Rule 11 Is No Match for Generative AI

Jessica R. Gunder*

27 STAN. TECH. L. REV. 308 (2024)

ABSTRACT

In a series of high-profile ethics debacles, attorneys who used generative AI technology found themselves in hot water after they negligently relied on fictitious cases and false statements of law crafted by the technology. These attorneys mistakenly relied upon the output they received from a generative AI product without verifying and validating that output. Their embarrassing ethical breaches made national news, and spurred judges to implement standing orders that require attorneys to disclose their use of AI technology.

Scholars were quick to criticize these standing orders[1] and the standing orders are rife with problems. But are they needed? Or are the standing orders redundant because Civil Rule of Procedure 11 can address this problem?

Generative AI and the filing of briefs that contain fictitious cases and false statements of law is testing the reach of Rule 11, which is coming up lacking. This Article is the first to study and evaluate whether Rule 11 can effectively address litigant use of generative AI output that contains fictitious cases and false statements of law. In this Article, I contend that, while the failure to perform adequate research is conduct that can be reached through Rule 11, the rule is not well-suited to the task of regulating this behavior, and Rule 11's inadequacy is likely spurring the creation of these standing orders. I then analyze the benefits and detriments that inure from these standing orders, setting forth various considerations for judges and jurisdictions to weigh when evaluating whether to impose their own standing orders, revise current standing orders, or promulgate local rules to regulate litigant use of generative AI technology.

---

* Associate Clinical Professor of Law, University of Idaho College of Law. I am indebted to Linda Jellum, John Rumel, Sam Williams, and Nick Smith for their ongoing support and useful feedback on this project and am grateful for the able research assistance performed by Mitchell Lange. This work also benefitted from the 2024 Legal Communication & AI Works In Progress Event and the scholars at that event that provided feedback, including Kirsten Davis, Raina Haque and Nathan Reitinger. Finally, in the interest of giving credit where credit is due, I also need to thank my torn ACL, which offered me additional writing time this winter.

[1] Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 68 (2023); Kirsten K. Davis, *Courts are Regulating Generative AI for Court Filings. What Does This Mean for Legal Writers?*, APPELLATE ADVOCACY BLOG (July 6, 2023), https://perma.cc/R3RU-2RHH.

TABLE OF CONTENTS

INTRODUCTION

In the summer of 2023, Steven Schwartz and Peter LoDuca received national attention after they filed a response to a motion to dismiss that contained fabricated case law and false statements of law.[2] At a hearing on the matter, Schwartz testified that he mistakenly used generative AI technology[3] that he "falsely assumed was like a super search engine."[4] Schwartz stated in a declaration that he "could not fathom that ChatGPT could produce multiple fictitious cases."[5]

District court judges across the country responded to these attorneys' negligent use of fictitious generative AI output by promulgating standing orders that regulated the use of generative AI. Given that Federal Rule of Civil Procedure 11 is the primary mechanism federal courts use to sanction litigants, it appears surprising at first glance that these judges found it necessary to craft standing orders.

Federal Rule of Civil Procedure 11 "exists in large part to regulate conduct that is not merely inefficient or questionable, but that threatens the integrity of the courts."[6] The rule was promulgated to deter frivolous actions and abusive litigation tactics, and Rule 11—on its face—seems well-suited to the task of sanctioning litigants who present fictitious cases and false statements of law to a court. Indeed, the Supreme Court has cautioned that, where a litigant's conduct "could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules" rather than employ the other authority or powers at its disposal.[7]

---

[2] Josh Russell, *Sanctions Ordered for Lawyers Who Relied on ChatGPT Artificial Intelligence to Prepare Court Brief*, COURTHOUSE NEWS SERVICE, (June 22, 2023), https://perma.cc/MX9U-9BKE. Steven Schwartz was not admitted to practice in New York, and as a result, his colleague, Peter LoDuca entered his appearance in the case and signed the pleadings that Schwartz prepared. Siddartha Rao & Andrew Ramstad, *Legal Fictions and ChatGPT Hallucinations: 'Mata v. Avianca' and Generative AI in the Courts*, N.Y. L. J., (Dec. 21, 2023), https://perma.cc/BP64-GNDU.

[3] This Article uses the generic term "generative AI" to refer to generative artificial intelligence system technology.

[4] Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 456 (S.D.N.Y. 2023).

[5] *Id.* at 458.

[6] Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments*, 24 HOFSTRA L. REV. 677, 703 (1996).

[7] Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

Lawyers are ultimately responsible for the content of their filings and what they present to a court.[8] A failure to conduct adequate research is at the heart of attorney misconduct involving generative AI. While this specific type of attorney misconduct is not new, generative AI is.[9]

The novel scenario presented by litigant use of generative AI output that contains fictitious cases and false statements of law highlights the rule's deficiencies.[10] This Article is the first to analyze the different ways in which Rule 11 is poorly situated to address filings containing AI generated fictitious cases and false statements of law. Ultimately, this Article concludes that Rule 11 is not well-suited for sanctioning this type of attorney misconduct, and its inadequacy is likely spurring the creation of these standing orders.

This Article then analyzes the different benefits and detriments that inure from these standing orders and suggests that, should courts believe that the balance of these benefits and detriments weighs in favor of promulgation, they can make specific choices to ameliorate the negative impacts detailed above. For example, many problems can be prevented through careful attention to word choice. Additionally, an anti-technology tone and the appearance of bias can be avoided by not imposing a ban or disclosure requirement, but instead by informing litigants that the use of generative AI is permissible, but its use must be consistent with the litigant's obligations under Rule 11. Finally, use of the local rules process instead of implementing a standing order will prevent

---

[8] As Davis notes, "[n]o currently available generative AI tool replaces a lawyer in producing written documents." Davis, *supra* note 1.

[9] While generative AI is new, attorney failure to conduct adequate research is not. *See, e.g.*, Fahner v. Marsh, No. 87 C 2898, 1988 WL 5016, at *1 (N.D. Ill. Jan. 19, 1988). Different iterations of this offense have even earned their own nomenclature. For example, Black's Law Dictionary contains the term "headnote lawyer" which it describes as "[a] lawyer who relies on the headnotes of judicial opinions rather than taking the time to read the opinions themselves." *Lawyer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[10] Rule 11 has been the subject of wide-ranging criticism, including the limited scope of papers that it applies to, the safe harbor provision, and whether penalties should be mandatory under the Rule. *See, e.g.*, Jeffrey A. Parness & Alexandria N. Short, *FRCP 11 Sanctions for Bad Discovery Papers*, 45 N.M. L. REV. 203, 203-04 (2024) (advocating for the expansion of the rule to apply to discovery papers); Stephen R. Ripps & John D. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?* 32 VAL. U. L. REV. 67, 89 (1997) (advocating for the removal of the safe harbor provision, noting that it fosters the negligent preparation of filings because they can be withdrawn); Cynthia A. Leiferman, *The 1993 Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger?*, 29 TORT & INS. L. J. 497, 501-02 (1994) (asserting that the lack of mandatory sanctions makes the rule 'toothless').

the problems inherent to a patchwork of standing orders with varying requirements.

This Article proceeds in four parts. First, it details relevant aspects of generative AI technology and early instances of attorney misuse of AI. Second, it discusses the history, reach, and requirements of Federal Rule of Civil Procedure 11, with a focus on how the 1993 amendments limited the reach of Rule 11. Third, it considers instances in which Rule 11 has been used to sanction attorneys for failing to conduct adequate research and how it could be similarly applied to attorneys who fail to conduct adequate research due to their negligent reliance on generative AI, concluding that courts will generally be unable to use Rule 11 to sanction litigants who negligently rely on fictitious cases and false statements of law crafted by generative AI. Fourth, and finally, it considers the judicial response to this problem, evaluating different standing orders that have been imposed by judges and the problems underlying those orders. It sets forth considerations for judges and jurisdictions to weigh when evaluating whether to impose their own standing orders, revise current standing orders, or promulgate local rules to regulate litigant use of generative AI technology.

I. ATTORNEY MISUSE OF AI TECHNOLOGY

Generative AI has incredible potential to revolutionize the legal services industry.[11] At this point in time, however, the technology is still nascent and has features and flaws that impact the reliability of its output. This part begins by discussing those features and flaws and then discusses some high-profile instances in which attorneys who used this technology shortly after it became publicly available failed to implement necessary safeguards.

A. Notable Features and Flaws of AI Technology

Generative AI products have many potential uses. In the legal services field, a lawyer might use these products to "prepare the initial draft of a memo and

[11] *See, e.g.*, Xavier Rodriguez, *Artificial Intelligence (AI) and the Practice of Law*, 24 SEDONA CONF. J. 783 (Sept. 2023) (discussing both the potential and the challenges presented by this technology).

then tweak that draft as needed . . . [or] produce an initial batch of arguments and then winnow them down to the most effective . . . [or] adapt past examples of legal documents to make her work more efficient."[12] Beyond document generation, AI products can assist with tasks ranging from research and information gathering to analysis.[13]

While the potential generative AI possesses to disrupt and revolutionize the legal services industry is clear, the technology has certain features—or flaws, depending on your perspective—that may harm unwary users. Generative AI responses to a query may "fail[] to explain various aspects of the doctrine and could mislead a user."[14] Generative AI can produce biased output.[15] Additionally, generative AI can express false confidence in incorrect answers.[16]

The aspect of generative AI technology that is most relevant to this Article, however, is that AI technology "hallucinates"—which is to say that it lies about facts, or invents them, ultimately creating "inaccurate answers that sound convincing."[17] Many generative AI products will hallucinate, or fabricate sources, which includes providing citations to cases that appear accurate but

---

[12] Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan & Daniel Schwarcz, *ChatGPT Goes to Law School*, 71 J. LEGAL EDUC. 381, 391-93 (2022) (reporting a C+ average).

[13] Andrew M. Perlman, *The Implications of ChatGPT for Legal Services and Society* 3 (Dec. 5, 2022), THE PRACTICE, March 2023 (finding that "Bing Chat is already operating at the level of a B/B+ law student"); Bernice Buie Donald, James C. Francis IV, Rondald J. Hedges & Kenneth J. Withers, *Generative AI and Courts: How Are They Getting Along?*, PLI CHRONICLE: PLI PLUS 3-4, (Sept. 2023) (describing technology and its abilities).

[14] Perlman, *supra* note 13, at 21.

[15] Rao & Ramstad, *supra* note 2 (discussing this flaw, and noting that where the generative AI's training data contains problematic materials, that content will be reflected in the output, and can result in biased output. This is particularly found where the training data is it relying upon highlights "dominant voices" or excludes "based on gender, sex, or age"); *see also* Rodriguez, *supra* note 11.

[16] Resulting errors include making statements with no indication they may be false as well as making false statements of confidence or accuracy. *See, e.g.*, Andrew Ng, *When Models are Confident–and Wrong*, THE BATCH DEEPLEARNING.AI, (Dec. 7, 2022), https://perma.cc/4NWV-X6ZD; Michael Nuñez, *Google's new ASPIRE system teaches AI the value of saying 'I don't know*,' VENTURE BEAT, (Jan. 18, 2024), https://perma.cc/ZLN9-V9KV.

[17] Matt Reynolds, *vLex Releases New Generative AI Legal Assistant*, ABA J., (Oct. 17, 2023), https://perma.cc/2Y4B-9M3C; *see also* Rodriguez, *supra* note 11 ("Although why errors occur is not fully understood, generally the LLMs hallucinate because the underlying language model compresses the language it is trained on and reduces/conflates concepts that oft-times should be kept separate.").

do not actually exist and making false statements of law.[18] While hallucinations may not be desirable for some generative AI users, for others, hallucinations are a feature of the technology and not a bug.[19] For these users, hallucinations provide creative potential that can be leveraged.[20] Hallucinations can be prevented or mitigated by: (1) ensuring the product you are using has high-quality training data or employs retrieval-augmented generation; (2) limiting the use of the AI technology to specific purposes; (3) limiting the output you receive through data templates or by defining boundaries; and (4) implementing human oversight, including "validating and reviewing" the output.[21]

Some studies have found relatively low hallucination rates: for example, one study "estimated the rate of ChatGPT hallucination at three percent."[22] However, it is critical to keep in mind that hallucinations increase where the program is dealing with ambiguity – and ambiguities are incredibly prevalent in the practice of law.[23] Indeed, a law-focused study of hallucinations found a much higher rate (and risk) of hallucinations when the program was asked law-related queries.[24] The researchers found that "hallucination rates range from 69% to 88% in response to specific legal queries."[25] The performance of these generative AI systems declined when they were presented "with more complex

---

[18] Choi, Hickman, Monahan & Schwarcz, supra note 12, at 395; Ashley Binetti Armstrong, *Who's Afraid of ChatGPT? An Examination of ChatGPT's Implications for Legal Writing*, (2023) https://perma.cc/2Q96-ZBDN.

[19] *What are AI Hallucinations?* IBM, https://perma.cc/2EGS-KV7F.

[20] *Id.*

[21] *Id. See also* Rodriguez, *supra* note 11, at 792-93 (discussing the principle of "GIGO—garbage in, garbage out" as it applies to training data for generative AI platforms); Rick Merritt, *What is Retrieval-Augmented Generation, AKA RAG?*, NVIDIA (Nov. 15, 2023), https://perma.cc/HVT4-B456.

[22] Rao & Ramstad, *supra* note 2.

[23] *Id.*

[24] Matthew Dahl, Varun Magesh, Mirac Suzgun & Daniel E. Ho, *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, J. LEGAL ANALYSIS (forthcoming 2024).

[25] Matthew Dahl, Varun Mages, Mirac Suzgun & Daniel E. Ho, *Hallucinating Law: Legal Mistakes with Large Language Models are Pervasive*, STAN. HUM.-CENTERED A.I., (Jan. 11, 2024), https://perma.cc/LQT6-Y8C3.

tasks that require a nuanced understanding of legal issues or interpretation of legal texts."[26]

Notably, however, this study focused on generative AI programs that are generalist in nature: GPT 3.5, Llama 2, and PaLM 2.[27] While most of the work in this area has not evaluated legal-focused AI systems, a recent study tested legal-focused generative AI products, including Westlaw AI-Assisted Research and Lexis+ AI. It found that legal-focused tools were less likely to hallucinate than the generalist systems discussed above, but still reported hallucinations "between 17% and 33% of the time.[28]

B. Attorney Misuse

This Article focuses on attorney misuse of generative AI technology in our federal courts[29] and the ability of Rule 11 to sanction this misconduct. It would be a mistake, however, to assume that only attorneys misuse AI technology: these same errors can be found in filings from self-represented litigants.[30] As

---

[26] *Id.* Interestingly, these programs "do no better than random guessing" when asked to measure "the precedential relationship between two" cases, and "hallucinate at least 75% of the time" when asked about a core ruling or holding. *Id.*

[27] *Id.*

[28] Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools* (forthcoming 2024), preprint available at https://perma.cc/YVV3-Y8YR.

