurally, and the 1993 amendment's substance still stands today.[54] The new Rule eliminated mandatory sanctions. Rule 11 affords district court judges discretion to decide whether sanctions are appropriate.[55] The primary procedural change created a "safe-harbor" procedure giving "putative [attorney] violators the opportunity to withdraw challenged papers."[56] Attorneys cannot bring a Rule 11 violation to the court's attention unless they first challenge opposing counsel to withdraw the suspect submission.[57] An accused attorney has twenty-one days "to withdraw that position or to acknowledge candidly that [he or she does] not currently have evidence to support a specified allegation."[58] It is only when an attorney does not withdraw her submission that opposing counsel may bring the matter to the court's attention.

In addition to providing the twenty-one day safe harbor, the new amendments clarified courts' ability to initiate sua sponte sanction proceedings.[59] Although the amendments do not describe the circumstances permitting court sanction, the Advisory Committee Notes indicate that these sanctions "will ordinarily be issued only in situations that are akin to a contempt of court."[60] Thus, although the

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(discussing Judge William Schwarzer's critique that a subjective bad faith standard under Rule 11 "crowds the dockets").

51. GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES, AND PREVENTATIVE MEASURES 14 (Richard G. Johnson ed., 3d ed. 2004).

52. *Id.* at 24.

53. *Id.* at 15 ("In July 1990, the Advisory Committee responded to continued criticisms of Rule 11 by announcing a Call for Comments about the Rule and Public Hearings.")

54. Goland, *supra* note 49, at 461.

55. VAIRO, *supra* note 51, at 32 (noting that the new rule "was a signal to courts and litigants that they should be less zealous in using Rule 11 in cases where there were relatively minor infractions of the rule"); Goland, *supra* note 49, at 461-62.

56. Hirt, *supra* note 8, at 1017.

57. VAIRO, *supra* note 51, at 33.

58. Hirt, *supra* note 8, at 1018 (quoting FED. R. CIV. P. 11 advisory committee's note (1993)).

59. Rule 11(c)(1)(B) explicitly states that courts have the ability to impose sua sponte sanctions. Hirt, *supra* note 8, at 1020-21.

60. *Id.* at 1021 (quoting FED. R. CIV. P. 11 advisory committee's note (1993)).

amended Rule provides a "safe harbor" in the face of opposing counsel's attack, attorneys remain subject to censure by judicial imposition of sua sponte sanctions without a safe harbor.

Some courts concluded that where the provision addressing judge-initiated sanctions lacks a "safe harbor," judges should issue sanctions only in the face of deliberate Rule 11 violations.[61] Other courts concluded that, because the Rule does not explicitly state that attorney liability standards are different when issued by judges, judges can continue to issue sanctions in the face of negligent and deliberate Rule violations.[62] Thus, "[t]he specific issue is whether the lawyer's liability for the sanction requires a mental state of bad faith or only objective unreasonableness in circumstances where the lawyer has no opportunity to withdraw or correct the challenged submission."[63] Courts divide in their answers, with some circuits relying on the Advisory Committee Notes and others seeking guidance from the text.

1. Empty Head, Pure Heart: Courts Interpret the New Amendments

In *In re Pennie & Edmonds LLP*, the Second Circuit articulated a subjective bad faith standard for judge-initiated sanctions.[64] The underlying case began as "relatively mundane trademark litigation."[65] Two New York City restaurants began selling pasta sauce with similar labels, and plaintiffs brought suit claiming the defendant's pasta label infringed on their trademark.[66] The defendant, represented by the New York law firm Pennie & Edmonds, countered that he had used the disputed label since 1993, before the plaintiffs began marketing their pasta sauce.[67] As evidence, the defendant submitted a "1993" copy of his label and a "1993" invoice from his printer.[68] The plaintiffs discredited these documents by showing that neither the documents' bar code nor the printer's area code existed in

61. *See, e.g.*, *In re* Pennie & Edmonds LLP, 323 F.3d 86, 87 (2d Cir. 2003) (noting that for sua sponte sanctions "the appropriate standard is subjective bad faith").

62. *See, e.g.*, Young v. City of Providence, 404 F.3d 33, 39 (1st Cir. 2005) ("[W]e think mistaken any inference that this language requires malign subjective intent.").

63. *Pennie & Edmonds*, 323 F.3d at 87.

64. *Id.*

65. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *1 (S.D.N.Y. Jan. 16, 2002). For the sake of simplicity, both the district court and the appellate proceeding will be referred to hereinafter as the "*Pennie & Edmonds*" court or decision in the text of this Note.

66. *Id.*

67. *Id.* at *1-2.

68. *Id.* at *2.

1993.[69] The Pennie & Edmonds attorneys confronted their client, who claimed that he mistakenly submitted a 1999 copy of his pasta label and that the printer, unable to locate the originals, had provided the fraudulent invoice without informing the defendant that it was a reconstruction instead of an original copy.[70] As proof of his innocence, the client furnished his attorneys with an affidavit purportedly signed by the printer admitting the error.[71] Pennie & Edmonds attorneys contacted the printer, who denied doing business with the defendant in 1993.[72] Instead of admitting its client's deception, however, Pennie & Edmonds filed for summary judgment, maintaining that its client had marketed his pasta under the disputed label since 1993 and that it submitted the materials in good faith.[73] When confronted, the attorneys claimed they had acted with a pure heart in reliance on their client's statements.[74]

Based on this evidence, the district court sanctioned Pennie & Edmonds.[75] The circuit court, however, vacated the sanctions, finding that, because the attorneys acted with what some have called a "pure heart," they complied with Rule 11.[76] The court held that, in the absence of a "safe harbor" provision, judges should issue sanctions sua sponte "only in more egregious circumstances,"[77] basing this conclusion on "the Advisory Committee's expectation that court-initiated sanction proceedings will ordinarily be used only in situations that are 'akin to a contempt of court.' "[78] The court hesitated to require more, worrying "that lawyers [would] sometimes withhold submissions that they honestly believe have plausible evidentiary support for fear that a trial judge, perhaps at the conclusion of a contentious trial, will erroneously consider their claimed belief to be

69. *Id.*

70. *In re* Pennie & Edmonds LLP, 323 F.3d 86, 88 (2d Cir. 2003).

