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A Comparative Study of Attorney Responsibility for Fees of an Opposing Party

Amy Salyzyn

A COMPARATIVE STUDY OF ATTORNEY RESPONSIBILITY FOR FEES OF AN OPPOSING PARTY

*Amy Salyzyn**

INTRODUCTION

The American civil litigation system has a number of distinguishing features. This reality has led scholars of comparative civil procedure to remark upon and consider the consequences of what they have termed "American exceptionalism" in civil procedure.[1] One commonly cited example of "exceptional" American procedure is the "American rule" of costs allocation or the "no cost-shifting rule": the losing party is not required to indemnify the prevailing party for the court costs and attorney fees that the prevailing party has incurred in the course of the litigation.[2]

Notwithstanding this general rule, there are a number of circumstances in which a party in the American system may be indemnified for expenses incurred in a lawsuit.[3] One such circumstance is the case in which an attorney is found to have improperly conducted himself or herself and, as a result, is held to be personally responsible for the attorney fees of an opposing party. The United States is not unique in empowering courts to impose personal responsibility upon a lawyer for the costs of

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* J.S.D. Candidate, Yale Law School, J.D., University of Toronto. The author completed an earlier draft of this paper during her L.L.M. studies at Yale Law School in the context of a course entitled "Comparative Civil Procedure" taught by Professor John H. Langbein. The author is grateful to Professor Langbein for his insights, encouragement and helpful comments.

[1] *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 280-281 (2002) (stating that civil procedure in comparative perspective reveals that American disputing is an example of exceptionalism); *see also* Scott Dodson, Review Essay, *The Challenge of Comparative Civil Procedure Civil Litigation in Comparative Context*, 60 ALA. L. REV. 133, 141 (2008) (stating that "American procedure is particularly different because of its strong exceptionalism"); *see also* Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709 (2005) (explaining that American proceduralists have not been comparativists in large part due to American exceptionalism).

[2] *See* Dodson, *supra* note 1, at 141 (noting the "exceptional" nature of the "American rule" of cost allocation); *see also* Marcus, *supra* note 1, at 709–12 (discussing that America has a set of procedural characteristics that set it off from the rest of the world); *see also* James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. 195, 215–17 (2010) (characterizing a "no indemnity practice" as being "peculiar to America").

[3] *See* John F. Vargo, *The American Rule of Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1629 (1993).

litigation. However, this power of the courts has not been the subject of any comparative scholarship. In this paper, I compare the American practice of requiring attorneys to pay personally the fees of opposing parties to analogous practices in two other common law jurisdictions: England and Canada.

Comparing the law in this area in England and Canada to the law in the United States is a useful endeavor because each country shares in the common law tradition but also differs from each other in material respects. Unlike the United States, both England and Canada implement a "loser pays" system of costs. Further, in the context of considering an attorney's personal liability for costs, England has historically differed from Canada and the United States in one material respect in its approach to lawyer regulation: until very recently, English law recognized the doctrine of "advocates' immunity." Under this doctrine, discussed below, both barristers and solicitors enjoyed significant immunity from liability to clients in negligence.

Given these material differences among the three countries, one might predict that each country would employ a unique approach to assessing the circumstances in which lawyers should be required to pay costs personally due to improper conduct. In fact, the law in each country on this issue reveals a trend of convergence. The United States, England, and Canada have all shifted in recent years to the use of an objective test that imports a standard of negligence in determining if a lawyer should be personally responsible for litigation costs.

The first three sections of this paper will consist of a country-by-country review of developments over the last several decades in relation to an attorney's personal liability for costs, beginning with the United States and continuing with England and then Canada. In order to make this task manageable with respect to the two federal countries studied, I have limited my analysis with respect to the United States to the federal court system and in regards to Canada, to the province of Ontario. The fourth and final section of this paper will be devoted to exploring the following two questions: (a) what might be the reason (or reasons) that explain this cross-jurisdictional trend toward a negligence standard, and (b) is this trend desirable? With respect to the first inquiry, my analysis will focus on what connections might drawn between the cross-jurisdictional move to a negligence standard and broader incursions on the self-regulation of lawyers in each of these countries in recent years. Regarding the second inquiry, I will consider the coherence (or lack thereof) of importing a negligence standard into this context. Ultimately, I argue that there are a number of reasons to be concerned about the adoption of a

negligence standard in this area and highlight several issues for further consideration.

I. THE UNITED STATES

In the United States, federal courts have both inherent jurisdiction and statutory authority to require a lawyer to pay the attorney fees of an opposing party resulting from attorney conduct that the court determines is improper. The United States Supreme Court has held that the federal courts' exercise of their inherent jurisdiction to assess such attorney's fees requires a finding of conduct either "constituting" or "tantamount to" bad faith.[4] In addition to this inherent jurisdiction, there are two main statutory mechanisms that empower federal courts to require an attorney to pay all or part of an opposing party's attorney fees: 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure.[5] With respect to Section 1927,[6] the circuit courts have generally held that bad faith, recklessness, or intentional misconduct must be made out before fees may be imposed on a lawyer personally.[7] In

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[4] *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (holding that the court must make a finding as to whether counsel's conduct was tantamount to bad faith preceding any sanction).

[5] *See* 28 U.S.C. § 1927 (1980) (stating that any attorney who so multiplies the proceedings in any case vexatiously may be required to satisfy the attorneys' fees incurred because of such conduct); *see also* FED. R. CIV. P. 11 (stipulating that if warranted, the court may award to the party prevailing on a motion for sanctions the attorney's fees incurred). It should be noted that, in addition to Rule 11, there are several other Federal Rules of Civil Procedure which authorize federal courts to require an attorney to pay the attorney fees of an opposing party. *See, e.g.*, FED. R. CIV. P. 16(f)(2) (stating that, instead of or in addition to any other sanction, the court is required to order that the party and/or its attorney pay the reasonable expenses incurred because of non-compliance with the rule, including attorney's fees); *see also* FED. R. CIV. P. 26(g)(3) (threatening sanctions, including attorney's fees, if certain documents are unsigned).

[6] 28 U.S.C.A. § 1927 (2012) provides:

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

[7] *See* Lindsey Simmons-Gonzalez, Comment, *Abandoning the American Rule: Imposing Sanctions on an Empty Head Despite a Pure Heart*, 34 OKLA. CITY U. L. REV. 307, 316–18 (2009). As observed by Simmons-Gonzalez, although generally a standard of bad faith, recklessness, or intentional misconduct has been found to be required, the circuit courts have taken significantly different approaches as to how this needs to be established. *See id.* For example, the Tenth Circuit recently held that an objective standard applies to Section 1927 and permits fee awards against attorneys who manifest "intentional or reckless disregard of [their] duties to the court," *Kornfeld v. Kornfeld*, 393 F. App'x 575,

contrast, Rule 11 now employs an objective standard from which liability may be found on the basis of negligent conduct. In its original form as introduced in 1938, Rule 11 had been interpreted as imposing a subjective standard that focused on the bad faith of the attorney.[8] The evolution of Rule 11 will be the focus of the following sections.

A. The Introduction of Rule 11 in 1938

As first enacted in 1938, Rule 11 required that every pleading be signed by an attorney of record[9] and provided, *inter alia*:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with the intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.[10]

Rule 11 was not an entirely new procedural innovation in 1938. As observed by the Federal Rules Advisory Committee[11] in accompanying notes to Rule 11, the rule "consolidated a number of pleading practices found in (1) certain code states at the time the Federal Rules of Civil Procedure were adopted, (2) the former federal equity rules, and (3) English practice."[12]

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579 (10th Cir. 2010), while the Second Circuit recently confirmed that section 1927 requires subjective bad faith of counsel, *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp*., 607 F.3d 817, 834 (Fed. Cir. 2010).

[8] *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment (stating that Rule 11 was amended to remedy the subjective bad-faith standard of the original rule).

[9] In cases where a party was self-represented, that party was required to sign the pleading himself and state his address. *See* FED. R. CIV. P. 11.

[10] *See id.*

[11] *See* J. Thomas F. Hogan, *The Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts*, UNITED STATE COURTS, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (last visited Dec. 17, 2010) (providing an account of the federal rulemaking process, focusing on the Advisory Committee's role in that process).

[12] 5A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1331 (3d ed. Supp. 2010). *See also* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment; *But see* D. Michael

In several respects, the original Rule 11 embodied a subjective test. Regarding the propriety of the pleading at issue, the rule mandated an inquiry into what the attorney knew and believed of the pleading: whether to "the best of his knowledge, information, and belief," the pleading was supported by "good grounds" and "not interposed for delay." The "awareness standard" contained in this part of the rule "mirrored both the early equity signature and code pleading verification standards as to merits and extended only to matters within the knowledge and belief of the attesting party."[13]

The sanction provisions under the original Rule 11 also invoked a subjective test.[14] As originally enacted, Rule 11 provided two non-exclusive options: (a) striking the pleading; or (b) disciplining the attorney. A signed pleading could only be struck if the court found the pleading to have been signed "with intent to defeat the purpose of the rule." Similarly, an attorney could only be disciplined if he or she committed an intentional (i.e., "wilful") violation of the rule. An improper motive on the part of the attorney was, therefore, a necessary requirement for sanctions.

On its face, then, the text of the original Rule 11 mandated two phases of subjective inquiry. First, in order to find that the rule had been violated, it was necessary for the court to conclude that—contrary to what the attorney certified by his signature—it was *not* the case that to the best of his knowledge, information, and belief there was good ground to support the pleading and that the pleading was not interposed for delay. Second, if a violation of the rule was found, the court needed to find that the attorney intentionally violated the rule before imposing a sanction.

Prior to being amended in 1983, Rule 11 was rarely used. The first reported case of a Rule 11 motion is not found until 1950.[15] Between 1938 and 1976, only 19 cases of Rule 11 motions

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Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 8 n.20 (1976) (highlighting how the enforcement provisions of Rule 11 were not properly drafted).

[13] *See* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L. J. 665, 706–07 (2000) (discussing how the original version of Rule 11 was composed of two subjective elements).

[14] *Id.*

[15] *See* Risinger, *supra* note 12, at 35 n.115 (noting that United States v. Long, 10 F.R.D. 443 (D. Neb. 1950) is the first reported case of a "genuine adversary" Rule 11 motion).

are reported.[16] In those few cases where courts heard Rule 11 motions, the courts were faithful to the subjective test embodied in the text of the rule. An example of the court applying a subjective test under Rule 11 can be found in the first reported case in 1950, *United States v. Long*.[17] In this case, the plaintiff had moved to strike the defendant's answer that had consisted solely of "a general denial made in a single sentence." In reply to the motion, counsel for the defendant filed a brief affirming the defendant's intention to "put into issue every allegation of plaintiff's complaint upon the trial of this cause." Given the nature of the complaint, the court commented on the "improbability" of the defendant actually intending to deny each and every allegation of the plaintiff. Nonetheless, the court denied the Rule 11 motion, noting "counsel for the defendant…assures this court that his client intends to controvert 'every allegation of the plaintiff's complaint'" and holding that the court was "compelled to accept those assurances as being tendered in good faith."[18] Following *United States v. Long*, the courts continued to frame the question under Rule 11 as requiring a demonstration that the attorney had failed to act in "good faith."[19] This high standard, along with uncertainty regarding when sanctions should be brought and what sanctions were available,[20] is often cited as the reason why Rule 11 motions were so rarely brought.

B. The Introduction of a Negligence Standard: The 1983 Amendments to Rule 11

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[16] *See id.* at 34–37 (showing how cases have rarely imposed sanctions on Rule 11 grounds).

[17] United States v. Long, 10 F.R.D. 443, 444 (D. Neb. 1950) (holding that the defendant did not violate Rule 11 because he acted in good faith).

[18] *See id.* at 445.

[19] *See, e.g.*, Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961) (noting that "the basic question is whether the attorneys in good faith believed there was good ground to support the charges"); *see also* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (holding that "[t]he standard under Rule 11 . . . is bad faith").

[20] 5A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1331 (3d ed. Supp. 2010) explains the issue of ambiguity as follows:

> By the early 1980's experience had shown that Rule 11 rarely was utilized and appeared to be ineffective in deterring abuses in federal civil litigation. A significant contributing factor apparently was the inherent ambiguity of the original rule. As the Advisory Committee noted in connection with the 1983 amendment: "There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions." (footnotes omitted).

In 1983, amendments were introduced to Rule 11. The Advisory Committee characterized the amendments as correcting for the failure of the originally enacted rule to deter litigation abuses effectively.[21] Additionally, the Committee observed that there had been "considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions."[22]

The main motivation behind the 1983 amendments appears to have been the growing concern at the time with the litigation culture in the federal courts. As summarized by Paul Carrington and Andrew Wasson, "[t]he 1983 version of Rule 11 was designed to address a perceived social problem—that there were too many civil proceedings and too much motion practice in federal courts and that this costly excess was the result of neglect, indifference, or misuse of procedure by counsel."[23] Georgene Vairo has attributed the choice of the Advisory Committee to seek to address this problem through Rule 11, in particular, to the failure of Committee's previous attempt in 1970 to curb litigation abuses through amendments to Rule 37's provisions dealing with discovery-related misconduct.[24] Rule 11 was a natural choice for the Committee to use as a reforming mechanism "because it was the only rule dealing with attorney conduct *per se*."[25]

An additional possible motivation behind the Rule 11 amendments, although not explicitly acknowledged by the Advisory Committee, was the perceived need to more effectively

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[21] FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

[22] *See id.* (discussing the confusion surrounding frivolous motions and pleadings, including when to strike a motion or pleading, or what sanctions are available and appropriate to levy against an attorney for filing a frivolous motion or pleading).

[23] *See* Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564 (2004) (discussing that the 1983 amendment was designed to remedy the perceived abuse of motion practice in civil litigation). However, the authors further observe, that: "[w]hether there was or is in fact such a problem remains uncertain. There had been an increase in civil filings in the decade of the 1970s, but much of it was explained by changes in substantive law, notably in the field of civil rights." *See id.*

[24] *See* Georgene M. Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 594–96 (1998) (explaining the historical background surrounding Rule 37's ineffectiveness, and the rise of Rule 11's use in its place).

