

***IN RE PENNIE & EDMONDS: THE SECOND  
CIRCUIT RETURNS TO A SUBJECTIVE  
STANDARD OF BAD FAITH FOR IMPOSING  
POST-TRIAL SUA SPONTE RULE 11  
SANCTIONS***

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INTRODUCTION

The American adversary system of civil litigation is characterized in large part by the power of the parties to control major aspects of the case.<sup>1</sup> As a practical matter, however, advocates for the parties, not the litigants themselves, assume primary responsibility for conducting the litigation—they select the legal theories on which to base the complaint, develop the evidence, conduct discovery, and ultimately try the case.<sup>2</sup> As an agent of the represented party, the advocate must act zealously and faithfully on behalf of her client.<sup>3</sup> The duty owed to a client, however, is not unqualified; it is balanced with the responsibilities owed by a lawyer to the court.<sup>4</sup> This inherent

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<sup>1</sup> See GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* 86–87 (1993) (“Theoretically, the parties bear the entire responsibility for presenting the law and the facts.”).

<sup>2</sup> See *id.* at 87–88 (noting that “the advocates are the architects of the litigation”).

<sup>3</sup> See *id.* at 92 (stating that the advocate is required “to present all favorable evidence, to mitigate unfavorable evidence by cross-examination and argument, and to advance the most favorable interpretation of the law”). It is an old principle that the primary duty of the advocate is to the client. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 21 (6th ed. 2002) (quoting often-repeated statement of Lord Brougham: “ ‘an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client’ ” (citing 2 *TRIAL OF QUEEN CAROLINE* 8 (J. Nightingale ed., 1821))).

<sup>4</sup> See *Bus. Guides, Inc. v. Chromatic Communications Enters.*, 498 U.S. 533, 564 (1991) (Kennedy, J., dissenting) (“An attorney acts not only as a client’s representative, but also as an officer of the court, and has a duty to serve both masters.”); HAZARD & TARUFFO, *supra* note 1, at 92 (“In the adversary system, the

conflict may potentially lead to situations when duties owed to a client are fulfilled at the expense of obligations owed to the legal system in general.<sup>5</sup> Such disregard of the duties owed to the court may, and too often does, manifest itself in the submission of litigation papers that lack evidentiary or legal support.<sup>6</sup> Filing such baseless papers has negative ramifications that go beyond the particular conflict being litigated: courts' dockets are clogged,<sup>7</sup> the public trust in the integrity of the legal system diminishes,<sup>8</sup> and the image of the legal profession suffers.<sup>9</sup>

Courts are ultimately responsible for sanctioning lawyers for abuse of the legal system and for filing baseless claims,

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lawyer's duties to the court are delicately balanced with responsibilities to the client."); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 92 (1994) ("Lawyers in [the adversary] system are not only *advocates*, who have a duty to represent clients competently and zealously, but are also officers of the court, whose zeal is circumscribed by a professional responsibility founded upon rules of law and principles of professional ethics."). The basic duties to the court include obligations not to present false evidence, to advise the court of adverse legal authority, and to be truthful in all statements made to the court. See HAZARD & TARUFFO, *supra* note 1, at 92.

<sup>5</sup> See HAZARD & TARUFFO, *supra* note 1, at 92–94 ("The adversary system subjects the advocates to great incentives to ignore the duty to the court in favor of the interest of the client."); Re, *supra* note 4, at 107 ("Unfortunately, some cases, however frivolous, are pursued and presented because they are deemed to have vexation value."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 69–76 (1996) (discussing the economic rationale behind frivolous cases).

<sup>6</sup> See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520–21 (1997) (stating that "there is widespread belief that frivolous litigation is out of control . . . Americans are simply too litigious . . . and all too fond of filing meritless suits"). See generally WARREN FREEDMAN, *FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES: UNJUSTIFIABLE LITIGATION* (1987) (analyzing the nature of various frivolous claims).

<sup>7</sup> See Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1570 (1996) ("Frivolous lawsuits waste limited judicial resources and clog the courts' dockets, preventing or delaying access to justice to other plaintiffs with meritorious claims."); Re, *supra* note 4, at 107 ("The public perceives that lawyers file every conceivable type of case, regardless of merit. As a result, the quantity of cases filed with the courts has burdened court dockets and threatens the quality of justice.").

<sup>8</sup> See James E. Ward IV, *Rule 11 and Factually Frivolous Claims: The Goal of Cost Minimization and the Client's Duty to Investigate*, 44 VAND. L. REV. 1165, 1169–70 (1991) ("When the delay associated with resolving a dispute in court becomes too great, the courts are unable to perform their function, and the public loses confidence in the judicial process. Lack of confidence in the system and the rule of law may result in increased lawlessness." (citations omitted)).

<sup>9</sup> See Re, *supra* note 4, at 91–113 (analyzing the reasons for public dissatisfaction with lawyers); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 644 (1998) (stating that "the public's mistrust and dislike for lawyers is at an all-time high").

pleadings, and motions.<sup>10</sup> Federal courts have both inherent power<sup>11</sup> and statutory authority<sup>12</sup> to sanction lawyers for frivolous litigation conduct.<sup>13</sup> In recent decades, however, the “weapon of choice” for judicial imposition of sanctions has been Rule 11 of the Federal Rules of Civil Procedure.<sup>14</sup> Whereas other

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<sup>10</sup> Responsibility to deter unprofessional conduct is not exclusive to the judiciary. The legal profession is largely self-regulated and the organized bar is a major force in shaping the rules of professional behavior. *See* GILLERS, *supra* note 3, at 1–7 (discussing the genesis of the rules regulating the conduct of attorneys). Historically, however, the organized bar had not dealt effectively with the abuses of the litigation process. *See* Vairo, *supra* note 9, at 629, 645 (“[T]he ethical codes have not been successful in reining in the unprofessional conduct of many lawyers . . .”). For a federal judge’s view on the effectiveness of the bar disciplinary committees see Kevin Thomas Duffy, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 *FORDHAM L. REV.* 1, 20 (1985):

Why do lawyers bring stupid, senseless, baseless lawsuits? Because they get away with it. The organized bar itself is supposed to watch out for the activities of lawyers. Has the organized bar met its own requirements? Are lawyers still bringing stupid, senseless, baseless lawsuits? Sure. Why aren’t they disbarred? Well, they are not, and it is quite obvious to the judiciary that if the organized bar is not going to clean its own house then somebody has got to do something about it. Isn’t it nice of the organized bar to say, “Hey we have got a problem, let’s pass it off to the judiciary.”

*Id.*

<sup>11</sup> *See* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991) (reaffirming the inherent power of federal courts to award counsel fees and expenses for bad-faith litigation); *United States v. Int’l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991) (maintaining that “a court has a . . . means at its disposal for sanctioning improper conduct: its inherent power” and that “[t]his power stems from the very nature of courts”).

<sup>12</sup> Section 1927 of the United States Code provides the federal courts with statutory authority to impose monetary sanctions against lawyers for unreasonable and vexatious increase of litigation costs. The section provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (2000).

<sup>13</sup> *See Chambers*, 501 U.S. at 43.

<sup>14</sup> While the 1993 amendments, *see infra* Part I.B.3, reduced the number of Rule 11 proceedings, *see Vairo, supra* note 9, at 626, a brief search of district court cases reported on computerized databases shows that when district courts contemplate sanctions, Rule 11 cases continue to outnumber section 1927 and “inherent power” cases. From January to November of 2003, 240 reported cases imposing sanctions cited Rule 11. Search of WESTLAW, District Courts Database (Oct. 31, 2003) (search for da (aft 01/01/2003) & da (bef 10/31/2003) & sanction! & (“fed. r.civ. p. 11” “rule 11”). In the same time period, district courts cited “inherent power” in 144 cases, *id.* (search for da (aft 01/01/2003) & da (bef 10/31/2003) & sanction! & “inherent power”), and “§ 1927” in only 65 cases, *id.* (search for da (aft 01/01/2003) & da (bef 10/31/2003) & sanction! & “28 u.s.c. 1927”).

remedies require a showing of bad faith as a prerequisite for sanctions,<sup>15</sup> Rule 11 authorizes sanctions on the basis of conduct found to be unreasonable.<sup>16</sup> Since Rule 11 was amended in 1983, the general understanding among courts<sup>17</sup> and commentators<sup>18</sup> has been that an “unreasonable” submission will subject the offender to sanctions.<sup>19</sup> Recently, however, in *In re Pennie &*

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<sup>15</sup> The Second Circuit has articulated the bad faith requirement for sanctions under the inherent power doctrine. See *Int'l Bhd. of Teamsters*, 948 F.2d at 1345 (“[T]his Court . . . has always required a particularized showing of bad faith to justify the use of the court’s inherent power.”); see also *id.* (discussing sanctions under section 1927 and stating that “[b]ad faith is the touchstone of an award under [section 1927]”).

<sup>16</sup> Courts routinely rely on Rule 11’s authority to sanction attorneys for unreasonable conduct. See, e.g., *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254–55 (11th Cir. 1996) (unreasonable reliance on the conclusory statements of the client); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll.*, 103 F.3d 294, 298–300 (3rd Cir. 1996) (poor legal research); *In re Cascade Energy & Metals Corp.*, 87 F.3d 1146, 1151 (10th Cir. 1996) (failure to correctly quote the statute on which the claim was based). See generally Marguerite L. Butler, *Rule 11 Sanctions and a Lawyer’s Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681 (2002) (analyzing Rule 11’s implications on lawyers’ duty to conduct competent research); Vairo, *supra* note 9, at 605–18 (giving examples of various conduct sanctionable under Rule 11).

<sup>17</sup> See *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997) (“Rule 11 requires only a showing of *objective unreasonableness* on the part of the attorney or client signing the papers . . . .”); *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997) (“[T]he test for imposition of Rule 11 sanctions is whether the attorney’s conduct was reasonable under the circumstances.”); *Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir. 1995) (“Rule 11 sanctions are based on ‘an objective standard of reasonableness under the circumstances.’ ” (citations omitted)); see also 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 11.11 n.30 (3d ed. 2003) (providing a circuit-by-circuit listing of cases where the court applied an objective standard for imposition of Rule 11 sanctions).

<sup>18</sup> See 2 MOORE ET AL., *supra* note 17, ¶ 11.11[3] (concluding that the courts have interpreted “Rule 11 [as] establish[ing] an objective standard of reasonable conduct for litigants and attorneys”); Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 511 (1986) (pointing out that Rule 11 creates an affirmative obligation for an attorney to make reasonable “prefiling inquiry with respect to both the facts and the law”); Vairo, *supra* note 9, at 598 (“Bad faith findings [are] not required. Rather, an attorney’s conduct would be put to an objective test . . . .”); Yablon, *supra* note 5, at 65 (1996) (commenting that “the determination that a claim is frivolous, and an *objective* determination at that, has been a primary criterion for imposing liability under Rule 11”).

<sup>19</sup> While some courts impose sanctions only when a pre-filing inquiry into the factual and legal merits of the claim is unreasonable and the paper ultimately filed is also frivolous, see, e.g., *FDIC v. Elephant*, 790 F.2d 661, 667 (7th Cir. 1986) (noting that sanctions are warranted “only when the failure to investigate leads to the taking of an objectively unsupported position”), others will award sanctions regardless of whether the claim itself is found to be frivolous, see, e.g., *Garr v. U.S.*

*Edmonds LLP*,<sup>20</sup> a majority of a panel of the United States Court of Appeals for the Second Circuit held that attorneys could not be sanctioned in a court-initiated post-trial proceeding in the absence of a showing of subjective bad faith.<sup>21</sup> The Second Circuit grounded its conclusion on two propositions.<sup>22</sup> First, the court claimed that the 1993 Advisory Committee's Note to Rule 11, which states that *sua sponte* sanctions ordinarily will be imposed in situations where the attorney's conduct is "akin to a contempt," compellingly indicates that the intent of the Advisory Committee was to require something more serious than mere unreasonable conduct before a court imposes sanctions.<sup>23</sup> The court's reasoning was straightforward: because bad faith is essential to a determination of contempt and because *sua sponte* Rule 11 sanctions should be imposed only in situations that are akin to contempt, it follows that a finding of bad faith is a prerequisite to *sua sponte* sanctions as well.<sup>24</sup> Second, the court concluded that the heightened *mens rea* is justified as a matter of good public policy.<sup>25</sup> According to the Second Circuit, a bad faith requirement effectively counterbalances the risk that some attorneys may withhold submissions that have plausible evidentiary and legal support out of fear that their conduct will be found unreasonable by the trial judge.<sup>26</sup>

This Comment argues that the Second Circuit erred in imposing a bad faith requirement as a prerequisite for court-initiated post-trial Rule 11 sanctions. It submits that neither the express language, historical development, purpose of Rule 11, nor the policy considerations advanced by the court support

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Healthcare, Inc., 22 F.3d 1274, 1281 (3d Cir. 1994). For a discussion of whether the Rule 11 analysis should involve the "product approach," which focuses on the merits of the filed paper, or the "conduct approach," which looks into the reasonableness of the inquiry, see Vairo, *supra* note 9, at 607–09.