71. *Id.* "According to [the defendant], [the printer] took it upon himself to fabricate the records because he no longer had his records from 1993, and he did not tell this to [the defendant]." *Patsy's Brand, Inc.*, 2002 WL 59434, at *2.

72. *Patsy's Brand, Inc.*, 2002 WL 59434, at *3.

73. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., 317 F.3d 209, 214-15 (S.D.N.Y. 2003).

74. *Pennie & Edmonds*, 323 F.3d at 93.

75. *Patsy's Brand, Inc.*, 2002 WL 59434, at *10 (requiring "that a partner of the firm submit to the Court an affidavit stating that a copy of [the] Opinion has been delivered to each of the lawyers in the firm with a memorandum that states that it is firm policy that its partners and associates adhere to the highest ethical standards and that if a lawyer's adherence to those standards results in the loss of a client, large or small, the lawyer will not suffer any adverse consequence").

76. *See Pennie & Edmonds*, 323 F.3d at 93 (holding that where the "lawyers acted with subjective good faith, the Rule 11 sanction must be vacated").

77. *Id.* at 89-90.

78. *Id.* at 90.

objectively unreasonable."[79] While the district court judge had argued that courts bear responsibility for "weeding out abuses," the Court of Appeals concluded that an "objective" standard "risk[ed] more damage to the robust functioning of the adversary process than the benefit it would achieve."[80] Thus, because the Second Circuit worried more about the risk of stifling creative lawyering and zealous advocacy than about checking negligence, it concluded that Rule 11 sua sponte sanctions required a finding of subjective bad faith.

The court limited its holding to situations where the court does not afford the attorney a safe harbor; however, as Section III.A will discuss, the court's cabining of its holding is mostly illusory.

2. Trend Spotting: The Move Towards a Bad Faith Standard

The *Pennie & Edmonds* court supported its interpretation of the 1993 Amendments by noting that other circuits drew similar conclusions from the Advisory Committee's "akin to contempt" language.[81] The court specifically highlighted the Fourth Circuit's decision in *Hunter v. Earthgrains Co. Bakery*.[82] There, the Fourth Circuit overturned the district court's imposition of sanctions, noting that "[t]he Advisory Committee contemplated that a sua sponte show cause order would only be used 'in situations that are akin to a contempt of court.' "[83] The *Hunter* court noted that the sanctioned attorney's claims were not frivolous, but merely an attempt to resolve an ambiguous legal question in her client's favor.[84] Although the decision did not explicitly address the mens rea standard for a judge-initiated sanction, the *Pennie & Edmonds* court cited this case as demonstrating that "the Advisory Committee's 'akin to contempt' standard is applicable to sanction proceedings initiated by a court."[85] Because the Fourth Circuit interpreted the Advisory Committee's language as creating a distinction between judge-initiated and attorney-initiated sanctions, the decision implies that a judge should require a higher standard than negligence in the former case.

The Eighth and Eleventh Circuits appear to be following the Second Circuit's path. They too have required a finding of heightened

79. *Id.* at 91.

80. *Id.* at 93.

81. *Id.* at 90 ("[T]he Advisory Committee's 'akin to contempt' standard is applicable to sanction proceedings initiated by a court . . . .").

82. 281 F.3d 144, 151 (4th Cir. 2002).

83. *Id.*

84. *Id.* at 156-57.

85. *Pennie & Edmonds*, 323 F.3d at 90.

negligence before imposing Rule 11 sanctions. For example, in *MHC Investment Co. v. Racom Corp.*, the Eighth Circuit affirmed a district court's sanction imposition.[86] MHC Investment Company originally sued Racom for breach of contract.[87] Racom filed several affirmative defenses, such as claiming that the contract lacked consideration, and filed counterclaims against MHC for fraud, slander, and breach of fiduciary duty.[88] Finding that their affirmative defenses and counterclaims constituted "frivolous defenses" brought for the "purpose of delaying payment to MHC," the district court sanctioned Racom's attorneys.[89] On review, the Eighth Circuit highlighted that Rule 11

> is applied with particular strictness where, as here, the sanctions are imposed on the court's own motion. In that circumstance—unlike the situation in which an opposing party moves for Rule 11 sanctions—there is no "safe harbor" in the Rule allowing attorneys to correct or withdraw their challenged filings.[90]

The court's decision to highlight the Rule's strictness when there is no safe harbor indicated its reluctance to apply Rule 11 to negligence. In that instance, the Eighth Circuit affirmed the sanctions, noting that "the behavior was not a single incident[;] the Racom attorneys established a pattern of persisting in these claims over the course of two separate resistances to summary judgment motions, as well as two separate attempts to extend those proceedings without offering valid reasons to do so."[91] Holding that the district court had not abused its discretion in determining that the attorneys' behavior constituted "bad faith,"[92] the court avoided addressing whether sua sponte sanctions can be imposed in cases of attorney negligence; however, its language implies it will apply a "bad faith" standard in future cases.[93]

Finally, the Eleventh Circuit, in *Kaplan v. DaimlerChrysler*, followed the Second Circuit in reading Rule 11 to impose a bad faith standard on judge-imposed sanctions.[94] The district court imposed

86. 323 F.3d 620, 621 (8th Cir. 2003).

87. *Id.*

88. *Id.*

89. *Id.* at 623.

90. *Id.*

91. *Id.* at 627.

92. *See id.* at 626 (holding that the district court did "not err in deciding that [the law firm] used the claims and defenses for the purpose of delaying" its client's payment of money owed to the plaintiff).

93. *See id.* at 623 (noting that where there is no "safe harbor," courts must review sua sponte sanction impositions with "particular strictness").

94. 331 F.3d 1251, 1255 (11th Cir. 2003) ("Other circuits apply the 'akin to contempt' rationale to court-initiated Rule 11 sanctions.").

sanctions against DaimlerChrysler's counsel for filing a motion *in limine* to prevent opposing counsel's mention of "World War II, Adolph Hilter [sic], the Nazis, slave labor, concentration camps, gas chambers, or any other inflammatory aspect of German history."[95] DaimlerChrysler presumably worried that plaintiffs would denigrate DaimlerChrysler, a German company, by linking Germany to World War II and Nazi atrocities. The district court judge noted, "There is absolutely nothing in the record to indicate that Plaintiffs have or intend to muddy the issues in this case," and imposed sanctions against DaimlerChrysler's attorneys for a "frivolous" motion.[96] Citing *Pennie & Edmonds*, the Eleventh Circuit overturned the lower court's sanction imposition.[97] In dicta, the court agreed with *Pennie & Edmonds*' "subjective bad faith" standard for judge-initiated sanctions.[98] However, the court never applied the standard because it overturned for procedural reasons.[99] To date, no other court has applied this standard.