[25] *See id*. at 595 (noting how Rule 11 was drafted to directly address the claims attorneys can bring in court by requiring an attorney's signature endorsing any document submitted to the court).

punish attorney misconduct.[26] In the 1970s and early 1980s, the behavior of attorneys was under particular scrutiny. In 1976, then Chief Justice Warren Burger expressed his alarm at the "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense."[27] The involvement of lawyers "in the Watergate scandal had pushed the profession's public image to new lows."[28] As public criticism of lawyers was growing, the American Bar Association ("ABA") was taking steps during this time period to be more aggressive in enforcing professional norms. In 1970, the ABA replaced the largely aspirational Canons of Professional Ethics promulgated in 1908 with a Model Code of Professional Responsibility "containing black-letter law known as Disciplinary Rules…. [the violation of which would result] not merely in fraternal disapprobation but in disciplinary adjudication, with court-imposed penalties."[29] In 1983, the same year as the amendments to Rule 11, the ABA supplanted the Model Code with Model Rules of Professional Responsibility "which consisted more or less exclusively of specific, legally cognizable rules drafted by a quasilegislative process."[30] The environment in which the 1983 amendments to Rule 11 took place, therefore, was one of significantly increased scrutiny of lawyer conduct and of interest in increased regulation of the profession.

The 1983 amendments to Rule 11 introduced several major changes, including: (1) extending the rule to apply not only to pleadings but to motions and all other litigation "papers"; (2) making the imposition of sanctions mandatory upon a finding that the rule had been violated; and (3) explicitly including among the available sanctions an order that the offending attorney pay the "reasonable attorney's fee" of an opposing party.[31] Of particular

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[26] *See* S. M. Kassin, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS, 29 (Federal Judicial Center 1985), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/$file/rule11study.pdf (explaining that while the Advisory Committee articulated only a deterrence rationale, the need to punish more effectively may have also prompted the Rule 11 amendments).

[27] *See* H.R. REP. 104-62, at 9 (1995).

[28] *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 200 (2000) (discussing how the role that the lawyers played in the Watergate Scandal led the ABA to require law schools teach a class on professional responsibility).

[29] *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991).

[30] *See* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 233 (2008).

[31] *See* FED. R. CIV. P 11 ; *see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 n.8 (1988) (recognizing that courts had been split

importance to the analysis here is the language change in the part of the rule addressing the significance to be attributed to the attorney's signature on the pleading. After the 1983 amendments, Rule 11 provided *inter alia*:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[32]

The language in the original rule requiring a "wilful violation" was replaced with language requiring that the attorney conduct a "reasonable inquiry" into the appropriateness and sufficiency of the pleading. This change imposed an affirmative duty that the attorney conduct "some prefiling inquiry into both the facts and the law."[33] The Advisory Committee indicated that this duty was to be measured by the standard of "reasonableness under the circumstances."[34] Bad faith was no longer a precondition and, under the amended wording, "merely negligent or reckless behavior" could result in sanctions.[35] In short, the 1983 amendments "shift[ed] the focus away from inquiring into what the attorney *actually knew* about the law and facts of the case when he or she filed a pleading….[to] what the lawyer *should have known* after conducting a 'reasonable inquiry.'"[36]

The 1983 amendments had a dramatic effect on the frequency of Rule 11 motions. Within five years, over 1,000 Rule 11 cases were reported[37] and, by 1991, over 3,000 cases.[38]

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prior to the amendment as to whether the original version of Rule 11 permitted the payment of attorney fees).

[32] *See* FED. R. CIV. P. 11 (emphasis added).

[33] *See* FED. R. CIV. P. 11 advisory committee's note.

[34] *See id.*

[35] *See* Vairo, *supra* note 31, at 193 (excluding bad faith as a requirement to sanction an attorney under the 1983 amendments to Rule 11 motions).

[36] *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 947–48 (1992) (showing that the 1983 amendments switched the inquiry about a lawyer's knowledge of a case from a subjective approach to an objective approach).

[37] *See* Alan E. Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J., 901, 901 (1988).

Although some early cases following the 1983 amendments continued using a subjective "bad faith" standard, by the end of 1986 all the circuits acknowledged that the amended rule imposed an objective standard of reasonable inquiry.[39] In addition to requiring that the attorney conduct an objectively reasonable inquiry into the facts and law underlying the claim, a number of courts held that the amended rule also imposed a reasonableness requirement on the attorney's determination that the pleading was proper.[40] As articulated by the Second Circuit in *Eastway Construction Corp. v. City of New York*, "sanctions shall be imposed against an attorney…where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."[41]

The language adopted by the court in *Eastway Construction* and by the Advisory Committee in introducing the amended Rule 11 closely tracks language used in articulating the standard of care owed by an attorney to his or her client in the legal malpractice context.[42] A number of courts have recognized that the revised Rule 11 effectively adopted a negligence standard or, at the very least, a standard closely comparable to negligence. The Supreme Court has made *obiter* references to a negligence standard being employed by Rule 11 in two cases. In *Cooter & Gell v. Hartmarx Corp.*,[43] Justice O'Connor observed that "the considerations involved in the Rule 11 context are similar to those involved in determining negligence."[44] A year later, in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,[45] the Supreme Court considered whether Rule 11 imposed a duty of an objectively reasonable inquiry on *parties* (as opposed to only attorneys) who sign pleadings, motions, or other papers. The

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[38] *See* Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 480 (1991) (displaying the increase in Rule 11 motions by 1991).
[39] *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES 5–9 (2d ed. 1992).
[40] *See id.*
[41] *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253–54 (2d Cir. 1985) (explaining the replacement of subjective bad faith with a standard of how a competent attorney might reasonably act under the circumstances).
[42] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2011) (stating that in order to avoid liability for professional negligence, a lawyer "must exercise the competence and diligence normally exercised by lawyers in similar circumstances").
[43] *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).
[44] *Id.* at 402.
[45] *See* Bus. Guides, Inc. v. Chromatic Commc'n. Enters, Inc., 498 U.S. 533 (1991).

majority found that Rule 11 did impose such a duty on the parties as well. In a dissent, Justice Kennedy made explicit reference to "the majority's negligence standard."[46] A number of lower courts have also explicitly drawn the connection between the 1983 amendments and the imposition of a negligence standard. For example, in *Hays v. Sony Corp. of America*,[47] the Seventh Circuit commented that "in effect, [Rule 11] imposes a negligence standard, for negligence is a failure to use reasonable care" and that Rule 11, therefore, "defines a new form of legal malpractice."[48] In *Mars Steel Corp. v. Continental Bank N.A.*,[49] the Seventh Circuit similarly noted that because Rule 11 "establishes a new form of negligence (legal malpractice)," the rule "creates duties to one's adversary and to the legal system, just as tort law creates duties to one's client."[50] The Third Circuit has also characterized the 1983 amendments as having been intended "to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence."[51]

The 1983 amendments to Rule 11 drew considerable criticism. As observed by Vairo, "in contrast to its pre-1983 obscurity, amended Rule 11 met with more controversy than perhaps any other Federal Rule of Civil Procedure."[52] Following the 1983 amendments, both academic commentators and legal

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[46] *Id*. at 566 (asserting that the majority's standard was simply a negligence standard).

[47] Hays v. Sony Corp. of Amer., 847 F.2d 412 (7th Cir. 1988), *abrogated on other grounds by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

[48] *See* Hays v. Sony Corp. of Amer., 847 F.2d 412, 418 (7th Cir. 1988) (explaining the role that Rule 11 plays in legal malpractice claims); *see also* Vista Mfg., Inc. v. Trac-4, Inc., 131 F.R.D. 134, 137 (N.D. Ind. 1990) (noting that the Rule 11 standard is an objective one, which imposes sanctions on attorneys who fail to use reasonable care); *see also* PaineWebber, Inc. v. Can Am Fin. Grp., 121 F.R.D. 324, 330 (N.D. Ill. 1988).

[49] Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989).

[50] *See id.* at 932 (indicating that attorneys owe a duty to their adversaries and the legal system to avoid excessive legal expenses and wasting the court's time); *see also* Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists and Aerospace Workers, 802 F.2d 247, 255 (7th Cir. 1986) (discussing the court's ability to impose Rule 11 sanctions against attorneys who assert baseless claims).

[51] *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) (confirming that negligence is sufficient to impose Rule 11 sanctions and that a finding of bad faith is not necessary); *see also* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986) (holding that a finding of subjective bad faith is not the only predicate to a Rule 11 violation).

[52] *See* Vairo, *supra* note 24, at 591 (noting that there have been numerous commentaries and journal articles analyzing and critiquing the application of Rule 11); *see also* Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997) (explaining that the 1983 amendments to Rule 11 suffered severe criticisms, particularly with respect to the federal circuits' failure to uniformly apply Rule 11).

practitioners reached the conclusion that Rule 11 was being overused, that it was burdening court dockets with satellite litigation, and that it was generating an undue "chilling effect" on novel or unusual claims.[53] During this period of time, the threat of a potential Rule 11 motion loomed large for attorneys. In one study of attorneys practicing in the Fifth, Seventh and Ninth Circuits, 32% of respondents indicated that they had been counsel or co-counsel in a federal district court case where a Rule 11 motion or show cause order had been brought during the last year.[54] Because the most commonly ordered sanction for violating Rule 11 following the 1983 amendments was attorneys' fees,[55] which could be quite substantial,[56] parties had a strong incentive to bring Rule 11 motions. The "new form of negligence" established by the amendments to Rule 11 had taken on a life of its own.

C. The Addition of Safeguards: The 1993 Amendments to Rule 11

In response to criticisms of the 1983 amendments, Rule 11 was further amended in 1993.[57] This set of amendments introduced a number of provisions that had the aim of tempering the use and effect of the rule. Although sanctions had become mandatory in the 1983 amendments, the 1993 rule reverted to

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[53] For a discussion of criticisms of the 1983 amendments, *see* 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1332 (3d ed. Supp. 2010) (asserting that Rule 11 has a chilling effect on vigorous advocacy especially for public interest and civil rights plaintiffs); s*ee also* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1082–83 (1994) ; *see also* Vairo, *supra* note 38, at 484–86 (arguing that Rule 11 has a chilling effect on zealous advocacy, particularly in civil rights, employment discrimination, certain kinds of securities fraud, and RICO cases).

[54] *See* Marshall, *supra* note 36, at 952.

[55] *See* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 36 (1989); *see also* GREGORY JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 1-13 (4th ed. 2011).

[56] Two extreme examples of this can be found in the Eleventh Circuit case of *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied* 502 U.S. 1048 (1992), wherein the court affirmed the district court's order finding plaintiffs' lead counsel, counsel's law firm, and the plaintiffs were jointly and severally liable for over $1 million in fees.

[57] *See* FED. R. CIV. P. 11 (amended 1993). The version of Rule 11 following the 1993 amendments essentially continues to be the rule in place today. Following the 1993 amendments, Rule 11 was again amended in 2007. These amendments, however, introduced only stylistic changes in addition to a provision that all papers include the signer's email address.

permissive sanctions.[58] The 1983 rule was further softened by adding a "safe harbor" provision that requires a party to wait 21 days after serving a motion under Rule 11 before filing the motion, in order to allow for the served party to withdraw or correct the challenged litigation paper.[59] The purpose was to encourage a party to "to abandon a questionable contention" without fear that the abandonment could be used as evidence of a Rule 11 violation.[60] Additionally, the 1993 amendments clarified that the court could issue Rule 11 sanctions on its own initiative, but only through a show cause order.[61]

With respect to the standard to be applied to attorney conduct, the 1993 version of Rule 11 retained an objective test requiring the signing attorney to certify the paper's appropriateness "to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances."[62] Further, the 1993 amendments deleted the previous exception for "good faith arguments" for the extension, modification or reversal of existing law, and replaced it with an exception for "nonfrivolous argument[s]."[63] This change "eliminate[d] any possibility of reading the language in Rule 11 as establishing a subjective standard."[64]

Regarding sanctions, the 1993 amendments emphasized the deterrent purpose of the rule, introducing language into Rule 11

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[58] *See id.* (providing that if the court determines that a violation has occurred, the court "may impose an appropriate sanction").

[59] *See* FED. R. CIV. P. 11(c)(2) (stating that a motion for sanctions must describe the specific conduct that allegedly violates Rule 11(b) but cannot be filed within 21 days after service or within another time the court sets).

[60] *See* FED. R. CIV. P. 11 advisory comm. notes (1993) (stating that under the 1993 amendments, a timely withdrawal of a questionable contention will protect a party against a motion for sanctions).

[61] *See id.* (requiring a show cause order when the court issues Rule 11 sanctions *sua sponte* in order to provide the person with notice and an opportunity to respond); *see also* FED. R. CIV. P. 11(c)(4) (limiting sanctions to those sufficient to deter repetition of the conduct or comparable conduct by others in similar situations).

[62] *See* FED. R. CIV. P. 11(b) (stating that the objective test for attorney certification applies to pleadings, written motions, or other papers, whether by signing, filing, submitting, or later advocating the motion for sanctions).

[63] *See* FED. R. CIV. P. 11(b)(2) (obligating that claims, defenses, and other legal contentions presented to the court are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law).