<sup>20</sup> 323 F.3d 86 (2d Cir. 2003).

<sup>21</sup> *Id.* at 87. ("We conclude that where, as here, a *sua sponte* Rule 11 sanction denies a lawyer the opportunity to withdraw the challenged document pursuant to the 'safe harbor' provision of Rule 11(c)(1)(A), the appropriate standard is subjective bad faith." (emphasis added)). Since a dispositive summary judgment ruling is the functional equivalent of a trial, the term "post-trial" is used in this Comment to describe invocation of *sua sponte* sanctions during both post-summary judgment and post-trial adjudication.

<sup>22</sup> *Id.* at 89–91.

<sup>23</sup> *Id.* at 89–90.

<sup>24</sup> *Id.* at 90.

<sup>25</sup> *Id.* at 90–91.

<sup>26</sup> *Id.* at 91.

the imposition of a separate *mens rea* element for any subset of Rule 11 sanctions. Application of two distinct standards for punishing the same behavior, depending on whether the sanction proceedings are on-motion or *sua sponte*, will bring confusion to the operation of Rule 11, may encourage meritless filings, and may, in some situations, have an adverse effect on attorneys who act in subjective good faith. Furthermore, this Comment submits that the likely ramification of the Second Circuit's holding is a limitation, and a possible elimination, of district courts' power to sanction attorneys for unreasonable conduct associated with the filing of motions, pleadings, and other papers. Such a result may hamper judges' power to control their courtrooms and may greatly reduce the role of the judiciary in curbing unprofessional conduct.

Part I of this Comment examines the current language of Rule 11 and its historical development. Part II provides the factual and procedural background to the issue raised in *In re Pennie & Edmonds* and details the reasoning of the majority and dissenting opinions. Part III analyzes and questions the *Pennie* court's rationale and holding and then discusses the likely impact of the case on the effectiveness of Rule 11. Part IV sets forth possible alternatives that may provide some basic protection for lawyers who act in good faith without offending the plain meaning of Rule 11.

## I. RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE: TEXT AND HISTORICAL DEVELOPMENT

### A. *The Current Version*

Rule 11 provides that every pleading, written motion, or other paper presented to a federal district court must be signed either by the attorney or, if the party is unrepresented, by the litigant herself.<sup>27</sup> The signature constitutes a certification that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" the allegations and claims have evidentiary and legal support and that the filing "is not being presented for any improper purpose."<sup>28</sup> If the conditions implied by the certification are

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<sup>27</sup> FED. R. CIV. P. 11(a).

<sup>28</sup> *Id.* 11(b). Rule 11(b) in its entirety provides that:

violated, the court, after notice and a reasonable opportunity to respond, may impose appropriate sanctions upon the violator.<sup>29</sup> The proceeding for sanctions may be initiated by motion of the opposing counsel<sup>30</sup> or on the court's own initiative.<sup>31</sup> When the sanctions proceeding is initiated by motion of a litigant, the offending party has the protection of a so-called "safe harbor" provision: no sanctions are allowed if the attorney withdraws or corrects the offending document within twenty-one days after the Rule 11 motion is served.<sup>32</sup> There is no "safe harbor," however, when the inquiry is initiated by the court.<sup>33</sup>

The text of the rule also defines the nature of sanctions.<sup>34</sup> "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."<sup>35</sup> While the determination of what is "sufficient" rests largely on the discretion of the trial judge,<sup>36</sup> the rule imposes important

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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:

- (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;
- (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;
- (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
- (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.

*Id.*

<sup>29</sup> *Id.* 11(c).

<sup>30</sup> *Id.* 11(c)(1)(A).

<sup>31</sup> *Id.* 11(c)(1)(B).

<sup>32</sup> *Id.* 11(c)(1)(A) ("[M]otion for sanctions . . . shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.").

<sup>33</sup> *Id.* 11(c)(1)(A), (B).

<sup>34</sup> *Id.* 11(c)(2).

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* ("[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or . . . an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation."); *id.* 11 advisory committee's

limitations when the court initiates a sanctions proceeding: awarding of attorney fees to opposing counsel is not permitted<sup>37</sup> and other monetary sanctions can be imposed only if the show cause order was issued before any voluntary dismissal or settlement.<sup>38</sup>

The language of Rule 11's reasonableness standard for attorney conduct is relatively simple and straightforward,<sup>39</sup> but, as the *Pennie* panel's split decision demonstrates, difficulties of interpretation still exist. The context of Rule 11's historical development proves a basis for understanding its standard for sanctions.<sup>40</sup>

### B. Historical Development

#### 1. The Original 1938 Version: Subjective Standard of Bad Faith

Rule 11 was initially adopted in 1938 as part of the original Federal Rules of Civil Procedure.<sup>41</sup> The original version of the rule provided that by signing a pleading the attorney certified that "to the best of his knowledge, information and belief there is

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note (1993), *reprinted in* 146 F.R.D. 401, 587 (1993) ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation . . .").

<sup>37</sup> See *id.* 11(c)(2); *id.* 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. at 591–92 ("[A] monetary sanction imposed after a court-initiated show cause order [must] be limited to a penalty payable to the court . . .").

<sup>38</sup> See *id.* 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 . . ."). The Advisory Committee explained that "[p]arties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case." *Id.* 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. at 592.

<sup>39</sup> See Rebecca Ellen Bruck, Comment, *Lessons in Eliminating Statutory Vagueness: Rule 11 of the FRCP as a Model for Removing the "Good Faith" Fulcrum from Section 707(A) of the Bankruptcy Code*, 19 BANKR. DEV. J. 399, 414–15 (2003) (using Rule 11 as a template of statutory clarity).

<sup>40</sup> See Vairo, *supra* note 9, at 592 (underscoring the importance of historical context for a proper understanding of Rule 11 and stating that "[t]o understand the controversy about Rule 11 and the impact it has had on the legal profession, it is important to remember the context in which the rule was first amended").

<sup>41</sup> See STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE xv–xvi (2002) (providing a concise description of the process by which the Federal Rules of Civil Procedure are promulgated and the roles of Congress, the Supreme Court, the Judicial Conference, and the Advisory Committees in this process).

good ground to support it; and that it is not interposed for delay.”<sup>42</sup> The old rule provided for “appropriate disciplinary action” against an attorney who violated the certification provision, but sanctions were available only for “a willful violation of [the] rule.”<sup>43</sup> The emphasis on the subjective nature of the violation, however, was inconsistent with Rule 11’s purpose “to check abuses in the signing of pleadings”<sup>44</sup> and “to assure the integrity of pleadings.”<sup>45</sup> First, the certification standard was too forgiving—mere good faith would remove the attorney’s conduct from the reach of sanctions.<sup>46</sup> Second, because of the bad faith requirement, a significant burden of proof had to be met before sanctions could be imposed.<sup>47</sup> Furthermore, the text of the rule failed to properly define the key requirement that there be “good ground” to support the pleading with the result that the nature of the duty owed by the attorney to the court was unclear.<sup>48</sup> Due to these factors and a general reluctance by courts to impose sanctions,<sup>49</sup> Rule 11 sanctions were rarely imposed.<sup>50</sup> Thus, Rule 11, as originally

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<sup>42</sup> FED. R. CIV. P. 11 (1938).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* 11 advisory committee’s note (1983), *reprinted in* 97 F.R.D. 165, 198 (1983).

<sup>45</sup> *See* Cavanagh, *supra* note 18, at 503 (“Old Rule 11 was designed specifically to assure the integrity of pleadings filed in federal court . . .”). To underscore the importance of the signature requirement in improving the integrity of litigation process, Professor Cavanagh quoted Chief Justice Warren E. Burger: “When the elder statesmen among you here today came to the bar, I am sure you were told, as I was, that your signature on a pleading or motion was something like your signature on a check. There was supposed to be something to back it up.” *Id.* at 503 n.23 (citing *Rodgers v. Lincoln Towing Serv.*, 596 F. Supp. 13, 27 (N.D. Ill. 1984) (quoting Chief Justice Warren Burger, Address at American Law Institute Annual Meeting (May 15, 1984))).

<sup>46</sup> *See id.* at 504.

<sup>47</sup> *See id.* at 505.

<sup>48</sup> *See id.* at 504 (concluding that under the language of old Rule 11 “[t]he precise nature of the attorney’s responsibilities remained unclear”).

<sup>49</sup> *See id.* at 505, 505 n.41 (discussing the reluctance of judges to impose Rule 11 sanctions); Vairo, *supra* note 9, at 595 (commenting that “most judges were notoriously reluctant to impose sanctions even when faced with apparently serious breaches of professionalism”).

<sup>50</sup> *See* SAUL M. KASSIN, FEDERAL JUDICIAL CENTER, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 (1985) (reviewing the effectiveness of the 1938 version of Rule 11). From 1938 to 1976, Rule 11 produced only nineteen reported opinions in which only three attorneys were actually sanctioned. *Id.* (citing Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976)). In the next three years there was only one additional reported instance of Rule 11 sanctions. *Id.*

enacted, was an ineffective tool to combat the abuse of frivolous filings.<sup>51</sup>

## 2. The 1983 Amendments: Objective Standard of Reasonableness

The major development in Rule 11 jurisprudence came in 1983, when the rule was significantly amended “[i]n an effort to curtail frivolous claims, defenses, and motions more effectively, to foster judicial economy, and to prevent delay in litigating legitimate matters.”<sup>52</sup> As amended, Rule 11 established an objective rather than a subjective standard for attorney’s conduct—by signing court documents,<sup>53</sup> the attorney certified that her “knowledge, information, and belief” were “formed after reasonable inquiry.”<sup>54</sup> Furthermore, the rule provided for mandatory sanctions when the objective standard of reasonableness was violated.<sup>55</sup>

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<sup>51</sup> See FED. R. CIV. P. 11 advisory committee’s note (1983), *reprinted in* 97 F.R.D. 165, 198 (1983) (“Experience shows that in practice Rule 11 has not been effective in deterring abuses.”); Cavanagh, *supra* note 18, at 506 (concluding that “the old Rule did not effectively deter abuses of the litigation process”); Vairo, *supra* note 9, at 596 (pointing that before the 1983 amendments Rule 11 “was largely ignored” and that certification provisions were “not read enough, not demanding enough, and not honored enough”). “Promulgated to curb tendencies toward untruthfulness, the effect of the rule was to place a moral obligation on attorneys to satisfy *themselves* that good grounds existed for the action or defense.” *Id.* at 595–96 (emphasis added).

<sup>52</sup> Cavanagh, *supra* note 18, at 511. For an in depth discussion of the historical context in which the 1983 amendments were promulgated and the reasons behind the amendments see Vairo, *supra* note 9, at 591–98.

<sup>53</sup> The 1983 amendments explicitly expanded the reach of Rule 11 to cover “every pleading, motion, and other paper,” as opposed to pleadings only in the original version. FED. R. CIV. P. 11 (1983), *reprinted in* 97 F.R.D. 165, 196 (1983). Even prior to 1983, however, Rule 11 applied to motions and other papers through incorporation by reference in Rule 7(b)(2). *Id.* 11 advisory committee’s note (1983), *reprinted in* 97 F.R.D. at 197.

<sup>54</sup> The 1983 version of the rule provided in relevant part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*Id.* 11, *reprinted in* 97 F.R.D. at 198 (emphasis added). Please note that in 1987 Rule 11 was amended to make the text gender neutral. *See id.* (1987).

<sup>55</sup> *Id.* 11 (1983) (“If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose* . . . an

After the 1983 amendments, Rule 11 became the major source of judicial sanctioning power in federal courts.<sup>56</sup> The number of reported decisions imposing sanctions under Rule 11 increased dramatically after 1983.<sup>57</sup> Along with an increase in the sheer number of Rule 11 decisions, the 1983 amendments produced “more controversy than perhaps any other Federal Rule of Civil Procedure.”<sup>58</sup> 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.<sup>59</sup> Opponents of the rule, however, maintained that much of the conduct being deterred by the rule was the advancement of novel legal theories and legitimate factual contentions by plaintiffs and their attorneys, especially in civil rights actions.<sup>60</sup>

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appropriate sanction.” (emphasis added)).

<sup>56</sup> See R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY AND PRACTICE* 149 (2d ed. 1996) (“While largely ignored for the first 45 years of its existence, after its amendment in 1983 Rule 11 became a major concern both among lawyers and judges.”); GILLERS, *supra* note 3, at 493 (“Rule 11 is a force to be reckoned with.”).