[29] The examples in this section focus on the federal courts, however, state courts are similarly identifying and taking action when parties file documents that contain fictitious citations. *See, e.g.*, Will of Samuel, No. 2016-2501/A&B, 2024 WL 238160, at *2 (N.Y. Sur. Ct. Jan. 11, 2024) (identifying fake citations in a reply brief, ordering the pleading to be struck, and scheduling a hearing concerning whether economic sanctions would be imposed); Doug Austin, *Leading Eviction Law Firm Caught Citing Fake Cases: Artificial Intelligence Trends*, EDISCOVERY TODAY, (Oct. 13, 2023), https://perma.cc/6QEH-6LNB.

[30] *See, e.g.,* Morgan v. Community Against Violence, No. 23-cv-353-WPJ/JMR, 2023 WL 6976510, at *8 (D. N.M. Oct. 23, 2023) (noting that the self-represented plaintiff had "cited to several fake or nonexistent opinions" and warning her that future filings with such citations "may result in sanctions such as the pleading being stricken, filing restrictions imposed, or the case being dismissed."); Taranov v. Area Agency of Greater Nashua, No. 21-cv-995-PB, 2023 WL 6809637, at *10 n.9 (D.N.H. Oct. 16, 2023) (stating that "most of the cases" the plaintiff cited in her opposition to the pending motion to dismiss pursuant to Rule 12(b)(6) "appear to be nonexistent."); Thomas v. Pangburn, No. CV423-046, 2023 WL 9425765, at *5 & *7 (S.D. Ga. Oct. 6, 2023) (dismissing the case on the merits, and dismissing it in the alternative as a sanction under Rule 11(b) for submitting false citations to the court). For a further discussion of generative AI technology and self-represented litigants, see Jessica R.

discussed below, the attorney misuse of generative AI that we have seen to-date revolves around the failure of attorneys to: (1) understand generative AI technology and (2) evaluate the work product that the generative AI technology produced.[31]

First, attorneys have run afoul where they misunderstand how generative AI programs work.[32] As detailed below, these attorneys perceived generative AI to be the equivalent of a search engine. It is not.

Instead, these tools use statistical models to predict future values in a series based on past values.[33] In simpler terms: generative AI programs predict what word will come next in a series, producing "not just statistically probable text, but humanlike answers to questions."[34] These programs have been trained on extremely large data sets and are able to use those training materials to accurately predict what words should appear next.[35]

Second, these attorneys erred when they subsequently accepted the generative AI work product and used it in their filings without stopping to check and verify the work product. The legal field has largely become accustomed to reliable technology. Attorneys do not have to worry that Westlaw, LexisNexis, or Fastcase would give them a fictitious case in response to their query. But attorneys' trust for those platforms cannot currently be blindly applied to generative AI technology, as these products are wont to provide wholesale misrepresentations of things as fundamental to the practice of law as citations and legal rules.

Ultimately, these attorneys' lack of familiarity and understanding of generative AI technology, combined with the trust they had developed through

---

Gunder, *Why Can't I Have a Robot Lawyer? Limits on the Right to Appear Pro Se*, 98 TUL. L. REV. 363 (2024).

[31] The Florida State Bar Association issued an advisory ethics opinion outlining ethical considerations related to the use of generative AI. One major topic discussed in the opinion relates to attorney oversight of generative AI. It specifies that lawyers should review generative AI output "in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals." Fla. State Bar Ass'n, Op. 24-1 (Jan. 19, 2024). Further, attorneys "must verify the accuracy and sufficiency of all research performed by generative AI." *Id*.

[32] Rao & Ramstad, *supra* note 2.

[33] *Id.*; *see also* Davis, *supra* note 1 ("What it does is this: It uses mathematical computations to predict the most appropriate words to provide in response to a prompt."); Rodriguez, *supra* note 11, at 788-89.

[34] Kim Martineau, *What is Generative AI?*, IBM, (Apr. 20, 2023), https://perma.cc/2CPN-NTF5.

[35] *Id.*

their previous experience with legally-focused technology, lulled them into a false sense of security that they could rely on the generative AI output without reviewing and verifying the work.

The following sections discuss some of the first cases involving attorney use of generative AI. They include the respective attorneys' statements regarding how they came to present filings with fictitious cases and made-up law to the court, and how the respective courts addressed this misconduct.

1. Mata v. Avianca

In the summer of 2023, Steven Schwartz and Peter LoDuca gained national attention when a pleading they submitted to the Southern District of New York contained fabricated statements of law and cases.[36] The offending conduct occurred in *Mata v. Avianca*, a personal injury suit brought against an airline.[37]

At a hearing on the matter, Schwartz testified that he turned to ChatGPT for legal research because he had limited access to federal cases through the research services and databases at his firm, claiming that "it had occurred to me that I heard about this new site which I assumed – I falsely assumed was like a super search engine called ChatGPT, and that's what I used."[38] Schwartz ultimately entered a series of prompts into ChatGPT, including:

- argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to montreal convention
- provide case law in support that statute of limitations is tolled by bankruptcy of defendant under montreal convention
- show me specific holdings in federal cases where the statute of limitations was tolled due to bankruptcy of the airline
- show me more cases

[36] Russell, *supra* note 2; Rao & Ramstad, *supra* note 2 (noting that Steven Schwartz was not admitted to practice in New York, and as a result, his colleague, Peter LoDuca entered his appearance in the case and signed the pleadings that Schwartz prepared).
[37] *Id.*
[38] Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 456 (S.D.N.Y. 2023).

- give me some cases where the montreal convention allowed tolling of the statute of limitations due to bankruptcy[39]

ChatGPT's response to these prompts was to comply with the requests by hallucinating holdings and cases.[40]

Schwartz and LoDuca included these fabricated cases in their response to a pending motion to dismiss.[41] When the attorneys' reliance on fictitious case law came to light, Judge P. Kevin Castel scheduled a show cause hearing, threatening sanctions under "(1) Rule 11(b)(2) & (c),[42] Fed. R. Civ. P., (2) 28 U.S.C. § 1927,[43] and (3) the inherent power of the court."[44] Schwartz and LoDuca subsequently made this bad situation worse by lying to the court about their availability and doubling down on the cases, claiming that they were not fabricated.[45] Schwartz stated in a declaration that he "could not fathom that ChatGPT could produce multiple fictitious cases."[46]

Ultimately, Judge Castel determined that the attorneys had acted in bad faith and found that sanctions were appropriate under Rule 11 and the court's inherent authority.[47] He declined to sanction the attorneys pursuant to 28 U.S.C. § 1927.[48]

---

[39] *Id.* (errors in original).

[40] *Id.*

[41] *Id.* at 450.

[42] Fed. R. Civ. P. 11(b)(2) states "By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Further, Rule 11(c) provides for law firms to be held jointly liable for a "violation committed by its partner, associate, or employee."

[43] 28 U.S.C. § 1927 authorizes a court to sanction an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously."

[44] *Mata*, 678 F. Supp. 3d at 458.

[45] *Id.* at 452. Indeed, these attorneys supported their claim that the cases were not fabricated by asking ChatGPT to provide the cases and submitting the response to the Court.

[46] *Id.* at 458.

[47] *Id.* at 464.

[48] *Id.*

Ultimately, Judge Castel made a finding of subjective bad faith.[49] He imposed a $5,000 penalty upon of the attorneys and their firm "to advance the interests of deterrence and not as punishment or compensation."[50] Additionally, he ordered the attorneys to inform both their client and any judges whose names were wrongfully listed as the authors of the fabricated case law of the sanctions.[51]

2. United States v. Cohen

Despite the heavy publicity of the *Mata* debacle, this scenario happened again only a few months later. In support of a request for the early termination of supervised release, David M. Schwartz, counsel for Michael Cohen, filed a letter brief that contained three fictitious cases.[52] In response, District Judge Jesse M. Furman ordered Mr. Schwartz to provide copies of those three cases, and specified that if he was unable to provide copies of the cases, he must instead "show cause in writing why he should not be sanctioned pursuant to (1) Rule 11(b)(2) & (c) of the Federal Rules of Civil Procedure, (2) 28 U.S.C. 1927, and (3) the inherent power of the Court for citing non-existent cases to the Court."[53]

In response to the Court's order, Schwartz, Cohen, and others involved in the case filed declarations explaining how the fictitious cases came to be included in the letter brief.[54] Essentially, as Mr. Cohen states in his declaration, he "did not realize [Google Bard] was a generative text service that, like Chat-

[49] A finding of subjective bad faith is required both for courts imposing Rule 11 sanctions *sua sponte* and for courts imposing sanctions pursuant to their own inherent power. Muhammad v. Walmart Stores East, L.P., 732 F.3d 104, 108 (2d Cir. 2013) (Rule 11); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991) (inherent power).

[50] *Mata*, 678 F. Supp. 3d at 466.

[51] *Id.*

[52] United States v. Cohen, No. 18-CR-602 (JMF), 2023 WL 8635521, at *1 (S.D.N.Y. Dec. 12, 2023).

[53] *Id.*

[54] *See* Letter from Barry Kamins & John M. Leventhal, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 15, 2023), ECF No. 103; Letter from E. Danya Perry, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 29, 2023), ECF No. 104; Letter from Barry Kamins & John M. Leventhal, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Jan. 3, 2024), ECF No. 105; Reply Declaration of David M. Schwartz, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Jan. 3, 2024), ECF No. 106.

GPT, could show citations and descriptions that looked real but actually were not. Instead, [he had] understood it to be a super-charged search engine."[55] Mr. Cohen provided his attorney with the citations and case summaries the program generated, and his attorney added them to the filing without independently verifying their accuracy.[56]

The district court noted that the Second Circuit required "a finding of subjective bad faith" before imposing *sua sponte* sanctions.[57] Ultimately, the judge found that that standard was not satisfied under these circumstances. While the "citation to non-existent cases is embarrassing and certainly negligent, perhaps even grossly negligent," it did not constitute bad faith.[58] As a result, the court declined to impose sanctions against Mr. Schwartz.

3. Park v. Kim

In this appeal before the Second Circuit, the plaintiff was represented by Jae S. Lee.[59] Ms. Lee filed a reply brief containing only two citations, and the Second Circuit ordered her to provide a copy of one of the decisions to the court.[60] Ms. Lee responded to the order, calling the case "non-existent" and explaining how the fictitious case came to be included in her filing with the court:

> I encountered difficulties in locating a relevant case to establish a minimum wage for an injured worker lacking prior year income records for compensation determination . . . Believing that applying the minimum wage to in injured worker in such circumstances under workers' compensation law was uncontroversial, I invested considerable time searching for a case to support this position but was unsuccessful.

---

[55] Letter from E. Danya Perry, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 29, 2023), ECF No. 104.
[56] *See supra* note 54.
[57] United States v. Cohen, No. 18-CR-602 (JMF), 2024 WL 1193604, at *5 (S.D.N.Y. Mar. 20, 2024) (citing Muhammad v. Walmart Stores E., L.P., 732 F.3d 104, 108 (2d Cir. 2013)).
[58] *Id.*
[59] Park v. Kim, 91 F.4th 610, 612 (2d Cir. 2024).
[60] *Id.* at 614.

> . . .
>
> Consequently, I utilized the ChatGPT service, to which I am a subscribed and paying member, for assistance in case identification. ChatGPT was previously provided reliable information, such as locating sources for finding an antic furniture key. The case mentioned above was suggested by ChatGPT, I wish to clarify that I did not cite any specific reasoning or decision from this case.[61]

The Second Circuit discussed the applicability of Rule 11 to Ms. Lee's conduct, noting that attorneys must read any legal authority they rely upon, as doing so is necessary to confirm the existence and validity of those cases.[62] The court stated that it "can think of no other way to ensure that the arguments made based on those authorities are 'warranted by existing law' or otherwise 'legally tenable.'"[63] Because Ms. Lee failed to make that inquiry, the Second Circuit referred her "to the Court's Grievance Panel pursuant to Local Rule 46.2 for further investigation, and for consideration of a referral to the Committee on Admissions and Grievances."[64]

4. Ex Parte Lee

In July 2023, judges on the Texas Court of Appeals considered a habeas petition that contained citations to cases that did not "actually exist in the Southwest Reporter."[65] The panel noted in a footnote that "it appears that at least the 'Argument' portion of the brief may have been prepared by artificial intelligence (AI)."[66] Despite expressing that concern, the court declined to investigate the matter or impose sanctions, noting that they ultimately decided not to issue a show cause order or report the attorney to the State Bar for their potential violation of the Bar's rules.[67]

---

[61] *Id.* (errors in original).
[62] *Id.* at 614-15. The Second Circuit does not discuss why it chose to apply Federal Rule of Civil Procedure 11 to this conduct, and not Federal Rule of Appellate Procedure 28.
[63] *Id.* (quoting FED. R. CIV. P. 11(b)(2); Cooter v. Gell, 496 U.S. 384, 393 (1990)).
[64] *Id.* (citing 2D CIR. R. 46.2).
[65] Ex Parte Lee, 673 S.W. 3d 755, 756 (Tex. App. 2023).
[66] *Id.* at 757 n.2.
[67] *Id.*

II. FEDERAL RULE OF CIVIL PROCEDURE 11

While the judiciary has many different rules and powers at its disposal to regulate the conduct of the attorneys and litigants who appear before them, Federal Rule of Civil Procedure 11 is the primary mechanism federal courts use to sanction litigants[68] and the Supreme Court has cautioned that, where a litigant's conduct "could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power."[69]

This Article discusses how Rule 11 is ill-suited to address scenarios in which litigants present AI-generated fictitious cases and false statements of law to the court. While they are not the focus of this Article, the other rules and powers the judiciary employs to regulate the conduct of the attorneys and litigants[70] are replete with their own shortcomings. For example, a court imposing sanctions under its inherent authority must first find that the offending party acted in bad faith.[71] Additionally, to sanction an attorney pursuant to 28 U.S.C. § 1927, the court must find that "the claims were . . . motivated by improper purposes such as harassment or delay."[72] Finally, while there is a large overlap between conduct that violates Rule 11 and conduct that violates a state's rules of professional conduct, the two are not interchangeable. Although it is not uncommon for a court to refer a matter to the state bar for investigation upon finding that an attorney has failed to conduct adequate research, the rules of professional conduct are not a tool that the court itself wields.[73]

---

[68] Courts may – depending on the specific circumstances involved – use several of these rules and powers when considering legal sanctions for an attorney's failure to conduct adequate research. In addition to Fed. R. Civ. P. 11, penalties may be available under Fed. R. Civ. P. 26(g), the court's inherent authority, 28 U.S.C. § 1927, or a state's rules of professional conduct. Legal malpractice is another structure that governs attorney conduct, and such actions might be pursued by clients who have been wronged. *See* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) (discussing legal malpractice as a primary source of attorney regulation).