3. Objective Unreasonableness: The First Circuit Articulates an Objective Standard

In *Young v. City of Providence*, the First Circuit rejected the *Pennie & Edmonds* court's "empty head, pure heart" approach in favor of an objective liability standard.[100] The original litigation involved two police officers who, in the course of responding to a reported disturbance, shot and killed an off-duty officer attempting to assist them.[101] The deceased officer's mother sued the police officers for killing her son.[102] Before trial, the plaintiff's attorney created a diagram to demonstrate the officers' movements throughout the evening.[103] However, video footage of the area filmed by a local television station indicated that the diagram was inaccurate.[104] After arguing the diagram's admissibility, both sides signed a stipulation

95. *Id.* at 1253 (quoting the district court judge's *in limine* order).

96. *Id.*

97. *Id.* at 1255-57.

98. *See id.* at 1256 (agreeing with circuits that review sua sponte sanctions with "particular stringency," but excusing itself from resolving the issue in the case at bar).

99. *Id.* at 1257 (finding a "material variance" between the lower court's show cause order (for the "Nazi" motion) and the eventual stated reasons for imposing sanctions (excessive *in limine* motions)).

100. 404 F.3d 33, 40 (1st Cir. 2005).

101. *Id.* at 35.

102. *Id.*

103. *Id.* at 36.

104. *Id.*

that the diagram was inaccurate.[105] Later, however, the plaintiff's attorney re-evaluated the film and concluded that it did not necessarily indicate the diagram's inaccuracy.[106] As a result, the plaintiff sought relief from the stipulation, claiming a mistake.[107] The plaintiff's memo accused the court of ordering her to sign the stipulation.[108] After issuing a show cause order, the court imposed Rule 11 sanctions on plaintiff's attorneys for misrepresenting the court's role in the stipulation agreement.[109]

The sanctioned attorneys appealed, and the First Circuit reversed the sanctions, articulating an objective mens rea standard.[110] Relying on Rule 11's text, the court noted that the Rule sets out "the substantive obligations of counsel (e.g., that factual claims must have evidentiary support or a likely prospect of it) without in any way suggesting that the substantive obligations differ depending on whether a later claim of violation is raised by opposing counsel or the court."[111] Unlike the Second Circuit, this court determined that the 1993 amendments' overall purpose was to "eliminate any 'empty-head pure-heart' justification for patently frivolous arguments."[112] While the court noted that the "wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims," it simultaneously highlighted that "opposing counsel has far greater incentive than the trial judge to invoke Rule 11 for slight cause."[113]

The First Circuit's decision evinces trust in both district court judges and appellate court supervision. While the court worried that too strict an interpretation of Rule 11 would quash zealous advocacy, it concluded that the solution is careful appellate review, not limited judicial discretion.[114] However, the appellate court reversed the

105. *Id.*

106. *Id.*

107. *Id.* "The main thrust of plaintiff's argument in the motion and memoranda was that plaintiff had entered into the stipulation under circumstances that created a 'manifest injustice,' and that the agreement was made under a clear mistake." Young v. City of Providence, 301 F. Supp. 2d 187, 192 (D.R.I. 2004) (quoting the plaintiff's "corrected memorandum" in support of her "Motion Requesting to be Relieved from the Stipulation Regarding Exhibit 18[A]") (internal quotation marks omitted).

108. *Young*, 404 F.3d at 36-37.

109. *Id.* The sanction order noted that "[t]he Court *never* informed plaintiff she had to agree to defendant's version of the stipulation." *Young*, 301 F. Supp. 2d at 193.

110. *Young*, 404 F.3d at 40-41.

111. *Id.* at 39.

112. *Id.* at 40.

113. *Id.*

114. *Id.*

district court's sanction imposition, finding that the memo adequately portrayed the trial court's role in the stipulation.[115] Thus, the court's analysis regarding mens rea standards cannot be used as precedent.

Recently, however, the Fifth Circuit explicitly held in *Jenkins v. Methodist Hospitals of Dallas, Inc.*, that "an attorney's good faith will not, by itself, protect against the imposition of Rule 11 sanctions."[116] In *Jenkins*, the district court sanctioned an attorney for including racially inflammatory language in his brief.[117] Despite the attorney's protestations that the "statement at issue was an inadvertent mistake and not the result of serious misconduct," the appeals court affirmed the sanction imposition.[118] The court noted that "district courts are 'on the front lines of litigation,' " and, as such, appellate courts should review sanction imposition deferentially.[119] Although the court did not engage in an in-depth analysis of either the Rule's text or the Advisory Committee Notes, its conclusion evinces sympathy for the Rule's objectives and an understanding that a strict interpretation is necessary for the Rule to be effective.

III. INTERPRETING RULE 11

A. The Second Circuit: A Misguided Approach to Rule 11

The *Pennie & Edmonds* court examined Rule 11's 1993 amendments and determined that the Advisory Committee sought to "restore the pre-1983 standard of subjective bad faith for post-trial, sua sponte Rule 11 sanctions."[120] The court based this conclusion on Advisory Committee language indicating that courts should impose sanctions in situations "akin to contempt," and provides the twenty-one-day "safe harbor" only for sanctions initiated by opposing

115. *Id.*

116. 478 F.3d 255, 264 (5th Cir. 2007) (emphasis omitted).

117. Jenkins v. Methodist Hosps. of Dallas, Inc., No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 25131, at *2-3 (N.D. Tex. Dec. 14, 2004). Lead counsel for the plaintiff in *Jenkins* made a "serious misrepresentation of the factual record" by inserting the epithet "Boy" before the statement, attributed to one of the defendants by plaintiff in his affidavit, "I would not let you treat my dog," despite the lack of any evidence in the record that the defendant used that, or any other, epithet in making that statement. *Id.*

118. *Jenkins*, 478 F.3d at 263, 266 (emphasis omitted).