<sup>57</sup> See DESSEM, *supra* note 56, at 150, 150 n.75 (contrasting the number of reported decisions before and after 1983). “As of 1988, only five years after amended Rule 11 took effect, there were over 100 federal appellate decisions and over 1000 reported decisions in all federal courts dealing with Rule 11.” *Id.* (citations omitted).

<sup>58</sup> Vairo, *supra* note 9, at 591; see GILLERS, *supra* note 3, at 493–95 (“By far . . . it is Rule 11 that has received the most attention, some of it highly critical, even caustic.”).

<sup>59</sup> See DESSEM, *supra* note 56, at 150; Vairo, *supra* note 9, at 590 (“[T]here can be no argument that Rule 11 has changed lawyer conduct in some significantly positive ways. . . . [L]awyers engaged in more serious pre-filing research than before, and . . . decided after such research not to file marginal pleading and motions.”); Erik Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora’s Box?*, 13 U. HAW. L. REV. 57, 60–61 (1991) (“Rule 11 in federal courts deters careless and ill-conceived filings to a measurable extent. Rule 11 has made attorney’s ‘stop, look and inquire’ before filing. . . . Fewer meritless positions are asserted and litigated. Groundless motion and nuisance value claims are discouraged.” (citations omitted)).

<sup>60</sup> 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) (discussing chilling effect of the 1983 version of the rule).

[B]ecause of the threat of Rule 11 sanctions, lawyers were much less likely to file some novel but meritorious claims that they might otherwise have pursued and/or to make novel legal arguments that may well have prevailed in court. . . . Rule 11 had a disproportionate impact on certain types of litigants and their attorneys; the threat of sanctions “pose[d] special threats to small plaintiffs attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups,

The other major area of concern was the apparent overuse of Rule 11.<sup>61</sup> The relaxed objective standard, the mandatory nature of sanctions upon a finding of unreasonable behavior, and the allowance for the shifting of attorney fees triggered an "avalanche of 'satellite litigation.'"<sup>62</sup> Designed to curtail the abuses of the legal process, Rule 11 itself engendered abusive practices<sup>63</sup> and raised the question of whether "the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to 'stop and think.'"<sup>64</sup>

### 3. The 1993 Amendments: Step Back, Step Forward, No Change in Applicable Standard

In response to the legitimate concerns raised by the critics of the 1983 version of the rule,<sup>65</sup> Rule 11 was again significantly

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especially those asserting novel legal theories or reordered social understandings in the form of legal rights."

*Id.* (quoting Yamomoto & Hart, *supra* note 59, at 101).

<sup>61</sup> See Vairo, *supra* note 9, at 598.

<sup>62</sup> *Id.* at 598.

<sup>63</sup> See *id.* at 589–90.

Even though the adoption of amended Rule 11 in 1983 was in large measure an attempt to deal with the abuses that undermined civility and professionalism, it appears that Rule 11 contributed significantly to the further decline in civility. This, in turn, may have contributed to further undermining the public's confidence in the profession as well. The availability of compensatory sanctions made possible by the amended rule also created a new form of pernicious attorney conduct: the all-too-frequent making of Rule 11 motions.

*Id.* at 590.

<sup>64</sup> DESSEM, *supra* note 56, at 150 (quoting Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335, 346 (1990)).

<sup>65</sup> See *supra* notes 60–64 and accompanying text. After reviewing Rule 11 criticism, the Advisory Committee concluded that:

[T]here was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated

amended in 1993.<sup>66</sup> While the apparent purpose of the 1993 amendments was to tone down<sup>67</sup> the far-reaching potency of Rule 11, it also appears that the Advisory Committee wanted to ensure that Rule 11 would remain an effective and available tool for the judicial enforcement of lawyers' conduct.<sup>68</sup>

The changes implemented in 1993 were both substantive and procedural in character. The substantive changes were designed primarily to lessen the negative impact of Rule 11 "on the assertion of novel claims and [the] disproportionate impact on plaintiffs."<sup>69</sup> First, the new version of the rule allowed for a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,"<sup>70</sup> as opposed to the "good faith" standard of the 1983 version.<sup>71</sup> Second, the plaintiff now could assert not only factual contentions that already had explicit evidentiary support, but also those that were "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."<sup>72</sup> The other change designed to soften the impact of Rule 11 was

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contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993). The purpose of the revision, as stated by the Advisory Committee, was "to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." FED. R. CIV. P. 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. 401, 583 (1993).

<sup>66</sup> See generally Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1013-22 (1999) (providing a concise but thorough overview of the 1993 amendments).

<sup>67</sup> See Vairo, *supra* note 9, at 589 (pointing out that "Rule 11 ultimately was toned down in 1993").

<sup>68</sup> See *id.* at 594 ("Though most of the changes were intended to scale back the more draconian aspects of Rule 11, the mindset occasioned by the 1983 amendments to Rule 11 remained."); *infra* note 86.

<sup>69</sup> See Hart, *supra* note 60, at 25-26.

<sup>70</sup> FED. R. CIV. P. 11(b)(2).

<sup>71</sup> See Hart, *supra* note 60, at 25-26, 25 n.73 (discussing the effect of a frivolousness standard on the assertion of novel claims).

<sup>72</sup> FED. R. CIV. P. 11(b)(2). For a discussion of difficulties involved in determining which assertions are likely to have evidentiary support before the actual discovery, see Lisa Pondrom, Comment, *Predicting the Unpredictable Under Rule 11(B)(3): When are Allegations "Likely" to Have Evidentiary Support?*, 43 UCLA L. REV. 1393, 1396-1402 (1996).

the elimination of mandatory sanctions.<sup>73</sup> Now, even after a determination that a violation occurred, courts had discretion not to impose any sanctions.<sup>74</sup>

While the substantive modifications were significant, the Advisory Committee relied mainly on procedural changes to combat the proliferation of secondary litigation brought by lawyers seeking to use Rule 11 as a means of recovering legal costs.<sup>75</sup> The procedural revisions included the previously-described “safe harbor” provision<sup>76</sup> and the requirement that litigants be given notice and an opportunity to respond before the imposition of sanctions.<sup>77</sup> Furthermore, courts imposing sanctions were required to enter formal orders describing “the conduct determined to constitute a violation . . . and explain the basis for the sanction imposed.”<sup>78</sup>

Even as some of the changes introduced in 1993 were designed to relax Rule 11 regime,<sup>79</sup> other modifications were intended to actually broaden the reach of the rule.<sup>80</sup> The more subjective parts of the previous standard were replaced with elements that were clearly objective.<sup>81</sup> The 1983 version stated that after reasonable inquiry the signer could conclude that filings were “well grounded in fact and [were] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”<sup>82</sup> The 1993 revision

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<sup>73</sup> FED. R. CIV. P. 11(c).

<sup>74</sup> *See id.* (“If . . . the court determines that subdivision (b) has been violated, the court *may* . . . impose an appropriate sanction. . . .” (emphasis added)); *id.* 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. at 587 (“The court has significant discretion in determining what sanctions, *if any*, should be imposed for a violation.” (emphasis added)).

<sup>75</sup> *See id.* 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. at 584 (stating that “greater constraints on the imposition of sanctions . . . should reduce the number of motions for sanctions presented to the court”).

<sup>76</sup> *Id.* 11(c)(1)(A) (providing that Rule 11 motion can be only filed with the court twenty-one days after its service on the opponent and only if the opponent does not withdraw the challenged document within that time); *see supra* note 32 and accompanying text.

<sup>77</sup> FED. R. CIV. P. 11(c)(1)(B) (requiring the court to direct the offending party to show cause why it has not violated the provisions of Rule 11 before any sanctions could be imposed).

<sup>78</sup> *Id.* 11(c)(3).

<sup>79</sup> *See supra* notes 69–78 and accompanying text.

<sup>80</sup> *See infra* notes 81–88 and accompanying text.

<sup>81</sup> *See Hirt, supra* note 66, at 1014 (discussing changes in Rule 11 standards of liability).

<sup>82</sup> FED. R. CIV. P. 11 (1983), *reprinted in* 97 F.R.D. 165, 167 (1983).

replaced the “well grounded in fact” provision with the requirement that the factual assertions either have “evidentiary support” or “are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>83</sup> The subjective “good faith” standard for advocating a modification of existing law was replaced with the requirement that such advocacy not be frivolous.<sup>84</sup> While the effect of these changes was arguably to reduce the disproportionate burden of sanctions on plaintiffs and litigants attempting to advance novel legal claims,<sup>85</sup> the Advisory Committee insisted that the purpose of the revisions was to broaden and expand the responsibilities of litigants to the court.<sup>86</sup> The desire to broaden Rule 11’s reach is also evidenced by an expansion of the circle of persons and entities potentially accountable for violation of the rule.<sup>87</sup> As amended, the rule allows sanctions to reach not only the persons signing the meritless filing, but also those who were “responsible for the violation.”<sup>88</sup>

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<sup>83</sup> *Id.* 11(b)(3) (1993).

<sup>84</sup> *Id.* 11(b)(2).

<sup>85</sup> *See supra* notes 69–74 and accompanying text.

<sup>86</sup> First, the Advisory Committee stated that the overall goal of Rule 11 was not altered or reduced by the 1993 amendments: “The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 11. The revision *broadens* the scope of this obligation . . .” FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 584 (1993) (emphasis added). The Committee reiterated the requirement to conduct a reasonable inquiry into the law and facts before filing:

These subdivisions restate the provisions requiring attorney and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part *expands* the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to “stop-and-think” before initially making legal or factual contentions.

*Id.*, 146 F.R.D. at 584–85 (emphasis added).

<sup>87</sup> *See Hirt, supra* note 66, at 1018–19 (discussing accountability for violation of Rule 11).

<sup>88</sup> FED. R. CIV. P. 11(c). The list of those subject to Rule 11 sanctions, besides the actual signer, now includes the violator’s law firm, other attorneys in the firm, co-counsel, other law firms, the represented party, and even governmental agencies or other institutional parties that control the primary violator. *See* FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. at 589.

II. *IN RE PENNIE & EDMONDS*: STATEMENT OF THE CASEA. *Factual and Procedural Background*

The sanction issue decided in *In re Pennie & Edmonds LLP*<sup>89</sup> arose out of a trademark infringement dispute over the use of the “Patsy’s” brand in the marketing of pasta sauce.<sup>90</sup> In response to the plaintiff’s motion for a preliminary injunction, defendants asserted that they began using the “Patsy’s” name in 1993, a year before the plaintiff started selling its product under the same name.<sup>91</sup> In support of their contention, the defendants submitted a label that purportedly was used in 1993 and a printer’s invoice showing that the label had been ordered in 1993.<sup>92</sup> The submitted documents, however, were shown to be false: the bar code type on the label and the phone number on the invoice did not exist until some time after 1993.<sup>93</sup> After the District Court granted the plaintiff’s motion for a preliminary injunction, the defendants’ original counsel withdrew from the case and the defendants retained the Pennie & Edmonds law firm.<sup>94</sup> Two partners of the firm questioned defendants about the previously submitted documents.<sup>95</sup> One of the defendants, Frank Brija, still maintained that the defendants had used the disputed trademark prior to 1993 and explained the submission of falsified documents was an inadvertent mistake.<sup>96</sup> According to Brija, the disputed label was in fact used in 1993 but he mistakenly submitted a 1999 version instead of the correct one.<sup>97</sup> With respect to the invoice, Brija explained that the printer had been unable to locate the original and reconstructed a copy from his recollection of printing orders.<sup>98</sup> Brija produced an affidavit, purportedly signed by the printer, stating that the invoice given by the printer to Brija was a reconstruction and that the printer did not recall disclosing to the defendants that he had given

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<sup>89</sup> 323 F.3d 86 (2d Cir. 2003).

<sup>90</sup> *Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209 (2d Cir. 2003).