[64] *See* 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1335 (3d ed. Supp. 2011) (illustrating that removing the "good faith" terminology in the prior text and replacing it with a "nonfrivolous" benchmark prohibits interpreting the language of Rule 11 as establishing a subjective standard).

that "a sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[65] The Advisory Committee notes to the 1993 amendments state that "since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."[66] In practice, awards of attorney fees have decreased since the 1993 amendments but remain common.[67]

The number of Rule 11 motions also decreased significantly following the 1993 amendments.[68] One reason may be that the amendments eliminated the possibility for a defendant to file a Rule 11 motion after the court has adjudicated the merits of the claim.[69] As noted by Charles Yablon, "under the 1993 version of Rule 11, and the subsequent case law, parties cannot make Rule 11 motions after the merits of the case have been decided, since that would deprive the opposing party of their safe harbor withdrawal rights [under the rule]."[70] As a result, the moving party is deprived "of the powerful 'hindsight effect' under which [a judge], having just dismissed or having decided to dismiss a case as non-meritorious, [is] then asked whether the claim lacked such a basis in law or fact that it should never have been brought in the first place."[71]

Following the 1993 amendments, the courts have continued to acknowledge that Rule 11 imposes a standard of "objective

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[65] *See* FED. R. CIV. P. 11(c)(4) (explaining the scope of sanctions under Rule 11).
[66] *See* FED. R. CIV. P. 11 advisory comm. note (1993) (maintaining that the purpose of the sanctions is to deter parties, not compensate them).
[67] *See* GREGORY JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 2–265 (4th ed. 2008); *see also* Howard A. Cutler, Comment, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMP. L. REV. 265, 292 (1994) (suggesting that under the 1993 amendment, judges will not consistently award attorneys' fees).
[68] *See* Danielle Kie Hart, *Still Chilling After All these Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs after the 1993 Amendments*, 37 VAL. U. L. REV. 1, 104–05 (2002) (opining that the decrease in number of federal cases citing Rule 11 is indicative of a decrease in the use of the Rule itself); *see also* Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 600 (2004) (stating that the amendment to Rule 11 could have reduced the number of motions filed due to financial considerations).
[69] *See* Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 618–32 (2004) (providing various arguments for and against the possibility that the amendments to Rule 11 decreased its usage in motion practice).
[70] *Id.* at 630 (referencing a 1988 study revealing that approximately fifty percent of Rule 11 motions occur following the conclusion of an action).
[71] *Id.* at 604.

reasonableness under the circumstances"[72] and have continued to recognize the negligence standard inhering in Rule 11. In 2003, the Seventh Circuit again analogized Rule 11 litigation to tort law, commenting that the rule "establishes a new form of negligence," in which one owes a "duty to one's adversary to avoid needless legal costs and delay."[73] The Fifth Circuit, contrasting Rule 11 to Section 1927, observed in 2009 that the former is "about mere negligence" as opposed to intentional wrongdoing.[74]

Notwithstanding the fact that courts have acknowledged that Rule 11 imposes a standard of objective reasonableness, judges have taken a number of measures to temper the impact of using a negligence standard in this context and have judicially added to the statutory safeguards implemented by the 1993 amendments. For example, one notable exception to the courts' continued use of an objective standard has occurred in the context of *sua sponte* (court-initiated) sanctions. In the case of *In re Pennie & Edmonds LLP*,[75] the Second Circuit held that the lack of a "safe harbor" provision in the case of court-initiated applications of Rule 11 necessitated increased procedural protections in the form of a heightened intent element.[76] Specifically, the court held that a "bad faith" standard should apply to the application of Rule 11 in this context. The Eighth and Eleventh Circuit have issued decisions consistent with the holding in In re *Pennie & Edmonds* LLP, while the First Circuit has explicitly rejected the Second Circuit's approach.[77]

Further mitigating moves can be found in court decisions interpreting the standard of attorney conduct to be applied in non-court initiated applications. In the Ninth Circuit, for example, it has been held that it is necessary to determine that the complaint is legally or factually "baseless" from an objective perspective before

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[72] *See* 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS,FEDERAL PRACTICE AND PROCEDURE § 1335 (3d ed. Supp. 2010) (noting that jurisprudence leading up to the 1993 amendment continues to serve as valid precedent) ; *see also* Joseph, *supra* note 55.

[73] Divane v. Krull Elec. Co., 319 F.3d 307, 315 (7th Cir. Ill. 2003) (citing Mars Steel Corp. v. Cont. Bank , 880 F.2d 928 (7th Cir. 1989)).

[74] Vanderhoff v. Pacheco, 344 Fed. Appx. 22, 27 (5th Cir. La. 2009) (citing Baulch v. Johns, 70 F.3d 813, 817 (5th Cir. 1995)).

[75] In re Pennie & Edmonds LLP, 323 F.3d 86 (2nd Cir. 2003).

[76] *See id.* at 91 (reasoning that it is better to question evidence by the use of cross-examination and opposing evidence rather than to inhibit lawyers from presenting questionable evidence).

[77] For a discussion of this divide in the case law, *see* Sybil Louise Dunlop, *Are an Empty Head and a Pure Heart Enough? Mens Rea Standards for Judge-Imposed Rule 11 Sanctions and Their Effects on Attorney Action*, 61 VAND. L. REV. 615, 631–38 (2008) (comparing the approaches of the First, Second, and Fifth Circuits in interpreting In re Pennie & Edmonds LLP).

sanctions can be awarded.[78] Similarly, the First Circuit has asserted that "at least culpable carelessness" is required before a violation of the Rule can be found.[79] Moreover, several circuits have endorsed a requirement that a legal argument advanced have "no chance of success" under existing precedent in order to run afoul of the provisions of Rule 11.[80] The language used in these cases reaches beyond conventional understandings of an "objective reasonableness" standard to impose a higher threshold before Rule 11 sanctions are ordered.

As reflected in the above examples, the precise contours of the "new form of negligence" instituted by Rule 11 remain to be articulated. This reality can also been seen in the varied circumstances in which courts have imposed Rule 11 sanctions. Lawyers have been sanctioned under Rule 11 for filing a "generic complaint" that listed "hypothetical violations" of the law;[81] for failing to make a basic inquiry that would have revealed that a witness who signed two affidavits and claimed to be an attending physician in an operating room had, in fact, been suspended from the practice of medicine at the relevant time;[82] for engaging in "blatant forum-shopping";[83] for filing a federal court action in an

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[78] *See* Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002) (holding that a district court must first determine whether the complaint is legally or factually baseless, and then whether the attorney conducted a reasonable investigation before signing the complaint).

[79] *See* Citibank Global Mkts., Inc. v. Rodríguez Santana, 573 F.3d 17, 32 (1st Cir. 2009) (explaining that Rule 11(b) is not a strict liability provision).

[80] *See* Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp., Inc., 186 F.3d 157, 167 (2d Cir.1999) (explaining that for a position to be frivolous there must be no chance of success and no reasonable argument to amend the current law); *see also* Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006) (citing Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002)) (noting that a legal argument fails to satisfy Rule 11(b) when a reasonable attorney in like circumstances could not believe his actions to be legally justified); *see also* Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1278–79 (3d Cir. 1994) (holding that where an attorney signs and files a document after conducting a reasonable inquiry, the attorney is not in violation of Rule 11); *see also* Citibank Global Mkts., 573 F.3d 17, 32 (stating that the mere fact that a claim ultimately fails is not enough to impose Rule 11 sanctions).

[81] *See* Pickern v. Pier 1 Imps. (U.S.), Inc., 339 F. Supp. 2d 1081, 1091–92 (E.D. Cal. 2004) (holding that the plaintiff's attorney violated Rule 11 but that monetary sanctions were not warranted because counsel thereafter sought to amend its pleadings in other matters before the court).

[82] *See* Pfizer, Inc. v. Y2K Shipping & Trading Inc., No. 00-CV-5304-SJ, 2004 WL 896952, at *11 (E.D.N.Y. Mar. 26, 2004) (reasoning that the attorney could have withdrawn the affidavit pursuant to Rule 11(c)(1)(A) after learning that it was false).

[83] See Fransen v. Terps LLC, 153 F.R.D. 655, 660 (D. Colo. 1994) (concluding that a plaintiff that brought a case in federal court in hopes that the result will be more favorable than the holding from state court is blatant forum shopping).

attempt to influence a parallel lawsuit in another state;[84] bringing an unwarranted Rule 11 motion;[85] and for exhibiting "a pattern of uncooperativeness and delay [that] had begun before litigation even commenced."[86] Given the uncertainty as to what, exactly, a negligence standard means in this context and the varied circumstances in which Rule 11 sanctions are imposed, it is not surprising that concerns remain about Rule 11's potential "chilling effect" on vigorous advocacy or the bringing of novel or creative claims.[87]

II. ENGLAND

In England, the power of the court to order a lawyer to pay the costs[88] of an opposing party as a consequence of the lawyer's improper conduct is referred to as the "wasted costs jurisdiction." As in the United States, the authority for this type of order is found both in the courts' inherent jurisdiction to discipline lawyers as well as in statutory provisions. As in the United States, English law has also moved over the last several decades to a negligence standard and has adopted safeguards to mitigate the potential overbreadth resulting from the use of a negligence standard.

A. The English Courts' Inherent Jurisdiction

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[84] *See* Devereaux v. Colvin, 844 F. Supp. 1508, 1511–12 (M.D. Fla. 1994) (explaining that bringing a suit to influence a pending lawsuit draws the Court's attention away from more important matters, wastes time, and is therefore worthy of sanction).

[85] *See* Local 106 v. Homewood Mem'l Gardens, Inc., 838 F.2d 958, 961 (7th Cir. 1988) (showing that the court will *sua sponte* sanction a party when they file an unwarranted motion for sanctions that disregards the existing law that supports opposition's defense).

[86] *See* EEOC v. Milavetz and Assocs., 863 F.2d 613, 614 (8th Cir. 1988), *abrogated by* NAACP–Special Contribution Fund v. Atkins, 908 F. 2d 336 (8th Cir. 1990) (quoting what the district court noted and took into consideration in granting a motion for attorney fees).

[87] *See* Hart, *supra* note 68 at 105–06 (2002) (arguing that the 1993 amendments have not reduced the chilling effects of Rule 11); *see also* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1093–94 (1994) (positing that despite the safe harbor provision in the 1993 amendment to Rule 11, there is still a chilling effect on litigation because there is no balanced approach).

[88] My use of the term "costs" in this section adopts the definition found in Part 43, Rule 43.2(1)(a) of The Civil Procedure Rules 1998 as including "fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person . . . any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track." *See* Civil Procedure Rules 1998, 1999, S.I. 1998/3132, pt. 43, r. 43.2 (U.K.) (defining the scope of the term costs).

Until recent developments discussed below, the English courts recognized themselves as only having the authority to hold solicitors, and not barristers, personally responsible for the costs of an opposing party.[89] This authority was derived from the English courts' inherent jurisdiction to discipline solicitors and has been described by the House of Lords as having existed "from time immemorial."[90] In *Myers v Elman,*[91] the House of Lords canvassed the history of the courts' inherent disciplinary jurisdiction and, specifically, the courts' authority to order solicitors to pay costs personally. Although the lords did not settle on one shared articulation of the appropriate standard to be applied, they shared the view "that something more serious was required than mere negligence."[92] Lord Maugham stated that although "misconduct or default or negligence in the course of the proceedings"[93] may be sufficient to justify an order of costs against a solicitor personally, the jurisdiction of the court to make such an order "ought to be exercised only when there has been established a serious dereliction of duty."[94] Lord Atkin adopted a comparable position, observing that past case law had treated the courts' jurisdiction to award costs against solicitors as including instances of "gross negligence" as well as in cases of "disgraceful" or "dishonourable" conduct.[95] Lord Wright stated that "[a] mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice."[96] In short, although a

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[89] *See* JACKSON & POWELL ON PROFESSIONAL LIABILITY (Rupert M. Jackson, John L. Powell & Roger Stewart eds., 6th ed. 2007); *see also* W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 436 n.461 (1999) (citing Moorfield Storey's statement that the English Courts may order a lawyer who has engaged in misconduct to pay the opposing party's fees, and that this rule has been applied to solicitors).

[90] *See* Myers v. Elman [1940] A.C. 282 302 (U.K.) (acknowledging the power of judges and the courts to penalize solicitors for misconduct).

[91] *See id.* (highlighting the reasons for applying disciplinary actions towards solicitors and the consequences caused by their misconduct).

[92] *See* JACKSON & POWELL ON PROFESSIONAL LIABILITY 735 (Rupert M. Jackson, John L. Powell & Roger Stewart eds., 6th ed. 2007) (discussing the different positions taken on professional liability by the courts in England since the eighteenth century).

[93] *See* Myers, *supra* note 90, at 289 (observing that misconduct, default, or negligence in the course of a proceeding may justify an order of costs against a solicitor personally).

[94] *See id.* at 291 (urging that courts impose a personal order of costs against a solicitor only in cases involving a serious dereliction of duty).

[95] *See id*. at 303–04 (noting that past cases in which courts have awarded costs against solicitors involved instances of gross negligence or disgraceful conduct).

[96] *See id.* at 319 (opining that gross negligence or inaccuracy may justify imposition of a personal cost order against a solicitor).

subjective standard was not articulated in *Myers v. Elman*, the House of Lords was careful to distinguish instances in which cost orders against solicitors would be appropriate from cases of "ordinary" negligence. As explained by Sachs J. in the subsequent case of *Edwards v. Edwards*,[97] "the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error of judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence."[98] A finding of a "serious dereliction of duty" was required to ground a wasted costs order.[99]

At the time that *Myers v. Elman* was heard, there were also statutory provisions in place addressing cost orders against solicitors. In *Myers v. Elman*, the House of Lords acknowledged the applicable Rule of the Supreme Court[100]—Order 65, rule 11—as providing "the necessary machinery" for the court's exercise of its inherent jurisdiction.[101] At the time, Order 65, rule 11 gave a court the authority to order a solicitor personally liable for costs of litigation if it appeared to the court that costs had been "improperly" incurred or wasted as a result of "undue delay" or "any misconduct or default of the solicitor."[102] Notwithstanding

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[97] *See* Edwards v. Edwards [1958] 2 All E.R. 179, 186 (U.K.) (highlighting the distinction between cases involving the kind of negligence warranting cost orders against solicitors and those involving ordinary negligence).

[98] *See id.* (profiling which situations do not call for grounding a wasted costs order).

[99] *See id.* (showing what the House of Lords felt was the standard for grounding a wasted costs order).

[100] Prior to the introduction of the Civil Procedure Rules in 1999, the Rules of the Supreme Court governed procedure in all proceedings in the Supreme Court in England. These rules fell under the rule-making power of the Supreme Court Rule Committee, which consisted of the members of the bench and bar. The term "Supreme Court" referred to the Court of Appeal, the High Court of Justice, and the Crown Court prior to the establishment of the Supreme Court of the United Kingdom (the highest appeal court in England) in 2005. These courts are now referred to as the "Senior Courts of England and Wales." *See* PETER ST. JOHN AND LAWRENCE JOSEPH HENDERSON, CIVIL PROCEDURE 14–15 (3rd ed. 1983).