119. *Id.* (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990)).

120. Goland, *supra* note 49, at 466 (citing *In re* Pennie & Edmonds LLP, 323 F.3d 86, 91 n.4 (2d Cir. 2003)).

counsel.[121] Thus, the court concluded that because judge-imposed sanctions lacked a "safe harbor," the Advisory Committee must have intended for judges to sanction attorneys only in the face of "bad faith."[122] The court supported its conclusion with policy arguments, noting that to rule otherwise would deter zealous and creative lawyering.[123]

The *Pennie & Edmonds* decision cannot be reconciled with the Rule's text or its history. The *Pennie & Edmonds* court's reliance on the Advisory Committee's "akin to contempt" language contradicts the plain language of Rule 11, which indicates only one standard for sanction imposition. Moreover, the addition of a "safe harbor" is a mere procedural change, and it is unlikely that the Advisory Committee meant to bring about a change in the substantive mens rea standards for Rule 11 without comment. Although the *Pennie & Edmonds* court limited its holding to situations in which the court does not offer a safe harbor, this cabining is illusory.

Finally, the *Pennie & Edmonds* majority's policy concerns are assuaged without difficulty. Because research indicates that judges impose sua sponte sanctions far less frequently than attorney-initiated sanctions,[124] it is unlikely that an "objective unreasonableness" standard would deter creative and zealous lawyering. Furthermore, whereas the Advisory Committee suggested the 1993 amendments to limit extensive Rule 11 satellite litigation, a requirement that the court find bad faith may in fact trigger an additional judicial hearing, thus thwarting one of the main purposes of the 1993 amendments. The following section of this Note explores these criticisms of the Second Circuit's approach.

1. Reliance on Advisory Committee Notes at the Expense of the Text

The Second Circuit based its standard on imprecise Advisory Committee language and, therefore, misread the Committee's intent. The decision highlighted an Advisory Committee Note indicating that "[s]ince show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a 'safe

121. *Pennie & Edmonds*, 323 F.3d at 89-91 (quoting FED. R. CIV. P. 11 advisory committee's note (1993)). The court specifically noted that a finding of contempt requires a heightened mens rea standard. *Id.* at 94-95.

122. *Id.* at 90.

123. *Id.* at 90-91.

124. *See* Hirt, *supra* note 8, at 1035-36 (concluding, based on his own research, that sua sponte "rulings represent a small number of decisions relative to the number of decisions in which courts have considered motions filed by a party").

harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative."[125] The Second Circuit interpreted "akin to contempt" to mean that the mental state applicable to judge-initiated sanctions is "bad faith."[126] However, Rule 11's text does not make this distinction.

First, the Advisory Committee's use of the word "ordinarily" implies that only in *extraordinary* circumstances will courts grant show cause orders in situations that are *not* akin to contempt of court.[127] The word "ordinarily" thus specifically carves out room for judicial discretion in extraordinary situations. Moreover, the Advisory Committee's use of an explanatory simile does not necessarily indicate that the standards should be identical. "Akin to contempt" does not necessarily require the same standard as contempt.[128] Some commentators argue that Rule 11 court-initiated sanctions are not identical to contempt sanctions because "each of these sanctions has a distinct purpose behind it."[129] For instance, Jeff Goland argues that because "[t]he purpose of contempt sanctions is either punitive—to vindicate the authority of the court, or remedial—to force a party to comply with a court order or to compensate the complainant," the goals of each method should inform their application.[130] Thus, where Rule 11 seeks to deter, courts can better achieve this goal by demanding a high standard.[131]

Moreover, Judge Underhill's *Pennie & Edmonds* dissent offered an alternative interpretation of the Advisory Committee's language. The dissent noted that the word "ordinarily" is "predictive, not restrictive; the reference to contempt describes the seriousness of the conduct likely to prompt a court to issue a show cause order initiating sanctions proceeding, not the mens rea necessary before sua sponte sanctions can permissibly be imposed."[132] Both interpretations—that

125. *Pennie & Edmonds*, 323 F.3d at 90 (quoting FED. R. CIV. P. 11 advisory committee's note (1993)).

126. *Id.* at 90-91. "By declining to make the 'safe harbor' provision applicable to court-initiated show cause orders, the Committee was signaling that the unavailability of an opportunity to withdraw or correct makes the sanction appropriate for conduct 'akin to contempt,' conduct that traditionally requires a heightened mens rea standard." *Id.* at 91 n.4.

127. *See* Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *6 (S.D.N.Y. Jan. 16, 2002) ("[T]he word 'ordinarily' . . . clearly implies that there would be instances where the court would initiate Rule 11 proceedings where the conduct at issue does not meet the standard applied to contempt of court.").

128. Goland, *supra* note 49, at 472 (noting that the "akin to contempt" language does not literally mean "the same as contempt").

129. *Id.*

130. *Id.* at 472-73.

131. *See infra* Part IV.

132. *In re* Pennie & Edmonds LLP, 323 F.3d 86, 95 (2d Cir. 2003) (Underhill, J., dissenting).

the phrase leaves room for judicial discretion or that the phrase is predictive, and not restrictive—are more convincing than the *Pennie & Edmonds* majority's contention that the sentence evinces the Advisory Committee's intent to create separate, unidentified, standards for each method of bringing a Rule 11 claim.

2. Mistakenly Equating Rule 11's Structural Changes to Substantive Changes

The Second Circuit mistakenly concluded that the 1993 amendment's structural changes indicate substantive changes in the mens rea required for judge-imposed sanctions. As Judge Underhill's *Pennie & Edmonds* dissent noted,

> The fundamental flaw in the majority's interpretation of Rule 11 is that it seeks to use procedural distinctions drawn in section (c), regarding *how* sanctions can be imposed with and without a motion, to modify the substantive requirements of section (b), which controls *whether* a violation of Rule 11 has occurred. Under a plain reading of Rule 11, the procedural distinctions set forth in section (c) have no bearing whatsoever on the state-of-mind requirement of section (b).[133]

Judge Underhill concluded that, while judges and attorneys initiate sanctions differently, this distinction does not alter the state of mind required for each method. Thus, Rule 11's structure implies that "when" and "how" courts impose Rule 11 sanctions are unrelated decisions.