[69] Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

[70] *See supra* note 68.

[71] Kipps v. Caillier, 197 F.3d 765, 770 (5th Cir. 1999); *see also* Giesecke & Devrient GmbH v. United States, 160 Fed. Cl. 193, 200 (2022) ("Without a finding of fraud or bad faith whereby the 'very temple of justice has been defiled,' a court enjoys no discretion to employ inherent powers to impose sanctions.") (internal citations omitted).

[72] Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 55 (2d Cir. 2018) (quoting Kim v. Kimm, 884 F.3d 98, 106 (2d Cir. 2018)).

[73] *See, e.g.*, Clement v. Pub. Serv. Electric and Gas Co., 189 F.R.D. 634, 637 (D. N.J. 2001); *In re* S.C., 138 Cal. App. 4th 396, 428 (Cal. App. 2006).

The following sections explore the nuances of Rule 11, considering the history and purpose of the rule and the means by which it is enforced. They focus on the parts of Rule 11 that are implicated by the prospect of a litigant's negligent use of generative AI technology that results in filing documents with a court that contain fictitious cases or false statements of law.

A. The History and Purpose of Rule 11

Rule 11 was enacted in 1938 "to deter lawyers from filing lawsuits that do not have a legal or factual basis, to reduce abuses in the litigation process [that might harm] the interests of the opponent, to prevent litigants from wasting court resources in pursuing frivolous claims, and to compensate defendants for legal fees that they should not have been forced to incur."[74] Under the version of Rule 11 that was originally promulgated, litigants were able to avoid sanctions because the rule "permitted a 'pure heart, empty head' subjective defense for failing to conduct competent legal research."[75] It was difficult for an opposing party to prove bad faith, and as a result, so long as the litigant professed that the argument was not made in bad faith, the litigant was able to avoid the imposition of sanctions.[76]

Rule 11 was amended in 1983, and several of the amendments that were implemented at that time are relevant here. First, the Rule was revised to state that one's signature certified "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law."[77] Second, the amendment removed the requirement of a willful mental state from the rule.[78] Instead the Rule incorporated an objective standard, making the test "one of reasonableness

---

[74] Marguerite L. Butler, Rule 11 – *Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 687-88 (2001).
[75] *Id.* at 688 (quoting Anderson v. Prod. Credit Assoc., 482 N.W.2d 642, 645 (S.D. 1992)).
[76] *Id.* at 688-89.
[77] FED. R. CIV. P. 11 (amended 1993).
[78] Christopher A. Considine, Rule 11: *Conflicting App. Standards of Rev. and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727, 732 (1990).

under the circumstances."[79] Third, the amended Rule made the imposition of sanctions mandatory where a court found that the rule had been violated.[80]

In 1993, Congress amended Rule 11 again. These amendments were a response to the view that the 1983 amendments had "spawned excessive litigation concerning sanctions."[81] Accordingly, the 1993 amendments were designed to reduce the amount of Rule 11 motions that were filed, and subsequent studies have demonstrated that the amendments were successful in reducing sanctions motions.[82]

The 1993 amendments to Rule 11 attempted to find a balance between the "goal of deterring frivolous litigation while still providing attorneys and litigants with the flexibility to pursue novel, yet nonfrivolous legal claims and theories."[83] The revised Rule specified that one's signature certified that "the claims, defenses, and other legal contentions in the filing are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[84] The Advisory Committee Notes published along with this amendment stated that, "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether" the arguments the attorney has raised are nonfrivolous.[85]

The 1993 amendments also incorporated a "safe haven" provision that Justice Scalia feared rendered Rule 11 "toothless" and would encourage litigants to "file thoughtless, reckless and harassing pleadings, secure in the

---

[79] Total Television Ent. Corp. v. Chestnut Hill Vill. Assocs., 145 F.R.D. 375, 382 (E.D. Pa. 1992).
[80] *Id.*
[81] Thomas M. Geisler, Jr., *Proof of Violation of Federal Rule of Civil Procedure 11 and of Sanctions Thereunder*, 47 AM. JUR. PROOF OF FACTS 3D 241 §1 (Feb. 2024 update).
[82] Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litig.*, 37 LOYOLA OF L.A. L. REV. 599, 612 (2004) (citing Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J. 12 (March 1995)).
[83] Jerold S. Solovy, Norman M. Hirsch, Margaret J. Simpson & Christina T. Tomaras, *Sanctions Under* Rule 11*: A Cross-Circuit Comparison*, 37 LOY. LA L. REV. 727, 745 (2004).
[84] FED. R. CIV. P. 11 (amended 1993).
[85] FED. R. CIV. P. 11(b)(2) advisory committee's note to 1993 amendment.

knowledge that they have nothing to lose."[86] The safe haven provision within Rule 11 provides an opportunity for litigants to correct their filings in order to avoid the filing of a sanctions motion, however, it is only available to prevent sanctions motions from being filed by opposing parties, and does not provide a shield to protect a litigant from the prospect of court-imposed *sua sponte* sanctions.[87]

Another component of the 1993 amendments to Rule 11 was to change the availability of sanctions. It did so in two primary ways. First, where a violation of the Rule is found, courts are no longer obligated to impose a sanction.[88] Second, while the previous iteration of the Rule focused on providing compensation to the complaining party, this amendment changed the focus of the sanction to deterring the prohibited conduct.[89] As detailed in Section III.B, below, the 1993 amendments are largely the reason why Rule 11 is poorly situated to address scenarios in which attorneys file documents containing fictitious cases and false statements of law due to misplaced trust in generative AI technology.

B. Examining the Reach and Requirements of Rule 11

Rule 11 is exacting in many ways. This part examines the nuances of this Rule, considering first its scope, and then discussing relevant process and procedures. This part subsequently discusses the legal standards courts impose when evaluating whether sanctions are appropriate and concludes with a discussion of what sanctions are available to a court that finds that Rule 11 has been violated.

---

[86] FED. R. CIV. P. 11(c)(1)(A); Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 507-08 (1993) (Scalia, J., dissenting).

[87] Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 397-98 (4th Cir. 2004).

[88] *See* Yablon, *supra* note 82, at 601.

[89] King v. Fleming, 899 F.3d 1140, 1149 (10th Cir. 2018); Murphy v. Aurora Loan Services, LLC, 859 F. Supp. 2d 1016, 1022 (D. Minn. 2012); Welk v. GMAC Mortg., LLC, 850 F. Supp. 2d 976, 1004 (D. Minn. 2012); LCS Group LLC v. Shire LLC, 383 F. Supp. 3d 274, 282 (S.D.N.Y. 2019).

1. Rule 11: Scope

The reach of Rule 11 is somewhat limited in that it is only applicable to civil cases pending before a federal district court.[90] Notably, however, rules exist that capture similar conduct in other types of cases and provide for sanctions in those matters.[91] For example, Federal Rule of Appellate Procedure 28 requires attorneys to support the legal contentions in their briefs with citations,[92] while Federal Rule of Appellate Procedure 38 provides for awards of "just damages and single or double costs to the appellee" for frivolous appeals.[93]

Rule 11 requires that attorneys (or parties, where they appear self-represented) sign "[e]very pleading, written motion, and other paper."[94] An attorney cannot evade review by omitting their signature. Instead, the court would strike that filing unless the error is corrected.[95]

Even within federal civil actions, however, Rule 11 sanctions do not reach all the conduct and papers in a particular action. For example, Rule 11 is inapplicable to discovery papers.[96] While Rule 11 applies to the various filings

---

[90] The rule is therefore inapplicable to state proceedings, federal criminal matters, or bankruptcy proceedings. *See* FED. R. CIV. P. 81.

[91] In bankruptcy proceedings, FED. R. BANKR. P. 9011 specifies that an attorneys' signature represents a certification that "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." States have enacted similar rules governing their own courts. *See, e.g.*, Ariz. R. Civ. P. 11, Cal. Civ. Proc. Code § 575.2; Ga. Code Ann. § 9-15-14. Notably, courts regularly rely upon case law interpreting Federal Rule of Civil Procedure 11 to inform their understanding of these rules. *See, e.g.*, Miller v. Cardinale (In re DeVille), 361 F.3d 539, 550 & n.5 (9th Cir. 2004) (looking to Rule 11 when evaluating sanctions under FED. R. BANKR. P. 9011).

[92] FED. R. APP. P. 28 (requiring that the argument section of appellant's brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies" and incorporates similar requirements into what must be included in appellee's brief and any reply brief that is filed).

[93] FED. R. APP. P. 38. Indeed, attorneys may be found personally liable under this rule where after "careful research of the law, a reasonable attorney would [have] conclude[d] that the appeal is frivolous." Beam v. Downey, 151 F. App'x 142, 144-45 (3d Cir. 2005) (citing Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 254 (3d Cir. 1990)).

[94] Fed. R. Civ. P. 11(a).

[95] *Id.*

[96] Instead, Federal Rule of Civil Procedure 37 is generally used to enforce the discovery process. *See* Parness & Short, *supra* note 10 (advocating for the application of Rule 11 to civil discovery papers).

and papers submitted to a court, it cannot be used to sanction *oral* misrepresentations and testimony.[97] Rule 11 motions cannot be brought after a claim has been adjudicated and the case is concluded.[98] Finally, Rule 11 similarly cannot reach incivility and "Rambo-style" litigation tactics.[99]

2. Rule 11: Process and Procedures

Rule 11 is notable for the procedural hurdles it imposes upon courts and litigants before a judge may impose sanctions pursuant to the rule.

Rule 11 provides two procedural routes for the imposition of sanctions. Under the first, a motion is brought by the opposing party. Under the second, sanctions are imposed *sua sponte* by the court. While both options require notice and an opportunity to respond, they are otherwise very different.[100]

Turning first to Rule 11 motions filed by opposing parties. Rule 11 is unique in that it incorporates a safe harbor provision, requiring opposing parties to first notify the other party of their intent to seek sanctions. This notice provides a 21-day safe harbor period: requiring the opposing party to wait until that period has expired to actually file the motion.[101] That 21-day period is an opportunity for the offending party to take corrective steps, such as withdrawing or correcting the pleading.[102] The rule provides this "'last clear chance' to renounce the challenged statement."[103] If the offending party does so, the

---

[97] FED. R. CIV. P. 11 advisory committee's note to 1993 amendments ("It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection."); *see also* Business Guides, Inc. v. Chromatic Commc'ns Enter, Inc., 892 F.2d 802, 813 (9th Cir. 1989) (reversing the district court's application of Rule 11 to oral representations).

[98] Yablon, *supra* note 82, at 607 (citing FED. R. CIV. P. 11 advisory committee's note to 1993 amendments). Interestingly, Professor Yablon attributes this change as a driving force behind the reduced number of Rule 11 sanctions following the 1993 amendments. He asserts that because judges do not know the outcome of the case when they are considering a Rule 11 motion, they are not swayed by hindsight bias.

[99] *See, e.g.*, Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 82 (1991).

[100] FED. R. CIV. P. 11.

[101] *See, e.g.*, Jordan v. Sprint Nextel Corp., 3 F. Supp. 3d 917 (D. Kan. 2014) (declining to impose sanctions where notice was not provided to the offending party 21 days before the Rule 11 motion was filed with the court).

[102] *See, e.g.*, Robertson v. Cartinhour, 711 F. Supp. 2d 136 (D.D.C. 2010).

[103] Yablon, *supra* note 82, at 610.

motion becomes moot, and would never be filed with the court. The opposing party can file their motion for sanctions only if the offending party does not respond to the notice by withdrawing or correcting the offending paper.[104]

Alternatively, the second procedural option for Rule 11 sanctions is for the court to initiate the process *sua sponte*.[105] Under this option, a court will enter an order, known as a "show cause" order, that details the apparent violation of Rule 11.[106] That order will direct the litigant to show cause why they have not violated the Rule.[107] When a court pursues Rule 11 sanctions *sua sponte*, no safe harbor is provided for the offending litigant.[108] That is not to say that the attorney cannot withdraw or amend the document at issue, however, doing so will not eliminate the risk of sanctions being imposed.

Additionally, and as discussed in more detail in the following section, the Advisory Committee Note to the 1993 amendments contemplates only limited use of court-initiated *sua sponte* sanctions. The Note specifies that courts ordinarily issue show cause orders "only in situations that are akin to a contempt of court."[109]

The requirement that the conduct be akin to contempt prevents sanctions from being imposed in scenarios involving "[m]ere negligence or ignorance of the facts or law."[110] Conversely, this requirement permits sanctions where the conduct involves "making a 'knowingly false statement or exhibiting deliberate indifference to obvious facts.'"[111]

---

[104] The motion for sanctions should be made separately from other motions or requests for relief—so should not be appended to a motion for summary judgment or be included as a component of a motion to dismiss. Davis v. MCI Commc'ns Servs., Inc., 421 F. Supp. 2d 1178, 1181 (E.D. Mo. 2006); Duprey v. Twelfth Judicial Dist. Ct., 760 F. Supp. 2d 1180, 1200 (D.N.M. 2009); Gissendaner v. Credit Corp. Solutions, Inc., 358 F. Supp. 3d 213, 222 (W.D.N.Y. 2019).

[105] FED. R. CIV. P. 11(c)(1)(B).

[106] FED. R. CIV. P. 11(c)(1)(B); Jerold S. Solovy, Norman M. Hirsch, Margaret J. Simpson, Christina T. Tomaras, *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. LA L. REV. 727, 746-47 (2004).

[107] FED. R. CIV. P. 11(c)(1)(B).

[108] Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 397-98 (4th Cir. 2004).

[109] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[110] Hodge v. Orlando Utils. Comm'n., No. 6:09-cv-1059-Orl-19DAB, 2010 WL 376019, at *5 (M.D. Fl. Jan. 25, 2010) (citing Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th Cir. 2003); Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998)).