[101] *See id.* at 189 (explaining where the House of Lords believes the court can exercise its inherent jurisdiction).

[102] Order 65, rule 11 specifically provided, *inter alia:*

> If in any case it shall appear to the Court or a judge that costs have been improperly or without any cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the

the reference in Order 65, rule 11 to "*any* misconduct or default of the solicitor," the House of Lords in *Myers v. Elman* chose to adopt what would appear to be a higher standard, requiring "gross negligence" or "serious dereliction of duty."

Order 65, rule 11 was ultimately replaced by a new rule introduced in 1961, which was amended in turn in 1966. The revised rule following the 1966 amendments – Order 62, rule 8 – retained similar language to that contained in Order 65, rule 11.[103] The particular language of the rule, however, continued to have little, if any, impact on the practice of courts. In discussing the judicial treatment of the Order 62, rule 8 and its predecessor rules, the Court of Appeal observed that these rules stated in the commentary contained in successive editions of *The Supreme Court Practice* were intended to "provid[e] machinery for the exercise of the court's inherent jurisdiction," as opposed to being intended to set out a substantive standard.[104] The Court of Appeal further noted that, consistent with the explanation found in this commentary, the courts "required that an applicant seeking an order for costs against a solicitor…prove a serious dereliction of duty, gross negligence or gross neglect," regardless of the specific wording of associated statutory rule in force.[105] As a matter of practice, the *Myers v. Elman* standard prevailed irrespective of the statutory provision in place governing the personal liability of solicitors for the payment of costs.

B. Beginnings of a Negligence Standard: 1986 Amendments to the Supreme Court Rules

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> solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require.

[103] Order 62, rule 8 provided:

> Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, "the [c]ourt may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order:—
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> (a) disallowing the costs as between the solicitor and his client; and
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> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
>
> (c) directing the solicitor personally to indemnify such other parties against costs payable by them."

[104] Gupta v. Comer, [1991] 1 Q.B. 629, 631 (appeal taken from Eng.).

[105] *Id*.

Forty-five years after *Myers v. Elman*, the case's hold on the applicable standard to be applied to wasted costs orders loosened. In 1986, the Supreme Court Rule Committee replaced Order 62, rule 8 with Order 62, rule 11.[106] The reference in the rule to "misconduct or default" was deleted and replaced with new language permitting cost awards if costs had "been wasted by failure to conduct proceedings with reasonable competence and expedition."[107] This change to Order 62, rule 11 was part of more extensive amendments to the costs provisions in Supreme Court Rules that sought to simplify the taxation of costs and was not the subject of specific discussion in the commentary that addressed the broader amendments.[108] The notes accompanying Order 62, rule

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[106] Rules of the Supreme Court (Amendment) 1986, SI 632, s. 11.

[107] The material portions of the new Order 62, rule 11 were as follows:

> "Subject to the following provisions of this rule, where it appears to the court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the court may —
>
> (a) order —
>
> (i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or
>
> (ii) the solicitor personally to indemnify such other parties against costs payable by them; and
>
> (iii) the costs as between the solicitor and his client to be disallowed."

[108] In his Preface to 1988 edition of the *Supreme Court Practice*, Jack Jacob reported on developments relating to the Supreme Court Rule that had taken place since the last edition of the guide that had been published in 1985. In addressing the changes to the costs regime, he writes:

> A major development of exceptional merit and importance has been the introduction of an entirely new Order 62 relating to costs, which implements the recommendations of the Working Party on the Simplification of Taxation….One of the main objectives of the recommendations was to produce greater fairness and justice as between the parties who win and those who lose their cases. The new Order 62 has, as was intended, greatly simplified the previous basis for the taxation of costs by providing for only two bases for the orders of costs, namely, "the standard basis" and "the indemnity basis," . . . The revision and restructuring of Order 62 have produced greater clarity and simplicity and a new freshness in the complex problems of costs, though no new principle has been introduced as a matter of general policy in the award of costs to the successful party.

A summary of the specific changes was reported in the Law Society Gazette at the time. *See New Costs Regime in the Supreme Court*, L. Soc'y Gazette, April 30, 1986.

11 in the 1988 edition of *The Supreme Court Practice* in which the amended rule first appeared also failed to register the change as being of any significance and continued to reference the rule as being "intended to cover the inherent jurisdiction of the Court."[109]

The courts, however, took note of the changed language. In 1989, the Court of Appeal addressed the new language of Order 62, rule 11 in *Sinclair-Jones v. Kay.*[110] In this case, the plaintiff had applied for an order that the defendant's solicitors personally pay her costs and the court was faced with the question of whether the "gross misconduct" standard established by *Myers v. Elman* should apply to the solicitors' conduct or whether Order 62, rule 11 established a lesser standard rooted in "reasonable competence and expedition."[111] In considering this question, May L.J. stated that, in his opinion, the purpose of the 1986 amendments was to "widen the court's powers in cases which properly fall within this rule."[112] Although he did not provide any direct authority for this view, May L.J. pointed out that the amended rule had also given taxing masters wider powers to impose costs against solicitors personally.[113] The court held that a standard of "reasonable competence and expedition" should be applied to applications under Order 62, rule 11 in accordance with "its ordinary English meaning"[114] and in view of "the circumstances of each case."[115] Although the court in *Sinclair-Jones v. Kay* did not expressly articulate a negligence standard, the Court of Appeal has subsequently characterized the reference to "reasonable

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[109] SUPREME COURT PRACTICE 965 (Jacob et al. eds.,1988).

[110] *See* Sinclair-Jones v. Kay [1989] 1 W.L.R. 114, 114–15, 121 (holding that Order 62, Rule 11 allows for the solicitor to be held financially responsible despite refraining from gross misconduct, and that case-by-case determination of whether the costs are reasonable is also required).

[111] The facts of this case were that the plaintiff had brought an action against the defendant claiming rent arrears and damages for breach of a tenancy agreement and had entered judgment in default after no defense had been served. Damages were to be assessed at a later hearing. One week after the plaintiff had entered default judgment, the defendant was granted legal aid to defend the claim. Seven weeks later and only two days before the damages assessment hearing, the defendant's solicitors informed the plaintiff of this development and the fact that the defendant intended to apply to have the judgment set aside. At the damages assessment hearing, judgment was granted for the rent arrears but set aside on the damages claim. The defendant was given leave to amend and no costs were ordered in relation to the hearing. The plaintiff then applied for an order that the defendant's solicitors pay her costs personally. The application judge dismissed the claim and she appealed to the Court of Appeal.

[112] *See id.* at 121 (discussing that the principles laid in prior case law still apply despite that the new Order increases the court's authority).

[113] *See id.*(explaining that only after the rule was amended did the taxing masters' powers expand to both substantive and taxation proceedings).

[114] *See id.* at 122.

[115] *See id.* at 121.

competence" as "suggesting the ordinary standard of negligence."[116]

The reasons why the Supreme Court Rules Committee introduced a negligence standard in Order 62, rule 11 as part of a set of more extensive amendments to the cost rules are not clear. Broader developments taking place at the time in relation to the regulation of the legal profession in England may hold some clues as to the Committee's motivations. In 1983, a public scandal had erupted as a result of the Law Society's failure to act effectively against Glanville Davies, a solicitor and a member of the Council of the Law Society, who had grossly overbilled a client.[117] The litigation that resulted as well as a subsequent review of the situation by the Law Society had "revealed an appalling catalogue of errors, insensitivity, and lack of sound judgment on the part of the Law Society."[118] The failings of Law Society attracted a significant amount of publicity and, in the view of one commentator, "led to a complete breakdown of public confidence in the Law Society's ability to regulate professional conduct."[119] The "Glanville Davies affair" (as this series of events came to be called) along with other developments in the mid-1980s—including the liberalization of restrictions in advertising and the passage of legislation ending the conveyancing monopoly that solicitors had previously enjoyed—had placed the English legal profession under increased scrutiny and generated serious questions regarding the desirability of permitting the legal profession to self-regulate.[120] Although there is no indication that the changes to Order 62, rule 11 were a direct response to these developments, the move to using a negligence standard (and the attendant increased power given to the courts to monitor and

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[116] *See* Ridehalgh v. Horsefield [1994] Ch. 205, 229. It should be noted that a differently constituted panel of the Court of Appeal criticized the decision in Sinclair-Jones v. Kay approximately a year and a half later in Holden & Co. v. Crown Prosecution Service [1990] 2 Q.B. 26. The dispute between the panels in Sinclair-Jones v. Kay and Holden & Co. v. Crown Prosecution Service, however, was ultimately short-lived. A year later, the Court of Appeal addressed the split between the two cases in Gupta v. Comer [1991] 1 Q.B. 629. The decision ultimately resolved the matter in favor of the approach taken in Sinclair-Jones v. Kay of adopting the plain language of Order 62, rule 11.

[117] The litigation bill at issue was ultimately reduced from £197,000 to £67,000 upon taxation. See generally ROBIN C.A. WHITE, THE ENGLISH LEGAL SYSTEM IN ACTION 392 (3rd ed. 1999) (discussing the "Glanville Davies Affair"). *See also* MICHAEL BURRAGE, REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES 556–57 (2006).

[118] *See* ROBIN C.A. WHITE, THE ENGLISH LEGAL SYSTEM IN ACTION 392 (3d ed. 1999).

[119] *See id*.

[120] *See id*. at 392–93.

punish lawyer misconduct) is consistent with the broader concerns that were emerging at the time regarding the profession's ability to regulate itself effectively.

Another particular aspect of the broader background that requires note is a feature of English law not paralleled in the United States or Canada: "advocates' immunity" from actions in negligence. Until recently, both barristers and solicitors in England were immune from liability arising from the conduct and management of a case in court.[121] This immunity, for example, precluded a client from bringing an action in negligence against his or her lawyer in relation to a failure to put a defense to the court or to call an important witness or in respect of certain conduct that occurred outside the courtroom, including advice about pre-trial settlements.[122] In the 1969 case *Rondel v. Worsley,*[123] the House of Lords clarified that this immunity (which had no statutory basis) was based on public policy. The House of Lords identified three public policy rationales for the immunity: (a) the administration of justice required that a barrister be able to carry out his or her duty to the court fearlessly and independently without the worry of a potential lawsuit from a client; (b) negligence actions against barristers would inevitably require retrying the original actions, which would bring the administration of justice into disrepute by prolonging litigation and risking inconsistent decisions; and (c) because a barrister was required to accept any client as a result of the "cab-rank" rule, it would be unfair "to continue to compel him to take cases, yet at the same time to remove his independence and immunity."[124] Although the decision in *Rondel v. Worsley* only addressed the immunity granted to barristers, the House of Lords confirmed that this immunity extended to solicitors also in the subsequent case of *Saif Ali v. Sydney Mitchell & Co*.[125]

Advocates' immunity was the subject of great criticism towards the end of the twentieth century and was viewed by some commentators to be creating an "indefensible" exception in

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[121] Matthew Groves & Mark Derham, *Should Advocates' Immunity Continue?*, 28 MELB. U. L. REV. 80, 81 (2004) (stating that in *Arthur J S Hall & Co v. Simons*, the common law doctrine of advocates immunity was abolished).
[122] Mary Seneviratne, *The Rise and Fall of Advocates' Immunity*, 21 LEGAL STUDIES 644, 647–48 (2001) (detailing the extent of advocates' immunity in English courts).
[123] *See* Rondel v. Worsley, [1969] 1 A.C. 191 (upholding immunity for solicitors and barristers because it is within the public interest to protect counsel).
[124] *See id*. at 276 (listing various public policy interests that are served by upholding immunity for barristers and solicitors).
[125] *See* Saif Ali v. Sydney Mitchell, [1980] A.C. 198 (clarifying that the immunity enjoyed by barristers applies equally to solicitors).

negligence for advocates' work in court.[126] A number of commentators "called on Parliament to abolish the immunity, on the grounds that it was outdated and based on flimsy public policy justifications."[127] The trend in judicial decisions was to interpret the immunity strictly and to limit its application through narrowing its scope in relation to pre-trial matters.[128] Ultimately, the House of Lords abolished the doctrine of advocates' immunity in 2000 in the "revolutionary"[129] case of *Arthur J.S. Hall & Co. (a Firm) v. Simons.*[130] Although there is no evidence of any direct connection between the language change to Order 62, rule 11 and the mounting criticisms at the time of the doctrine of advocates' immunity, the increased power given to judges to discipline lawyer conduct through the amendments to Order 62, rule 11 is, once again, consistent with the larger trend of growing concerns over the regulation of lawyers in England.

C. Introduction of an Explicit Negligence Standard: 1991 Revisions to the Supreme Court Act

In 1990, Parliament passed major legislation that sought to address the concerns that had emerged in relation to the regulation of the English legal profession. *The Courts and Legal Services Act, 1990*[131] was the product of several inquiries into the English legal profession that had culminated in the 1989 release of three Green Papers[132] by Lord Mackay, then Lord Chancellor. Lord Mackay's Green Papers were highly critical of the claim of barristers and solicitors to self-regulation and advocated for free

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[126] *See* Mary Seneviratne, *The Rise and Fall of Advocates' Immunity*, 21 LEGAL STUD. 644, 651 (2001) (noting that immunity has been criticized on the grounds that it does not provide a duty of care to clients).

[127] *See id.* at 650 (accounting for the growing criticism directed at advocates' immunity in the United Kingdom).

[128] *See id.* at 647–48 (2001); *see also* Atwell v. Michael Perry & Co., [1998] 4 All E.R. 65 (exemplifying how the courts sought to interpret the advocate's immunity strictly by not extending it to giving advice on the prospects of appeal); *see also* Dickinson v. Jones Alexander & Co., [1993] 2 FLR 521 (holding that the advocates' immunity did not extend to matters in relation to a financial settlement reached after divorce even though the terms of the settlement were contained in a consent order).

[129] *See* HUGH EVANS, LAWYERS' LIABILITIES 91 (2002).