Commentators agree with Underhill's conclusion. Attorney Gregory Joseph argues that instead of changing the mens rea requirements for sua sponte sanctions, the Advisory Committee "set limits in Rule 11(c)(2) as to the nature of the sanctions that may be imposed sua sponte.[134] For example, the Rule notes that the court cannot ordinarily award attorney's fees in the sua sponte situation.[135] However, Joseph highlights *Pennie & Edmonds*' ironic implication: if judges invite sanctions motions from opposing counsel because they are wary to issue their own, judges can then impose monetary sanctions and circumvent the Rule's (c)(2) limitations. Reading the Rule to preclude judicial sanctions in the face of negligence encourages such absurd results.

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133. *Id.* at 94.

134. Gregory P. Joseph, *Sua Sponte Sanctions*, NAT'L L.J., Apr. 14, 2003, at B6.

135. FED. R. CIV. P. 11(c)(2)(B) ("Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.").

Although the *Pennie & Edmonds* majority framed its holding as limited to situations in which the court does not afford the attorney the twenty-one-day safe harbor, "[t]he impact of *Pennie* is broader than may appear."[136] Judges will be most likely to issue sanctions in precisely those situations in which there can be no twenty-one-day safe harbor (i.e., "when the court has already disposed of a claim, defense or position because the offender can no longer withdraw it"[137]). Thus, the *Pennie & Edmonds* majority is restricting the impact of Rule 11 sanctions precisely when our judiciary could find them most useful—that is, when the opposing attorney is no longer likely to take action on her own.

3. Policy Rationale

In addition to relying on a questionable reading of the Advisory Committee Notes, the Second Circuit based its "bad faith" standard on policy arguments insufficient to justify its reading of the amendments. The *Pennie & Edmonds* majority supported its conclusion by arguing both that an objective standard deters creative lawyering and that when attorneys do not have a safe-harbor, and thus cannot withdraw or change their filings, fairness demands a finding of bad faith before sanctions are imposed.[138]

Because courts rarely impose sua sponte sanctions, however, the argument that an objective bad faith standard would deter creative lawyering is unpersuasive. The *Pennie & Edmonds* majority specifically worried that lawyers would withhold nonfrivolous submissions for fear of sanction.[139] Such worries led it to conclude that a "vigorous adversary process is better served by avoiding the inhibiting effect of an 'objectively unreasonable' standard applied to unchallenged submissions."[140] Although the court's goal is laudable, research suggests that it overestimated the impact of an objective standard.

Multiple empirical studies have highlighted the rarity of judge-imposed sanctions.[141] Additionally, appellate courts have indicated a willingness to overturn sua sponte imposed sanctions that appear to

136. Joseph, *supra* note 134.

137. *Id.*

138. *Pennie & Edmonds*, 323 F.3d at 90-91.

139. *Id.*

140. *Id.* at 91.

141. *See id.* at 95 n.1 (Underhill, J., dissenting) (citing BURBANK, *supra* note 25, at 57; THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 76 (Fed. Judicial Ctr. 1988)) (referencing additional research indicating that judges rarely impose sua sponte sanctions).

stifle creativity.[142] As the *Young* court noted, while "judges must be especially careful where they are both prosecutor and judge[,] . . . careful appellate review is the answer to this concern."[143] Because the empirical data indicate that judges are hesitant to impose sua sponte sanctions, the *Pennie & Edmonds* majority cannot reasonably contend that lawyers would be deterred from creative lawyering.

The *Pennie & Edmonds* majority also expressed concern that, lacking a safe harbor, fairness demands that judge-imposed sanctions adhere to a bad faith standard.[144] This distinction, however, ignores the safe harbor's purpose. As the *Young* court recognized, the purpose of the safe harbor provision "is to allow a party to privately withdraw a questionable contention without fear that the withdrawal will be viewed by the court as an admission of a Rule 11 violation."[145] Where a secondary goal is to "protect the *courts* from the burden of deciding numerous, often unnecessary, Rule 11 motions," the judiciary need not worry that courts will be part of the problem.[146] Because the Advisory Committee clearly defined the purpose of the safe harbor, courts should not read into it a backdoor intention to alter liability standards.

B. The First and Fifth Circuits: Concerns About Fairness and Chilling Creative Claims

Critics voice two primary concerns against the "objective unreasonableness" standard. First, critics emphasize potential conflicts of interest when a court acts as both prosecutor and judge.[147] Second, despite the infrequency with which judges impose sanctions sua sponte, there is some evidence that the threat of Rule 11 sanctions may deter "creative lawyering," particularly in civil rights cases.[148]

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142. *See, e.g.*, Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1253, 1256 (11th Cir. 2003) (holding that while an *in limine* motion made by a German defendant company requesting the exclusion of Nazi-related statements might amount to "overkill," its filing did not warrant the imposition of Rule 11 sanctions); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153-54 (4th Cir. 2002) (noting that Rule 11 "does not seek to stifle the exuberant spirit of skilled advocacy" (citation omitted)).

143. Young v. City of Providence, 404 F.3d 33, 40 (1st Cir. 2005).

144. *Pennie & Edmonds*, 323 F.3d at 90-91.

145. *Young*, 404 F.3d at 39.

146. *Pennie & Edmonds*, 323 F.3d at 100 (Underhill, J., dissenting).

147. *Young*, 404 F.3d at 40 (noting that "judges must be especially careful where they are both prosecutor and judge" to impose sanctions only for serious misconduct, and not every time lawyers make "unfounded objections, weak arguments, and dubious factual claims").

148. *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*,

Although both concerns are valid, they are better addressed by methods other than requiring "bad faith" to impose judge-initiated sanctions.

The *Young* decision conceded that judges "must be especially careful where they are both prosecutor and judge" but noted that "careful appellate review" solves this problem.[149] This dual role raises concern that the court may lack impartiality. For example, in *Young*, the district judge had issued sanctions because she disagreed with plaintiff counsel's representation of her role in persuading parties to sign a stipulation.[150] Where a judge is personally involved in the incident that raises the threat of sanction, it may be impossible for the judge to view the situation impartially. The appellate process, however, alleviates this concern. In fact, as the court in *Young* asserted, appellate review serves this same purpose in contempt findings.[151] Therefore, there is no need to cabin the district court's discretion where effective checks already exist within the system.