<sup>91</sup> *Id.* at 214.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *In re Pennie & Edmonds LLP*, 323 F.3d 86, 88 (2d Cir. 2003).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

them a reconstructed copy.<sup>99</sup> While the defendants continued to insist on the truthfulness of their explanations, the circumstances afforded significant doubts about their claims. A second label, claimed by the defendants to be the true 1993 label, included a registration mark even though the defendants did not own any registered trademarks for “Patsy’s” in 1993.<sup>100</sup> Furthermore, when the Pennie & Edmonds lawyers contacted the printer’s attorney, they were told that the printer denied doing any business with the defendants during the relevant time period and that he would so testify at the trial.<sup>101</sup>

In opposition to the plaintiff’s motion for summary judgment, the defendants submitted, among other papers, Brija’s affidavit, which reiterated his contention that the previous fraudulent submission was an inadvertent mistake.<sup>102</sup> The district court granted the plaintiff’s motion for summary judgment, explicitly rejecting Brija’s explanation as false.<sup>103</sup> The district judge John S. Martin also issued a *sua sponte* order directing the Pennie & Edmonds lawyers to show cause why they should not be sanctioned under Rule 11 for permitting their client to submit a false affidavit.<sup>104</sup> Since it was not possible to withdraw the paper at this point, the law firm responded by detailing the steps taken to investigate the client’s explanations and also pointed out the defendants’ repeated insistence on the truthfulness of their statements.<sup>105</sup> Although Judge Martin accepted the firm’s assertion that it had acted in subjective good faith,<sup>106</sup> he sanctioned Pennie & Edmonds for permitting the filing of “an affidavit containing statements that the law firm could not have objectively believed were true.”<sup>107</sup> The firm was ordered to send to every attorney in the firm a copy of the court’s opinion imposing sanctions accompanied by a memorandum stating that it was the policy of the firm to adhere to the “highest ethical standards,” and that no lawyer would suffer adverse

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

consequences even if such adherence caused the loss of a client.<sup>108</sup>

Despite the relatively mild nature of the sanctions, Pennie & Edmonds appealed Judge Martin's decision.<sup>109</sup> The firm contended that court-initiated sanctions were improper because the firm's lawyers had not acted in bad faith.<sup>110</sup> The Second Circuit agreed with the firm and held that where "a *sua sponte* Rule 11 sanction denies a lawyer the opportunity to withdraw the challenged document pursuant to the 'safe harbor' provision of Rule 11(c)(1)(A), the appropriate standard is subjective bad faith."<sup>111</sup> Because the district court made an explicit finding that the Pennie & Edmonds' lawyers acted with subjective good faith, the court of appeals vacated the order imposing a Rule 11 sanction.<sup>112</sup>

### B. *The Majority Opinion*

The Second Circuit, in an opinion written by Judge Jon O. Newman and joined by the late Judge Fred I. Parker, analyzed the impact of the 1993 amendments to Rule 11 and concluded that the intended effect of those amendments was to restore the pre-1983 standard of subjective bad faith for post-trial, *sua sponte* Rule 11 sanctions.<sup>113</sup> The linchpin to the court's analysis was the "safe harbor" provision and its effect on Rule 11 sanctions.<sup>114</sup> Judge Newman contrasted the availability of the "safe harbor" for sanctions initiated by a motion with the

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The decision to appeal is certainly understandable. There are arguably no sanctions against attorneys that are "too mild." See GILLERS, *supra* note 3, at 495.

Rule 11 and related sanctions alarm lawyers for several reasons. For most, having a judge find that they engaged in frivolous or vexatious conduct, no matter how modest the sanction, is disturbing. The court's opinion may appear in the case reports, on line, or in the popular or legal press. Client relations may suffer if sanctions are jointly imposed on the lawyer and client, if the sanction undermines the client's cause, or if it requires additional legal expense beyond the sanction itself.

*Id.*

<sup>110</sup> *In re Pennie & Edmonds*, 323 F.3d at 87.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 93.

<sup>113</sup> *Id.* at 91 n.4 ("We believe we implement the [Advisory] Committee's expectation by applying a contempt-like *mens rea* standard to court-initiated show cause orders issued where there is no opportunity to withdraw or correct.").

<sup>114</sup> *Id.* at 89.

absence of similar protections when the sanctions are initiated by a court.<sup>115</sup> Rationalizing this discrepancy, the court examined the Advisory Committee's Note to the 1993 amendments.<sup>116</sup> The Advisory Committee explained the absence of a "safe harbor" protection against *sua sponte* sanctions as follows: "Since 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 harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative."<sup>117</sup> The Second Circuit interpreted the phrase "akin to a contempt of court" as imposing the same *mens rea* standard for Rule 11 violations as for contempt of court.<sup>118</sup> After noting that contempt sanctions require a finding of bad faith,<sup>119</sup> the court concluded that *sua sponte* Rule 11 sanctions are subject to the same requirement.<sup>120</sup>

The court also concluded that a heightened *mens rea* requirement better serves a "vigorous adversary process."<sup>121</sup> The court considered the risk "that lawyers will 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 a

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 89–90.

<sup>117</sup> FED. R. CIV. P. 11 advisory committee's note (1993), reprinted in 146 F.R.D. 401, 592 (1993).

<sup>118</sup> *In re Pennie & Edmonds*, 323 F.3d at 90.

<sup>119</sup> *Id.* (citing *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 194 F.3d 323, 338 (2d Cir. 1999); *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997)).

<sup>120</sup> *Id.* (finding "strong support for the proposition that, when applying sanctions under Rule 11 for conduct that is 'akin to a contempt of court,' a bad faith standard should apply"). According to the majority, the authors of the 1993 amendments intended such an interpretation:

We have taken seriously the Committee's expectation that show cause orders will be issued in circumstances where the challenged conduct is "akin to contempt," which, as we have noted, requires bad faith. . . . 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. We believe we implement the Committee's expectation by applying a contempt-like *mens rea* standard to court-initiated show cause orders issued where there is no opportunity to withdraw or correct.

*Id.* at 91 n.4.

<sup>121</sup> *Id.* at 91.

litigant's claimed belief to be objectively unreasonable."<sup>122</sup> The majority acknowledged the risk that on some occasions a jury may give "unwarranted weight" to objectively unreasonable submissions.<sup>123</sup> The court, nevertheless, concluded that the interests of the adversary system require presenting questionable evidence to a jury, and that a heightened *mens rea* better satisfies that requirement in the context of Rule 11 sanctions.<sup>124</sup>

The *Pennie* court explicitly limited its holding to situations where, as in the instant case, the court initiates Rule 11 proceedings post-trial and counsel has no opportunity to correct or withdraw the challenged submission.<sup>125</sup> The majority admitted that the bad faith standard arguably should apply to all court-initiated Rule 11 sanctions. The court agreed that the "akin to contempt" language in the Advisory Committee's note applies to all *sua sponte* sanctions, and that the "safe harbor" protection against such sanctions is unavailable regardless of when the show cause order is issued.<sup>126</sup> Nevertheless, the court refused to make "so broad a ruling" and declined to reach the question of whether all Rule 11 *sua-spontе* sanctions are subject to a subjective standard.<sup>127</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* The court explained that:

A vigorous adversary process is better served by avoiding the inhibiting effect of an "objectively unreasonable" standard applied to unchallenged submissions, and letting questionable evidence be tested with cross-examination and opposing evidence than by encouraging lawyers to withhold such evidence. It is better to apply a heightened *mens rea* standard to unchallenged submissions and take the slight risk with respect to such submissions that, on occasion, a jury will give unwarranted weight to a few submissions that a judge would consider objectively unreasonable than to withhold from the jury many submissions that are objectively reasonable but that cautious lawyers dare not present.

*Id.*

<sup>125</sup> *Id.* at 91–92.

<sup>126</sup> *Id.* at 91.

<sup>127</sup> *Id.* at 91–92 ("We need not decide the standard for a sanction proceeding initiated earlier in the litigation at a time when the challenged submission could be corrected or withdrawn as part of the lawyer's response to the show cause order. . . .").

*C. The Dissent*

Judge Stefan R. Underhill<sup>128</sup> filed a dissenting opinion. He criticized the majority for “substitut[ing] its judgment for that of the Advisory Committee.”<sup>129</sup> He argued that the majority erred in reverting to a heightened “bad faith” state-of-mind requirement for a subset of Rule 11 proceedings. Judge Underhill reasoned that this was a “requirement that the Advisory Committee, the Supreme Court and Congress abandoned in 1983.”<sup>130</sup>

Judge Underhill, applying a plain meaning analysis, argued that the substantive nature of the sanctionable conduct for both on-motion and *sua sponte* sanctions should be the same. He argued that the mere procedural distinctions in the text of Rule 11 were not enough to justify different treatment.<sup>131</sup> He then turned to an analysis of whether the Advisory Committee intended to make such a distinction and concluded that it did not.<sup>132</sup> The dissent faulted the majority for “a misreading of the Advisory Committee’s intent” because it had relied on the phrase “akin to contempt” which came from a single sentence in the Advisory Committee notes.<sup>133</sup> Judge Underhill maintained that the “akin to contempt” language merely described conduct that is subject to a show cause order and not the actor’s state of mind.<sup>134</sup>

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<sup>128</sup> Judge Underhill, of the United States District Court for the District of Connecticut, was sitting on the Second Circuit by designation. It is probably appropriate to suggest that, as a trial judge, Judge Underhill is familiar with the behavior of lawyers during litigation and values every tool available to the judge to control the flow of the trial and the conduct of the trial’s participants. See *Zak v. Kenney*, 197 F.R.D. 212, 212 (D. Conn. 2000) (imposing *sua sponte* Rule 11 monetary sanction of \$250 on defendant’s counsel for failing to keep the court informed of material matters, failing to comply with court orders, and causing significant delay in the trial date).

<sup>129</sup> *In re Pennie & Edmonds*, 323 F.3d at 101 (Underhill, J., dissenting).

<sup>130</sup> *Id.* at 102.

<sup>131</sup> *Id.* at 94 (“The fundamental flaw in the majority’s interpretation of Rule 11 is that it seeks to use procedural distinctions . . . regarding *how* sanctions can be imposed with and without a motion, to modify the substantive requirements . . . which control[] *whether* a violation of Rule 11 has occurred.”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 95 (“[T]he Show Cause Sentence 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.”).

The dissent also dismissed the majority's assertion that "changing the *mens rea* standard for a class of court-initiated Rule 11 sanctions is supported by policy considerations."<sup>135</sup> While not directly challenging the policy analysis advanced by the majority, Judge Underhill maintained that it was improper for the court to impose its own solution to the perceived problem when a legislative "considered judgment" reflects "efforts to balance competing interests, concerns and suggestions."<sup>136</sup>

Concluding that the imposition of a bad faith standard as a prerequisite for Rule 11 sanctions "[was] not supported by the text, Advisory Committee notes, drafting history or purpose of Rule 11" and that the proper standard should still be a reasonableness test, the dissent would have affirmed the sanction imposed on Pennie & Edmonds.<sup>137</sup>

### III. *IN RE PENNIE & EDMONDS*: ANALYSIS

#### A. *Rule 11's Weak Support for a Separate Standard for Sua Sponte Sanctions*

The differential treatment the authors of the 1993 amendments gave to on-motion and court-initiated sanctions is the foundation of the Second Circuit's decision in *In re Pennie & Edmonds* to impose a separate standard for *sua sponte* sanctions.<sup>138</sup> The text of Rule 11 separates the sanctions based on the method of their initiation—the procedural steps required for on-motion sanctions are described in section (c)(1)(A) of the rule,<sup>139</sup> and those for court-initiated proceedings are in section

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<sup>135</sup> *Id.* at 101.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 102.

<sup>138</sup> *See id.* at 89–90 (exploring the differences between on-motion and court-initiated sanctions).

<sup>139</sup> FED. R. CIV. P. 11(c)(1)(A).

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 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

(c)(1)(B).<sup>140</sup> However, such separate treatment in the structural language of the rule, standing alone, does not support the *mens rea* distinction—section (c) merely sets out the *procedural* steps that must be taken before the court may reach the question of whether the *substantive* requirement of the certification provision was violated.<sup>141</sup> This substantive requirement is defined in section (b), which does not differentiate between types of sanction proceedings and, therefore, does not afford any deviation from a single *mens rea* standard.<sup>142</sup>

In the absence of any meaningful textual distinctions between the two types of Rule 11 sanctions (on-motion and *sua sponte*) as related to the applicable standard,<sup>143</sup> the *Pennie* court had to base its conclusion on the practical differences afforded by the “safe harbor” to lawyers facing on-motion sanctions.<sup>144</sup> There is, of course, a profound difference between facing a sanction motion from an adversary and responding to a show cause order. In the former case, the attorney remains in control of the determination of whether to withdraw the disputed submission or to challenge the potential Rule 11 motion. Withdrawal within twenty-one days will automatically thwart any sanctions.<sup>145</sup> In the case of a court’s show cause order, corrective actions by the

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violations committed by its partners, associates, and employees.

*Id.*

<sup>140</sup> *Id.* 11(c)(1)(B) (“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.”).

<sup>141</sup> *See id.* 11(c)(1); *see also In re Pennie & Edmonds*, 323 F.3d at 94 (Underhill, J., dissenting) (“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).”).

<sup>142</sup> *See supra* note 28 (full text of Rule 11(b)).

<sup>143</sup> As the *Pennie* dissent pointed out, “The majority [did] not cite to any language in the rule itself that marks a distinction in the state-of-mind required for imposition of sanctions with and without a motion by counsel, because no such language exists.” *In re Pennie & Edmonds*, 323 F.3d at 94 (Underhill, J., dissenting).

<sup>144</sup> *See id.* at 89.