[130] *See* Arthur J.S. Hall & Co. v. Simons, [2002] 1 A.C. 615 (abolishing advocates' immunity, recognizing an advocate's duty to not mislead the court).

[131] *See* The Courts and Legal Services Act, 1990 (reforming the way the legal profession and the court system worked).

[132] *See* Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation -- Canada Between the United States and the English/Australian Experience*, 2008 J. PROF. LAW 87, 99 n.56 (2008) (explaining that green papers represent the first consideration by the British government of concepts for new legislation, and are followed by a period of debate and deliberation, eventually leading to the introduction of legislation).

competition among legal services providers and for state supervision of the bar's complaints and disciplinary procedures.[133] As summarized by Michael Burrage, "[the Green Papers] heralded the end of sovereign, self-governing professions and triumphantly proclaimed that market principles were henceforth to govern the provision of legal services."[134] The Green Papers prompted an intensely negative reaction from the bench and bar.[135] Ultimately, the resulting White Paper that became law as the *Courts and Legal Services Act, 1990* "backed away from the more radical proposals for reform" and "was a comparatively modest measure."[136] The

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[133] For a more detailed discussion of the contents of the Green Papers, *see* WHITE, *supra* note 117, at 395–398; *see also* BURRAGE, *supra* note 117 at 558–60 (explaining the green papers' position that the legal field is not entitled to self-regulation); *see also* Michael Zander, *The Legal Services Act 2007: An Act of Revolution for the Legal Profession*, LEGAL SERVICES INSTITUTE 1, 3 (2011) (detailing the radical reforms of the green papers).

[134] *See* BURRAGE, *supra* note 117, at 559 (emphasizing the green papers' fundamental arguments).

[135] *See id.* at 560–61 (detailing the bar's public campaign against the green papers, which included an extensive advertising campaign, protest meetings, and press conferences); *see also* Judith L. Maute, *Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?* 17 THE PROFESSIONAL LAWYER 1, 7 (2006) (discussing the green papers and their negative reception).

[136] PATON, *supra* note 132, at 99 (noting that the Courts and Legal Services Act of 1990 was a modest effort because it eliminated the more radical proposals that were criticized as an apparent intrusion of government onto the English legal system). Judith Maute summarizes the changes from Green Papers to the White Paper as follows:

> Three months later a new set of White Papers signaled retreat from the Government's original radical stance. The professional bodies mostly would retain their traditional controls prohibiting barrister partnerships, direct access to clients, multidisciplinary partnerships, and recognition of specialties. Rights of audience remained unchanged for practical purposes, but with the understanding that statutory bars against solicitors would be repealed. Proposals to allow contingency fees were dropped altogether. The professional bodies would continue to make the rules of conduct and training regarding advocacy and litigation, but they would now require approval of the Lord Chancellor. Where the Green Papers conferred on the Lord Chancellor strong regulatory powers over professional codes of conduct, rights of audience and specialization certification, the White Papers proposed legislation defining general principles applicable to these areas. They retained some less controversial aspects of the Green Papers, such as ending Solicitors' monopoly on conveyancing, and creating the Legal Services Ombudsman. Both professional branches opposed the White Papers' stance on rights of audience; the Law Society bemoaned them as too little, and the Bar decried them as too much. (footnotes omitted).

Maute, *supra* note 135, at 5.

act, consisting of 125 sections and spanning 201 pages,[137] dealt with procedure in civil courts,[138] the regulation of legal services,[139] qualification for judicial office,[140] and the rules governing arbitrations.[141]

The *Courts and Legal Services Act 1990* also changed the courts' wasted costs jurisdiction. Section 51 of the Supreme Court Act was revised, effective October 1991, and introduced an explicit negligence standard:

> 51(6) In any proceedings mentioned in subsection (1),[142] the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
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> 51(7) In subsection (6), "wasted costs" means any costs incurred by a party—
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> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.[143]

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[137] ROBIN C.A. WHITE, A GUIDE TO THE COURTS AND LEGAL SERVICES ACT 11 (1991).

[138] These changes included rule changes relating to the liberalization of rights of audience and rules governing evidence.

[139] Major reforms in this area included extending rights of audience in higher courts to solicitors as well as the creation of the Legal Services Ombudsman.

[140] *See* ROBIN C.A. WHITE, A GUIDE TO THE COURTS AND LEGAL SERVICES ACT 15 (1991) (observing that as a result of extending rights of audience and the right to conduct litigation, the exclusion of anyone except barristers from higher judicial office was no longer considered to be justified; accordingly, the Act introduced provisions "[tying] eligibility for judicial appointment to the holding for specified periods of time, of an advocacy qualification").

[141] Including increased powers given to arbitrators to dismiss claims or counter-claims in circumstances where there has been "inordinate and inexcusable delay."

[142] Subsection 1 refers to proceedings in the civil division of the Court of Appeal, the High Court and any county court.

[143] Note that Order 61, rule 11 was amended to supplement the new section 51 of the Supreme Court Act, but was ultimately replaced by Section 48.7 of the Civil Procedure Rules ("CPR") in 1999. Section 48.7 of the CPR (which remains in force) does not articulate a substantive standard with respect to the courts' exercise of wasted costs jurisdiction, but rather outlines the procedures applicable in cases in which the court "is considering whether to make an order under section 51(6) of the Supreme Court Act 1981." Among the provisions is a

The inclusion of the language in section 51(7) referring to "any improper, unreasonable or negligent act or omission" resolved that negligence was sufficient to give rise to a wasted costs order. The reference to "legal or other representatives"[144] in Section 51(6) extended the court's wasted costs jurisdiction to barristers in addition to solicitors.

The White Paper, *Legal Services: A Framework for the Future*,[145] which formed the basis for the legislation, mentions the proposed changes to costs orders only very briefly, noting that the government was proposing that the "existing rule which enables some courts to order that a solicitor should personally bear any part of the costs of the an action, where his work has fallen short of the standards of competence the court expects" should be extended to include all advocates as well as magistrates' courts.[146] In contrast to this relative silence in the official literature, there is some indication that the legal profession was not happy with the move to an explicit negligence standard. An article published in August 1990 in the Law Society Gazette reported that "[t]he Law Society is furious that the clause has been inserted without proper consultation or discussion" and was concerned about a new broad and uncertain standard being applied to lawyer conduct under the wasted costs jurisdiction.[147]

The leading case on the application of wasted costs orders under section 51 is *Ridehalgh v. Horsefield*,[148] in which the Court of Appeal in 1994 consolidated six appeals, all addressing the

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requirement that the lawyer be given a reasonable opportunity to attend a hearing and dispute the appropriateness of a wasted costs order against him. Additional guidance is provided by a Practice Direction that accompanies Section 48.7 of the CPR that, among other things, affirms the court's ability to make a wasted costs order on its own initiative.

[144] The phase "legal or other representatives" is defined in turn in section 51(13) of the Supreme Court Act as meaning "any person exercising a right of audience or right to conduct litigation on his behalf."

[145] *See* DEPARTMENT OF THE LORD HIGH CHANCELLOR, LEGAL SERVICES: A FRAMEWORK FOR THE FUTURE 1989, Cm. 749 (U.K) (indicating that the White paper formed the basis for the proposed changes regarding wasted costs).

[146] *See id.* (describing the past rule which held that an attorney would bear the burden of paying for his own services if his services were deemed to fall below the expected standard).

[147] *See New Clause Angers Society*, LAW SOC. GAZ. (Aug. 22, 1990), http://www.lawgazette.co.uk/news/new-clause-angers-society (detailing the Law Society's concern that the new wasted costs direction would create the imposition of new and uncertain standards upon lawyer conduct).

[148] *See* Ridehalgh, [1994] A.C. at 205 (noting that the decision rules on six appeals determining the circumstances under which the court should order one party to pay the litigation costs of the opposing party).

circumstances in which a wasted costs order should be made. In *Ridehalgh*, Lord Bingham considered the appropriate interpretation of the terms "improper, unreasonable and negligent" as used in section 51 of the Supreme Court Act. Of the three terms, he deemed "negligent" as being the "most controversial."[149] In considering the meaning of "negligent" in the context of section 51, Lord Bingham held that "'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession."[150] He further clarified that a finding of negligence in the context of a wasted costs order did not require a finding that there had been "an actionable breach of the legal representative's duty to his own client."[151] Nevertheless, Lord Bingham cautioned that an applicant for a wasted costs order under the negligence arm of section 51 was required to establish the same elements that a plaintiff would be required to establish in an action for negligence,[152] including demonstrating a "causal link" between the impugned behavior and the costs that are said to have been wasted.

Lord Bingham also addressed the relationship between the doctrine of advocates' immunity, which had yet to be abolished, and the negligence standard articulated in section 51. After noting the apparent incongruity between the common law doctrine and the newly established statutory rule, he concluded that "the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct."[153] Lord Bingham further noted that "[i]t is our belief, which we cannot substantiate, that part of the reason underlying the changes effected by the new section 51 was judicial concern at the wholly unacceptable manner in which a very small minority of barristers conducted cases in court."[154]

In 2003, the House of Lords endorsed the interpretation given in *Ridehalgh* to section 51 in *Medcalf v. Mardell*.[155] Although the allegations in *Medcalf* involved accusations of

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[149] *See id*. at 232 (interpreting the 1990 Act's usage of the term).
[150] *See id.* at 233 (providing a new interpretation of the term "negligent").
[151] *See id*. at 232 (rejecting the old interpretation).
[152] For example, an error "such as no reasonably well-informed and competent member of that profession could have made." *Id*. at 233 (*citing Saif Ali v Sydney Mitchell & Co.* [1980] A.C. 198 at 218, 220) (reminding potential applicants of their burden of proof).
[153] *See* Ridehalgh, [1994] A.C. at 205, 236.
[154] *See id*. (explaining that the intention of the legislation is to limit the traditional immunity of the advocate if the advocate causes a waste by improper conduct).
[155] *See* Medcalf v. Mardell, [2003] 1 A.C. 120 (expanding the scope of the wasted costs doctrine to cover the factual situation present).

intentional misconduct and not negligence, Lord Hobhouse discussed the use of the term "negligence" at some length, commenting that:

> The word *negligent* raises additional problems of interpretation….[I]t would appear that the inclusion of the word *negligent* in substitution for "reasonable competence", is directed primarily to the jurisdiction as between a legal representative and his own client. It is possible to visualise situations where the negligence of an advocate might justify the making of a wasted costs order which included both parties, such as where an advocate fails to turn up on an adjourned hearing so that a hearing date is lost. The breach of the advocate's duty to the court will be clear and if the breach was not deliberate, the term *negligent* would best describe it.[156]

Insofar as Lord Hobhouse states that the term "negligent" in the statute is "directed primarily to the jurisdiction as between a legal representative and his own client," he departs from the general tenor of past judicial interpretation which articulated the wasted cost jurisdiction as focused on the duty owed by the lawyer to the court and as not being predicated upon "an actionable breach of the legal representative's duty to his own client."[157]

In the first decade following the introduction of a negligence standard in section 51, approximately 75 cases applying the section were reported.[158] Among the circumstances in which the English courts have made wasted cost orders are cases in which the lawyer: pursued a misconceived appeal against an arbitrator's decision;[159] failed to realize that an attempt to wind up a company

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[156] *See id*. at 143 (opining that negligence is a theory of liability that exists in the advocate-client relationship).

[157] For example, in *Ridehalgh*, Lord Bingham held that a wasted costs order under section 51's negligence arm was not dependent on the finding that a lawyer breached a duty to this client and, indeed, "since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client*." See also* Myers v. Elman [1940] AC 282, 291 (Lord Maugham as articulating the operative duty as a "duty to the court").

[158] *See* EVANS, *supra* note 129 at 127 n.6.

[159] *See* Fletamentos Maritimos SA v. Effjohn Int'l SA, [2003] Lloyd's Rep. P.N. 26 (criticizing the lawyer's appeal and ordering a wasted cost penalty).

was inappropriate;[160] failed to disclose to the Court in an application for a *Mareva* injunction that the client was in fact bankrupt;[161] issued proceedings to commit for a breach of an undertaking without warning, in circumstances where the breach at issue was merely technical;[162] and failed to attend an appeal because of wrong information given to the lawyer by the lawyer's clerk.[163] The scope of the English courts' jurisdiction under section 51 is broader that of the American courts' under Rule 11 because the later provision is limited to misconduct in relation to the filing of litigation papers and does not extend to misconduct in the course of litigation generally.

D. English Safeguards: An Exception for Hopeless Cases

Although they endorsed a "plain meaning" interpretation of the negligence arm of section 51, the courts in *Ridehalgh* and *Medcalf* each expressed concern about certain tensions that they viewed to be inherent in the wasted costs jurisdiction. In *Ridehalgh*, the Court of Appeal identified a tension arising between the public interest inhering in lawyers not being "deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents"[164] and "the other public interest…that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers."[165] The House of Lords in *Medcalf* noted a different tension in the form of a "risk of a conflict of interest for the

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[160] *See* Re a Company (No. 0022 of 1993), [1993] B.C.C. 726 (1993) (holding that the company's solicitors should be subject to a wasted cost order for inappropriately attempting to wind up the company).

[161] *See* Kleinwort Benson Ltd. v. de Montenegro, [1994] N.P.C. 46 (1994) (finding that the attorney's failure to disclose pertinent information warranted a wasted cost order).

[162] *See* R. v. Liverpool City Council, [1994] C.O.D. 144 (1993) (penalizing the solicitors with a wasted cost order for bringing an action based on a technical breach).

[163] *See* R. v. Rodney, [1997] P.N.L.R. 489, 489-90 (1996) (ordering a wasted cost penalty to be levied upon the lawyer for the failure to attend an appeal proceeding).

[164] *See* Ridehalgh, [1994] A.C. at 205 at 226. The Court of Appeal noted three additional interests for lawyers: "that [lawyers] should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease."