While research indicates that Rule 11 may chill "creative lawyering" in civil rights cases,[152] courts can best assuage this fear through the appellate process. In his article *Rule 11 and Civil Rights Litigation*, Carl Tobias cites multiple studies concluding that courts disproportionately sanction attorneys in civil rights cases.[153] However, because most of the research exploring the imbalance occurred before the 1993 amendments, there is little evidence that *judge-initiated* sanctions disproportionately affect civil rights claims. Moreover, because sua sponte sanctions remain rare, "[s]tatistically, an attorney is more likely to be sanctioned pursuant to a motion by her opponent than as a result of a court-initiated proceeding."[154] The problem, if any, seems to lie mostly with party-initiated sanctions, and there is no

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37 VAL. U. L. REV. 1, 2-3, 11-24, 104-16 (2002) (providing an analysis of the effect of Rule 11 in the civil rights context).

149. *Young*, 404 F.3d at 40.

150. *Id.*

151. *Id.*

152. *See* Hart, *supra* note 148, at 143.

153. *See* Carl Tobias, *Rule 11 and Civil Rights Litigations*, 37 BUFF. L. REV. 485, 490 (1989) ("Professor Nelken . . . determined that 22.4 percent of the cases in which Rule 11 motions were lodged from 1983 to 1985 involved civil rights, although civil rights claims comprised only 7.65 percent of the civil docket, and that defendants invoked the amendment substantially more often than plaintiffs . . . ." (citing Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1327, 1340 (1986))); *id.* (noting the Third Circuit Task Force's conclusion that, between July 1987 and June 1988, "civil rights plaintiffs and/or their lawyers were sanctioned 'at a rate . . . that is considerably higher than the rate . . . for plaintiffs in non-civil rights cases' " (quoting BURBANK, *supra* note 25, at 69)).

154. Goland, *supra* note 49, at 478.

reason to treat judge-initiated sanctions differently. However, even if judge-initiated sanctions are more frequent in civil rights cases, the appellate process can serve as an appropriate check on both types of sanctions.

The appellate court served as a check in *Hunter v. Earthgrains Co. Bakery*, where the district court sought to impose sua sponte sanctions on plaintiff's attorney in a civil rights case.[155] The appellate court set aside the district court's sanctions, finding that the plaintiff's attorney was not making frivolous claims but instead was arguing that the controlling precedent had been decided incorrectly.[156] The court noted that:

> If it were forbidden to argue a position contrary to precedent, "the parties and counsel who in the early 1950s brought the case of *Brown v. Board of Ed.* . . . might have been thought by some district court to have engaged in sanctionable conduct for pursing their claims in the face of the contrary precedent of *Plessy v. Ferguson*."[157]

The appellate process served as an effective check on the system in *Earthgrains*. But a system demanding evidence of attorney "bad faith" offers no check on attorney negligence, save for the opposing counsel check—the possibility that opposing counsel will bring the Rule 11 violation to the court's attention. In Part IV, this Note argues that this check is insufficient and, in some circumstances, opposing counsel may have an incentive to avoid seeking sanctions.

IV. DETERRING "BAD FAITH" AND NEGLIGENT ACTION

The confusion surrounding mens rea standards for judge-initiated sanctions results from the Advisory Committee's failure to articulate Rule 11's purpose sufficiently. Did the Committee design the Rule to deter both negligence and bad faith, or merely the latter? Although numerous commentators argue that the Rule should "create a higher standard of attorney behavior,"[158] others, such as Judge Posner, posit that "[R]ule 11 [is] designed to shift the expenses . . . caused by 'abuses' to those responsible for them."[159]

The 1993 amendments enlarged district court judges' discretion. Since 1993, judges have not been required to impose sanctions upon finding a Rule 11 violation, but rather have the ability to determine for themselves whether and what type of sanction to

155. 281 F.3d 144, 147-49 (2002).

156. *Id.* at 156.

157. *Id.* (quoting Blue v. U.S. Dep't of the Army, 914 F.2d 525, 534 (4th Cir. 1990)) (internal citations omitted).

158. BURBANK, *supra* note 25, at 9.

159. *Id.* at 10.

impose.[160] Insofar as the Rules expand judicial discretion in one area, they can be interpreted as broadening, not cabining, the power of the judiciary. This interpretation supports the view that courts should not interpret the amendments as limiting judicial discretion to issue sanctions sua sponte where the amendments explicitly recognize benefits associated with an independent judiciary.

Additionally, because the Advisory Committee specifically noted that the most recent revision's purpose was to "remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule,"[161] the amendments should not be interpreted as changing mens rea standards. The Advisory Committee's actions are thus best viewed as a mere "tweaking" of the system. And, it is improper to interpret the amendments as causing a change to something as substantial as the mens rea standards of Rule 11 through procedural "tweaking."[162]

On the other hand, the Advisory Committee Notes indicate that the 1993 amendment "expands the responsibilities of litigants" and cabins the district courts' power by "providing greater constraints . . . in dealing with infractions of the rule."[163] The Advisory Committee states that courts normally will issue show cause orders only "in situations that are akin to a contempt of court, [so] the rule does not provide a 'safe harbor.' "[164] This language indicates that the 1993 amendments sought to limit district judges' discretion as part of the campaign to reduce the number of sanction claims.

Because "one's perception of purposes or goals may affect that individual's interpretation of the duties imposed by the Rule[],"[165] the Supreme Court or the Advisory Committee should articulate the Rule's purpose in order to encourage courts to resolve the current circuit split. Beyond merely calling upon the Advisory Committee to articulate *a* vision for Rule 11, this Note encourages the Advisory Committee to articulate a *broad* vision for Rule 11. Specifically, the Rule should deter negligence as well as punish bad faith. This Part argues that deterring attorney negligence is not only possible, but

160. FED. R. CIV. P. 11(c) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.").

161. FED. R. CIV. P. 11 advisory committee's note (1993).

162. *Id.* Indeed, the Advisory Committee notes that the 1993 revision "broadens the scope of [the Rule's] obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court." *Id.*

163. *Id.*

164. *Id.*

165. BURBANK, *supra* note 25, at 9.

necessary, and that district court judges are uniquely qualified to undertake this task.