<sup>145</sup> *See Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995) (stating that sanctions are not allowed when plaintiff would have withdrawn or corrected misstatements if he had the proper twenty-one day notice); *Tri-Tech Mach. Sales, Ltd. v. Artos Eng’g Co.*, 928 F. Supp. 836, 840 (E.D. Wis. 1996) (holding that a correction of pleadings within the safe harbor will be protected from sanctions); *see also 2 MOORE ET AL.*, *supra* note 17, ¶ 11.22[1][b] (describing operation of Rule 11’s “safe harbor” provisions).

attorney, while relevant,<sup>146</sup> do not guarantee that sanctions cannot be imposed.<sup>147</sup>

It appears, however, that neither the practical and procedural differences between on-motion and *sua sponte* sanctions<sup>148</sup> nor the Advisory Committee's cursory reference to contempt warrant the Second Circuit's conclusion that the drafters' intent was to impose a separate *mens rea* for *sua sponte* sanctions. The textual construction of the Advisory Committee's Note does not conclusively support the proposition that *sua sponte* sanctions are essentially the same as contempt of court sanctions and, therefore, must have the same state-of-mind requirement. First, the "akin to contempt" language does not literally mean "the same as contempt."<sup>149</sup> Second, the Advisory Committee's Note states that *sua sponte* Rule 11 sanctions "will *ordinarily* be issued only in situations that are akin to a contempt,"<sup>150</sup> leaving open the possibility that sanctions can be imposed in situations that are less egregious than the conduct usually associated with contempt sanctions.<sup>151</sup>

Furthermore, *sua sponte* Rule 11 sanctions and contempt of court sanctions should not be treated the same in every respect (including the required *mens rea*) because each of these sanctions has a distinct purpose behind it.<sup>152</sup> The purpose of contempt

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<sup>146</sup> "Such corrective action . . . should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred." FED. R. CIV. P. 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. 401, 592 (1993).

<sup>147</sup> See *Ridder v. City of Springfield*, 109 F.3d 288, 297 n.8 (6th Cir. 1997) (stating that "safe harbor" is not available for court-initiated sanctions); FED. R. CIV. P. 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. 401, 592 (1993) ("[T]he rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative.").

<sup>148</sup> See *supra* notes 139–47 and accompanying text (discussing textual and practical differences between two types of Rule 11 sanction proceedings).

<sup>149</sup> Webster's Dictionary defines "akin" as "similar, analogous, comparable, parallel." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 46 (2d ed. 1997).

<sup>150</sup> FED. R. CIV. P. 11 advisory committee's note (1993), *reprinted in* 146 F.R.D. 401, 592 (1993) (emphasis added).

<sup>151</sup> The *Pennie* majority brushed this possibility aside by explaining the use of the word "ordinarily" as "a natural reluctance of rule-makers to say 'always,' in candid recognition of their inability to anticipate every imaginable set of circumstances that might one day arise." *In re Pennie & Edmonds LLP*, 323 F.3d 86, 92 (2d Cir. 2003).

<sup>152</sup> See *Willy v. Coastal Corp.*, 503 U.S. 131, 138–39 (1992) ("A civil contempt order has much different purposes than a Rule 11 sanction.").

sanctions is either punitive—to vindicate the authority of the court,<sup>153</sup> or remedial—to force a party to comply with a court order or to compensate the complainant.<sup>154</sup> The punitive, coercive, or compensatory functions of contempt sanctions focus on the past or future conduct of a particular contemnor.<sup>155</sup> The requirement that a finding of subjective bad faith supports a contempt order<sup>156</sup> is consistent with such “individualized” operation of contempt sanctions. In contrast, the goal of Rule 11 sanctions is not only “to punish a party who has already violated the court’s rules,”<sup>157</sup> but also to prevent the repetition of such violations by the same violator and by others, both in the context of the current case and in future proceedings.<sup>158</sup> The deterrent goal of Rule 11 is better served by requiring the participants to

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<sup>153</sup> See *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994) (describing both punitive and coercive roles of criminal contempt).

“[W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law’s purpose of modifying the contemnor’s behavior to conform to the terms required in the order.” Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender’s future obedience.

*Id.* (alteration in original) (quoting *Hicks v. Feiock*, 485 U.S. 624, 635 (1988)).

<sup>154</sup> See *id.* at 829 (describing the remedial purpose of civil contempt sanctions and explaining that a “contempt fine accordingly is considered civil and remedial if it either ‘coerce[s] the defendant into compliance with the court’s order, [or] . . . compensate[s] the complainant for losses sustained’” (alteration in original) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 303–04 (1947))); *Willy*, 503 U.S. at 139 (“Civil contempt is designed to force the contemnor to comply with an order of the court . . . to coerce compliance with the court’s decree . . .”).

<sup>155</sup> FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 587–89 (1993).

<sup>156</sup> See *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 194 F.3d 323, 338 (2d Cir. 1999) (reiterating the requirement of a specific finding of bad faith for sanctions under court’s inherent power doctrine and under 28 U.S.C § 1927); *United States v. Int’l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991) (same).

<sup>157</sup> *Willy*, 503 U.S. at 139.

<sup>158</sup> The Advisory Committee explicitly stated that “the purpose of Rule 11 is to deter [frivolous filings].” FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 587 (1993). Rule 11’s goal of altering the behavior of litigants in more general ways than in the context of a particular controversy is also evidenced by the definition of the nature of sanctions. “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*.” *Id.* 11(c)(2) (emphasis added). One of the factors to be considered in determining what sanctions are appropriate is the amount “needed to deter *similar activity by other litigants*.” *Id.* 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 587 (1993) (emphasis added).

adhere to an objective reasonableness standard, rather than the subjective bad faith standard.<sup>159</sup>

The general historical development of Rule 11<sup>160</sup> and the legislative history of the 1993 amendments<sup>161</sup> also reveal no intent to revert to a subjective test for evaluating attorney behavior. The changes implemented in 1993 were designed to address the specific set of problems that had “arisen in the interpretation and application of the 1983 revision of the rule.”<sup>162</sup> In particular, the “safe harbor” provisions were introduced not to protect attorneys from sanctions<sup>163</sup> but to “reduce the number of motions for sanctions presented to the court”<sup>164</sup> and to provide an incentive “to abandon a questionable contention.”<sup>165</sup> The overall goal was to “protect the *courts* from the burden of deciding numerous, often unnecessary, Rule 11 motions.”<sup>166</sup> Since the “safe harbor” was introduced to combat issues other than the perceived harshness of the reasonableness standard,<sup>167</sup> one cannot read into the rule the desire to protect litigants and their attorneys. It is logical to conclude, as the *Pennie* dissent did,

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<sup>159</sup> See Vairo, *supra* note 9, at 607 (“Rule 11 was designed to alter behavior. The point of the rule is to impose an affirmative duty on attorneys. . . . [I]t may be appropriate to sanction an attorney . . . where the attorney lacked the knowledge or belief that would have come from a reasonable inquiry.”).

<sup>160</sup> See *supra* Part I.B. (providing a brief overview of Rule 11 history).

<sup>161</sup> *In re Pennie & Edmonds* provides an analysis of the legislative history of Rule 11 as it relates to the standard for sanctions. See *In re Pennie & Edmonds LLP*, 323 F.3d 86, 99–101 (2d Cir. 2003) (Underhill, J., dissenting).

<sup>162</sup> FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 583 (1993). The problems that the 1993 amendments sought to remedy included the disproportionate impact of sanctions on plaintiffs, the negative effect on assertions of novel or unpopular claims, the implosion of motions seeking cost-shifting, the lack of incentives to abandon no longer supportable positions, the exacerbation of unprofessional and uncivil behavior, and the time burden on the courts. See *supra* note 65.

<sup>163</sup> The elimination of the requirement for mandatory sanctions upon finding a violation of the rule addressed the need to protect the attorneys from pointless sanctions. See *supra* note 74 and accompanying text.

<sup>164</sup> FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 584 (1993).

<sup>165</sup> *Id.*

<sup>166</sup> *In re Pennie & Edmonds*, 323 F.3d at 100 (Underhill, J., dissenting) (emphasis in original).

<sup>167</sup> In addition to the concerns about Rule 11 overuse that were addressed by the introduction of the “safe harbor,” the “chilling effect” of the rule was considered by the authors of the 1993 amendments and addressed elsewhere in the rule without changing the applicable standard of conduct. See *supra* notes 69–72 and accompanying text.

“that courts do not need to be protected from matters that they raise on their own”<sup>168</sup> and, therefore, a “safe harbor” is not needed for court-initiated sanctions.

Other procedural changes in the rule address the particular concerns that may be raised by *sua sponte* sanctions. Courts are required to issue a show cause order and provide notice and an opportunity to respond before sanctions may be leveled.<sup>169</sup> Cost-shifting orders are prohibited in the *sua sponte* context<sup>170</sup> and other monetary sanctions are not allowed unless the court issues a show cause order before any voluntary dismissal or settlement.<sup>171</sup>

The writers of the 1993 amendments carefully attempted to remedy the problems associated with the then current version of Rule 11. They did not want to alter the main proposition of the 1983 version—that there is “an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing.”<sup>172</sup> Each issue addressed in 1993 was resolved without reverting to the pre-1983 bad faith standard.<sup>173</sup> Furthermore, the Advisory Committee explicitly reiterated that the intended effect of the changes was to broaden, not to narrow, the scope of the duty owed by litigants and attorneys to the court.<sup>174</sup> It is highly unlikely that an issue as important as a change in an applicable standard for a sizeable subset of Rule 11 sanctions would be addressed only in passing in one of the Advisory Committee’s notes and not in the text of the rule itself.<sup>175</sup> Moreover, the

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<sup>168</sup> *In re Pennie & Edmonds*, 323 F.3d at 100 (Underhill, J., dissenting).

<sup>169</sup> FED. R. CIV. P. 11(c)(1)(B). The Advisory Committee explained that “[t]he power of the court to act on its own initiative [was] retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond.” *Id.* 11 advisory committee’s note (1993), reprinted in 146 F.R.D. 401, 591 (1993).

<sup>170</sup> See *id.* 11(c)(2); *supra* note 37 and accompanying text. *But see* Hart, *supra* notes 60, at 70–72 (showing that some courts award attorney’s fees under Rule 11 *sua sponte* despite the prohibition).

<sup>171</sup> See *supra* note 38.

<sup>172</sup> *Bus. Guides, Inc. v. Chromatic Communications Enters.*, 498 U.S. 533, 551 (1991).

<sup>173</sup> See *supra* notes 69–78 and accompanying text.

<sup>174</sup> See *supra* note 86.

<sup>175</sup> Despite the importance usually afforded to the Advisory Committee’s notes in the interpretation of the rules, the notes themselves are not the law. See STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE xvi, (2001) (explaining that the Advisory Committee’s notes “do not have the force of law” but “often serve the same function for the Rules that legislative history does for statutes”).

proposal to provide “safe harbor” protection for court-initiated sanctions was considered and rejected.<sup>176</sup> This rejection, together with the failure to provide explicitly for a subjective standard for sanctions, quite convincingly shows that the Advisory Committee thought that any additional protections for lawyers were unnecessary or inappropriate.

### B. Policy Considerations

It appears that the *Pennie* majority was aware that, in interpreting the Federal Rules of Civil Procedure, federal courts are not allowed to apply their “own notions of public policy.”<sup>177</sup> The majority insisted that its public policy analysis merely demonstrated the “soundness” of the Advisory Committee’s decision to implement the subjective bad faith standard for court-initiated sanctions.<sup>178</sup> Regardless of whether policy

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<sup>176</sup> See *In re Pennie & Edmonds LLP*, 323 F.3d 86, 92 n.5. (2d Cir. 2003).

Several groups have suggested that the safe harbor provisions, which under the published draft apply only to motions filed by other litigants, should apply also to show cause orders issued at the court’s own initiative. The Advisory Committee continues to believe that court-initiated show cause orders—which typically relate to matters that are akin to contempt of court—are properly treated somewhat differently from party-initiated motions.

*Id.* (quoting Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146 F.R.D. 401, 525 (1993)).

<sup>177</sup> *In re Pennie & Edmonds*, 323 F.3d at 91 n.4 (“We believe we implement the Committee’s expectation by applying a contempt-like *mens rea* standard to court-initiated show cause orders issued where there is no opportunity to withdraw or correct.”). The principle that the judgment of the Advisory Committee is controlling was clearly articulated by the Supreme Court in *Business Guides*:

[T]his Court is not acting on a clean slate; our task is not to decide what the rule should be, but rather to determine what it is. . . . Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside of the rulemaking process. “Our task is to apply the text, not to improve upon it.”

*Business Guides*, 498 U.S. at 548–49 (quoting *Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120, 126 (1989)).

<sup>178</sup> See *In re Pennie & Edmonds*, 323 F.3d at 92 n.4.

In reaching our conclusion, we have not . . . applied our own notions of public policy. Rather, we have discussed the policy implications of our ruling and the adverse implications of a contrary ruling only to indicate the soundness of the Advisory Committee’s expectation that show cause orders issued without an opportunity to withdraw or correct a challenged submission will be used in circumstances akin to contempt.

