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## Integrating Legal Ethics & (and) Professional Responsibility with Federal Rule of Civil Procedure 11

Richard G. Johnson

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# INTEGRATING LEGAL ETHICS & PROFESSIONAL RESPONSIBILITY WITH FEDERAL RULE OF CIVIL PROCEDURE 11

*Richard G. Johnson\**

## TABLE OF CONTENTS

|     |                                       |     |
|-----|---------------------------------------|-----|
| I.  | INTRODUCTION .....                    | 820 |
| II. | PRIMARY LITIGATION ETHICS RULES ..... | 832 |

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Mr. Johnson concentrates his practice in legal ethics and professional responsibility issues, and for the past decade, he has limited his practice to plaintiff's legal malpractice. In addition, for more than ten years he has been a member of the Legal Ethics & Professional Conduct Committee of the Ohio State Bar Association, which is a certified grievance committee under the Ohio Rules for the Government of the Bar.

Mr. Johnson wishes to thank Professor Vairo for her invitation to this Symposium, her mentorship in this topic area, and her helpful comments and suggestions on this Article. Editing Professor Vairo's treatise has been one of his most rewarding professional accomplishments, and the friendship that has been an outgrowth of that process is invaluable to him.

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|   |     |
|---|-----|
| A. <i>Meritorious Claims and Contentions (Model Rule 3.1)</i> .....   | 834 |
| B. <i>Expediting Litigation (Model Rule 3.1)</i> .....  | 835 |
| C. <i>Candor Toward the Tribunal (Model Rule 3.3)</i> .....   | 836 |
| D. <i>Fairness to Opposing Party and Counsel</i><br><i>(Model rule 3.4)</i> .....   | 842 |
| III. CIVIL RULE 11 .....  | 844 |
| A. <i>1983 Version</i> .....  | 844 |
| B. <i>1993 Version</i> .....  | 846 |
| IV. IMPACT OF LITIGATION ETHICS RULES ON CIVIL RULE 11  |     |
| CASE LAW .....  | 848 |
| A. <i>Litigation Ethics Rules Discussed Superficially</i> .....   | 850 |
| B. <i>Litigation Ethics Rules Rejected as Civil Rule 11</i><br><i>Standard</i> .....  | 864 |
| C. <i>Litigation Ethics Rules Adopted as Civil Rule 11</i><br><i>Standard</i> .....   | 871 |
| D. <i>Summary of Case Law Review</i> .....  | 890 |
| V. CRITICISM OF USING CIVIL RULE 11 TO ENFORCE THE<br>LITIGATION ETHICS RULES VERSUS REFERRAL TO THE<br>DISCIPLINARY SYSTEM ..... | 891 |
| VI. WHY HAVE THE LITIGATION ETHICS RULES GENERALLY<br>BEEN SEPARATED FROM CIVIL RULE 11 ANALYSIS? .....                           | 899 |
| VII. CONSEQUENCES OF HAVING SEPARATED THE LITIGATION<br>ETHICS RULES FROM CIVIL RULE 11 .....                                     | 910 |
| VIII. WHY SHOULD THE LITIGATION ETHICS RULES BECOME THE<br>CIVIL RULE 11 STANDARD? .....  | 914 |
| IX. PROPOSED 2003 VERSION OF CIVIL RULE 11 .....  | 917 |
| X. CONCLUSION .....   | 922 |

## I. INTRODUCTION

The year 2003 marks the twentieth anniversary of the 1983 amendments to Federal Rule of Civil Procedure 11 ("Civil Rule 11"), the frivolous conduct sanctions rule, which was first promulgated without teeth in 1937, as well as the tenth anniversary of the 1993 amendments to the rule, which greatly refined the procedure and remedies available there under.<sup>1</sup> The year 2003 also marks the twen-

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1. FED. R. CIV. P. 11 advisory committee's notes (1937-1993).

tieth anniversary of the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”), which were first promulgated in 1983, and which have been adopted by most of the states.<sup>2</sup> The Model Rules replaced the ABA Model Code of Professional Responsibility (“Model Code”), which was first promulgated in 1969.<sup>3</sup>

Model Code Disciplinary Rule 7-102 was the analog to the 1937 version of Civil Rule 11, and they were both measured by a largely unenforceable subjective standard.<sup>4</sup> Disciplinary Rule 7-102 was the “representing the client within the bounds of the law” rule,<sup>5</sup> and it will be discussed in brief below.<sup>6</sup> Model Rule 3.1 is the primary analog to the amended versions of Civil Rule 11, and they are both now measured by an objective standard that is designed to be more enforceable.<sup>7</sup> Model Rule 3.1 is the “meritorious claims and contentions” rule,<sup>8</sup> and it will be discussed in detail below along with the other Model Rules that impact litigation, which are all subsumed within Civil Rule 11.<sup>9</sup>

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Civil Rule 11 was adopted on December 20, 1937, but it did not become effective until September 16, 1938. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 3181 (2d ed. 1997 & Supp. 2003). Some writers refer to the original rule as the 1938 version, but since the advisory committee note to the original version is dated 1937, the author finds this confusing and thus refers to the original version as the 1937 version. All later amendments of Civil Rule 11 were effective in the year that they were adopted.