A. Deterring Negligence: Systemic and Individual Change

While critics wonder whether "stupidity [or corner-cutting can] be deterred by Federal Rules of Civil Procedure,"[166] research in the tort field indicates that it is possible to deter negligence.[167] This Note illustrates the point by drawing analogies between attorney conduct and specific areas of tort law.

Negligence standards influence systemic organizational change. Medical negligence occurs frequently; however, faced with rising malpractice insurance costs, hospitals look for systemic ways to prevent negligence before it happens.[168] Hospitals now prescribe "a variety of new operating-room procedures, from [computerized tracking] of surgical tools to bearing down on doctors who seem overly eager to close up a patient before all tools have been accounted for."[169] In the 1980s, Harvard doctors studied "anesthetic techniques" and created an effective monitoring system in response to negligence liability.[170] When the costs of negligence are high, organizations invest in the necessary research and training to change their procedures and deter negligence.

Having learned from the medical profession, law firms could disseminate information regarding heightened behavior standards. Large law firms already have extensive ethics programs in place to check for conflicts.[171] Most summer associates attend training meetings where they discuss the standards of professional responsibility.[172] If the Advisory Committee articulated a clear negligence standard for judge-initiated sua sponte sanctions, law

166. *Id.*

167. Gary T. Schwartz, *Reality In The Economic Analysis Of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 443 (1994). This Note only cursorily touches on the issue of deterrence to address recent research indicating that tort deterrents work.

168. *See id.* at 397-99.

169. *Id.* at 399.

170. *Id.* at 404.

171. Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 125-26 (2006) ("Large law firms manage conflicts on a daily basis by imposing procedures to ensure that information gained by an attorney regarding one client does not fall into hands of another attorney at the firm, who might be under a duty to use the information for the benefit of another client.").

172. *What Are The 'Big Picture' Issues for Law Firms in 2007?*, COMPENSATION & BENEFITS FOR L. OFFS., Feb. 2007, at 4 ("Several firms are developing new types of [summer associate] training programs.").

firms already have in place the mechanisms and infrastructure needed to teach and inform their employees about these standards.

Furthermore, research demonstrates that a "general threat of liability" can affect individual behavior.[173] Researchers found that a Canadian judicial decision expanding doctors' obligations to give informed consent "resulted in fifteen percent of all surgeons spending more time discussing surgical risks with patients."[174] More recently, research confirmed the "effectiveness on server monitoring and of public regulation of the server" in deterring drunk driving.[175] When individuals are informed as to the appropriate standards, they are likely to take specific steps to avoid personal liability.

In tort, the "general threat of liability" can be especially effective in deterring professional misbehavior. For example, in *Tarasoff v. Regents of the University of California*, the California Supreme Court dramatically changed the psychiatry profession when it held that a therapist who knew that his patient was contemplating attacking someone had a duty to warn the potential victim.[176] Studies indicate that the California Supreme Court's decision compelled individual therapists to modify their behavior.[177] Eight years after the decision, the overwhelming majority of California therapists were familiar with the case and its holding.[178] Furthermore, this awareness prompted them to change their behavior. Psychiatrists and psychologists were "considerably more willing to notify potential victims and also public authorities when dealing with dangerous patients."[179] Scholars and researchers attribute *Tarasoff*'s effectiveness to the professional therapist organizations that distributed information and educated members regarding their new responsibilities.[180]

These examples suggest that the threat of negligence liability can induce organizations and individuals to adopt new methods less likely to create unsafe situations. Like the professional organizations that helped change therapist behavior, the legal profession possesses a similar network of professional organizations and continuing education requirements. Applying these lessons to the *Pennie &*

173. *See* Schwartz, *supra* note 167, at 401.

174. *Id.* at 400.

175. FRANK A. SLOAN ET AL., DRINKERS, DRIVERS, AND BARTENDERS, at x (2000).

176. 551 P.2d 334, 346 (Cal. 1976).

177. *See* Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 451-52.

178. *See id.* at 461 (citing responses to a survey of California therapists).

179. Schwartz, *supra* note 167, at 400.

180. Givelber et al., *supra* note 177, at 446.

Edmonds case, it appears likely that judge-imposed sanctions for attorney negligence would spawn procedures and training programs to prevent future sanctions. The district court's sanction imposition in *Pennie & Edmonds* identified systemic problems associated with larger law firms: "[t]he Court is also aware of the substantial economic benefits that flow to 'finders[,]' the partners who find the clients, and the pressure to please the client that is felt by the 'minders[,]' the lawyers that actually do the client's work."[181] To solve this problem, the lower court required Pennie & Edmonds to deliver "copies of the court's sanction opinion to every lawyer in the firm, with a memorandum stating that the firm adheres to the highest ethical standards."[182] Had the appeals court upheld these sanctions, this requirement might have led to the type of self-assessment undertaken by the Harvard doctors discussed above. Such a self-assessment would have resulted in cultural changes at the firm, and perhaps even at other law firms, to prevent future instances of negligence.

In addition to forcing big firms to change their behavior, liability for negligent action will encourage solo practitioners to adopt new and more cautious methods. Just as Canadian doctors responded to increased obligations by spending more time discussing risks with patients, solo attorneys would be more likely to look personally into their clients' claims. And just as post-*Tarasoff* professional conferences covered the new psychiatric standards, legal conferences could discuss individual compliance with an objective reasonableness standard. Bar and ethics classes would add the information to their curricula. In sum, the legal profession would rely on its extensive network of CLE classes, legal conferences, and bar associations to disseminate information regarding new liability standards. Just as knowledge reduced violations after *Tarasoff*, informed lawyers will be less likely to engage in negligent behavior.

Because Rule 11 sanction impositions are unlikely to pose the same financial risk as medical malpractice claims,[183] critics may ask whether one truly can expect a similar deterrent effect in the legal community. This concern is mitigated partially by two factors: (1) the insular nature of the legal community and (2) a law firm's

181. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *9 (S.D.N.Y. Jan. 16, 2002).

182. *In re* Pennie & Edmonds LLP, 323 F.3d 86, 88 (2d Cir. 2003).