*Id.* at 91–92 n.4.

considerations were advanced by the court to illustrate the propriety of the Advisory Committee's expectation or the Second Circuit's own view of the matter, the court's analysis and conclusion are questionable.

The premise for the policy analysis of Rule 11 sanctions is a search for a proper balance between a lawyer's ability to submit all legitimate claims on behalf of clients and the courts' interest in maintaining the functionality and integrity of the legal system.<sup>179</sup> The *Pennie* majority believed that the court's power to impose sanctions for unreasonable submissions when offenders do not have the opportunity to correct them shifts the balance to such an extent that it can do "more damage to the robust functioning of the adversary process than the benefit it would achieve."<sup>180</sup> However, what appears to be a careful balancing of the risks associated with court-initiated sanctions proceedings is, upon close examination, the Second Circuit's own value judgment. The court simply assumed that there is a substantial risk that legitimate submissions will be withheld out of the fear of sanctions and that the risk of improper submissions is only "slight."<sup>181</sup> While it is inherently difficult to estimate the number of otherwise valid submissions that may never have been filed because of the possibility of sanctions,<sup>182</sup> there is some

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<sup>179</sup> The *Pennie* court quite logically observed that:

If the sanction regime is too severe, lawyers will sometimes be deterred from making legitimate submissions on behalf of clients out of apprehension that their conduct will erroneously be deemed improper. On the other hand, if the sanction regime is too lenient, lawyers will sometimes be emboldened to make improper submissions on behalf of clients, confident that their misconduct will either be undetected or dealt with too leniently to matter.

*Id.* at 90–91.

<sup>180</sup> *Id.* at 93.

<sup>181</sup> *See id.* at 91, 93.

It is better to apply a heightened *mens rea* standard to unchallenged submissions and take the *slight risk* with respect to such submissions that, *on occasion*, a jury will give unwarranted weight to a *few* submissions that a judge would consider objectively unreasonable than to withhold from the jury *many* submissions that are objectively reasonable but that cautious lawyers dare not present.

*Id.* at 91 (emphasis added).

<sup>182</sup> The commentators often rely on anecdotal evidence to ascertain the impact of Rule 11 on litigants. *See, e.g.*, Hart, *supra* note 60, at 106 (admitting that any conclusions reached in evaluating the chilling effect of the rule are "anecdotal"); Hirt, *supra* note 66, at 1026 ("To date [(as of 1999)], there is relatively little academic or practitioner commentary on how the amended Rule operates. There is,

data showing that Rule 11 still has a chilling effect, especially in civil rights cases.<sup>183</sup> It is unclear, however, what portion of those “chilled claims” can be attributed to a fear of *sua sponte* sanctions, or to a fear of sanctions in general. It might be true that a court-initiated proceeding is more likely to result in the imposition of an actual sanction than the process started by a motion.<sup>184</sup> Nonetheless, the higher risk that a show cause order will result in a sanction is counter-balanced by the fact that *sua sponte* show cause orders make up a relatively small share of all Rule 11 sanction proceedings.<sup>185</sup> Statistically, an attorney is more likely to be sanctioned pursuant to a motion by her opponent than as a result of a court-initiated proceeding.<sup>186</sup>

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however, some ‘anecdotal’ reporting . . .” (citation omitted).

<sup>183</sup> See Hart, *supra* note 60, at 143 (analyzing the federal case law and concluding that “because of the way the 1993 amendments are being interpreted and applied in the federal courts, the chilling effects continue to exist today”).

<sup>184</sup> *Id.* at 92–93 (finding that the rate of sanctions actually imposed pursuant to orders to show cause was as high as 71%); see also Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 952 (1992) (analyzing the impact of the 1983 version of the rule and concluding that “the rate of sanctions emerging from a judicial show cause order is far greater than the success rate of motions for sanctions: about 60% of the judicially-initiated Rule 11 formal activity leads to sanctions as compared with approximately 15% of the counsel-initiated motions”).

<sup>185</sup> See Hart, *supra* note 60, at 92–93 (estimating that district court issued show cause orders in 16% of all reviewed Rule 11 sanctions cases); Hirt, *supra* note 66, at 1035–36 (concluding that court-initiated sanctions “represent a small number of decisions relative to the number of decisions in which courts have considered motions filed by a party”). The earlier study also suggests that the risk that a party will be sanctioned as a result of the court-initiated proceeding is actually smaller than the risk of a successful motion by an adversary. See Marshall et al., *supra* note 184, at 952. The overall rate of success for all Rule 11 sanction proceedings was reported at 17% as compared to 15% success rate of the counsel-initiated motions. *Id.* Thus, all *sua sponte* sanctions only increased the overall rate by 2%, despite the fact that court-initiated proceedings were four times more likely to result in sanctions. See *id.* Of course, the reliability of this study’s results should be discounted in determining the current risks because the impact of the “safe harbor” was not taken into consideration.

<sup>186</sup> See Hart, *supra* note 60, at 92–93. Out of one hundred thirty-five federal cases collected and analyzed by Professor Hart, Rule 11 sanctions were imposed in sixty-six cases. *Id.* at 103. Orders to show cause were issued in twenty-one of those cases and resulted in fifteen sanctions, comprising approximately 23% of the sixty-six Rule 11 cases. *Id.* at 92–93. Conversely, fifty-one sanctions, or 77%, were imposed pursuant to counsel-initiated proceedings. See *id.* While Professor Hart’s research admittedly falls short of the comprehensive across-the-board statistical analysis of Rule 11, it nevertheless suggests that even with the availability of the “safe harbor” provisions it is still three times more likely that an actual sanction will be issued in response to motion rather than on the court’s own initiative. See *id.* at 106.

Assessment of the magnitude of risk that attorneys will face sanctions pursuant to the court's order to show cause is only one part of the analysis of whether such sanctions curtail legitimate claims. The other part is a determination of whether the apprehension of such risk by lawyers will actually alter their decisions to file submissions that they themselves believe to be "borderline." The *Pennie* court, in reaching its conclusion that there will be "many submissions that are objectively reasonable but that cautious lawyers dare not present,"<sup>187</sup> failed to consider the factors that provide strong incentives for an attorney to file a paper regardless of the attorney's beliefs about the merits of the filing or the adequacy of pre-filing research. These incentives may arise from ethical<sup>188</sup> and legal<sup>189</sup> obligations to clients and, very often, from underlying economic realities of the attorney-client relationship in the context of an adversary system.<sup>190</sup> The common theme of these incentives is their strong presence at the time when filing of the motion is contemplated, as opposed to the threat of Rule 11 sanctions, which at this moment may be seen by an attorney as fairly remote. Without a real threat of sanctions that are not automatically preventable by a filer's subsequent actions, there will be no real counterweight to the inclination to file first and consider the merits of a motion later.<sup>191</sup>

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<sup>187</sup> *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003).

<sup>188</sup> There is an independent duty to zealously represent a client. This duty may, in some situations, require an attorney who honestly believes in the legal merits of her client's contentions to present them to the court. *See supra* note 3; *see also* MODEL RULES OF PROF'L CONDUCT Preamble (2003) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); N.Y.S.B.A., Lawyer's Code of Professional Responsibility EC 7-3, *available at* [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Lawyers\\_Code\\_of\\_Professional\\_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf) (last revised Jan. 1, 2002) ("While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law.").

<sup>189</sup> *See GILLERS, supra* note 3, at 765–68 (discussing lawyers' liability to clients for malpractice and breach of fiduciary duty).

<sup>190</sup> *See id.* at 143–46 (discussing various financial arrangements for paying for legal services and noting that "[m]ost lawyers get paid by their clients"); Yablon, *supra* note 5, at 69–76 (analyzing the economic rationale behind frivolous cases and describing situations "in which it pays for lawyers to bring cases they know they are going to lose").

<sup>191</sup> *See Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986). The court in *Hale* pronounced, possibly prematurely in light of the *Pennie* case, that:

The day is past when our notice pleading practice—circumscribed only by a requirement of subjective good faith on the pleader's part—plus liberal

C. *Likely Effect of In re Pennie & Edmonds on the Rule 11 Sanctions Regime*

The consequences of the Second Circuit decision in *In re Pennie & Edmonds* can be analyzed under two possible scenarios. First, one can assume that the subjective bad faith standard will apply only to post-trial situations when there is absolutely no opportunity for any corrective measures to be taken. The *Pennie* holding is explicitly limited to such post-trial situations.<sup>192</sup> The second possible scenario is that the bad faith standard will apply to all *sua sponte* Rule 11 sanctions. While the court refused to adopt the second approach,<sup>193</sup> the rationale behind the holding certainly supports its extension to proceedings initiated earlier in the litigation.<sup>194</sup>

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discovery rules invited the federal practitioner to file suit first and find out later whether he had a case or not. We have observed that, before 1983, Rule 11 required merely a subjective, good faith belief that there was good ground to support a pleading. In such circumstances, unless the pleading was preposterous on its face, the less the pleader inquired, the safer he was from sanction.

*Id.* (citation omitted).

<sup>192</sup> See *In re Pennie & Edmonds*, 323 F.3d at 87. The framing of the issue and the court's explicit holding leave no doubt that the court intended to limit the bad faith standard only to post-trial Rule 11 proceedings:

The 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. . . . We conclude that where, as here, a *sua sponte* Rule 11 sanction denies a lawyer the opportunity to withdraw the challenged document pursuant to the "safe harbor" provision of Rule 11(c)(1)(A), the appropriate standard is subjective bad faith.

*Id.*

<sup>193</sup> See *id.* at 91–92 (limiting the decision to the pending case's circumstances).

<sup>194</sup> The *Pennie* court itself recognized the merits of the arguments for expansion:

It is arguable . . . that a "bad faith" standard should apply to all court-initiated Rule 11 sanctions because no "safe harbor" protection is available and because the Advisory Committee contemplated such sanctions for conduct akin to contempt. However, we need not make so broad a ruling in the pending case. . . . We need not decide the standard for a sanction proceeding initiated earlier in the litigation at a time when the challenged submission could be corrected or withdrawn as part of the lawyer's response to the show cause order, even though the Rule does not explicitly guarantee a "safe harbor" protection in such circumstances.

*Id.*

1. Immediate Ramifications of *In re Pennie & Edmonds'*  
Holding

If read narrowly as applying only to post-trial sanctions, the *Pennie* decision should have little impact on the overall operation of Rule 11. Since an attorney who contemplates filing the “borderline motion” cannot predict at which point in the litigation the court may issue the show cause order and, therefore, cannot know what standard will be used to judge her behavior, it is unlikely that the mere possibility that the sanction proceedings will begin after there is an opportunity to correct will be determinative of the decision to file such a motion. Under the narrow reading of *Pennie*, the reasonableness of the lawyer’s conduct still can be evaluated by the court without the protection of a “safe harbor.”<sup>195</sup> The application of a bad faith standard only for post-trial sanctions, with the presence of the threat of unavoidable sanctions for merely unreasonable submissions during the litigation, may result in excusing some conduct *post hoc* but will fail to alter lawyers’ conduct at the point when the filing of a questionable submission is contemplated and, therefore, will not address the risk the *Pennie* court was seeking to mitigate.<sup>196</sup>

Yet, even the limited application of the *Pennie* ruling might have negative implications on participants in the litigation process. It is true that the underlying reason for the Second Circuit’s tightening of the standard for Rule 11 sanctions was to provide more protection for attorneys who act in good faith from the perceived harshness of the reasonableness standard when the “safe harbor” protection does not apply.<sup>197</sup> However, one can easily imagine situations in which the requirement of a bad faith finding as a prerequisite for Rule 11 sanctions may actually have

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<sup>195</sup> Since the *Pennie* court limited its holding only to post-trial *sua sponte* sanctions, see *supra* notes 125–27 and accompanying text, the reasonableness test still applies to all other sanction proceedings—either on-motion or *sua sponte*—initiated earlier in the litigation.

<sup>196</sup> The court’s intent was to minimize the risk “that lawyers will sometimes withhold submissions that they honestly believe have plausible evidentiary support for fear that a trial judge . . . will erroneously consider their claimed belief to be objectively unreasonable.” *In re Pennie & Edmonds*, 323 F.3d at 91. The imposition of a bad faith standard for some *sua sponte* sanctions, but not for all, does not remove the risk “that a trial judge . . . will erroneously consider [the] claimed belief to be objectively unreasonable.” *Id.*

<sup>197</sup> See *id.* at 89–91 (discussing the negative impact of sanctions when there is no opportunity for lawyers to correct or withdraw the challenged submission).

a greater negative impact on lawyers than Rule 11 would otherwise afford.