2. As of September 30, 2003, the Model Rules have been adopted by forty-five states. LAWS. MAN. ON PROF. CONDUCT ¶¶ 01:3–:08 (ABA/BNA) (2003). For a discussion of any differences between the Model Rules and the various states’ adoption of the same, see *id.* at ¶¶ 01:11–:68.

3. MODEL RULES PROF’L CONDUCT preface (2003) (describing the ABA’s historical involvement in legal ethics and professional responsibility).

4. See CTR. FOR PROF’L RESPONSIBILITY, A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–1998, at 163–64 (1999) [hereinafter MODEL RULES HISTORY] (discussing history of Model Rule 3.1 and comparison with DR 7-102).

5. MODEL CODE PROF’L RESPONSIBILITY DR 7-102 (1980).

6. See *infra* notes 46, 48, 50 & 52.

7. See MODEL RULES HISTORY, *supra* note 4, at 163–64.

8. MODEL RULE PROF’L CONDUCT R. 3.1 (2003).

9. See *infra* Part II.

The purpose of this Article is to explore the apparent disconnect between Model Rule 3.1 and Civil Rule 11;<sup>10</sup> to explain why this has occurred and whether it has been beneficial;<sup>11</sup> and to suggest that, with the culmination of Ethics 2000 and the concomitant 2002 amendments to the Model Rules of Professional Conduct,<sup>12</sup> the integration of legal ethics and professional responsibility with Civil Rule 11 should be examined as part of a total system of attorney regulation.<sup>13</sup>

By way of introduction to this disconnect between Model Rule 3.1 and Civil Rule 11, in his seminal 1982 article, Professor Richard H. Underwood captured and explained the zeitgeist of the litigation environment that existed before, and which gave rise to, these 1983 rules, to wit:

To further the end that no man be denied justice, modern procedural reforms have emphasized the simplification of pleadings and the expansion of pretrial discovery. Although these reforms generally are lauded as advancing the public policy favoring free access to the courts, they have opened the door to substantial abuse of the litigation process. Observing the pernicious effects of unbridled discovery in the hands of lawyers, Justice Powell has noted that “[l]awyers devote an enormous number of ‘chargeable hours’ to the practice of discovery . . . all too often . . . enabling the party with greater financial resources to prevail by exhausting the resources of a weaker opponent.” Clients may exacerbate this abuse, often entering the fray of litiga-

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10. See *infra* Part IV.

11. See *infra* Parts VI & VII.

12. See The 2002 Changes to the ABA Model Rules of Professional Conduct, *supplementing* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003) [hereinafter ANNOTATED MODEL RULES].

These 2002 changes resulted from the work of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”), the ABA Commission on Multijurisdictional Practice (“MJP Commission”), and the ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”). *Id.* For a discussion of how these entities fit into the development of the Model Rules, see ANNOTATED MODEL RULES, *supra*, preface, at vii–viii.

13. See *infra* Parts VIII–X.

tion indifferent to the burdens it may impose on others. Not surprisingly, cases arise in which neither the plaintiff nor his counsel has reasonable grounds for initiating the litigation, but have proceeded simply in the hope that some basis for suit may materialize during discovery. Similarly, defendants often succumb to the temptations of liberal pleading and discovery rules, asserting sham defenses and counterclaims, and filing flurries of motions in the hope of discouraging the plaintiff and delaying a judgment.

For the most part, courts have eschewed any role in these pre-trial adversarial battles. Indeed, the Federal Rules of Civil Procedure specifically contemplate minimal judicial intervention at the discovery stage. Consequently, counsel are free to file “shotgun” complaints, to assert and explore all conceivable claims and defenses—to leave no stone unturned during discovery. The crushing burden on litigants and the courts which results when this system is exploited frequently culminates in a denial of justice.

In response to the flood of unchecked litigation abuse, intense pressures currently are being exerted on the legal profession for procedural and ethical reform. One manifestation of this is the proliferation of malicious prosecution actions against trial counsel. Within the profession, an [ABA] committee has labored to secure approval of a comprehensive revision of the [Model] Code of Professional Responsibility, including certain [M]odel [R]ules specifically addressed to counsel’s duty to expedite litigation and refrain from vexatious conduct. Additionally, the Judicial Conference of the United States has adopted yet another set of proposals for amending the Federal Rules of Civil Procedure, aimed at curbing abuses in pleading, motion practice and discovery.<sup>14</sup>

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14. Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN’S L. REV. 625, 626–29 (1982) (footnotes omitted).

