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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

Supreme Court No.: R-15-0004

**PETITION TO AMEND RULE 11,
ARIZONA RULES OF CIVIL
PROCEDURE**

**Comments of the Pima County Bar
Association Regarding Proposed
Amendments to Rule 11**

14 The Pima County Bar Association (hereinafter "the PCBA") respectfully
15 submits the following comments regarding the proposed amendments to Rule 11,
16 Arizona Rules of Civil Procedure.

17 While the PCBA's membership generally has not experienced the perceived
18 Rule 11 abuses and proliferation of satellite litigation as noted in the Petition, the
19 PCBA is supportive of the proposed amendments with the sole exception of the
20 mandatory sanctions provision in proposed Rule 11(c). The Petition proposes that
21 "shall" be replaced by "must." To provide clarity, the PCBA agrees with the Petition
22 that the word "shall" should be replaced in Rule 11(c); however, we diverge from the
23 State Bar's belief that Rule 11 sanctions should be mandatory. The PCBA
24 respectfully proposes that "shall" be replaced by "may."

25 In large measure, the Petition tracks the 1993 and 2007 amendments to
26 Federal Rule 11; however, the Petition departs from the 1993 federal amendments

1 which shifted from mandatory (“shall”) to discretionary (“may”) sanctions. This
2 departure is without compelling justification. The PCBA recognizes that this federal
3 1993 amendment was controversial. Carl Tobias, *Congress and the 1993 Civil*
4 *Rules Proposals*, 148 F.R.D. 383, 387 (1993); *Excerpt from the Report of the*
5 *Judicial Conference Committee on Rules of Practice and Procedure* (Sept. 1992),
6 reprinted in 146 F.R.D. 515 (1993). The PCBA believes, however, that the current
7 federal approach vesting Rule 11 decisions to the trial court’s discretion is the
8 correct approach if the State Bar’s and the Court’s goal is to limit satellite litigation
9 under Rule 11. *See id.*

10 Leading up to the 1993 federal amendments, there was a Bench-Bar
11 Proposal. Judge A. Leon Higginbotham, Jr., *et al.*, *Bench-Bar Proposal to Revise*
12 *Civil Procedure Rule 11*, reprinted in JEROLD S. SOLOVY, NORMAN M. HIRSCH,
13 MARGARET J. SIMPSON, *SANCTIONS UNDER RULE 11* app. II.¹ John P. Frank of Lewis &
14 Roca² was one of the authors of the proposal. The Bench-Bar Proposal
15 recommended making Federal Rule 11 sanctions permissive, rather than
16 mandatory. It noted that it was taking the concept from a proposal by the American
17 College of Trial Lawyers, and recognized that “[a] major purpose of this change is to
18 reduce the elements of lawyers fighting with each other for personal gain.” *See*
19 *Bench-Bar Proposal* at 8.

20 The 1993 Federal Rule 11 amendments, including the permissive sanctions
21 provisions, appear to have addressed the concerns regarding satellite Rule 11
22 litigation that troubled the federal bar in the early 1990s and which apparently now

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¹ Available at:
25 [https://jenner.com/system/assets/assets/5514/original/Sanctions_20Under_20Rule_2011-
Complete_2010.pdf?1323114005](https://jenner.com/system/assets/assets/5514/original/Sanctions_20Under_20Rule_2011-Complete_2010.pdf?1323114005)

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² Now Lewis Roca Rothgerber.

1 trouble the State Bar and members of the judiciary. Local anecdotal reports from the
2 federal judiciary suggest that Rule 11 motions are few and far between.

3 The sole justification set forth in the Petition for substituting “must” for “shall”
4 is that “the heightened procedural requirements proposed in the amendments allow
5 ample opportunity for a party or attorney in violation of the Rule to take corrective
6 measures.” Petition, p. 9. The Petition’s purported justification does not support a
7 deviation from the Federal Rule 11 as the Federal Rule 11 also has a safe-harbor
8 provision before a Rule 11 motion can be filed. As noted below, there are occasions
9 where a trial judge should have the discretion *not* to award any sanctions even when
10 a Rule 11 violation is found.

11 Under the existing Arizona Rule 11, as well as the proposed amended
12 Arizona Rule 11, whether a violation has occurred and what “appropriate” sanctions,
13 if any, to impose are matters committed to the trial court’s discretion. *Taliaferro v.*
14 *Taliaferro*, 188 Ariz. 333, 341, 935 P.2d 911, 919 (App. 1996). The PCBA
15 recognizes that “*shall* is a chameleon-hued word,” and subject to varying
16 interpretations based upon context. Bryan A. Garner, *Shall We Abandon Shall?*,
17 ABA J., August 1 2012.³ In interpreting the existing “shall” language of existing Rule
18 11(c), Division One of the Court of Appeals has noted that sanctions under Rule 11
19 are *discretionary*. *Taliaferro*, 188 Ariz. at 341, 935 P.2d at 919 (“The sanction
20 authorized by these Rules are discretionary but the Rules provide the sanctions are
21 to be ‘appropriate’ and ‘just,’ . . . The same is true for Rule 11, which authorizes an
22 ‘appropriate sanction.’”). Ultimately, the trial court’s determination of the various
23 issues regarding a Rule 11 motion are heavily fact-based, and the PCBA believes
24 that the Rule should clearly vest discretion with the trial court not only to find a
25 violation but also to award the “appropriate” sanctions—which in theory, could be no

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1 sanctions in the particular case “if, for example, the offense was technical or de
2 minimis, the court thought that the sanctions were not needed for their deterrent
3 purpose, or the parties were equally at fault.” Steven S. Gensler, FEDERAL RULES OF
4 CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 11 Practice Commentary (2015)
5 (citations omitted).

6 Finally, in support of permissive Rule 11 sanctions, the PCBA notes that Rule
7 11 has a chilling effect on access to the courts, especially on civil rights plaintiffs.
8 See Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Civil Rules*
9 *of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993*
10 *Amendments*, 37 Val. U. L. Rev 1, *11 n. 31, *14 n. 39 (2002) (citations omitted). In
11 light of this Court’s strategic agenda focusing on accessible justice, including to
12 those who are most vulnerable, Rule 11(c) should be amended to substitute “may”
13 for “shall.”

14 For the foregoing reasons, the PCBA respectfully submits that the Court
15 should follow the federal example and make Rule 11 sanctions permissive by
16 adopting the Petition as modified to insert “may” for “shall” in Rule 11(c).

17 RESPECTFULLY SUBMITTED this 14th day of May, 2015.

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19 /s/ E. Hardy Smith
20 /s/ D. Greg Sakall
21 E. Hardy Smith, President
22 D. Greg Sakall, Chair – Rules
23 Committee

22 Electronic copy filed
23 with the Clerk of the Supreme
24 Court of Arizona this 14th day
25 of May, 2015.

24 By: D. Greg Sakall
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26 ³ Available at: http://www.abajournal.com/magazine/article/shall_we_abandon_shall.