[111] Iparametrics, LLC v. Meier, No. 2:08-CV-00056-WCO, 2012 WL 12896231 at *4 (N.D. Ga. Oct. 30, 2012) (quoting *Hodge*, 2010 WL 376019, at *5; Mortgage Elec. Registration Sys., Inc. v. Malugen, No. 6:11-cv-2033-ORL-22GJK, 2012 WL 1282265 (M.D. Fla. April 3, 2012)).

3. Rule 11: Standards and Requirements

Courts considering sanctions apply legal standards that vary in two ways. First, different standards are applied if the sanctions are the result of a motion filed by an opposing party or are being sought *sua sponte* by the court. Second, courts are split regarding the proper standard to be applied to *sua sponte* sanctions.

Courts evaluating a motion filed by an opposing party apply an objective standard and may enter sanctions where counsel has "[a]n empty head but a pure heart."[112] "[A] paper filed in the best of faith, by a lawyer convinced of the justice of his client's cause, is sanctionable if counsel neglected to make 'reasonable inquiry' beforehand."[113] When evaluating whether a litigant's conduct is sanctionable, courts resolve doubts in favor of the party that has been accused of the violative conduct.[114]

Things are a bit more complicated when *sua sponte* sanctions are at issue, however. A circuit split exists concerning: (1) whether *sua sponte* sanctions are only available in scenarios that are akin to contempt; and (2) what *mens rea* is required.[115]

As far as the circuit split is concerned, every circuit court except the Second Circuit Court of Appeals applies the same standard when considering the imposition of *sua sponte* Rule 11 sanctions.[116] These circuits base this standard upon an Advisory Committee Note to the 1993 amendments to Rule 11 that directed courts to only issue "show cause" orders for *sua sponte* sanctions in "situations that are akin to a contempt."[117] Accordingly, these courts impose sanctions "only in more egregious circumstances."[118]

---

[112] Dohm v. Gilday, No. 02 C 9056, 2004 WL 1474581, at *2 (N.D. Ill. June 29, 2004) (quoting Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986)).

[113] *Id*. (quoting Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 918, 932 (7th Cir. 1989)).

[114] Berweger v. Cnty. of Orange, 121 F. Supp. 2d 334, 349 (S.D.N.Y. 2000).

[115] *See* Jerold S. Solovy, Norman M. Hirsch, Margaret J. Simpson, Christina T. Tomaras, *Sanctions Under* Rule 11*: A Cross-Circuit Comparison*, 37 LOY. LA L. REV. 727, 748-55 (2004) (discussing circuit split).

[116] *See, e.g.*, *id*.; ATSI Commc'ns, Inc. v. Shaar Fund, LTD, 579 F.3d 143, 151 n.9 (2d Cir. 2009) (noting that no other circuit has imposed a heightened *mens rea* requirement).

[117] *Id.* at 747; *see also* Kaplan v. Daimlerchrysler*, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003).

[118] *In re* Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003); *see also* Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002); Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998).

For conduct to be akin to contempt, it cannot constitute "[m]ere negligence or ignorance of the facts or law."[119] However, sanctions could be imposed where a litigant puts forward a "knowingly false statement" or otherwise exhibits "deliberate indifference."[120]

Like motions brought by an opposing party, these courts impose an objective standard, so are not concerned with what the attorney actually knew at the time.[121] A claim made in a litigant's filings is objectively unreasonable if, when the attorney signs the pleading, "it is patently clear that [the] claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands."[122] This inquiry is a determination of "whether a reasonable attorney in like circumstances could believe his actions were factually and legally justified."[123] The Third Circuit described this standard as an inquiry into whether the litigant had "an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well grounded in law or fact."[124]

District courts within the Second Circuit, however, impose a different standard in most[125] cases.[126] The court must make a finding that either the

---

[119] Hodge v. Orlando Utils. Comm'n., No. 6:09-cv-1059-Orl-19DAB, 2010 WL 376019, at *5 (M.D. Fl. Jan. 25, 2010) (citing Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th Cir. 2003); *Barber*, 146 F.3d at 711).

[120] Iparametrics, LLC v. Meier, No. 2:08-CV-00056-WCO, 2012 WL 12896231 at *4 (N.D. Ga. Oct. 30, 2012) (quoting *Hodge*, 2010 WL 376019, at *5; Mortgage Elec. Registration Sys., Inc. v. Malugen, No. 6:11-cv-2033-ORL-22GJK, 2012 WL 1282265 (M.D. Fla. April 3, 2012)).

[121] Adams v. New York State Educ. Dept., No. 08 Civ. 5996(VM)(AJP), 2010 WL 4970011 at *7 (S.D.N.Y. Dec. 8, 2010).

[122] *Id.* (quoting Catcove Corp. v. Patrick Heaney, 685 F. Supp. 2d 328, 337 (E.D.N.Y. 2010) (alteration in original)).

[123] Mobile Shelter Sys. USA, Inc. v. Grate Pallet Sols., LLC, No. 3:10-cv-978-J-37JBT, 2011 WL 7030963, *3 (M.D. Fl. Nov. 10, 2011) (citing Kaplan v. Daimlerchrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. 2003)).

[124] *In re* Taylor, 655 F.3d 274, 283-84 (3d Cir. 2011) (quoting Ford Motor Co. v. Summit Motor Prod., Inc., 930 F.2d 277, 289 (3d Cir. 1991)).

[125] While the Second Circuit has declined to make a bad faith standard applicable universally in cases involving the *sua sponte* imposition of sanctions, it does require the application of that standard in matters where, due to the timing of the motion, the sanctioned party was unable to either correct the offending submission or withdraw it. Kyros Law P.C. v. World Wrestling Ent., 78 F.4th 532, 543 (2d Cir. 2023) (citing *In re* Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003)).

[126] The First Circuit has explicitly stated its disagreement with the standard employed by the

conduct is "akin to contempt" or that it was "taken in subjective bad faith" to impose sanctions *sua sponte* under Rule 11(c)(3).[127] In practice, courts interpret this this subjective bad faith standard to require that attorneys "have *actual knowledge* that a pleading or argument that he or she is advancing is frivolous."[128] An attorney's "[m]ere negligence or ignorance of the facts or law" cannot form the basis for the court to impose sanctions *sua sponte.*[129]

While the articulated standards for the *sua sponte* imposition of Rule 11 sanctions appear to differ substantially from one another, it is possible that this is a distinction without much of a practical difference. The question of whether a subjective or objective standard is used is largely irrelevant, given that a court may "[infer] the presenter's intent from his or her objective behavior"[130] and the Second Circuit's requirement of subjective bad faith may ultimately equate to the "akin to contempt" standard imposed in other circuits.

4. Rule 11: Sanctions

A court that has decided to impose sanctions has a range of options at its disposal. Depending on the particular circumstances involved, available sanctions may include attorney's fees, a monetary penalty, and various non-monetary sanctions.[131]

The deterrence goals of the 1993 amendments are intended to steer courts as they consider available sanctions. Because Rule 11 is rooted in the goal of deterring instead of punishing litigants, courts considering what sanction to oppose will consider "the particular facts of [the] case"[132] and should "utilize the sanction that furthers the purposes of Rule 11 and is the least severe

---

Second Circuit, noting that "[n]othing in the language of Rule 11(c) says that, if the court initiates the inquiry, something more than a Rule 11(b) breach of duty is required." Young v. City of Providence, 404 F.3d 33, 39 (1st Cir. 2005); *see also* Gregory P. Joseph, *'Sua Sponte' Sanctions,* N.Y. L. J. (2003), https://perma.cc/WKJ6-EJX3 (arguing that the Second Circuit's standard "is irreconcilable with the text and history of Rule 11").

[127] *Id.* (quoting *Hodge* 2010 WL 376019, at *5); In re *Pennie & Edmonds LLP*, 323 F.3d at 90.

[128] Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu, No. 11-CV-04383, 2015 WL 4389893, at *14 (S.D.N.Y. July 10, 2015).

[129] *Mobile Shelter Sys. USA, Inc.*, 2011 WL 7030963, at *3 (quoting *Hodge*, 2010 WL 376019, at *5).

[130] GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 213 (3d ed. 2000).

[131] *See* FED. R. CIV. P. 11.

[132] Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986).

sanction adequate to such purpose."[133] Rule 11 itself is silent regarding what factors a court might assess when determining what sanction to impose, but the Advisory Committee Note suggests consideration of:

> whether the improper conduct was willful, or negligent; whether it was party of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants.[134]

Courts acting *sua sponte* are limited in what sanctions they may impose, and they cannot award attorney's fees except when the subject of the sanctions "has demonstrated bad faith."[135] Conversely, where a Rule 11 motion is filed by an opposing party, fees are available for both the expenses incurred as a result of the violation and the expenses incurred in bringing the Rule 11 motion.[136]

That is not to say, however, that attorneys' fees are automatically granted to the moving party. Turning first to the availability of fees for expenses the opposing party incurred as a result of the violation, the language of the rule specifies that "if imposed on motion and warranted for effective deterrence, [a court may issue] an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[137] Whether the fees and expenses are a direct result of the Rule 11 violation can be a contested issue.[138] Additionally, even where the court determines that the fees and expenses result from the violation, the court still

---

[133] Langer v. Monarch Life Ins. Co., 966 F.2d 786, 811 (3d Cir. 1992).
[134] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.
[135] Willhite v. Collins, 459 F.3d 866, 870 (8th Cir. 2006).
[136] FED. R. CIV. P. 11(c)(2), (4).
[137] FED. R. CIV. P. 11(c)(4). *See also* Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 395 (6th Cir. 2009).
[138] *See, e.g.*, Regents of Univ. of Cal. v. Stidham Trucking, Inc., No. 16-cv-02835-MCE-CKD, 2018 WL 338998 at *3 (E.D. Ca. Jan. 8, 2018).

has discretion and may choose to award just some—or even none—of that sum.[139]

Courts regularly consider whether the Rule 11 violation involved bad faith when evaluating whether an award of attorney's fees should be entered, and the amount of any such fees.[140] Understandably, courts enter lower awards where the conduct is the result of negligence.[141] Additionally, courts have considered whether the attorney has previously been sanctioned when assessing what sanction is appropriate.[142]

Rule 11 also specifies that a court may, "[i]f warranted," award the prevailing party their "reasonable expenses, including attorney's fees, incurred for the motion."[143] This can be meaningful both to a moving party in weighing whether it is worthwhile to file a Rule 11 motion and to a party who successfully defends themselves against a motion.

Monetary penalties can be imposed both where the sanctions order is the result of a motion from an opposing party, and where the sanctions are imposed *sua sponte*.[144] If the court chooses to impose a monetary penalty, that penalty is paid to the court, not the opposing party.[145] Additionally, courts imposing a monetary sanction evaluate various factors, including the offending party's ability to pay the sanction[146] and the severity of the violation.[147]

Nonmonetary penalties are available in both types of sanctions proceedings.[148] However, these sanctions are similarly limited to what is

---

[139] *See, e.g.*, StreetEasy, Inc. v. Chertok, 651 F. App'x 37, 38-39 (2d Cir. 2016).

[140] Terminix Intern. Co., L.P. v. Kay, 150 F.R.D. 532, 538-39 (E.D. Pa. 1993).

[141] *Id.*

[142] *See, e.g.*, Adams v. New York State Educ. Dept., No. 08 Civ. 5996(VM)(AJP), 2010 WL 4970011, *12 (S.D.N.Y. Dec. 8, 2010)

[143] FED. R. CIV. P. 11(c)(2).

[144] FED. R. CIV. P. 11(c)(4).

[145] Carlino v. Gloucester City High School, 57 F.Supp.2d 1, 10 (D.N.J. 1999) (imposing a fine of $500 to be paid to the Clerk of Court).

[146] *See, e.g.*, Dohm v. Gilday, No. 02 C 9056, 2004 WL 1474581, at *4 (N.D. Ill. June 29, 2004) (noting that ability to pay should be considered, and declining to reduce award because burden is on sanctioned party to show that they cannot pay, and counsel submitted nothing to the court to support his claim).

[147] King v. Fleming, 899 F.3d 1140, 1155 (10th Cir. 2018).

[148] FED. R. CIV. P. 11(c)(4).

considered necessary to deter the conduct at issue.[149] Examples of nonmonetary sanctions that courts have imposed include: (1) education or training;[150] (2) reprimands or publicly filing the order finding that an attorney has violated Rule 11;[151] (3) bars on initiating other lawsuits without leave of court;[152] (4) bars on initiating future lawsuits against particular defendants;[153] (5) a requirement that the attorney provide the court's sanctions order to their clients;[154] and (6) the dismissal of claims, counterclaims, or even an entire complaint.[155] Dismissal is a harsh sanction, and should be rarely imposed. Dismissal is disfavored both because it is primarily effectuated upon the client, and because our judicial system prefers to resolve matters on their merits.[156]

III. THE USE OF RULE 11 TO SANCTION ATTORNEYS FOR FAILING TO CONDUCT ADEQUATE RESEARCH

Rule 11 specifies that an attorney's signature is a certification that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[157] A litigant runs afoul of this section when it files a document that either contains a false representation of law or does not

---

[149] The Third Circuit has noted that "what is 'appropriate' may be a warm-friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to circumstances." Langer v. Monarch Life Ins., 966 F.2d 786, 810 (3d Cir. 1992).

[150] *See, e.g.*, *Carlino*, 57 F. Supp. 2d at 40 (ordering attorney to attend two CLE classes); Leuallen v. Borough of Paulsboro, 180 F. Supp. 2d 615, 622 (D.N.J. 2002) (requiring the attorney to produce a "well organized and thorough summary of the requirements that Rule 11, FED. R. CIV. P., places upon attorneys, specifically the requirements of Rule 11(b)(1)-(3), and also discussing how the courts, specifically the Third Circuit, have interpreted that rule. This summary shall be at least twenty (20) pages in length and may not paraphrase hornbook law and must be researched and written by Mr. Malat himself, not an associate or an assistant.").

[151] *See, e.g.*, Corp. Printing Co., Inc. v. New York Typographical Union N. 6, 886 F. Supp. 340, 348 (S.D.N.Y. 1995) (reprimand); Choi v. D'Appolonia, 252 F.R.D. 266, 274 (W.D. Pa. 2008) (public filing of court order).

[152] Williams v. Revlon Co., 156 F.R.D. 39, 44 (S.D.N.Y. 1994).

[153] Chauvet v. Local 1199, Drug, Hosp. & Health Care Emps. Union, No. 96 Civ. 2934, 1996 WL 665610, *20 (S.D.N.Y. Nov. 18, 1996).