First, the applicability of two distinct standards for evaluating the same conduct, depending not on the timing of the conduct, but on the timing of the evaluation,<sup>198</sup> may add to the confusion surrounding Rule 11 sanctions. After *In re Pennie & Edmonds*, a lawyer may get a false sense of security that her good faith submissions are not sanctionable only to find herself, prior to the conclusion of the case, facing a show cause order without an opportunity to correct and automatically avoid sanctions.<sup>199</sup>

Second, the availability of the easier objective standard for sanctions in the earlier stages of a litigation, as opposed to a need to satisfy the more stringent subjective test later, may prompt the court to “pre-judge[] the merits of a claim, defense or position before deciding the matter.”<sup>200</sup> The judge at this point may issue a show cause order or invite a motion from the adversary.<sup>201</sup> If the show cause order is issued, the attorney could be forced to defend the merits of her submission even before the court finds it to be frivolous.<sup>202</sup> If the motion is filed by the adversary in response to the court’s prompting, the attorney will get the protection of the “safe harbor,” but she also

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<sup>198</sup> See *supra* note 195.

<sup>199</sup> Some of the news reports about the case failed to make perfectly clear that the court explicitly limited its holding to situations where corrective measures are not feasible. See, e.g., Mark Hamblett, *Panel Vacates False Affidavit Sanctions: Pennie & Edmonds Had Acted in Good Faith*, N.Y. L.J., Mar. 18, 2003, at 1 (“The Second Circuit found that a district judge’s belief that intellectual property firm Pennie & Edmonds acted with subjective good faith meant that the firm should not have been sanctioned.”); David L. Hudson, Jr., *A Good-Faith Belief in a Client’s Story: Firm That Filed False Affidavit Avoids Judge-Initiated Sanctions*, 12 A.B.A. J. E-REPORT, Mar. 28, 2003, at 3 (reporting that “[a]ttorneys cannot face Rule 11 sanctions initiated by a judge unless they act with subjectively bad faith”).

<sup>200</sup> Gregory P. Joseph, “*Sua Sponte*” Sanctions, NAT’L L.J., Apr. 14, 2003, at B6.

<sup>201</sup> See *id.*; see also *Method Elecs., Inc. v. Adam Techs., Inc.*, No. 03 C 2971, 2003 U.S. Dist. LEXIS 13049, at \*10 (N.D. Ill. July 24, 2003) (providing an example of a case where a motion for Rule 11 sanction was filed at the court’s suggestion). In this case defendants’ lawyer “reacted with enthusiasm to the idea that his oral motion for costs . . . [could] only be addressed through a sanctions motion pursuant to Rule 11,” *id.* at \*12, and filed such motion after the court stated in one of its orders that it could “think of no basis other than Rule 11 of the Federal Rules of Civil Procedure, which would authorize sanctions.” *Id.* at \*10.

<sup>202</sup> See Joseph, *supra* note 200 (noting also “that mere frivolousness of a position is frequently an insufficient basis from which to infer bad faith”).

may face greater sanctions than would be available the court if acted *sua sponte*.<sup>203</sup>

Third, there is a possibility that some judges will be simply more willing to find bad faith behavior knowing that it is required for sanctions. The *Pennie* court itself alluded to the contentiousness of some trials<sup>204</sup> and to the possibility that a judge might render an erroneous sanction decision.<sup>205</sup> The judge's own immediate emotions<sup>206</sup> or personality traits,<sup>207</sup> even if unintentionally and somewhat subconsciously, may influence the consideration process. The risk is actually greater when sanctions proceedings are *sua sponte* because the issuance of a show cause order by itself requires some predetermination that the questioned conduct is sanctionable.<sup>208</sup> Since the same judge who issues the show cause order is ultimately responsible for deciding whether sanctions are warranted, it is conceivable that some judges will find that the attorney has acted in bad faith only because they feel strongly that the conduct must be sanctioned.<sup>209</sup> While the extent of Rule 11 sanctions themselves,

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<sup>203</sup> See *id.* (discussing the ramifications of the Second Circuit decision in *Pennie*).

[I]f [*Pennie*] leads judges to invite sanctions motions from adversaries before the offending paper or position has been ultimately adjudicated, that will have the consequence of circumventing the limitations that Rule 11(c)(2) places on *sua sponte* sanctions. A motion opens up the offender to an award of attorney fees (which Rule 11(c)(2) always precludes when sanctions issue *sua sponte*) or other monetary sanctions (which Rule 11(c)(2) precludes if a show-cause order issues post-adjudication).

*Id.*

<sup>204</sup> See *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003) (“The risk is that lawyers will 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 objectively unreasonable.” (emphasis added)).

<sup>205</sup> See *id.* (recognizing the possibility that “a judge would consider [some submissions] objectively unreasonable . . . that are objectively reasonable”).

<sup>206</sup> Judges are not immune from feelings and expressions of “impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” *Liteky v. United States*, 510 U.S. 540, 555–56 (1994).

<sup>207</sup> “[A] stern and short-tempered judge[]” is still a judge with the power to render judgments. See *id.* at 556 (discussing whether judge’s personal views and temperament form a sufficient basis for disqualification).

<sup>208</sup> See 2 MOORE ET AL., *supra* note 17, ¶ 11.23[3] (“If the court contemplates imposing sanctions *sua sponte*, the court must issue an order specifically describing the conduct that appears to violate Rule 11 and directing the attorney, law firm, or party to show cause why he or she has not violated the rule.”).

<sup>209</sup> For example, it is possible that Judge Martin, knowing that in order for Rule

at least theoretically, should not be any greater in such a hypothetical situation,<sup>210</sup> other consequences could be much more detrimental. First, a finding by a federal court that an attorney has acted in bad faith, if not reversed on appeal,<sup>211</sup> would have a greater negative impact on the violator's reputation both in the public eye and within the profession than would the finding of mere negligence.<sup>212</sup> Second, such a ruling may be reported to a grievance committee, where a finding of bad faith could weigh heavily against an attorney in any disciplinary proceedings that might follow.<sup>213</sup> As a result, the sanctioned lawyer may find herself in a worse position than she would have been in if the trial judge possessed the authority to

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11 sanctions to be imposed against Pennie & Edmonds' lawyers he had to make a finding of bad faith, would not accept the lawyers' explanations as easily as he did and, indeed, would find their submissions to be not just unreasonable but in bad faith as well.

<sup>210</sup> See FED. R. CIV. P. 11(c)(2) ("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."); *Id.* 11 advisory committee's note (1993), reprinted in 146 F.R.D. 401, 587 (1993) ("[T]he sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.").

<sup>211</sup> Since a court's decision to award sanctions under Rule 11 for bad faith submission can only be reviewed under an abuse of discretion standard for a clearly erroneous assessment of the evidence, it would be a difficult task to attain the reversal. See 2 MOORE ET AL., *supra* note 17, ¶ 11.28[4][b]. The "abuse of discretion" standard is extremely deferential to an opinion of the court below. See *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 803 (5th Cir. 2003).

For this deferential review, the district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court.

*Id.* (internal quotation marks, emphasis, and citations omitted).

<sup>212</sup> The trial court's finding that Pennie & Edmonds' lawyers had acted unreasonably was not disturbed by the Second Circuit. Nevertheless, in the absence of a finding of bad faith, the firm could still claim that their conduct was "vindicated." See *Hudson*, *supra* note 199, at 3 ("We are very happy that the firm was vindicated . . . The firm, as it always does, acted in subjective good faith." (quoting John Normile, Co-Managing Partner at Pennie & Edmonds)).

<sup>213</sup> See *Vairo*, *supra* note 9, 589, 633–36 (providing examples of cases in which attorneys were reported to disciplinary committees by courts for violation of Rule 11 and discussing whether it is appropriate for courts to do so); see also Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 755–60 (1997) (analyzing judges' ethical duty to report professional misconduct to the appropriate disciplinary committees).

impose Rule 11 sanctions based on the mere unreasonableness of the submission.

Furthermore, resolution of the question of whether the submission had adequate evidentiary support may require the additional expense and time of a separate evidentiary hearing.<sup>214</sup> Consequently, the obligation to find subjective bad faith may, in some cases, lead to more, not less litigation<sup>215</sup>—an outcome that is inconsistent with the general purpose of Rule 11 to “streamline litigation.”<sup>216</sup>

## 2. The Larger Impact of *In re Pennie & Edmonds*’ Rationale

Although the Second Circuit explicitly limited the applicability of the bad faith standard to post-trial show cause orders,<sup>217</sup> the purported boundaries of the court’s decision are illusory. An attorney who faces a show cause order during the litigation is certainly free to withdraw an offending paper or otherwise correct her filings. Rule 11, however, does not require the court to take such corrective measures into consideration in determining whether a violation of the rule has occurred.<sup>218</sup> Therefore, no corrective measures taken by the attorney at this point can automatically preclude sanctions: the judge still has the discretion to find a violation of the rule and impose sanctions. To provide real protections, the Second Circuit will either have to require district judges not to impose sanctions when the offending filing is withdrawn in response to a show

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<sup>214</sup> See, e.g., *Commercial Fin. Servs., Inc. v. Great Am. Ins. Co. of N.Y.*, No. 02 Civ. 7168, 2003 U.S. Dist. LEXIS 9872, at \*33 (S.D.N.Y. June 12, 2003) (following *In re Pennie & Edmonds* and ordering an additional evidentiary hearing to determine whether “counsel had adequate evidentiary support to bring the claims”).

<sup>215</sup> See Joseph, *supra* note 200 (explaining that “it is rare for a court to hold an evidentiary hearing on a Rule 11 motion” but if “bad faith must be shown, that fact question may trigger a need for such a hearing.”).

<sup>216</sup> See *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 47 (2d Cir. 1994) (“The purpose of Rule 11 is to streamline litigation by thwarting the use of frivolous and abusive trial tactics.” (citing *McMahon v. Shearson*, 896 F.2d 17, 22 (2d Cir. 1990))).

<sup>217</sup> See *supra* notes 125–27 and accompanying text (discussing the *Pennie* court’s rationale in limiting its holding).

<sup>218</sup> Corrective measures are only to be used in the determination of appropriate sanctions, not to determine whether a violation has occurred. See FED. R. CIV. P. 11 advisory committee’s note (1993), *reprinted in* 146 F.R.D. 401, 592 (1993) (“Such corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant’s response, the court concludes that a violation has occurred.”).

cause order or to apply the bad faith standard in all *sua sponte* Rule 11 proceedings.

The text of Rule 11 and the Advisory Committee's Note do not support the imposition of a judicial "safe harbor"—allowing lawyers to automatically avoid sanction by withdrawing the offending document after the court-initiated show cause order. On the contrary, the "safe harbor" for *sua sponte* sanctions was unambiguously rejected by Rule 11's drafters.<sup>219</sup> To impose a "safe harbor" for court-initiated proceedings might also require an independent determination by an appellate court (if there is an appeal) that the sanctioning judge gave the lawyer the opportunity to correct and then considered the corrective measures in determining whether there was a violation.<sup>220</sup>

It appears that the Second Circuit might be inclined to expand the bad faith standard to all court-initiated Rule 11 sanction proceedings rather than impose a "safe harbor" for *sua sponte* sanctions. First, the *Pennie* court based its conclusion on the "akin to contempt" language in the Advisory Committee's Note, which clearly refers to all court-initiated show cause orders.<sup>221</sup> Second, the majority openly acknowledged the merits of the argument for such expansion.<sup>222</sup> The court also recognized that the drafters of Rule 11 rejected a proposal to provide "safe harbor" protection to *sua sponte* sanctions.<sup>223</sup> If the Second Circuit follows the *Pennie* rationale and adopts a subjective bad faith standard for all *sua sponte* sanctions, that decision will effectively remove judicial authority to sanction unreasonable litigation conduct in many situations. An attorney will simply be able to withdraw the offending submission if sanction proceedings are on-motion or hide behind the "empty-head pure-heart" defense if the court issues a show cause order *sua sponte*.<sup>224</sup> Merely unreasonable submissions, no matter how

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<sup>219</sup> See *id.* ("[T]he rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative."); see also *supra* note 176.

<sup>220</sup> The scope of such appellate review would fall outside the "abuse of discretion" standard presently used in reviewing Rule 11 sanctions decisions. See *supra* note 211.

<sup>221</sup> See *supra* notes 116–20 and accompanying text.

<sup>222</sup> See *supra* text accompanying note 126; see also *supra* note 194 (recognizing the merits of the arguments for expansion of the bad faith standard).

<sup>223</sup> See *In re Pennie & Edmonds LLP*, 323 F.3d 86, 92 n.5 (2d Cir. 2003).