183. *See* CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF 3-4 (Jan. 8, 2004), *available at* http://www.cbo.gov/showdoc.cfm?index=4968&sequence=0 ("The average payment for a malpractice claim has risen fairly steadily since 1986, from about $95,000 in that year to $320,000 in 2002."); *id.* at 4. ("Each year, about 15 malpractice claims are filed for every 100 physicians, and about 30 percent of those claims result in an insurance payment.").

reputational concerns. Law firms frequently argue before the same judges. Firms should be unwilling to risk alienating these judges with frequent sanction violations, because they care about their future relationships with the court.[184] Once the Advisory Committee articulates a clear negligence standard, attorneys will know what behavior judges expect and behave accordingly. Moreover, law firms rely on their reputations to recruit both law students and clients.[185] Sanction impositions damage reputations; thus, law firms have economic incentives to avoid behavior likely to result in sanctions.

B. The Judicial Advantage: District Courts Are Uniquely Positioned to Police the System

From their unique perspective, judges can police the legal system in a way that attorneys cannot. The Supreme Court has noted that district court judges "on the front lines of litigation" are "best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted."[186] Limiting trial judges' ability to impose sanctions for objective unreasonableness means that only an attorney's opposing counsel can police the profession for negligent acts—a result replete with potential pitfalls.

First, the court, more than any individual litigant, has the greatest incentive to "weed out . . . abuses" and "improve its dispute-resolving function."[187] As the district court's decision in *Pennie & Edmonds* notes, because "the Court as an institution has a far greater interest in weeding out abuses than does any individual litigant, there is no reason not to apply the well-established 'objective reasonableness' standard to Rule 11 proceedings initiated by the Court."[188] In fact, individual attorneys, as players in the court, may be

184. *See* W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 FORDHAM L. REV. 1567, 1568 (2003) ("[T]here are nonlegal, generally informal mechanisms available by which lawyers control one another, from within the profession, rather than relying on formal, legal, externally imposed systems of rules.").

185. *Id.* at 1573 ("[L]awyers are concerned with maintaining good relationships with opposing counsel, keeping their present clients happy, attracting future business, and winning the favor of judges who preside over their cases. Because they have these concerns, lawyers are sensitive to informal sanctions such as gossip and 'war stories' that might contribute to their reputations for aggressiveness or cooperativeness, retaliation by opposing counsel for uncooperative behavior, and the loss of credibility with the trial judge, which might result in losing a close call on a motion or evidentiary ruling.").

186. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990).

187. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *6 (S.D.N.Y. Jan. 16, 2002).

188. *Id.*

reluctant to bring sanction claims. Attorneys may fear antagonizing the court with delay. An attorney's unwillingness to risk alienating a judge highlights the importance of the district judge's participation.

Restricting judge-imposed sanctions solely to instances of bad faith leaves the fox guarding the hen house in matters of attorney negligence. For example, Professor Suzanna Sherry worries that repeat offenders will ignore each other's violations "out of a willingness to play along, a fear of later retaliation, or an unwillingness to risk antagonizing the judge or delaying the proceedings."[189] A small law firm may not be willing to risk antagonizing an established and powerful opponent, such as Pennie & Edmonds. Enabling a judge to respond with sanctions in this instance takes the pressure off attorneys who may not have the political capital to bring a Rule 11 claim.

Furthermore, the Second Circuit's bad faith standard chills the willingness of judges to impose sanctions in cases on the margin. "The [objective] reasonableness standard . . . allows courts to impose sanctions that might deter future violations, without having to call into question the good faith of the sanctioned party."[190] As it stands in the Second Circuit, a judge imposing sua sponte sanctions must assert that an attorney acted in bad faith. This accusation's severity makes it more likely that judges will assume, in marginal cases, that the attorney acted in good faith. Attorneys will take advantage of this ethical no-man's land. The result could be a race to the bottom in which the losers are the profession and the clients.

A bad faith standard also presents difficult proof issues. Scholars in diverse disciplines recognize that objective requirements streamline the factfinder's job.[191] Moreover, when the 1938 version of the Rule required a finding of bad faith, scholars conceded that the standard rendered the Rule toothless.[192]

The district court's sanction imposition against *Pennie & Edmonds* highlights courts' unwillingness to call into question the good faith of a well-respected law firm. The district court took pains to note that it "recognize[d] that the respondent firm, Pennie & Edmonds, enjoys a good reputation in the New York legal community, and the Court [did] not dispute counsel's assertion that they acted

189. Sherry, *supra* note 6, at 133.

190. *Id.*

191. *See, e.g.*, John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 326 (1999) ("[A]s a practical matter, objective standards reduce the possibility of fraud and obviate the problems of proof inherent in first-person testimonials regarding their motivation.").

192. *See* Hirt, *supra* note 8, at 1009-10.

with subjective good faith."[193] The court's reluctance to impeach a law firm with a "good reputation" underscores the importance of the negligence standard—a standard that allows a court to sanction without labeling an attorney's behavior in "bad faith."

V. CONCLUSION

The Advisory Committee has never sufficiently articulated Rule 11's purpose. From its earliest incarnation as a procedural signing requirement through the 1993 amendments, the Advisory Committee has not explicitly described a coherent vision for the rule—whether Rule 11 is designed to deter negligence or punish bad faith. Left to their own devices, individual courts and judges have brought their own interpretations to the table, resulting in the current circuit split.

Pennie & Edmonds highlights the type of behavior that will occur if the Advisory Committee or the Supreme Court does not resolve this question in the First Circuit's favor. Because research demonstrates that accountability contributes to both organizational and individual behavior change, Rule 11 could efficiently police the legal community if courts strengthen their interpretation of the Rule. However, systemic problems associated with the larger law firms will continue and worsen if judges cannot bring their judgment to bear on negligent attorney action. As the district court noted in *Pennie & Edmonds*, "increasing attention has been focused on lesser sanctions as a means of fine-tuning our litigation system to weed out some of its abuses and to improve its dispute-resolving function."[194] Without a negligence standard, courts have only a blunt tool—the contempt standard. To tie courts' hands in this matter is akin to creating a police system that permits only citizen's arrests. District courts "on the front line of litigation" have insight, knowledge, and judgment to offer, and the appellate courts should embrace the wealth of their offerings.

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193. *Patsy's Brand*, 2002 WL 59434, at *1.

194. *Id.* at *6.

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