[154] *Leuallen*, 180 F. Supp. 2d at 622.

[155] Dodson v. Runyon, 86 F.3d 37, 39-40 (2d Cir. 1996).

[156] Safe-Strap Co., Inc. v. Koala Corp., 270 F.Supp.2d 407 (S.D.N.Y. 2003).

[157] FED. R. CIV. P. 11(b)(2).

contain key cases discussing that topic.[158] Similarly, a litigant breaches their obligation to conduct a reasonable legal inquiry when—after a court has found that a pleading or motion is deficient—they refile the pleading or motion and do not correct those deficiencies.[159]

The ability to perform legal research—which includes locating relevant cases, statutes, or other legal authority, and evaluating the adequacy of those items—is a "fundamental skill[] every lawyer should possess."[160] Legal research is indisputably an essential lawyering skill,[161] and the consequences for failing to develop and employ this skill can be severe.[162]

While judges may sanction attorneys for a broad range of conduct, they are understandably wary of sanctioning litigants for crafting novel arguments. Nonetheless, it is not uncommon for attorneys to be sanctioned for seeking relief or making claims that are meritless or in direct contradiction to the law.[163]

Many courts have considered the applicability of Rule 11 when sanctioning a litigant who has failed to conduct adequate legal research. These opinions, however, articulate varied standards for when sanctions are appropriate where the offending party has failed to conduct research or has insufficiently researched the law.

This part contains two sections. First, it discusses several past cases in which courts have sanctioned an attorney for their failure to conduct adequate research to see how the standards discussed above are applied to this specific

---

[158] Courts may sanction attorneys under Rule 11 for a broad range of conduct, including "misrepresenting facts or making frivolous legal arguments." Muhammad v. Walmart Stores East, L.P., 732 F.3d 104, 108 (2d Cir. 2013).

[159] Adams v. New York State Educ. Dept., No. 08 Civ. 5996VM (AJP), 2010 WL 4970011 at *9 (S.D.N.Y. 2010).

[160] Ellie Margolis, *Surfin' Safari – Why Competent Lawyers Should Research on the Web*, 10 YALE J. L. & TECH. 82, 84 (2007).

[161] Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 38 U. BALT. L. REV. 173, 212 (2010); ABA TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 101 (1992); WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 163 (2007).

[162] Denitsa R. Mavrova Heinrich & Tammy Pettinato Oltz, *Legal Research Just in Time: A New Approach to Integrating Legal Research into the Law School Curriculum*, 88 TENN. L. REV. 469, 482 (2020) (discussing consequences new attorneys may encounter for inadequate legal research skills, including "disciplinary actions, professional sanctions, and even legal malpractice lawsuits").

[163] *See, e.g.*, Bautista v. Star Cruises, 696 F. Supp. 2d 1274 (S.D. Fla. 2010); Western Maryland Wireless Connection v. Zini, 601 F. Supp. 2d 634 (D. Md. 2009)

type of conduct. Second, it then seeks to apply those same standards and established practices to a case involving an attorney submitting generative AI-crafted fictitious cases and false statements of law to demonstrate that Rule 11 is ill-equipped to address that scenario.

A. Past Cases Applying Rule 11 to an Attorney's Failure to Research

The question of what constitutes adequate research appears simple on its face. It is an "abuse of the judicial system" to file pleadings with a court "without taking the necessary care in their preparation."[164] Under the objective standard employed in most courts,[165] the relevant inquiry has been articulated as requiring "a normally competent level of legal research to support the presentation."[166] The Eleventh Circuit specified that the proper inquiry is "whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been made aware had he made a reasonable inquiry."[167] Similarly, the Ninth Circuit has phrased this as a requirement that attorneys "perform adequate legal research."[168]

Nonetheless, courts run into many challenges when assessing whether sanctions are appropriate for an attorney's failure to conduct adequate legal research. These challenges are understandable:

- How much research is enough?[169]
- What if the law is especially complicated in this area?[170]

---

[164] Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 398 (1990).

[165] As detailed in Part II.B.3, *supra*, only courts within the Second Circuit apply a different standard.

[166] Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988) (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986)); *see also* Young v. Smith, 269 F. Supp. 3d 251, 333 (M.D. Pa. 2017) (reiterating standard); Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994).

[167] Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996).

[168] Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002).

[169] *See, e.g.*, Fahner v. Marsh, No. 87 C 2898, 1988 WL 5016, at *1 (N.D. Ill. Jan. 19, 1988) (specifying what sort of research would have been sufficient).

[170] *See, e.g.*, Smith Int'l, Inc. v. Texas Com. Bank, 844 F.2d 1193, 1199-201 (5th Cir. 1988); Metro. Interconnect, Inc. v. Alexander & Hamilton, Inc., No. CIV.A. 04-2896, 2005 WL 1431670, at *6 (E.D. La. May 26, 2005).

- What if the attorney only had a short period of time in which to conduct their research?[171]
- Perhaps they are advocating for "novel legal theories" or "reconsideration of settled doctrine?"[172]
- Is the claim frivolous, or merely weak?[173]

The result of these challenges is that courts are hesitant to impose sanctions for an attorney's inadequate research.

For example, the Seventh Circuit noted in *Mars Steel Corp. v. Continental Bank N.A.* that where a "legal point is obscure, though, even an absurd argument may not be sanctionable, because a 'reasonable' inquiry does not turn up every dusty statute and precedent."[174] Additionally, the court stated that the amount of research needed to equal a reasonable inquiry would vary depending upon "whether the issue is central, the stakes of the case, and related matters that influence whether further investigation is worth the costs."[175]

In another case, the Seventh Circuit listed various items that should be considered prior to the imposition of sanctions, including, how long the attorney had to research and prepare the filing; "whether the document contained a plausible view of the law; the complexity of the legal questions

---

[171] *See, e.g.*, Ins. Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1358 (7th Cir. 1989) (quoting Brown v. Fed'n of State Med. Bds., 830 F.2d 1429, 1435 (7th Cir. 1987)).

[172] An attorney may avoid the imposition of sanctions by demonstrating that their argument—while not based on existing law—is advocating instead for reconsideration of settled law or a novel legal theory. Young v. Smith, 269 F. Supp. 3d 251, 333 (M.D. Pa. 2017) (quoting Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987)).

[173] FED. R. CIV. P. 11(b)(2); *see also* Samuel J. Levine, *Seeking a Common Language for the Application of* Rule 11 *Sanctions: What is 'Frivolous'?*, 78 NEB. L. REV. 677 (1999). The question of whether something is frivolous is not easily answered in the binary. Instead, "[i]n the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak. Somewhere between these two points, courts draw a line to separate the nonfrivolous from the frivolous, the former category providing safe shelter, the latter subjecting attorney and client to sanctions." Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 574 (2d Cir. 1986). The variation in how courts assess whether a claim is frivolous impacts how Rule 11 is enforced, and has resulted in "widely different sanction rates being applied in different districts and circuits." Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and* Rule 11, 44 UCLA L. REV. 65, 94 (1996) (citing Lawrence C. Marshall, *The Use and Impact of* Rule 11, 86 NW. U. L. REV. 943, 953-54 (1992)).

[174] 880 F.2d 928, 932 (7th Cir. 1989) (citing FDIC v. Elefant, 790 F.2d 661 (7th Cir. 1986)).

[175] *Id.* at 932-33.

involved; and whether the document was a good faith effort to extend or modify the law."[176]

Other courts have excused an attorney's failure to conduct adequate research where the filing "was the product of ineptitude and misguided legal research rather than a failure to attempt a reasonable inquiry into the law or an intent to harass."[177] For example, the Fifth Circuit has excused a litigant's research error where the law at issue was complex.[178] The Second Circuit stated that "[m]erely incorrect legal statements are not sanctionable under Rule 11(b)(2)."[179]

Courts, understandably, treat this conduct differently depending on whether the behavior is the result of sloppy, poor-quality legal work or whether the behavior constitutes an intentional failure to disclose controlling legal authority.[180] The latter will be viewed as a much more egregious violation of an attorney's ethical requirements.[181]

Courts have imposed sanctions where a litigant made a false statement of law that "misrepresents" a court's holding.[182] In another case, an attorney was

---

[176] *Ins. Benefit Adm'rs, Inc.*, 871 F.2d at 1358 (quoting *Brown*, 830 F.2d at 1435).

[177] Bergquist v. FyBX Corp., 108 F. App'x 903, 905 (5th Cir. 2004) (affirming denial of motion for sanctions); Cross v. Cross, No. CIV.A. 98-1144, 1998 WL 690978, *4 (E.D. La. Oct. 5, 1998) (declining to impose sanction for legally groundless filing). While this Article is focused upon the use of Rule 11 to sanction attorneys, in *Horsley v. Feldt*, the federal district court declined to impose sanctions against a self-represented litigant. 128 F. Supp. 2d 1374, 1380 (N.D. Ga. 2000). The court found that the plaintiff had demonstrated that he had "made attempts to conduct thorough legal research regarding the basis for his claims . . . [and] it cannot be said that his claims are completely lacking in either factual or legal basis within the meaning of Rule 11." *Id.*

[178] Smith Int'l, Inc. v. Texas Com. Bank, 844 F.2d 1193, 1199-1201 (5th Cir. 1988); *see also* Metro. Interconnect, Inc. v. Alexander & Hamilton, Inc., No. CIV.A. 04-2896, 2005 WL 1431670 at *6 (E.D. La. May 26, 2005) (declining to find the conduct was sanctionable due to the complexity of the Sherman Act).

[179] Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 391 (2d Cir. 2003); *see also* Morana v. Park Hotels & Resorts, Inc., No. 20-CV-2797 (RA), 2022 WL 769327, at *11 (S.D.N.Y. 2022) (quoting Galin v. Hamada, 283 F. Supp. 3d 189, 201 (S.D.N.Y. 2017)) (holding that sanctions are not available merely for taking a position that is "legally incorrect" – so long as that conclusion is not "patently obvious.").

[180] *See, e.g.*, Glassalum Eng'g Corp. v. Ontario, Ltd., 487 So. 2d 87, 88 n.2 (Fla. Dist. Ct. App. 1986) ("If either counsel discovered but intentionally failed to disclose *Rivera*, the implications would be far more severe.")

[181] *Id.*

[182] *See, e.g.*, MetLife Bank, N.A. v. Badostain, No. 1:10-CV-118-CWD, 2010 WL 5559693, at *8-9 (D. Idaho Dec. 30, 2010).

sanctioned under the court's *sua sponte* authority after the attorney repeatedly filed baseless claims.[183] Similarly, a court concluded that sanctions were appropriate in a proceeding in which the attorney replied upon just one case to support their jurisdictional theories, "which, upon examination, proved to be completely inapposite to the case at bar."[184] Finally, sanctions were imposed where a party repeatedly ignored controlling authority in their filings with the court, and continued to ignore controlling authority even after the court identified it for the party.[185]

Because most courts are imposing an objective standard, a court's decision does not have to be based upon that attorney's knowledge. Instead, courts have instead imposed sanctions based on other markers that the attorney failed to conduct research. For example, in *Carlino v. Gloucester City High School*, the federal district court sanctioned the attorney because he raised baseless legal claims and continued to support them through his response to the court's order to show cause.[186] The court stated that his continued support of those claims "clearly demonstrates that [the attorney] has conducted absolutely no legal research whatsoever regarding these claims at any time before or *during* the pendency of this litigation."[187] Ultimately, the court found this to be a "flagrant failure to conduct any legal research" in violation of Rule 11(b).[188]

Similarly, in a recent case before the Northern District of Ohio, a court imposed sanctions upon attorneys who repeatedly filed complaints with previously rejected legal claims, and also ignored and failed to discuss established precedent.[189] The court did not articulate a standard for what research is necessary but concluded that the attorneys "did not do any

---

[183] Leuallen v. Borough of Paulsboro, 180 F. Supp. 2d 615, 622 (D.N.J. 2002)

[184] Total Television Ent. Corp. v. Chestnut Hill Vill. Assocs., 145 F.R.D. 375, 384 (E.D. Pa. 1992).

[185] Pacheco v. Chickpea at 14th St., Inc., No. 18-CV-251 (JMF) (GWG), 2019 WL 6683826 (S.D.N.Y. Dec. 6, 2019). Interestingly, in this case the court discusses the standards for sanctions under Rule 11, the court's inherent authority, and 28 U.S.C. § 1927, and ultimately does not specify the specific basis for the sanctions that are imposed in the case. *See also* Terminix Int'l Co. v. Kay, 150 F.R.D. 532, 537 (E.D. Pa. 1993) ("A party's position, even if superficially plausible, cannot be accepted as a good faith argument for the extension of the controlling law if, in framing the pleadings, the party ignores the controlling authority.").

[186] 57 F. Supp. 2d 1, 38 (D.N.J. 1999).

[187] *Id.*

[188] *Id.*

[189] Bojicic v. DeWine, No. 3:21-CV-00630-JGC, 2024 WL 365116, at *6-15 (N.D. Ohio Jan. 31, 2024).

meaningful legal research" because they failed to provide time records or credible testimony regarding their work on the case in response to the court's request.[190]

Some courts go a bit further in their opinions, providing some guidance as to what would have been sufficient research. For example, the Northern District of Illinois sanctioned an attorney and noted that they "should at least have read and shepardized the *Farrell v. O'Brien* case."[191] In another case, a court specified that parties "should identify and cite, at a minimum, pertinent decisions of the Supreme Court of the United States, the Court of Criminal Appeals, of this Court when available, and if no cases from this Court can be located on the issue presented, of other Texas intermediate courts of appeals" and went on to detail the number of citations needed and specify that counsel should review the subsequent history of the cases they cite.[192]

Ultimately, while some courts have imposed sanctions for inadequate legal research, it is not uncommon for a judge to excuse an attorney's failure in this area. Sanctions are significantly more likely where the conduct: (1) constitutes an intentional failure to disclose controlling legal authority; (2) is repeated, particularly after a court has informed the attorney of their error; or (3) involves misrepresenting or changing the holding of a case.

B. Applying Rule 11 to an Attorney's Failure to Research (Attributable to Generative AI)

Given that a court has already employed Federal Rule of Civil Procedure 11 to sanction attorneys who mistakenly relied on generative AI technology and submitted a motion response that contained fictitious cases and false statements of law,[193] it may seem obvious that Rule 11 can readily regulate this conduct. Indeed, in their recent work, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, Maura R. Grossman, Paul W. Grimm, and Daniel G. Brown provide a thoughtful look at the recent spate of standing orders

---

[190] *Id.* at *15-17.