<sup>224</sup> See FED. R. CIV. P. 11 advisory committee's note (1993), reprinted in 146 F.R.D. 401, 586–87 (1993). An objective standard of reasonableness was in fact

egregious, will be sanctionable only if the opposing counsel serves a Rule 11 motion and the offending lawyer chooses not to withdraw or correct the disputed paper. Such dilution of the sanction regime may ultimately encourage meritless filings.<sup>225</sup>

The final determination of what constitutes sanctionable conduct, and consequently whether sanctions are warranted, should not depend on the opposing counsel's decision to file a motion. Attorneys' primary interest in litigation is advancing the position of their clients.<sup>226</sup> The interest protected by Rule 11 is the integrity of the legal process.<sup>227</sup> Since these interests are not always perfectly aligned,<sup>228</sup> an attorney in some situations may not file a Rule 11 motion even when the opposing counsel's conduct truly is frivolous. In contrast, judges generally are in a better position to assess the impact of questionable litigation conduct<sup>229</sup> and have the responsibility to maintain the integrity of the legal process.<sup>230</sup> It seems illogical to remove the sanction mechanism that can reach unreasonable conduct and is the most powerful tool available to protect courts from frivolous

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"intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." *Id.*

<sup>225</sup> The *Pennie* majority properly noted that "if the sanction regime is too lenient, lawyers will sometimes be emboldened to make improper submissions on behalf of clients, confident that their misconduct will either be undetected or dealt with too leniently to matter." *In re Pennie & Edmonds*, 323 F.3d at 91.

<sup>226</sup> See *supra* note 3 and accompanying text.

<sup>227</sup> See *Bus. Guides, Inc. v. Chromatic Communications Enters.*, 498 U.S. 533, 542 (1991) ("Rule 11 is 'aimed at curbing abuses of the judicial system.'" (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990))); *Vairo*, *supra* note 9, at 600 ("Rule 11 was designed to give district court judges an effective tool to cut down on the abuses that often accompany federal litigation."); *supra* notes 44, 45 and accompanying text (discussing Rule 11's purpose); *supra* notes 162-66 and accompanying text (describing Rule 11's goal to protect courts, not attorneys).

<sup>228</sup> See *supra* note 5 and accompanying text.

<sup>229</sup> See Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 688-89 (1996) (noting that sanctions are often "delegated to the trial courts' discretion because of their perceived skill and institutional expertise in handling them").

<sup>230</sup> See *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175, 2002 U.S. Dist. LEXIS 491, at \*16 (S.D.N.Y. Jan. 16, 2002) (pointing out that "the Court as an institution has a far greater interest in weeding out abuses than does any individual litigant"). The American Bar Association's voiced its position on the role of judges in the litigation process. See ABA Comm. on Professionalism, Report to the House of Delegates (1986), reprinted in 112 F.R.D. 243, 264-65 (1987) ("Trial judges should take a more active role in the conduct of litigation. They should see that cases advance promptly, fairly and without abuse. . . . Judges should impose sanctions for abuse of the litigation process.").

submissions from judges and place it exclusively into the hands of litigants for whom the integrity of the legal process might only be a secondary responsibility.

V. PROVIDING MEANINGFUL PROTECTIONS FROM SANCTIONS TO  
LAWYERS ACTING IN GOOD FAITH WITHIN  
THE FRAMEWORK OF RULE 11

Despite the questionable remedy adopted by the *Pennie* court,<sup>231</sup> the problem itself is not imaginary—there is a real possibility that in some situations lawyers will withhold otherwise plausible submissions for fear of court-initiated sanctions.<sup>232</sup> Are there mechanisms, besides the “safe harbor,” that may protect lawyers acting in good faith from the undue hardship of Rule 11 sanctions without creating a separate standard for assessing sanctionable conduct? The answer appears to be “yes.”

Rule 11 has intrinsic constraints that limit courts' power in a meaningful way. Lawyers, of course, are not asked to be perfect, just reasonable—Rule 11(b) only imposes the duty to conduct “an inquiry reasonable under the circumstances.”<sup>233</sup> To determine the reasonableness of the investigation, courts evaluate how much time was available to the signer before filing, whether the lawyer had to rely on a client for information, whether the paper was based on a plausible view of the law, and the extent to which factual development required discovery.<sup>234</sup> This flexible approach protects lawyers and precludes sanctions in at least some cases.<sup>235</sup> To reduce the risk of Rule 11 sanctions, lawyers can also take certain relatively simple precautionary steps.<sup>236</sup>

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<sup>231</sup> See *supra* Part III (criticizing the imposition of the subjective bad faith standard for *sua sponte* Rule 11 sanctions).

<sup>232</sup> See *supra* notes 60, 179.

<sup>233</sup> FED. R. CIV. P. 11(b).

<sup>234</sup> See *Jones v. Int'l Riding Helmets, Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995).

<sup>235</sup> See, e.g., *Dubois v. United States Dep't of Agric.*, 270 F.3d 77, 82–83 (1st Cir. 2001) (refusing sanctions for failure to investigate when attorneys reasonably relied on technical expertise of their client); *CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 579 (3d Cir. 1991) (denying sanctions when a lawyer had less than twenty-four hours to investigate the facts); *Salzmann v. Prudential Sec. Inc.*, No. 91 Civ. 4253, 1994 U.S. Dist. LEXIS 6377, at \*42 n.12 (S.D.N.Y. May 13, 1994) (giving an offender “benefit of the doubt” and denying motion for sanctions because of the complexity of issues).

<sup>236</sup> See *generally* DESSEM, *supra* note 56, at 163–64 (providing tips on

Rule 11 has internal limitations on the kind of sanctions that can be imposed. The principle that sanctions “shall be limited to what is sufficient to deter repetition of [inappropriate] conduct,”<sup>237</sup> although not a shield from sanctions, may mitigate the burden imposed on an attorney, especially if she acted in good faith.<sup>238</sup> The prohibition on attorney fee shifting by *sua sponte* sanctions proceedings<sup>239</sup> also can be considered a mitigating factor in the context of Rule 11 sanctions.<sup>240</sup>

In addition to Rule 11’s “built-in” constraints,<sup>241</sup> there are alternative interpretations of Rule 11 that would effectively protect attorneys for whom the “safe harbor” is not available. As an alternative to the Second Circuit’s *mens rea* rule, noted commentator Gregory P. Joseph suggested that an attorney’s conduct should be deemed reasonable unless the client’s story is incredible as a matter of law.<sup>242</sup> In cases where the issue is assessment of a client’s credibility, the Second Circuit itself has recognized the difficulty of determining a client’s untruthfulness and ruled that the client’s testimony must be “incredible as a matter of law” before sanctions may be applied.<sup>243</sup> Such focus on

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preventive measures against Rule 11 sanctions). Professor Dessem’s list includes: good record-keeping, preparedness to explain the conduct in question, adopting internal review procedures for law firms, and counseling clients of Rule 11 implications. *Id.* at 163. Such “good lawyering” steps might be beneficial regardless of whether there is a threat of sanctions. *Id.*

<sup>237</sup> FED. R. CIV. P. 11(c)(2).

<sup>238</sup> Judge Martin, explaining the mild character of sanctions imposed against Pennie & Edmonds, pointed out that “[g]iven Pennie & Edmonds’ reputation and its candor in these proceedings, the Court is persuaded that little sanction beyond the publication of this Opinion is required to prevent repetition of similar conduct.” *Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175, 2002 U.S. Dist. LEXIS 491, at \*27 (S.D.N.Y. Jan. 16, 2002). In some cases, courts limited sanctions to mere warnings, reprimands, or admonitions. *See, e.g., Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 810–12 (3d Cir. 1992) (issuing a reprimand); *Westfield Partners, Ltd. v. Hogan*, 744 F. Supp. 189, 193 (N.D. Ill. 1990) (deciding in favor of censure). *See generally Vairo, supra* note 9, at 633, 641–42 (discussing the benefits of less severe Rule 11 sanctions).

<sup>239</sup> *See supra* note 37 and accompanying text.

<sup>240</sup> Professor Hart’s research showed that some federal courts do award attorney fees on their own initiative in violation of the plain language of Rule 11. *See Hart, supra* note 60, at 70–71. It is a responsibility of appellate courts to ensure that orders to show cause are not used as cost-shifting measure. *Id.* at 71–72. To mitigate the “chilling” problem, “attorneys’ fees cannot, and must not, be awarded pursuant to an order to show cause.” *Id.* at 129 (emphasis omitted).

<sup>241</sup> *See supra* text accompanying notes 233–40.

<sup>242</sup> *See Joseph, supra* note 200.

<sup>243</sup> *See Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 844 (2d Cir. 1993); *Healey v.*

the credibility of a client's story, instead of an attorney's state of mind, would allow the court to avoid sanctioning lawyers in situations, similar to the one in *Pennie*, where the reasonableness of reliance on the client's statement is questioned.<sup>244</sup>

The alternative solution for the court that wants to "protect" an attorney who acted unreasonably but in good faith would be to find that the conduct of the attorney was not "akin to contempt." For example, in *Kaplan v. DaimlerChrysler A.G.*,<sup>245</sup> the Eleventh Circuit resolved the case and reversed *sua sponte* Rule 11 sanctions on the basis that the attorney's conduct was not "akin to contempt" and therefore the state of mind of the sanctioned attorney was irrelevant.<sup>246</sup> The *Kaplan* court focused its analysis on the effect of unreasonable filings on the litigation<sup>247</sup> and concluded that the offending submissions fell short of contempt level.<sup>248</sup> Similarly, in *In re Pennie & Edmonds*, the Second Circuit could have evaluated the effect of the submissions on the litigation and the overall conduct of the

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Chelsea Res. Ltd., 947 F.2d 611, 626 (2d Cir. 1991). The Second Circuit in *Healey* refused to uphold sanctions against an attorney for failing to mitigate the false testimony of his client when such testimony "was not incredible as a matter of law." *Id.*

<sup>244</sup> See Joseph, *supra* note 200 (arguing that the better solution would be if "[t]he Pennie majority could have determined that the testimony at issue was not sufficiently incredible to warrant sanctions, without doing violence to the text of Rule 11").

<sup>245</sup> 331 F.3d 1251 (11th Cir. 2003).

<sup>246</sup> The court in *Kaplan* reversed the district court's Rule 11 *sua sponte* order imposing sanctions for filing unnecessary and frivolous *in limine* motions on the eve of the trial. *Id.* at 1254, 1257. While technically the sanctions were imposed during the trial, the defendant's counsel could not withdraw *in limine* motions after the trial began and, therefore, the situation could be compared to the *Pennie* post-trial sanctions.

<sup>247</sup> See *id.* at 1256. The court stated that:

No doubt those late filings irritated and inconvenienced both the court and plaintiffs' counsel, but seven were moot and thus consumed an inconsequential amount of the court's time, while the remainder could have simply been denied as untimely, if not carried with the case and decided via contemporaneous objection at trial.

*Id.*

<sup>248</sup> See *id.* (finding that defendants' "actions were abusive, but not 'over the top,' much less akin to contempt" and that "[w] [defendant's] motion may have been overkill, it simply cannot be said to meet the contempt-of-court level"). *Kaplan* actually acknowledges *In re Pennie & Edmonds*, recognizing that "akin to contempt" standard is applicable to *sua sponte* proceedings, but stops short of holding that the "akin to contempt" standard requires a finding of bad faith. See *id.* at 1255-56.

lawyers in the case and concluded that, taken as a whole, the conduct was not akin to contempt, even though the particular submission was in fact unreasonable.

The proper evaluation of whether *sua sponte* Rule 11 sanctions are warranted should concentrate on the nature of the offending conduct or filed document, the overall effect of the submission on the litigation, and the attorney's explanations during show cause proceedings and not on the attorney's subjective beliefs. This approach would allow the courts to be forgiving and reverse sanctions in deserving cases, while preserving the mechanism for punishing lawyers for more egregious conduct.

#### CONCLUSION

With the introduction of the objective standard of reasonableness for determining whether sanctions under Rule 11 of the Federal Rules of Civil Procedure are warranted, the federal judiciary received a powerful weapon with which to fight litigation abuses associated with the filing of frivolous pleadings and other papers. The weapon in fact proved to be so powerful that its use led to some collateral damage—legitimate claims were chilled and a cottage litigation industry flourished. The 1993 amendments were designed to insert some safety mechanisms to curtail the careless overuse of Rule 11 sanctions. The amendments, however, never intended to remove the ability of the courts to punish unreasonable conduct. As with any weapon, the true value of Rule 11 sanctions is not in their actual use but in the deterrent effect they provide.

The recent decision by the United States Court of Appeals for the Second Circuit in *In re Pennie & Edmonds* has the potential not only to limit the effectiveness of Rule 11 sanctions, but also to take away the courts' power to penalize attorneys for meritless submissions. The requirement of subjective bad faith as a prerequisite for court-initiated Rule 11 sanctions in effect puts the trigger for proceedings that may reach unreasonable litigation conduct exclusively into the hands of the adversaries and, consequently, courts in some cases may find themselves powerless to sanction attorneys who act in good faith no matter how egregious their offending conduct.