[165] *See id*. at 226 (noting that although lawyers should pursue their clients' interests without fear of personal liability, there is also an interest in protecting litigants from wasted costs).

advocate" between his or her duties to a client and to the court.[166] As observed by Lord Hobhouse, "ideally a conflict should not arise" because "[t]he advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court."[167] Notwithstanding this "ideal" congruence, Lord Hobhouse expressed concern that the circumstances in which a lawyer may, in fact, find himself or herself in litigation will not always be "so clear-cut":

> Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. Once an opposing party is entitled to apply for an order against the other party's legal representatives, the situation becomes much more unpredictable and hazardous for the advocate. Adversarial perceptions are introduced. . . . The factors which may motivate a hostile application by an opponent are liable to be very different from those which would properly motivate a court.[168]

The English courts have introduced one major substantive safeguard to the "negligence" arm of the wasted costs jurisdiction through an exception for "hopeless cases." In *Ridehalgh*, the English Court of Appeal considered the issue of "hopeless cases" and held that "[a] legal representative is not to be held to have acted improperly, unreasonably, or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail."[169] The House of Lords echoed this sentiment in *Medcalf*, commenting that "it is not enough that the court considers that the advocate has been arguing a hopeless case" and that "to penalise the advocate for presenting his client's case to the court would be contrary to . . . constitutional principles."[170] Although there has been some disagreement in the case law at to whether this judicially created exception for "hopeless cases" requires "something more than negligence for the wasted costs jurisdiction

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[166] *See* Medcalf, [2003] 1 A.C. at 142 (detailing how the wasted costs jurisdiction affects lawyers' duties).
[167] *See id*. (examining why conflicts should not arise for lawyers in most circumstances).
[168] *See id* (noting the situations in which a lawyer's duties to the client and court are not aligned).
[169] *See* Ridehalgh, [1994] A.C. at 233 (explaining that reproaching barristers for representing clients who pursue hopeless cases may have the negative effect of limiting reputable representation for those clients).
[170] *See* Medcalf, [2003] 1 A.C. 120 at 143 (Eng.) (stating that it is the duty of advocates to present their clients' cases, even if they are hopeless).

to arise" in the form of a finding of an abuse of process, this dispute appears to have resolved itself in favor of continuing with the "plain meaning" interpretation given to the term "negligent" in *Ridehalgh*.[171]

Notwithstanding the safeguard introduced through the judicial exception for "hopeless cases," several English commentators have expressed concern about the exercise of the courts' wasted costs jurisdiction under section 51. Hugh Evans has argued that "in both practice and principle, the wasted costs jurisdiction is seriously flawed."[172] One of Evans' complaints is that the cost of a wasted costs application is often far more than the actual wasted costs at stake.[173] Having surveyed the case law up to

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[171] In *Persaud v. Persaud*, [2003], EWCA (Civ) 394 [26]–[27] (Eng.), the Court of Appeal reviewed the comments of the courts with respect to the pursuit of hopeless cases in *Ridehalgh* and *Medcalf* and accepted the submission of counsel for the respondents "that there must be something more than negligence for the wasted costs jurisdiction to arise: there must be something akin to an abuse of process if the conduct of the legal representative is to make him liable to a wasted costs order." However, soon after *Persaud*, the Court of Appeal stepped back from these comments in the case of *Dempsey v. Johnstone*, [2003] EWCA (Civ) 1134 (Eng.). In *Dempsey*, Latham L.J. concluded that *Ridehalgh* and *Medcalf* could not be viewed reasonably as modifying the understanding of the term "negligent" articulated in *Ridehalgh*, although Latham L.J. acknowledged that finding that a legal representative was negligent, and thereby acted unreasonably was "akin to establishing an abuse of process." *See Dempsey*, [2003] EWCA (Civ) 1134 [28] (Eng.). In general, courts in subsequent cases have chosen to follow the approach in *Dempsey* as opposed to following a strict reading of the comments in *Persaud* that negligent conduct is not sufficient for the court's wasted costs jurisdiction to arise. *See, e.g.*, Morris v. Roberts [2005] EWHC (Ch) 1040 [52] (Eng.) (observing that "a legal representative will also be liable to a wasted costs order if, exercising the objective professional judgment of a reasonably competent solicitor, he ought reasonably to have appreciated that the litigation in which he was acting, constituted an abuse of process" and noting that the "stricter test" set out in *Persaud* "is no longer the law"); *see also* Isaacs P'ship v. Umm Al-Jawaby Oil Serv. Co. Ltd., [2003] EWHC (QB) 2539 [25] (Eng.) (noting that "the authorities do not warrant the conclusion that 'negligence' on its own is insufficient for the making of a wasted costs order"); *see also* Hedrich v. Standard Bank London Ltd., [2007] EWHC (QB) 1656 [12] (Eng.) (agreeing with the approach taken in *Morris* to adopt the approach in *Demspey* as opposed to *Persaud*). *But see, Patel v. Air India Ltd.*, [2010] EWCA (Civ) 443 [15] (Eng.) (stating that in order to attract the courts' wasted costs jurisdiction, "not only must the claim be hopeless but there must be a breach of duty to the court, that being a breach by the solicitors of their duty to the court . . . or, as it has been put in other authorities such as Persaud v Persaud [2003] EWCA Civ 394, there must be something akin to an abuse of the process of the court").

[172] *See* HUGH EVANS, LAWYERS' LIABILITIES 127 (2d ed. 2002) (exploring the defects of the wasted costs jurisdiction through analysis of reported cases affected by the jurisdiction).

[173] *See id* at 128–32 (2d ed. 2002) (analyzing specific cases which exhibit the exorbitant cost of wasted cost applications).

2002, he reports that he "found no reported case where it is clear that the costs incurred in the wasted costs application were justified by the amount of wasted costs sought or recovered."[174] Adrian Zuckerman has echoed Evans' concern, commenting that "the jurisdiction has given rise to a new type of satellite litigation, which can be expensive and wholly out of proportion to the costs that can be recovered from the lawyer or, indeed, to the costs of the substantive proceedings."[175]

III. CANADA

In Canada, as in the United States and England, the courts possess an inherent jurisdiction as well as statutory authority to require lawyers to pay personally the costs of an opposing party.[176] As in the United States and England, the law in Canada has moved towards the adoption of a negligence standard in recent decades and has employed various statutory and judicial safeguards to temper the effect of this standard.

A. The Canadian Courts' Inherent Jurisdiction

Historically, Canadian courts explicitly followed the House of Lords' 1940 decision in *Myers v. Elman* in cases concerning the courts' inherent jurisdiction to require a lawyer to pay personally the litigation costs of an opposing party.[177] However, in the 1993

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[174] *See id* at 129 (2d ed. 2002) One example given by Evans is the case of *Re a Company (No. 006798 of 1995)* [1996] 1 W.L.R. 491 wherein a petition to wind up a company was struck out within a day, but the subsequent petition and application for wasted costs from the solicitor who swore the affidavit in support of the petition "appears to have taken all or part of four days".

[175] *See* ADRIAN A.S. ZUCKERMAN, CIVIL PROCEDURE 966 (2003).

[176] *See* Young v. Young, [1993] 4 S.C.R. 3. (Can.) (explaining that Canadian courts have authority under statute and their inherent jurisdiction to award costs to the successful party); *see, e.g.*, MANITOBA LAW REFORM COMM'N, COSTS AWARDS IN CIVIL LITIG. REPORT #111 8 (2005), http://www.gov.mb.ca/justice/mlrc/reports/111.pdf (discussing that in the Canadian province of Manitoba, the court has the discretion to award the successful party costs against the unsuccessful party).

[177] *See* Paul Perell, *Ordering a Solicitor Personally to Pay Costs,* 25 ADVOC. Q. 103, 104 (2001). See, for example, the Ontario Court of Appeal's comments in *Re Ontario Crime Commission*, [1962] O.R. 872 (Can.) whereby the court ordered a lawyer to personally pay costs where he had knowingly filed a false affidavit of a client. In so ordering, the court held:

> It is no answer for counsel to say that he was merely carrying out his client's instructions. If the instructions are to do that which is wrong, counsel is abetting the wrong if he carries out the instructions. If he knows that his client is making false statements under oath and does nothing to correct it his silence indicates, at the very least, a gross neglect of duty. Regardless of any other sanctions which may be imposed upon him, there

decision of *Young v. Young*,[178] the Supreme Court of Canada departed from this tradition to some extent. Writing for the majority on this issue, Justice McLachlin (as she then was) considered the authority of the court to order a lawyer to pay costs personally and held that "[a]ny member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which [they] were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay."[179] Although the Supreme Court made no reference to *Myers v. Elman* in this case, the Court did approve of the lower court's conclusion that the conduct of the lawyer in question had not been sufficiently egregious to justify an award of costs against him. In reaching this conclusion, the lower court had relied on *Myers v. Elman* and had discussed the House of Lord's comments in that case at some length. Justice McLachlin's reference to a lawyer having "acted in bad faith," however, suggested a departure from *Myers v. Elman* standard under which only "gross negligence" or a "serious dereliction of duty" is

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> will be an order that counsel for the applicant personally pay the costs of all other parties appearing on this motion. Such an order may be exceptional but in our view is justified by the circumstances outlined. In *Myers v. Elman*, [1940] A.C. 282, Lord Wright discussed the principles for the making of the order as to costs which has just been made….

Following this passage, the court proceeded to quote from Lord Wright's speech in Myers v. Elman including his statement that "a mere mistake or error of judgment is not generally sufficient [for the court's exercise of its inherent disciplinary authority], but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice." A number of other Canadian courts have also explicitly relied on Myers v. Elman as support for the authority that the court has the inherent jurisdiction to order lawyers to personally pay costs. *See, e.g.*, Boland Foundation v. Moog, [1963] O.J. No. 314 (C.A.); Re: Fisher and the Queen, (1977) 78 D.L.R. (3d) 215 (Fed. C.A.); Pacific Mobile Corp. v. Hunter Douglas Ltd., [1979] 1 S.C.R. 842; Blair v. Levesque, (1990) 108 N.B.R. (2d) 171; Perley v. Sypher, (1990) 109 N.B.R. (2d) 427 (N.B. C.A.); First National Bank of Oregon v. Watson (A.H.) Ranching Ltd., 1984 A.R. LEXIS 3761 (Alta. Q.B. 1984); Petten et al. v. E.Y.E. Marine Consultants et al., 1998 Nfld. & P.E.I.R. LEXIS 441 (Nfld. S.C. 1998); Blair v. Ouellette et al. (1990), 108 N.B.R.(2d) 171; Royal Bank of Canada v. Kwiatkowski et al., 1989 Sask. R. LEXIS 822 (Sask. Q.B. 1989). Notably, the Supreme Court of Canada directly approved of Myers v. Elman in its brief judgment in Pacific Mobile Corp. v. Hunter Douglas Canada Ltd. [1979] 1 S.C.R. 842, stating that in the circumstances of the case, "the Court should make use of its power to order costs payable by solicitors personally, in accordance with principles which were fully stated by the House of Lords in Myers v. Elman, and need not be restated here."

[178] [1993] 4 S.C.R. 3. (Can.).

[179] *See* Young v. Young, [1993] 4 S.C.R. 3, 17 (Can.) [hereinafter *Young*] (ruling that no order of costs should have been made against respondent's attorney).

required. The issue of whether Justice McLachlin intended to depart from *Myers v. Elman* in *Young v. Young* does not appear to be the subject of any discussion in subsequent case law or in the academic literature. Following *Young v. Young*, a number of Canadian courts cited Justice McLachlin's comments as having established the proposition that the exercise of the courts' inherent jurisdiction to award costs against lawyers personally did require a finding of "bad faith."[180] In any event, as in the United States and England, Canadian courts now generally order costs against lawyers personally on the basis of statutory provisions rather than on the basis of the courts' inherent jurisdiction.

B. Ontario's Introduction of a Negligence Standard

In Canada, provincial legislatures have jurisdiction over the administration of civil justice and, accordingly, rules of civil procedure are established on a provincial basis. In what follows, I examine the statutory developments in one Canadian jurisdiction, Ontario. The first relevant statutory provision in Ontario was introduced in 1985 as part of comprehensive reforms to Ontario's Civil Procedure rules.[181] Although "a key objective of the reforms was to ensure full, early disclosure of facts and evidence in order to identify the contentious issues in a lawsuit and to promote settlement,"[182] the reforms introduced changes to a wide range of civil procedure rules including provisions addressing the costs of litigation.[183]

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[180] *See* Schwisberg v. Krieger & Assocs. (1997) 33 O.R. 3d 256 (Can. Ont. C.A.); *see also* Marchand v. Pub. Gen. Hosp. Soc'y of Chatham [1998] O.J. No. 527 at para. 179 (Can. Ont. Gen. Div.) (opining that an award for costs does not require a finding of bad faith); *see also* Markdale Ltd. v. Ducharme (1998) 238 A.R. 98 (Alta. Q.B.). More recently, in R. v. Cunningham [2010] 1 S.C.R. 331, 350 (Can.) the Supreme Court of Canada made reference to a bad faith standard being established in *Young*, [1993] 4 S. C. R. 3. (Can.) noting in passing that "McLachlin J. in Young v. Young, [1993] 4 S.C.R. 3, at pp. 135-36, acknowledged that a court can award costs against counsel personally in rare cases where counsel acts in bad faith by encouraging abuse and delay of the court's process."

[181] The reforms, contained in the newly promulgated Rules of Civil Procedure, were drafted by a Rules Committee created by statute and subject to legislative approval before coming into force.

[182] *See* MINISTRY OF THE ATTORNEY GENERAL, REPORT ON THE TASK FORCE ON DISCOVERY PROCESS (2003), *available at* http://www.ontariocourts.ca/scj/en/reports/discoveryreview/executivesummary.htm (listing objectives of reforms to the Rules).

[183] *See generally* John Morden, *An Overview of the Rules of Civil Procedure of Ontario*, 5 ADVOC. Q. 257, 259–61 (1984) (reviewing all of the procedural provisions introduced by the Rules).

In particular, the newly introduced Rule 57.07 explicitly provided that a lawyer could be personally liable for costs in certain circumstances. As introduced in 1985, Rule 57.07 read:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;
>
> (b) directing the solicitor to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> (c) requiring the solicitor to personally to pay the costs of any party.
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court.
>
> (3) The court may direct that notice of an order against a solicitor under subrule (1) be given to the client in the manner specified in the order.