[191] Fahner v. Marsh, No. 87 C 2898, 1988 WL 5016, at *1 (N.D. Ill. Jan. 19, 1988) (noting that the attorney's reliance on a footnote in a practice guide that cited the case was misplaced, given the age of the citation and brevity of the note).

[192] Walder v. State, 85 S.W.3d 824, 828 (Tex. App. 2002).

[193] Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

that have been issued to regulate the use of generative AI.[194] The authors opine that the standing orders "appear to be redundant" because the obligations they impose mirror "obligations that already apply under existing rules of civil practice and procedure[,]" including Rule 11.[195] In this section, however, I contend that Rule 11 will not generally be effective at sanctioning a litigant who mistakenly relies on generative AI technology and files a document with a court that contains fictitious cases and false statements of law.

The *Mata* case is discussed in Section I.B.1 above and involved an attorney who mistakenly believed that ChatGPT was similar to a search engine. The attorney and his colleague were sanctioned under Rule 11 after they unwittingly relied on the fictitious cases and false statements of law ChatGPT generated in a filing with the court. However, in the *Mata* case, and in keeping with the adage that 'the coverup is worse than the crime,' the attorneys were primarily sanctioned not for their conduct in filing a response that contained fictitious cases and false statements of law, but for their subsequent behavior.[196] Specifically, the court made the following findings of bad faith:

> 23. The Court concludes that Mr. LoDuca acted with subjective bad faith in violating Rule 11 in the following respects:
>
> a. Mr. LoDuca violated Rule 11 in not reading a single case cited in his March 1 Affirmation in Opposition and taking no other steps on his own to check whether any aspect of the assertions of law were warranted by existing law. An inadequate or inattentive "inquiry" may be unreasonable under the circumstances. But signing and filing that affirmation after making no "inquiry" was an act of subjective bad faith. This is especially so because he knew of Mr. Schwartz's lack of familiarity with federal law, the Montreal Convention and bankruptcy stays, and the limitations of research tools made available by the law firm with which he and Mr. Schwartz were associated.

---

[194] Grossman, Grimm & Brown, *supra* note 1.
[195] *Id.*
[196] *Mata*, 678 F. Supp. 3d at 465.

b. Mr. LoDuca violated Rule 11 in swearing to the truth of the April 25 Affidavit with no basis for doing so. While an inadequate inquiry may not suggest bad faith, the absence of any inquiry supports a finding of bad faith. Mr. Schwartz walked into his office, presented him with an affidavit that he had never seen in draft form, and Mr. LoDuca read it and signed it under oath. A cursory review of his own affidavit would have revealed that (1) "Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008)" could not be found, (2) many of the cases were excerpts and not full cases and (3) reading only the opening passages of, for example, "Varghese", would have revealed that it was internally inconsistent and nonsensical.

c. Further, the Court directed Mr. LoDuca to submit the April 25 Affidavit and Mr. LoDuca lied to the Court when seeking an extension, claiming that he, Mr. LoDuca, was going on vacation when, in truth and in fact, Mr. Schwartz, the true author of the April 25 Affidavit, was the one going on vacation. This is evidence of Mr. LoDuca's bad faith.

24. The Court concludes that Mr. Schwartz acted with subjective bad faith in violating Rule 11 in the following respects:

a. Mr. Schwartz violated Rule 11 in connection with the April 25 Affidavit because, as he testified at the hearing, when he looked for "Varghese" he "couldn't find it," yet did not reveal this in the April 25 Affidavit. He also offered no explanation for his inability to find "Zicherman". Poor and sloppy research would merely have been objectively unreasonable. But Mr. Schwartz was aware of facts that alerted him to the high probability that "Varghese" and "Zicherman" did not exist and consciously avoided confirming that fact.

b. Mr. Schwartz's subjective bad faith is further supported by the untruthful assertion that ChatGPT was merely a "supplement" to his research, his conflicting accounts about his queries to ChatGPT as to

> whether "Varghese" is a "real" case, and the failure to disclose reliance on ChatGPT in the April 25 Affidavit.[197]

Most of the court's findings of bad faith were related to counsels' conduct that attempted to conceal their error, which included making untruthful statements to the court and failing to disclose their reliance on ChatGPT in response to the court's inquiry.[198] As a result, *Mata* certainly stands for the principle that lying and concealing facts from a court is sanctionable conduct, but does not support an assertion that the *negligent* submission of fictitious cases and false statements of law may be sanctioned under Rule 11.[199] This conclusion is reinforced by the decision of the court in the *Cohen* case that sanctions were not appropriate because, while the conduct was negligent, it did not rise to the level of subjective bad faith.[200]

When considering the effectiveness of Rule 11 sanctions to address this sort of conduct, it is important to keep in mind how an attorney would come to include generative AI-created fictitious cases or false statements of law in their filings with a court. As evidenced from the discussions in Part I.B of this paper, the conduct results from a lack of familiarity with generative AI and its hallucinations:

- Mr. Schwartz testified that he turned to ChatGPT for legal research because he had limited access to federal cases through the research services and databases at his firm, and "it had occurred to me that I heard about this new site which I assumed – I falsely assumed was like a super search engine called ChatGPT, and that's what I used."[201] In a declaration he stated that he "could not fathom that ChatGPT could produce multiple fictitious cases."[202]

---

[197] *Id.*

[198] *Id*. Because this district court is within the Second Circuit and the sanctions issue was raised *sua sponte*, the court made specific findings of bad faith related to this misconduct.

[199] The first finding of bad faith (at paragraph 23(a), above) for Mr. LoDuca is the closest match, however, the district court found that Mr. LoDuca's conduct was not merely negligent.

[200] United States v. Cohen, No. 18-CR-602 (JMF), 2024 WL 1193604, at *6 (S.D.N.Y. Mar. 20, 2024).

[201] *Mata*, 678 F. Supp. 3d at 456.

[202] *Id.*

- In his declaration, Mr. Cohen stated that he "did not realize [Google Bard] was a generative text service that, like Chat-GPT, could show citations and descriptions that looked real but actually were not. Instead, [he had] understood it to be a super-charged search engine."[203]
- Similarly, Ms. Lee explained her use of generative AI, stating, "[b]elieving that applying the minimum wage to in injured worker in such circumstances under workers' compensation law was uncontroversial, I invested considerable time searching for a case to support this position but was unsuccessful. . . . Consequently, I utilized the ChatGPT service, to which I am a subscribed and paying member, for assistance in case identification. ChatGPT was previously provided reliable information."[204]

As these statements reflect, these litigants are relying on fictitious generative AI output due to their lack of knowledge of how generative AI works and its propensity to hallucinate. Without more, this conduct is negligent, and would not be akin to contempt or subjective bad faith.

In his analysis of the impacts of the 1993 amendments to Rule 11, Professor Yablon considered the different ways in which an attorney might run afoul of Rule 11, creating a taxonomy that delineated four different categories:

1. Tricksters: these litigants know their claims are meritless, however, they "think they can hide that fact from the other side while they run up litigation costs, making it more attractive for the other side to settle than to litigate;"
2. Don Quixotes: these are idealistic litigants, filing lawsuits "to maintain some ideological or expressive position on an issue irrespective of the viability of that position under current law;"
3. Slackers: these litigants "who simply neglect or do not feel like making a reasonable investigation of the law and facts prior to filing their claims[;]" and

---

[203] Letter by E. Danya Perry, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 29, 2023), ECF No. 104.

[204] Park v. Kim, 91 F.4th 610, 614 (2d Cir. 2024). (Errors in original).

4. Gamblers: these litigants do not know their likelihood of success but "believe, on the basis of the limited information available to them, that the claims may have merit, and are willing to file such 'longshots.'"[205]

Ultimately, the type of conduct we are considering when we evaluate the prospect of a litigant filing a motion or other document with the court containing fictitious cases or incorrect statements of law due to generative AI aligns most closely in the category Professor Yablon describes as "slackers."[206] He further describes this group as including lawyers who may be too lazy to perform adequate research, and states that it also encompasses "those who are too inexperienced to lack the ability to do so, or those who just made an honest mistake after a hard night of partying."[207] The violative conduct by Professor Yablon's "slackers" is—at its heart—negligent.[208]

As detailed in Part II of this Article, Rule 11 sanctions may arise via two distinct procedural routes: either through a motion filed by an opposing party, or *sua sponte*. While courts acting *sua sponte* do not provide the litigant with a safe harbor period, that is not the case for sanctions sought by an opposing party. In that circumstance, the opposing party must provide the litigant with notice of their error.[209] That notice starts the clock on a 21-day safe harbor period, giving the litigant the opportunity to withdraw the offending document.[210]

Given the nature of this error, it seems likely that, were an opposing party to provide this notice, the attorney who mistakenly relied on generative AI would recognize their error and withdraw the filing. While Professor Yablon's tricksters, Don Quixotes, and gamblers have different motivations that might lead them to choose not to withdraw a filing, that is not the case with the attorneys who fall into the slacker category on his taxonomy. As Professor

---

[205] Yablon, *supra* note 82, at 606-07.

[206] *Id.* at 607.

[207] *Id.* at 636.

[208] While it is possible that an attorney may use a generative AI tool in bad faith, this is unlikely given the negative ramifications that would inure to that attorney and their client. While they may be able to avoid Rule 11 sanctions by claiming negligence, they would be unlikely to obtain the relief they were seeking from the court and may face an ethics inquiry.

[209] *See* FED. R. CIV. P. 11.

[210] *Id.*

Yablon notes, attorneys who fall within this group "are likely to experience regret as evidence develops during the litigation process concerning the weakness of their claims."[211] Therefore, these individuals are likely to be willing to withdraw their offending filings when provided with a safe harbor opportunity.[212] Professor Yablon surmises that this conduct, therefore, is able to avoid judicial scrutiny—and subsequent sanctions—in many instances.[213]

This predicted result has played out already in the *Cohen* case detailed in Part I.B above, with the attorney providing valid case citations to the court upon realizing the error.[214] Indeed, in his declaration, Mr. Schwartz stated that he would have withdrawn the citations had he been provided with the opportunity to do so.[215] That we know about this error is unusual, and only due to the unique procedural history of this case.[216] It is possible that AI generated content has been withdrawn without public notice dozens of times since generative AI programs became readily available, as parties who do have the benefit of Rule 11's safe harbor are able to act quickly to withdraw the offending filing and correct their submission to the court.

Should an attorney fail to take advantage of the safe harbor period and withdraw their offending filing, the objective standard applied to Rule 11 motions filed by opposing parties would likely capture this conduct. Upon finding that Rule 11 was violated, a district court would then consider whether and what sanctions to impose[217] in light of "the particular facts of [the] case."[218]

---

[211] Yablon, *supra* note 82, at 608.

[212] *Id.*

[213] *Id.* at 642-43.

[214] *See* Letter by Barry Kamins and John M. Leventhal, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 15, 2023), ECF No. 103.

[215] This issue was not raised by opposing counsel, so no safe harbor was available. Letter by Barry Kamins and John M. Leventhal, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 15, 2023), ECF No. 103.

[216] The procedural posture of the Cohen case is unique, as the error was not caught by an opposing party but was instead flagged in the footnote of a letter filed by a newly-retained attorney representing Mr. Cohen. *See* Letter by E. Danya Perry, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Dec. 9, 2023), ECF No. 95. The court then issued a *sua sponte* show cause order. United States v. Cohen, No. 18-CR-602(JMF), 2023 WL 8635521 (S.D.N.Y. Dec. 12, 2023).

[217] The different considerations courts evaluate when considering sanctions are discussed in Part II.B.4, *supra.*

[218] Lieb v. Topstone Indus., Inc., 788 F.2d, 158 (3d Cir. 1986); Langer v. Monarch Life Ins. Co., 966 F.2d 786, 810 (3d Cir. 1992).

Because the goal underlying Rule 11 is deterrence, courts "utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose."[219] When evaluating whether an award of attorney's fees should be entered, and the amount of any such fees, courts regularly consider whether the Rule 11 violation involved bad faith, entering lower awards where the conduct is the result of negligence.[220] The result is that it is likely that these considerations would weigh toward the imposition of either no sanctions or a very minor sanctions award in this type of case.

Alternatively, should the sanctions proceeding arise not through a motion by an opposing party but through the court's initiative, no safe harbor period would exist to allow the attorney to recognize their error and withdraw the offending filing. As discussed in Part II.B.3 above, the circuit courts are split as to what standard would be applied, with the Second Circuit as an outlier.

In most circuits, courts considering the *sua sponte* imposition of sanctions would use an objective standard, however, sanctions should only be imposed in situations that are "akin to contempt."[221] This standard would not capture the conduct at issue here. These attorneys are not intending to deceive the court. Instead, they lack critical knowledge about generative AI technology and mistakenly rely on its output without verifying its accuracy.

Similarly, this conduct would not typically be sanctioned within the Second Circuit, as that court requires a finding that either the conduct is "akin to contempt" or that it was "taken in subjective bad faith" to impose sanctions under Rule 11(c)(3).[222] While this conduct would certainly satisfy a negligence

---

[219] *Lieb*, 788 F.2d at 158; *Langer*, 966 F.2d at 810.

[220] Terminix Int'l Co. v. Kay, 150 F.R.D. 532, 538-39 (E.D. Pa. 1993).

[221] "Mere negligence or ignorance of the facts or law" is insufficient. Hodge v. Orlando Utils. Comm'n, No. 6:09-cv-1059-Orl-19DAB, 2010 WL 376019, at *5 (M.D. Fl. Jan 25, 2010) (citing Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th Cir. 2003); Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998)). Akin to contempt refers to conduct that involves "making a 'knowingly false statement or exhibiting deliberate indifference to obvious facts.'" Iparametrics, LLC v. Meier, No. 2:08-CV-00056-WCO, 2012 WL 12896231 at *4 (quoting *Hodge*, 2010 WL 376019, at *5; *Mortg. Elec. Registration Sys., Inc.*, 2012 WL 1382265).

[222] *Id.* (quoting *Hodge*, 2010 WL 376019 at *5; *In re* Pennie & Edmonds LLP, 323 F.3d 86 at 90 (2d Cir. 2003)). In practice, this subjective bad faith standard has been interpreted to require that attorneys "have *actual knowledge* that a pleading or argument that he or she is advancing is frivolous." Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu, No. 11-CV-04383, 2015 WL 4389893, *14 (S.D.N.Y. July 10, 2015). "[M]ere negligence or ignorance of

standard, it would not meet the heightened requirement imposed by the Second Circuit. As a result, the conduct would evade the imposition of sanctions, as seen in *United States v. Cohen*, unless it involved additional sanctionable conduct, like *Mata v. Avianca*.

The idea that Rule 11 is ineffective at policing errors from sloppy or careless attorneys is not novel. Indeed, in his 2004 article, Professor Yablon questioned the value of sanctions to address the conduct of attorneys who fall within the "slacker" category.[223] He noted that they do not receive any benefit from their frivolous filings, so questioned whether "increased sanctions will have more than marginal effects on their already self-defeating behavior" and asserted that these sorts of litigants would not be responsive to monetary incentives including the risk of sanctions.[224] Professor Yablon's theory is just as relevant today, as the ill-informed use of generative AI technology will typically evade Rule 11 sanctions. This conduct is sloppy. It violates an attorney's ethical responsibilities. But whether it is in bad faith or akin to contempt is a different measure, and one that is likely not present in most cases.

IV. THE JUDICIAL RESPONSE TO ATTORNEY MISUSE OF GENERATIVE AI TECHNOLOGY

Upon learning of the instances of attorney misconduct involving generative AI, some judges issued standing orders to require the attorneys appearing before them to disclose their use of AI technology.[225] This part begins by asking whether sanctions are appropriate for this type of attorney misconduct. It then discusses many of the orders that have been issued, comparing the requirements and procedures they establish. This part concludes with an analysis of the benefits and detriments of imposing disclosure requirements.

---

the facts or law" is an insufficient basis for a court to impose sanctions *sua sponte.* Mobile Shelter Sys. USA, Inc. v. Grate Pallet Sols., LLC, No. 3:10-CV-978-J-37JBT, 2011 WL 7030963, at *3 (M.D. Fla. Nov. 10, 2011) (quoting *Hodge*, 2010 WL 376019, at *5).

[223] Yablon, *supra* note 82, at 638.

[224] *Id*. Relatedly, Professor Yablon posits that decreased Rule 11 sanctions would similarly be unlikely to have much of an effect on this group, as is it unlikely that attorneys who otherwise wouldn't perform shoddy research would start doing so simply because of a slight change to their risk analysis.

[225] In March 2024, Responsible AI in Legal Services (RAILS) published an *Analysis of AI Use In Courts*, which tracks the judicial response to generative AI technology and provides helpful insights. *See* https://perma.cc/URL2-RULU.

Ultimately, I suggest that – should courts believe that the balance of these benefits and detriments weighs in favor of promulgation, they can make specific choices to ameliorate the negative impacts detailed above, including careful attention to word choice, not imposing a ban or disclosure requirement, and use of the local rules process instead of implementing a standing order.

A. Should an attorney that submits generative AI output that contains fictitious cases and false statements of law be sanctioned?

As detailed above, Rule 11 is not an effective tool to sanction attorneys who mistakenly rely on generative AI output that contains fictitious cases and false statements of law. While Rule 11 is not the only sanctioning mechanism available to our federal courts, it matters that it is not effective in this regard because it should be the primary tool to regulate this sort of conduct absent any rule or order tailored specifically to the use of generative AI. Additionally, while not the focus of this Article, other potential tools have their own flaws.[226]

The nature of a sanctions regime is critical, as it impacts how attorneys are able to represent their clients and the very "functioning of the adversary process."[227] As the Second Circuit noted in a case reviewing a district court's imposition of sanctions against a law firm that filed an affidavit containing false statements, the threat of Rule 11 sanctions can dissuade attorneys from taking steps that would benefit their clients "out of apprehension that their conduct will erroneously be deemed improper."[228] Conversely, a lenient sanctions regime may embolden attorneys "to make improper submissions on behalf of clients, confident that their misconduct will either be undetected or dealt with too leniently to matter."[229]

The fact that this conduct is not readily reached through Rule 11 sanctions leads to what is most likely the most critical question to ask: *should* this conduct be sanctionable under Rule 11?

---

[226] *See* Section II, *supra*.
[227] *In re* Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003)
[228] *Id.* at 91.
[229] *Id.*

While Part III.A of this Article details cases in which courts have chosen to sanction an attorney for their failure to conduct legal research, it also recounts many examples of courts choosing instead to simply lecture that attorney regarding their errors or otherwise handle the attorney's failure to conduct adequate research.[230] Similarly, the early generative AI cases in Part III.B detail the same scenarios. While sanctions were imposed for the particularly egregious conduct in the *Mata* case, district courts have declined to impose sanctions in every other generative AI proceeding to-date.[231] These cases indicate a general willingness to excuse inadequate research, at least where the conduct appears negligent instead of willful. But that is not to say that all judges feel that the negligent use of generative AI technology should evade sanctions.

If we believe that an attorney who includes fictitious cases or false statements of law should be sanctioned irrespective of whether their conduct is merely negligent, then this regulatory lacuna presents a problem. And this is likely the reason why we are seeing an increasing number of courts enacting standing orders in an attempt to manage this conduct.

The fact that this conduct can evade sanctions is directly attributable to the 1993 amendments to Rule 11. These amendments are discussed in more detail in Part II.A, however, they were implemented in response to the view that the 1983 amendments had "spawned excessive litigation concerning sanctions"[232] and were designed to reduce the amount of Rule 11 motions that were filed.[233] The 1993 amendments both included the "safe haven" provision that allows litigants to withdraw these offending filings and evade sanctions as well as the Advisory Committee Note that contemplated only limited use of court-initiated *sua sponte* sanctions "in situations that are akin to a contempt of court."[234]

---

[230] *See, e.g.*, *In re* S.C., 138 Cal. App. 4th 396, 428 (Cal. App. 2006) (criticizing conduct of attorney and referring matter to bar for investigation); Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001) (demeaning the work of the attorneys).

[231] *See* Section I.B, *supra*.

[232] Thomas M. Geisler, Jr., *Proof of Violation of Federal Rule of Civil Procedure 11 and of Sanctions Thereunder*, 47 AM. JUR. PROOF OF FACTS 3d 241 §1 (Feb. 2024 update).

[233] Yablon, *supra* note 82, at 612 (citing Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J. 12 (March 1995)).

[234] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment. This note is responsible for the heightened standards courts impose when considering *sua sponte* sanctions.

While Justice Scalia's fear that the amendments rendered Rule 11 "toothless" may be a slight exaggeration,[235] Rule 11 certainly lost some of its teeth when the 1993 amendments went into effect. The result is that Rule 11 is much less effective at regulating certain kinds of conduct, such as the conduct that is at issue here.

At least some of these aspects of the 1993 amendments to Rule 11 would need to be rolled back for this conduct to be reached and sanctioned under the Rule. This sort of change is unlikely. While Rule 11 is subject to regular criticism, it also has widespread support in its current form.[236] The result is that courts wishing to sanction litigants for negligent conduct like this will need to rely upon a different source of authority.

B. What do the standing orders actually require?

Chief Justice Roberts took an optimistic tone when discussing generative AI in his 2023 year-end report: "[t]hese tools have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system."[237] That optimistic tone, however, was not reflected in the standing orders that district court judges across the country issued that year.

Several federal district court judges responded to challenges presented by generative AI and the attorney conduct the *Mata v. Avianca* case by implementing their own standing orders to regulate the use of generative AI in their courtrooms.[238] These standing orders are wide ranging, with their own specific nuances and features.

---

[235] FED. R. CIV. P. 11(c)(1)(A); Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 507-08 (1993) (Scalia, J., dissenting).

[236] See Armour, *supra* note 6; David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure*, FEDERAL JUDICIAL CENTER 2 (2005) ("More than 80% of the 278 district judges indicated that 'Rule 11 is needed and it is just right as it now stands.'").

[237] Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (December 31, 2023).

[238] This response has not been limited to U.S. Federal District Courts. Several Canadian courts including the Court of King's Bench of Manitoba and the Supreme Court of Yukon have enacted similar policies. Lilian Fridfinnson, *Yukon Supreme Court Says Lawyers Must Disclose Use of AI*, CBC NEWS, (July 11, 2023). Additionally, some state and local courts have taken action in this area. *See, e.g.,* Bexar County Civil District Courts Local R. 3(H)(1).

Most of the standing orders are focused on preventing the filing of documents containing fictitious cases and false statements of law. Some, however, are also concerned with confidentiality. For example, a U.S. Court of International Trade judge issued an order that has a secondary goal of asking attorneys to certify that use of the GAI "has not resulted in disclosure of any confidential or business proprietary information to any unauthorized party."[239] Similarly, the two bankruptcy judges appointed in the Western District of Oklahoma issued an order that requires certification that the attorneys' generative AI use "has not resulted in the disclosure of any confidential information to any unauthorized party."[240]

The standing orders employ various requirements in their quest to prevent the filing of documents containing fictitious cases or false statements of law. Similar language adopted by two judges requires litigants to file certifications attesting that generative AI won't be used in court filings, or that if it is used, the work will be "checked for accuracy, using print reporters or traditional legal databases, by a human being."[241] Other orders go a bit further. For example, Judge Padin with the Federal District Court for the District of New Jersey issued an order that also requires that the certification identify the "portion of the filing" for which AI assistance was employed.[242] Another order does not limit the disclosure requirement to the attorney's own work but requires attorneys to disclose others' use of such products.[243]

---

[239] Judge Stephen Alexander Vaden, United States Court of International Trade, Standing Order regarding *Order on Artificial Intelligence* (June 8, 2023), *available at* https://perma.cc/FG9R-WFS9.

[240] Chief Judge Sarah A. Hall & Judge Janice D. Loyd, United States Bankruptcy Court for the Western District of Oklahoma, Standing Order regarding *Pleadings Using Generative Artificial Intelligence* (July 25, 2023), *available at* https://perma.cc/CYV6-5MES.

[241] Judge Brantley Starr, United States District Court for the Northern District of Texas, Standing Order regarding *Mandatory Certification Regarding Generative Artificial Intelligence* (June 2, 2023), *available at* https://perma.cc/S36L-KDV4; Judge Matthew J. Kacsmaryk, United States District Court for the Northern District of Texas, Standing Order regarding *Mandatory Certification Regarding Generative Artificial Intelligence* (Dec. 4, 2023), *available* at https://perma.cc/QED8-H2MC.

[242] Judge Evelyn Padin, United States District Court for the District of New Jersey, Standing Order regarding *Judge Evelyn Padin's General Pretrial and Trial Procedures* (Nov. 13, 2023), *available* at https://perma.cc/MUH2-KVCL.

[243] Judge Michael J. Newman, United States District Court for the Southern District of Ohio, Standing Order Governing Civil Cases, OH R USDCTSD Newman-Civil Cases § 6 (July 14, 2023);

Northern District of Illinois Magistrate Judge Jeffrey Cole issued one of the broadest certification requirements. His standing order requires litigants to submit certifications where an AI platform is used for research.[244] A different, broad certification requirement was imposed by Judge Michael M. Baylson with the Eastern District of Pennsylvania. His standing order did not limit its application to generative AI technology, but instead ordered the disclosure where an attorney had "used Artificial Intelligence ('AI') in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court."[245]

Additionally, some judges have imposed an outright ban on the use of AI.[246] For example, Judge Michael J. Newman with the Southern District of Ohio promulgated a standing order that broadly bars the use of "Artificial Intelligence ('AI') in the preparation of any filing submitted to the Court."[247] Another judge barred generative AI not through promulgating a standing order but, instead, by imposing a ban as part of the court's granting of *pro hac vice* admission.[248] Judge Donald W. Malloy's orders specified that the admission was granted:

> on the condition that *pro hac* counsel shall do his or her own work. This means that *pro hac* counsel must do his or her own writing; sign his or her own pleadings, motions, and briefs; and appear and participate

---

Whaley v. Experian Information Solutions, Inc., No. 3:22-cv-356, 2023 WL 7926455, *1 n.2 (S.D. Ohio Nov. 16, 2023) (reminding the litigants that "[b]oth parties, and their respective counsel, have an obligation to immediately inform the Court if they discover that a party has used AI to prepare any filing.").

[244] Magistrate Judge Jeffrey Cole, United States District Court for the Northern District of Illinois, Standing Order regarding *The Use of "Artificial Intelligence" In the Preparation of Documents Filed Before this Court* (July 25, 2023), *available* at https://perma.cc/6DET-GMLR.

[245] Judge Michael Baylson, United States District Court for the Eastern District of Pennsylvania, Standing Order regarding *Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson*, (June 6, 2023), *available* at https://perma.cc/E7FU-K3SL.

[246] *See, e.g.*, *Self-Represented Litigants*, E.D. Mo., *available at* https://perma.cc/7SL3-42EE; Order, Harris v. Knoll, No. CV 23-M-DWM, Doc. 13, p. 1 (D. Mont Oct. 11, 2023); Newman, supra note 243.

[247] Newman, *supra* note 243. Although the standing order contains the broad language quoted above, it later specifies that "[t]he Court does not intend this AI ban to apply to information fathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing" — but does not provide any information on what AI technology would be encompassed by the standing order.

[248] Order, *Belenzon v. Paws Up Ranch, LLC*, No. CV 23-M-DWM, Doc. 8, p. 1 (D. Mont June 22, 2023); Order, *Harris v. Knoll*, No. CV 23-M-DWM, Doc. 13, p. 1 (D. Mont Oct. 11, 2023).

> personally. Use of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited.[249]

Finally, the sanction, or other consequence, for violating these orders varies as well. Most of the orders invoke Rule 11 in some way, for example, specifying that an attorney is certifying that they "understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing."[250] An order issued by Judge Araceli Martínez-Olguín, however, states that sanctions are available for failing to complete the certification itself, irrespective of whether the filing employs generative AI.[251] Similarly, the standing order imposed by Judge Newman threatens those who violate the ban with sanctions such as "striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit."[252]

C. Evaluating the benefits and detriments of the standing orders

These orders bring with them several inherent benefits and detriments that are worth considering, particularly as judges and jurisdictions weigh whether to impose their own standing orders, revise current standing orders, or promulgate local rules to regulate litigant use of generative AI technology.

As far as benefits are concerned, the standing orders have two arguable benefits: (1) they may prevent litigants from filing documents containing fictitious cases and false statements of law; and (2) they make it easier for a court to find that a litigant violated Rule 11 and impose sanctions.