The term "lawyer" replaced the term "solicitor" in the rule as part of an omnibus change in terminology in the Rules of Civil Procedure in 2007.

At the time of its introduction, Rule 57.07 was "entirely new"[184] and members of the profession expressed concern about its potential effects.[185] Within weeks of Rule 57.07 coming into

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[184] *See* David W. Scott, *Costs and the Rules of Civil Procedure*, *in* NEW RULES OF CIVIL PROCEDURE 12-2 (1984). Note that, under the previous rules that were in place, the Rules of Practice and Procedure of the Supreme Court of Ontario, there were certain circumstances under which lawyers might be held personally accountable for costs notwithstanding the fact that the rules did not make specific provisions for this to happen. *See* United Van Lines Ltd. v. Petrov, [1975] 13 O.R. 2d 479 (providing an example where costs against a lawyer were awarded by courts where a lawyer certified a clearly frivolous claim under Rule 33(4), which authorized the special endorsement of writs of summons with a statement of claim where the plaintiff had sought to recover a debt or a liquidated demand in money).

[185] The comments of David W. Scott, a senior practitioner in Ontario, reflect a number of the profession's concerns at the time:

> The somewhat troubling area [of the new changes to the civil procedure rules], insofar as this practitioner is concerned, flows from the recent history of the relationship between Bench and Bar in Ontario as the threshold against which the

force, one Ontario lawyer brought an application for a declaration that the rule was of no force and effect on several grounds, including the rule's purported attack on the independence of the bar as well as the rule's alleged violation of certain constitutional

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> provisions of Rule 57.07 were developed. The preoccupation of the Courts with the management of "its" caseload in terms of the expeditious resolution of disputes has resulted in a tendancy [sic], from time to time, to transfer to counsel involved the responsibility for what are perceived as unnecessary proceedings, delays or prolongation of trials. As counsel, one has the temerity to think that, from time to time, Her Majesty's Judges are somewhat forgetful of the responsibility for, and the process of dealing with, litigants determined to enforce their rights in increasingly complex matters. It would be well to remind ourselves of the demanding obligation which counsel has to his or her client. The Rules of Professional Conduct in Ontario include the principle generally accepted in England that:
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> > "a Barrister has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he properly may and which he thinks will help his client's case, without regard to any unpleasant consequences to himself or any other person" (emphasis added) (Halsbury's Laws of England, 4th Ed., Vol. 3, ¶1137)
>
> While this obligation is coupled with an overriding duty to the Court and to the public it is of such significance to the overall administration of justice that, within appropriately defined limits, counsel must be able to approach this responsibility with singlemindededness…
>
> The fact that a significant portion of the relief encompassed by Rule 57.07 was available in the ordinary exercise of the Court's extraordinary discretion is beside the point. The codification of this relief is, I would suggest, ominous. It is not a rule which will give much pause to the experienced practitioner. The inexperienced members of the Bar are another matter. How many times have we all, in our developing years, agonized over claims to make, issues to raise, lines of questioning to develop, as part of our responsibilities to our clients in the framework of our roles as officers of the Court? Will this process, in the hands of the young lawyer, be encouraged to the advantage of the client if the sword of Rule 57.07 hangs over counsel's head as a backdrop against which the strategy of presenting the client's case is developed. It is not unlikely that codification and expansion of this drastic remedy may serve to intimidate the responsible lawyer more than the reverse.

(Scott, *supra* note 184 at 12-8 to 12-9).

rights.[186] This application ultimately made its way to the Supreme Court of Canada, which upheld a lower court's decision to quash the application on the basis that the applicant had failed to put forward any evidence that the impugned rules violated provisions of the Canadian Charter of Rights and Freedoms.[187] The hostility to Rule 57.07 among the legal profession is reflected in the Supreme Court's decision: Justice Sopinka noted in the opening paragraph of his reasons that Rule 57.07 was "known colloquially among the Ontario Bar as the "Torquemada Rule," referencing "the first grand inquisitor of the Spanish Inquisition whose name has become synonymous with cruelty."[188]

C. Initial Resistance to a Negligence Standard

Notwithstanding the explicit negligence standard in Rule 57.07, courts were initially divided over the question of whether more than "mere negligence" was required before an order of costs against a lawyer could be made under the provision. One line of authority viewed the rule as codifying the doctrine in *Myers v. Elman* requiring serious misconduct (and thereby precluding an order for cases of "mere negligence"). A contrasting line of authority advocated for a plain reading of the rule's language and awarded costs against lawyers where lawyers had been found to have 'caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.'[189] Exemplifying the first line of authority, Justice Sutherland held in the 1987 case of *Cini v. Micaleff*[190] that "[a]lthough rule 57.07 is worded in such a way as to make it appear that it would be applicable as a compensatory matter in cases of mere negligence, it is clear that the thrust of the decided cases is such that something more than mere negligence is required."[191] On this basis, Justice Sutherland declined to award costs against the lawyers who had added a corporate plaintiff to an action at the opening of trial despite the fact that, unknown to the lawyers, the corporate plaintiff had been dissolved and, as such, could not have authorized the claim in its name. Following *Cini v. Micaleff*, a

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[186] *See* Danson v. Ontario (Attorney General) [1985], 51 O.R. 2d 405 (Can. Ont., H.C.J.) (discussing whether a lawyer had standing to challenge legislation which imposed penalties on lawyers filing frivolous lawsuits).

[187] *See* Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 (Can.) (explaining that a solicitor will be responsible for costs when they cause costs to be incurred without reasonable cause or wasted by undue delay, negligence or other default).

[188] *See id.* (emphasizing that many lawyers felt that new civil procedure rules assessing costs against lawyers in certain circumstances were cruel).

[189] Perell, *supra* note 177 at 105.

[190] (1987), 60 O.R. (2d) 584 (H.C.J.).

[191] *Id.* at 609.

number of other cases in Ontario held that conduct on the part of the lawyer needed to amount to something more than "mere negligence" before costs will be awarded under Rule 57.07.[192] A division in the case law emerged, however, when Justice Haines in the 1994 case of *Worsley v. Lichong*[193] rejected the proposition articulated in *Cini v. Micaleff* that more than "mere negligence" was required and instead held that the "straightforward" language in the rule should be given its "ordinary meaning."[194]

The division in the case law that had emerged was considered at length by Justice Granger in *Marchand v. Public General Hospital Society of Chatham.*[195] After reviewing both the Canadian and English authorities on the issue of awarding costs against lawyers personally, Justice Granger concluded that Rule 57.07 was a codification of the common law and that the "ordinary meaning of the words contained therein can be applied to determine if an order for costs should be made against the solicitor personally."[196] Justice Granger further held that "mere negligence can attract cost consequences" as can "actions or omissions which fall short of negligence."[197] For example, cases in which "bad judgment" does not amount to negligence yet causes undue delay in trial.[198] Notwithstanding these statements of Justice Granger, Ontario courts were initially split following *Marchand* on the issue of whether serious misconduct or bad faith was required before a costs order could be granted against a lawyer under Rule 57.07.[199] Recent cases, however, reflect a general acceptance of interpreting Rule 57.07 in accordance with its "ordinary meaning."[200] For

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[192] *See, e.g.*, 931473 Ontario Ltd. v. Coldwell Banker Canada Inc. (1992), 5 C.P.C.(3d) 271 (Ont. Gen. Div.); Drosos v. Chong, [1992] O.J. No. 520; 8 C.P.C.(3d) 312 (Ont. Gen. Div.); Bubbar v. Fabian, [1991] O.J. No. 813; Grenier v. Southam Inc., [1993] O.J. No. 1559 (Gen. Div.); Aitken v. Aitken, [1993] O.J. No. 2326 (Prov. Div.).

[193] [1994] 17 O.R. 3d 615 (Can. Ont. Gen. Div.).

[194] *See id*. (stressing that rule 57.07 expressly provides for certain cost consequences).

[195] [1996] O.J. No. 4420 (Gen. Div.)

[196] *Id*. at para. 122.

[197] *See id.*

[198] *See id.*

[199] *See* Perell, *supra* note 177 at 112–14 (2001-2002) (discussing split among Canadian courts as to whether bad faith was a strict requirement to award costs against a solicitor).

[200] Notably, in *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069, para. 33 (Can. Ont. Sup. Ct. J.), Justice Sutherland strayed from the position that he took in *Cini v. Micallef*, [1987] 60 O.R. 2d 584 (Can. H.C.J.), stating: "[a]lthough I continue to believe that my decision in Cini v. Micallef (1987), 60 O.R. (2d) 584, arrived at the correct result on the facts of that case, I take this opportunity to state that I now believe that I was wrong when I stated that despite the wording of rule 57.07, the court should not award costs personally against a solicitor except in cases of gross negligence or where the conduct of the solicitor

example, in *McDonald v. Standard Life Assurance Co.*,[201] Justice Quinn states:

> Rule 57.07(1) speaks of costs being "incurred without reasonable cause" or being "wasted by ... negligence or other default." . . . That is sufficient. There is no need to layer rule 57.07(1) with notions of "gross negligence," "inexcusable" or "outrageous conduct," "conduct meriting reproof" or similar language. Such terms describe conduct that goes beyond what is needed to satisfy rule 57.07(1). The wording of rule 57.07(1) is clear and simply put and, in the end, it does not pose a very high or onerous threshold.[202]

In *Galganov v. Russell (Township)*,[203] the Ontario Court of Appeal has recently confirmed that the appropriate standard to be applied under Rule 57.07 is as set out in *Marchand* and that "mere negligence can attract costs consequences in addition to actions or omissions which fall short of negligence."[204] It is clear that a negligence standard now prevails in Ontario as in the United States and England.

D. Safeguards Introduced by Courts

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is inexcusable and such as to merit reproof." Other cases adopting an "ordinary meaning" approach include *Standard Life Assurance Co. v. Elliott*, [2007] O.J. No. 2031, para. 25 (Can. Ont. Sup. Ct. J.), *Rand Estate v. Lenton*, [2007] O.J. No. 831 (Can. Ont. Sup. Ct.), *McDonald v. Standard Life Assurance Co.*, [2007] O.J. No. 2334 (Can. Ont. Sup. Ct.), and *Pineau v. Kretschmar Inc.*, [2004] O.J. No. 3239 (Can. Ont. Sup. Ct. J.). That said, some confusion still persists in the case law. Cases expressing uncertainty as to the appropriate standard or departing from an "ordinary meaning" approach include *Przybysz v. Przybysz*, [2005] O.J. No. 3131 (Can. Ont. Sup. Ct. J.) (citing *Cini v. Micallef* for the proposition that something more than mere negligence is required on the part of counsel before the court will order costs against a solicitor personally), *Bennett v. 1377360 Ontario Corp. (c.o.b. Thyssen Elevator)*, [2004] O.J. No. 5240, para. 49 (Can. Ont. Sup. Ct. J.) (citing "an apparent conflict" in the case law as to whether bad faith is required), *Gentles v. Francis*, [2009] CanLII 4854, para. 7 (Can. Ont. Sup. Ct. J.) (commenting that "some Courts have interpreted Young to require a finding of bad faith before a costs order against a counsel personally will be appropriate" but noting that "even if a finding of bad faith is not necessary to warrant an order under Rule 57.07, the wording is discretionary, not mandatory."), and *Martin v. Mazza*, [2009] CanLII 44723 (Can. Ont. Sup. Ct. J.) (applying a standard of serious misconduct).

[201] [2007] O.J. No. 2334 (Can. Ont. Sup. Ct. J.).

[202] *Id*. at para. 37.

[203] 2012 ONCA 410 (Can. Ont. C.A.)

[204] *Id.* at para. 18.

Although courts now generally accept that an order under Rule 57.07 requires only a finding of negligence and not a finding of bad faith, judges have expressed anxiety regarding the potential overbreadth of the negligence standard. In *Young v. Young*, Justice McLachlin had cautioned—albeit in the context of the courts' inherent jurisdiction—that "[a] lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her profession."[205] Speaking directly to Rule 57.07, Justice Quinn similarly noted in *McDonald v. Standard Life Assurance Company* that a lawyer "should not face liability under rule 57.01(1) [*sic*] 'in representing a client in respect of an issue possessing little merit simply on the basis that the issue had little merit' and that 'lawyers should not be afraid to take on, and fearlessly argue, weak issues.'"[206]

In view of these concerns, the courts have sought to temper the effect of interpreting Rule 57.07 in accordance with its "ordinary meaning" in several ways. Several decisions have emphasized Justice Granger's statements in *Marchand* that orders under Rule 57.07 "should only be made in rare circumstances" and that "it is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to rule 57.07."[207] Justice McLachlin's admonition in *Young v. Young* that "courts must be extremely cautious in awarding costs personally against a lawyer"[208] has also been reiterated a number of times.[209] Moreover, the caution urged by the courts in the application of Rule 57.07 has been formalized in a judicially created two-part test. In deciding whether or not to make an order against a lawyer under Rule 57.07, the court must first determine "whether the particular conduct complained of falls within the purview of the rule" and, if the conduct does fall under the rule, the court must

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[205] *See* [1993] 4 S.C.R. 3. (Can.) (warning against the dangers of allowing personal costs to be brought against an attorney).
[206] *See* [2007] O.J. No. 2334, para. 38 (Can. Ont.) (quoting *Belanger v. McGrade Estate*).
[207] *See Marchand* [1998] O.J. No. 527 at para. 179 (Can. Ont. Gen. Div.) (describing the limited circumstances where rule 57.07 should be applied).
[208] *See* [1993] 4 S.C.R. 3. (Can.) (explaining that the zealous representation expected of an attorney should lead courts to be hesitant to award personal costs against a lawyer).
[209] *See, e.g.*, Schreiber v. Mulroney, [2007] O.J. No. 3191, para. 28 (Can. Ont.) (recognizing the standard in *Marchand*, but still awarding costs against the lawyer given "egregious" and "wrong" conduct); *see also,* Carleton v. Beaverton Hotel, [2009] 96 O.R. (3d) 391, 397 (Can. Ont.) (setting aside a lower court's decision to award costs against a lawyer personally, in part because the lower court's reasoning did not reflect an application of the "extreme caution" principle).

then decide "whether the circumstances are such that the provisions of the rule should be invoked."[210] In deciding whether the provisions of the rule should be invoked, the court is required to use its discretion and exercise "extreme caution" before deciding whether a costs order should issue.[211] Most recently, in *Galganov*, the Ontario Court of Appeal reiterated the need for caution and noted that "[t]he rule was not intended to allow the frustration of the opposing party's counsel to be taken out against a counsel personally because he or she went down a series of blind alleys with his or her clients' instructions or approval."[212]

The particular cases in which Ontario courts have ordered costs against lawyers personally are diverse. Costs orders have been made "for failing to take instructions from a client; failing to appear at a hearing; failing to remove [oneself] from the record properly; mishandling an action and misleading the client; instituting proceedings which were ill-conceived and without merit; unreasonably and negligently causing costs to be wasted; being responsible for intolerable delay; commencing an action to circumvent a pending action; engaging in abusive conduct or loquacious and repetitious interference with an examination for discovery so that it was aborted; swearing a false and misleading affidavit by an articled student; failing to disclose that the defendant was bankrupt; and being responsible for unfounded allegations of undue influence which impugned the integrity and good faith of an executor."[213]

Although the courts' statutory jurisdiction to award costs against lawyers personally has given rise to some concerns on the part of courts as to potential overbreadth, the introduction of Rule 57.07 has not given rise to any significant controversy in Canada. Although substantial amendments were made to Ontario's Rules of Civil Procedure in 2010 as a result of a comprehensive review of the province's civil justice system, no amendments were suggested

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[210] *See Marchand*, [1998] O.J. No. 527 at para. 122 (Can. Ont. Gen. Div.) (adopting test set out by Justice Haines in *Worsley v. Lichong* (1994) 17 O.R. 3d 615 (Can. Gen. Div.)).