---

[249] *Id.*

[250] Starr, *supra* note 241; *see also* Judge Scott L. Palk, United States District Court for the Western District of Oklahoma, Standing Order regarding *Disclosure and Certification Requirements – Generative Artificial Intelligence* (Nov. 13, 2023), *available* at https://perma.cc/K9GL-UAU9 (specifying that an "attorney will be held responsible for the contents thereof, in accordance with Rule 11 and applicable rules of professional conduct and/or attorney discipline.").

[251] Judge Araceli Martínez-Olguín, United States District Court for the Northern District of California, Standing Order regarding *Standing Order for Civil Cases Before District Judge Araceli Martínez-Olguín* (Nov. 22, 2023), *available* at https://perma.cc/MVZ9-F76M.

[252] Newman, *supra* note 243.

First, these standing orders may help to prevent litigants from filing documents containing fictitious cases and false statements of law in the future. As Judge Brantley D. Starr noted, "I have the pound of cure in my ability to sanction lawyers. I would rather have the ounce of prevention so that's my goal."[253] While the *Mata* and *Cohen* cases received a large amount of publicity, there likely are some attorneys who are still unaware of the risk of using unvetted output from a generative AI platform.[254] For these attorneys, a standing order might be the thing they notice and that prevents them from making a significant error.

That this might be effective at reducing instances of attorney mis-reliance on generative AI is consistent with Professor Yablon's theory regarding "slackers," as this group encompasses lawyers "who are too inexperienced or lack the ability to do so, or those who just made an honest mistake after a hard night of partying."[255] Additional guidance regarding AI could prove beneficial to this type of litigant.

Second, for those who believe that this conduct should be sanctionable, including this language in a standing order could have that effect. While some of the standing orders are silent about enforcement, many of the orders invoke Rule 11. For example, Chief Judge Stephen R. Clark in the Eastern District of Missouri issued a standing order that specifies that "[b]y presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, self-represented parties and attorneys acknowledge they will be held responsible for its contents. See Fed. R. Civ. P. 11(b)." Similarly, language in standing orders entered by two different judges specifies that "[i]f generative AI is utilized in the preparation of any documents filed with the Court, the unrepresented party or attorney will be held responsible for the contents thereof, in accordance with Rule 11 and applicable

---

[253] Shweta Watwe, *Judges Reflect on GenAI Use One Year After ChatGPT's Debut*, BLOOMBERG LAW, (Nov. 28, 2023), https://perma.cc/XW2Q-E6KJ.

[254] However, as the court noted in the *Cohen* opinion, "[g]iven the amount of press and national attention that Google Bard and other generative intelligence tools have received[,]" an individual's lack of knowledge regarding these programs is surprising. United States v. Cohen, No. 18-CR-602, 2024 WL 1193604, at *6 (S.D.N.Y. Mar. 20, 2024).

[255] Yablon, *supra* note 82, at 607, 636.

rules of professional conduct and/or attorney discipline."[256] Additionally, as noted above, other standing orders indicate that sanctions may be imposed upon litigants who violate the standing order itself.[257]

Just because a standing order is silent regarding enforcement does not mean that a court is helpless to act. Standing orders can be the basis for sanctions based on a court's inherent authority.[258] Additionally, in some jurisdictions the local rules provide for sanctions for violating court orders.[259]

As a result, for those who believe that this conduct should be sanctioned pursuant to Rule 11, these standing orders have the benefit of making it easier for sanctions to be imposed.

On the opposite side of the spectrum are the detriments and negative consequences that inure from these standing orders. These include: (1) problems caused by drafting errors; (2) discouraging the adoption of new technology and the appearance of bias; and (3) problems that arise due to the patchwork nature of the standing orders that have been issued.

The first consequence is the result of the drafting errors that exist in several of these standing orders. For example, some orders simply refer to this technology as "Artificial Intelligence."[260] That phrase is broader than the term "generative AI," as it includes extractive AI technology.[261] And while generative AI is becoming ubiquitous, artificial intelligence has already crossed that

---

[256] Palk, *supra* note 250; Judge Leslie E. Kobayashi, United States District Court for the District of Hawaii, *Disclosure and Certification Requirements – Generative Artificial Intelligence* (Nov. 8, 2023), *available at* https://perma.cc/4VRD-L9Q4.

[257] *See supra* notes 251, 252.

[258] *See, e.g.*, Am. Unites for Kids v. Rousseau, 985 F.3d 1075, 1090 (9th Cir. 2021) ("When acting under its inherent authority to impose a sanction, as opposed to applying a rule or statute, a district court must find either: (1) a willful violation of a court order . . .").

[259] *See, e.g.*, Local Rules for the District of Nevada, Rule 11-8(c) & (e).

[260] Baylson, *supra* note 245.

[261] See, *e.g.*, Isha Marathe, *4 Generative AI Issues That Are Likely Keeping Judges Up at Night*, ALM MEDIA NEWS, (Aug. 10, 2023) https://perma.cc/U8RD-MPTA (noting that Kenneth J. Withers, the deputy executive director of the Sedona Conference, commented on this drafting error. He stated that, "this would actually cripple most law firms because everyone uses AI, even if they don't realize it in all sorts of different applications. Does this mean that if you're using a program like Grammarly or if you're using a translation program, which no one really thought was objectionable before do you suddenly have to certify that this has been done?").

threshold,[262] with everyday-use programs like Microsoft Word employing extractive AI technology.[263]

In addition to that drafting error, the standing orders generally do not define any of the terms they employ. This failure is likely to cause confusion in various ways, including both confusion over what is encompassed within the term generative AI[264] and what it means for something to be 'drafted by' the technology.[265]

The second negative consequence that is likely to result from the promulgation of these standing orders is that they will discourage attorneys from trying and adopting new technology. As Judge Castel stated at the outset of his sanctions order in *Mata*, "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance."[266]

Attorney adoption of new technology can often be glacial.[267] These policies may encourage this behavior—which discourage attorney adoption of new technology—and impede innovation in this space. Local rules and standing orders that regulate the use of generative AI technology are going to have a

---

[262] *See, e.g.*, Rodriguez, *supra* note 11 at 788 ("AI is ubiquitous and already in devices we use daily, including our smartphones and cars.").

[263] *Microsoft Editor Checks Grammar and More in Documents, Mail, and the Web*, MICROSOFT SUPPORT (last visited Feb. 15, 2024), https://perma.cc/UFG4-2UER (noting that "Microsoft Editor is an AI-powered service that helps bring out your best writer"). Additionally, LexisNexis has been employing extractive AI since 2017. Jake Nelson, *Combining Extractive and Generative AI for New Possibilities*, LEXIS NEXIS INSIGHTS, (June 6, 2023), https://perma.cc/8UHY-TA7A.

[264] AI is readily becoming ubiquitous, and with time and additional development, it will likely be impossible to draw this line. We are seeing the development of this technology in real-time, and what we are witnessing is that businesses are embedding AI technology into existing systems. The result is that generative AI technology can be found in online search engines, grammar software such as Grammarly, and Microsoft's programs. As this technology becomes ubiquitous, these disclosures become particularly meaningless, and policies that seek to ban generative AI use will likely become untenable.

[265] AI can perform many tasks. At what point does it cross the line into 'drafting' instead of research, summarization, or other parts of brief creation?

[266] Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023).

[267] *See, e.g.*, Sarah Martinson, *Less Than 30% of Legal Personnel Are Early Tech Adopters*, LAW360 CONNECTICUT PULSE, (Sept. 19, 2022), https://perma.cc/F34W-38VQ (discussing survey results that indicated that 28% of respondents identified themselves as an early adopter of new technology, 62% self-identified as a middle adopter, and that 10% were classified as late adopters); Grossman, Grimm, & Brown, *supra* note 1 ("The legal profession is already sufficiently risk adverse and technologically backward.").

chilling effect on attorney use of this innovative technology.[268] Indeed, standing orders that don't just require the disclosure of generative AI use but flatly bar the use are written with the intent to prevent adoption of this technology. While there may be instances in which judicial protectionism is warranted, the scenario the use of innovative technology presents does not warrant such protectionism.

It is important to remember that generative AI is not a monolith. Instead, an increasing number of organizations are developing and offering products in this space.[269] Some of the products that are now being offered include enterprise versions of generative AI tools that have been created to perform specific legal tasks.[270] These products do not—or will not—raise the same concerns with hallucinations as exist with current publicly available general-purpose programs such as ChatGPT.[271]

These standing orders are likely to deprive attorneys (and their clients) of the increased productivity and cost savings that will accompany the use of generative AI technology once it has attained reliability that is comparable to human drafters. As others have noted, these standing orders "deter the legitimate use of GenAI applications that could increase productivity and access to justice."[272]

It is important to remember that, "[a]s technology continues to change, so too will the standard for competence in legal research."[273] That admonition is not specific to research, however: as technology continues to change, so will

---

[268] *See, e.g.*, Letter by Gregory C. Belmont at 2, *United States v. Cohen*, No. 1:18-cr-00602 (S.D.N.Y. Jan. 3, 2024), ECF No. 107.

[269] *See, e.g.,* Rodriguez, *supra* note 11 at 790 (discussing different platforms that have been developed for various tasks, including "legal writing, contract management, due diligence reviews, litigation forecasting, predictions of judicial rulings, and juror screening").

[270] Davis, *supra* note 1.

[271] *Id.* Applications such as Lexis+AI, Thompson Reuters' Casetext's Cocounsel, and Harvey AI are designed to increase productivity and efficiency and have built-in safety measures intended to reduce the risk of error. *See, e.g., LexisNexis Launches Lexis+ AI, a Generative AI Solution with Linked Hallucination-Free Legal Citations*, LEXISNEXIS, (Oct. 25, 2023), https://perma.cc/D7BF-U5CA.

[272] Grossman, Grimm, & Brown, *supra* note 1 at 76. This technology has the potential to increase attorney productivity: enabling attorneys to perform more work for clients—or perform work for more clients—for less cost. Relatedly, it may help to close the justice gap, making our courts more accessible to self-represented parties.

[273] Margolis, *supra* note 160 at 119.

the standard for competence generally. An attorney's failure to use available resources can be considered deficient once that resource has hit a certain level of accuracy and availability.[274]

Additionally, these standing orders may deter the adoption of generative AI because they give the impression of judicial bias. As Judge Xavier Rodriguez cautioned, some of the orders convey "an anti-technology tone."[275] This may be problematic, particularly as these judges may subsequently be asked to rule on matters involving "AI in evidentiary and discovery issues."[276]

Finally, the third detriment to the imposition of orders is the patchwork nature of the standing orders themselves. The fact that individual judges are issuing standing orders, instead of coordinating this at the local rules level, creates its own problems.[277] As others have noted, the patchwork nature of these rules is problematic for attorneys over the time in which they are working on a case before it is filed and assigned to a judge.[278] During that time, the attorneys may choose to employ generative AI technology: perhaps to assist with drafting the complaint, or to summarize certain documents. The attorney runs the risk, however, of subsequently learning that the case has been assigned to a judge who has imposed a generative AI ban that impacts their work to-date.[279]

If an enforcement mechanism is needed to address the problem of litigants mistakenly relying on generative AI output and submitting fictitious cases and false statements of law to a court, the drafting of a local rule would be

---

[274] *Id.*

[275] Shweta Watwe, *Judges Reflect on GenAI Use One Year After ChatGPT's Debut*, BLOOMBERG LAW, (Nov. 28, 2023), https://perma.cc/XW2Q-E6KJ.

[276] *Id.*

[277] *See, e.g.*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts*, https://perma.cc/Z7AC-5L3B.

[278] *See, e.g.,* ERDM – Electronic Discovery Reference Model, *Should Courts Use Standing Orders or Local Rules to Address AI?* JD SUPRA, (Dec. 4, 2023), https://perma.cc/U2MH-FDHR (advocating that courts adopt local rules to address problematic use of generative AI instead of issuing standing orders because "[m]uch of the work in litigation often begins long before a lawsuit is commenced. At that time, attorneys don't know which Member of the Court will be assigned their case . . . . They may choose one pre-litigation course of action if they knew they would be under Judge A's Standing Order A and a different one if they may be governed by Judge B's Standing Order B.").

[279] *Id.*

preferrable to the current hodgepodge of standing orders.[280] The notice and comment aspect to the local rules process would provide the additional benefits of: (1) distributing another notice to attorneys of the risk of hallucinations and therefore reducing the likelihood of an attorney mistakenly relying on the output without verification; and (2) greater vetting and attention to the specific language, which may avoid some of the problems identified in the standing orders that have been issued to-date.[281]

Going forward, whether judges and jurisdictions elect to promulgate a standing order or local rule to regulate the use of generative AI likely depends upon how they balance the benefits against the detriments listed above. Where judges and jurisdictions find that the balance weighs in favor of implementation, they can make specific choices to ameliorate the negative impacts of the standing orders that have been issued to-date. First, many problems can be prevented through careful attention to word choice. Second, an anti-technology tone and the appearance of bias can be avoided by not imposing a ban or disclosure requirement, but instead by informing litigants that the use of generative AI is permissible, but its use must be consistent with the litigant's obligations under Rule 11. Third, and finally, use of the local rules process instead of implementing a standing order will prevent the problems inherent to a patchwork of standing orders with varying requirements.

CONCLUSION

Federal Rule of Civil Procedure 11 "exists in large part to regulate conduct that is not merely inefficient or questionable, but that threatens the integrity of the courts."[282] The Rule was promulgated to deter frivolous actions and abusive litigation tactics, and Rule 11—on its face—seems well-suited to the task of sanctioning litigants who present fictitious cases and false statements of law to a court. As detailed above, however, Rule 11 is not well-suited for the

---

[280] *See, e.g.*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *supra* note 277.

[281] 28 U.S.C.A. § 2071(b) (requiring "appropriate public notice and an opportunity for comment"; FED. R. CIV. P. 83(a)(1) (stating that courts may adopt and amend rules "[a]fter giving public notice and an opportunity for comment").

[282] See Armour, *supra* note 6, at 702.

task of sanctioning this type of attorney misconduct, and its inadequacy is likely spurring the creation of these standing orders.

If this conduct—which results from negligence and a lack of knowledge regarding generative AI—is conduct that judges want to capture within our sanctions regime, then more is needed. To avoid the many problems caused by the standing orders that have been issued to date, judges should think deeply about how they might best address this issue. Ultimately, where judges and jurisdictions find that the balance between the benefits and detriments listed above lean in favor of promulgation, they can make specific choices to ameliorate the negative impacts detailed above, including careful attention to word choice, not imposing a ban or disclosure requirement, and use of the local rules process instead of implementing a standing order.

* * *