[211] *See* Carmichael v. Stathshore Indus. Park Ltd. (1999), 121 O.A.C. 289, para. 15 (Can. Ont. C.A.) (recognizing that extreme caution must be exercised when determining whether to award costs personally against a solicitor); *see also* Carleton v. Beaverton Hotel (2009), 96 O.R. 3d 391, para. 15 (Can. Ont. Sup. Ct. J.) (reasoning that Rule 57.07 should only be applied to award costs against a solicitor sparingly); *see also* A and B Auto Leasing & Car Rental Inc. v. Mississauga Auto Clinic Inc., [2009] O.J. No. 4670, para. 32 (Can. Ont. Sup. Ct. J.) (stating the second step of the inquiry into whether rule 57.07 requires courts to apply the extreme caution principle).

[212] *See* 2012 ONCA 410 (Can. Ont. C.A.), para. 43.

[213] MARK ORKIN, THE LAW OF COSTS 2-301 – 2-302 (2nd ed., August 2010).

to Rule 57.07. It would appear that a negligence standard is fairly entrenched in Ontario.

IV. INSIGHTS FROM CONVERGENCE

This study of the law in the United States, England, and Canada reveals that these three common law countries have, beginning in the mid-1980s to early 1990s, converged upon a negligence standard to evaluate a lawyer's conduct in the context of deciding if a costs order should be made against that lawyer personally. This fourth and final part considers what broader insights might be derived from this analysis through the lens of two inquiries: (1) what might be the reasons why this convergence has occurred? and (2) what might be some concerns with the move to adopting a negligence standard in this area?

A. Why Convergence?

One might have anticipated that these jurisdictions would differ in their treatment of costs awards against lawyers personally, because of their very different approaches to other costs questions. Because the United States has a baseline rule of no cost-shifting, whereas England, Canada each implement a "loser pays" system of costs, one might reasonably predict that the threshold at which a lawyer is required to pay the fees of an opposing party would be higher in the United States than in these three other countries. In other words, one might have expected the general American reluctance to shift costs to affect conservatively the circumstances under which costs will be shifted in this particular scenario.[214] Further, given the distinctive culture of "adversarial legalism" that

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[214] The United States Supreme Court has, on several occasions, distinguished Rule 11 from a "fee-shifting statute." See, for example, Justice O'Connor's comments in *Business Guides, Inc. v. Chromatic Commc'n Enter., Inc.*, 498 U.S. 533, 553 (1991):

> Rule 11 sanctions do not constitute the kind of fee shifting at issue in *Alyeska*. Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded. Nor do sanctions shift the entire cost of litigation; they shift only the cost of a discrete event. Finally, the Rule calls only for "an appropriate sanction" -- attorney's fees are not mandated. As we explained in *Cooter & Gell:* "Rule 11 is not a fee-shifting statute . . . . 'A movant under Rule 11 has no entitlement to fees or any other sanction.'"

Very recently, the Third Circuit echoed this sentiment in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 297 (3d Cir. 2010) (stating that "Rule 11's 'primary purpose is not 'wholesale fee shifting but [rather] correction of litigation abuse'") (citing Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988)).

has been said to exist in the United States, one might also have predicted that American courts would be more restrained in their powers to require lawyers to pay personally the fees of an opposing party than courts in the other countries.[215] That is, if the culture of lawyering is more adversarial in the United States than in the other countries, we might anticipate that American lawyers will be treated as owing fewer obligations to the parties that their clients oppose and, as a consequence, will be held responsible for an opposing party's legal fees in more limited circumstances. These intuitions have not been borne out: the United States employs a relatively similar standard to those articulated in England and Canada in deciding if a lawyer should be required to pay for an opposing party's fees.

One might also have expected that the three countries would approach the issue of when a lawyer should be personally responsible for costs of litigation differently, in view of their different histories in approaching lawyer negligence generally. Lawyers in England were long protected from actions in negligence under the doctrine of "advocates' immunity". One explanation of the introduction of a negligence standard into the English courts' wasted costs jurisdiction is that this jurisdictional expansion was intended to encroach upon or mitigate the effect of the general bar on holding lawyers accountable for negligence in civil actions. In view of the fact that neither the United States nor Canada has recognized a comparable immunity for lawyers, one might have expected less need or enthusiasm in these two countries for supplementing the availability of a civil action in negligence against lawyers with civil procedure rules that evaluate and sanction lawyers' negligence. Yet, all three countries employ a relatively similar standard.

Why, then, this convergence to a negligence standard? Each jurisdiction was facing mounting concerns at the time about both the efficacy of its civil justice system and the ability of the legal profession to properly regulate itself. In England, the question of self-regulation came to the fore most dramatically in the enactment of the *Legal Services Act*, 2007. Two of the major reforms initiated by the legislation were the establishment of a single, independent regulator and a single, independent office to handle consumer complaints and lawyer discipline.[216] As summed

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[215] *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 239 (2001) (discussing the role "adversarial legalism" plays in counsel fees in the United States).

[216] *See* JOAN LOUGHREY, CORPORATE LAWYERS AND CORPORATE GOVERNANCE 276–77 (2011) (outlining key areas of reform implemented by England's Legal Services Act 2007); *see also* Paul D. Paton, *Between a Rock and a Hard Place:*

up by one commentator, one result of the introduction of this legislation was "the effective end of self-regulation, replaced by a front-line regulator with closer ties to government."[217] While developments in the United States and Canada have been less dramatic, self-regulation of the profession has also been under attack in these two jurisdictions in recent years.[218] One possible characterization of the introduction in these jurisdictions of more robust mechanisms for imposing costs against lawyers is as compensation for perceived failures of the self-regulation of the legal profession as well as part of broader reforms seeking to make the civil justice system more responsive to the realities of modern litigation.

B. Concerns with a Move to a Negligence Standard

Whatever the reasons for this convergence, the move in all three counties to a negligence standard invites the question of whether, as a substantive matter, the use of a negligence standard in this particular context is a coherent and desirable way to regulate lawyer conduct. One fundamental question that has not been answered satisfactorily in any of the three jurisdictions canvassed is: what, exactly, is the "new form of legal malpractice" being established? As a general matter, in cases of "traditional" legal malpractice (i.e. civil actions against lawyers for negligence), a lawyer is evaluated against her "reasonably competent" counterpart in terms of the legal skill and diligence that she has

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The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience, 2008 J. PROF. L. 87, 96 (2008) (summarizing the main components of England's Legal Services Act 2007).

[217] *See* Paul D. Paton, *Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession*, 2010 J. PROF. LAW. 165, 165 (2010) (noting fundamental changes effectuated by England's Legal Services Act 2007).

[218] One of the most significant examples in the American context is the Securities and Exchange Commission's assertion of regulatory authority over the securities bar. For a detailed discussion of this development, *see* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 239–41 (2008). A notable Canadian example critical of the self-regulation of the legal profession can be found in the Competition Bureau's 2007 report on self-regulated professions, which viewed certain measures in the self-regulated legal profession as anti-competitive. As part of a diplomatically worded conclusion, the Report stated that self-regulated professions in Canada "currently face a situation that is rich with opportunities to benefit from increased competition." *See* Competition Bureau of Canada, *Study on Self-Regulated Professions: Balancing Competition and Regulation*, Dec. 11, 2007, xi, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf (concluding that self-regulated professions could be more competitive).

employed in pursuing her client's cause. In contrast, in determining whether or not a costs award should be made against a lawyer personally as a result of the lawyer's allegedly improper litigation conduct, the court is often concerned not with whether the lawyer in question met the requisite level of skill and care owed to her client, but rather if the lawyer satisfied her obligations to the court and to opposing parties. These obligations have largely been historically understood in terms of requirements rooted in intent and purpose rather than skill and care. For example, a lawyer is required to refrain from abusing the courts' processes or violating certain minimum standards of "fair play" in relation to one's opponents.[219] What does it mean for a lawyer to be "negligent" in relation to these obligations? The focus in relation to obligations owed to the court and to one's adversary does not seem to be rooted in competence (or, at least, only rooted in competence) but also seems to engage the issue of fidelity to prescribed boundaries of role of an advocate.

Alternatively, if the intention in adopting a negligence standard in this context is to move beyond traditional understandings of a lawyer's duty to the court and to opponents and to create new and more expansive obligations, what are these obligations? Asking what the "reasonably competent" lawyer would do cannot be the starting point if a new, expansive code of conduct is being articulated. An inquiry into the conduct of a "reasonably competent" lawyer presumes an established professional norm. Further, the creation of more expansive obligations generates its own concerns and, in particular, a worry that lawyers will find themselves in the untenable position of choosing between representing their clients with all due vigor and skill or protecting themselves from financial penalties. As explored above, courts in each of three countries examined have expressed concern about this very issue. In the American context, both courts and commentators have commonly articulated concern about this potential conflict in term of Rule 11's "chilling effect" – that is, the worry that Rule 11 puts a damper on vigorous advocacy or the bringing of novel or creative claims.[220] English courts have

[219] For examples of standards in the American legal profession, *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 110–15 (2000) (stating things that a lawyer must be wary of not doing while practicing law); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1–3.4 (2006) (elaborating on rules of professional conduct regarding meritorious claims and contentions, expediting litigation, candor towards the tribunal, and fairness to opposing party and counsel).

[220] *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 566 (1991) (explaining that redistribution of costs under Rule 11 has the potential to deter meritorious lawsuits) (Kennedy, J., dissenting); *see also* Eastway Construc. Corp. v. City of New York, 762 F. 2d

expressed the same worry in context of their efforts, as reviewed above, to insulate "hopeless cases" from the application of the court's wasted costs jurisdiction.[221] The "extreme caution" principle espoused by Canadian courts seeks to mitigate the same perceived risk.[222]

Regardless of the means employed by each country to temper the use of a negligence standard, it is unclear whether any of these jurisdictions have fundamentally come to terms with the consequences of introducing "a new form of legal malpractice" in this area. Neither the "hopeless case" carve-out in England nor the "extreme caution" advocated by the Canadian courts, let alone the American "safe-harbor" provisions, shed much light into what duties of care lawyers are purported to owe to courts and opponents and how conflicts between these duties and lawyers' duties to their clients are to be resolved. To repeat the observations of Lord Hobhouse quoted above, although "ideally" a lawyer's duty to one's client should not conflict with the lawyer's duty to the court, the practical realities of litigation risk giving rise to circumstances that are not always "clear-cut." Moreover, it also bears mentioning that there been virtually no examination of the tension in the case law "between denying any duty of care [in the context of civil causes of action] by a lawyer to his client's opponent (save in exceptional circumstances), and permitting the latter to recover wasted costs from the lawyer."[223] Possible tensions between a lawyer's obligations under statutory provisions created personal liability for costs and other duties owed by the lawyer to his or her client and the court will be, no doubt, something that each jurisdiction will have to continue to deal with into the future.

CONCLUSION

Although the general approach to costs in the American civil justice system is commonly cited as an example of "American

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243, 254 (2d Cir. 1985) (opining that Rule 11 sanctions are not intended to chill zealous advocacy); *see also* GEORGENE M. VAIRO, CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES, 483–86 (2d ed. 1992); *see also* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L. J. 665, 706–07 (2000) (citing courts' confusion in enforcing Rule 11 sanctions where there is an otherwise meritorious claim); *see also* Danielle Kie Hart, *supra* note 68 at 2 (2002) (criticizing Rule 11 and its effect of inhibiting the development of the common law and zealous advocacy).

[221] *See* Ridehalgh, [1994] A.C. at 233 (cautioning against abuse of process to pursue a "hopeless" case).

[222] *See Carleton*, [2009] 96 O.R. 3d at para. 15 (Can. Ont. S.C.J.) (advocating "extreme caution" standard in awarding costs against a lawyer).

[223] *See* HUGH EVANS, LAWYERS' LIABILITIES 91, 141 (2002).

exceptionalism" in civil procedure, a multi-jurisdictional examination of this particular treatment of litigation expenses reveals that the United States is, in fact, aligned with England and Canada in converging to a negligence standard. As explored above, one way to understand this convergence is as part of broader and more globally held concerns with civil justice reform and the regulation of the legal profession. Further, the fact that the courts in each of these jurisdictions have voiced anxiety in relation to the use of a negligence standard in this area, in my view, brings into sharp relief unresolved concerns about using this particular standard in this context. Whether and how each of these jurisdictions ultimately deal with this latent issue remains to be seen.