Professor Underwood’s article further:

After surveying the topics of groundless litigation and delay, among other topics, Professor Underwood explained that:

Although there is considerable doubt regarding whether the [M]odel [R]ules will gain the support of the bar, they have provided secondary authority for the formulation of a more objective standard of culpability governing the imposition of . . . sanctions in the federal courts. Moreover, the emphasis throughout the [M]odel [R]ules upon balancing the legitimate interests of the client against the resultant delay has been carried forward in the proposed amendments to Federal Rules of Civil Procedure 7, 11 and 26. By allowing trial judges to determine whether a litigant's legitimate nondelay interests outweigh the delay which would accompany the particular motion or request, these provisions should encourage trial judges to sanction errant counsel with greater frequency and thus deter the abusive practices that, previously, often went unpunished.<sup>15</sup>

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[A]ddresse[d] the effectiveness of these recent developments and proposals, and discusse[d] them in the context of [then-] recent opinions illustrating the power of the trial judge to control the excesses of the adversary system. It reject[ed] the countersuit as a time-consuming and costly means of controlling litigation abuses, and [it] conclude[d] that "tinkering changes" in the rules of procedure cannot bring about true reform. It . . . urged . . . that the burden resulting from abuse of litigation can only be relieved by changes which foster stronger judicial control of adversarial ethics, and greater judicial involvement in the pretrial stages of litigation. Any proposed change or reform, therefore, [should be] evaluated from the perspective of whether the change will encourage trial judges to act resolutely in sanctioning errant counsel, without simultaneously producing a chilling effect on zealous advocacy.

*Id.* at 629 (footnotes omitted).

Professor Underwood has remained one of the leading commentators on litigation ethics. See, e.g., WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY* (2d ed. 2001 & Supp. 2003).

15. Underwood, *supra* note 14, at 668 (footnote omitted). See also Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 300-01 & n.5 (1986) ("Amended Rule 11 was part of a broader reform effort aimed at preventing abuse of the judicial system, especially by attorneys. Rule 11 empha-

This description of the pre-1983 litigation context and the resulting 1983 rules is offered to highlight that these rules were influenced by and emerged from the same intellectual discussion and for interrelated purposes, as succinctly explained by Professor Underwood.<sup>16</sup>

During the same time period, the intellectual discussion on this topic was being driven by the reality that the disciplinary process had ill-served the litigation arena in regards to frivolous conduct, because:

Attorneys can be disciplined for dilatory and abusive practices by their respective local bar associations. Under the Model Code of Professional Responsibility, an attorney has a duty not to delay a trial or act in any manner which would injure another. Furthermore, groundless or frivolous suits are prohibited. . . .

The problem with . . . sanctions being enforced by the bar is that they are extra-judicial in most cases and they do not provide restitution to the party injured by the delay in the litigation. Although local federal court rules often stipulate that attorneys admitted to practice before them are subject to the Model [Code of Professional Responsibility Disciplinary] Rules, the sanctions available are not frequently sought. More often the local bar is responsible for disciplining attorneys for unprofessional conduct. Usually only serious breaches of conduct warrant disbarment; and the deterrence value of other sanctions available through the bar is questionable. For the most part, attorneys and judges are reluctant to punish fellow members of their profession. When attorneys are sanctioned by the bar, the party injured by the improper conduct is not compensated. Although the bar can censure and fine attorneys, the infrequency with

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sizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously." Also, "Rules 16 and 26(g) were amended concurrently with Rule 11" to deal with frivolous conduct at pre-trial conferences and during discovery. (footnote omitted).

16. For a discussion of the development and history of these rules, compare GEORGENE M. VAIRO, *RULE 11 SANCTIONS* chs. 1 & 2 (Richard G. Johnson ed., 3d ed. 2004) (discussing history of Civil Rule 11), with *MODEL RULES HISTORY*, *supra* note 4, at 163–64 (discussing history of Model Rule 3.1).



which the bar imposes these sanctions makes them weak deterrents. The sanctions imposed by the bar do not adequately deter future dilatory practices, because they are not utilized frequently. Furthermore, although the sanctions penalize the attorney, justice is not served because the sanctions themselves do not make the injured party "whole."<sup>17</sup>

The challenge during this time period was to bridge the gap between the original 1937 version of Civil Rule 11 and the then-current 1980 Disciplinary Rule 7-102 by creating a mechanism whereby a trial court could both enforce litigation ethics and make the injured party whole, and this challenge resulted in the 1983 version of Civil Rule 11. Thus:

Among the more notable changes are the proposed amendments to Rules 7 and 11, which deal with motion and pleading practice. These changes have been proposed in response to appeals for the reform of motion and pleading practice to deter dilatory and abusive tactics in litigation. This deterrence would be achieved through the imposition of sanctions. More significantly, however, is that the proposed amendments authorized the award of reasonable attorney's fees incurred as a result of abusive delaying tactics.<sup>18</sup>

As explained later by Professor Judith A. McMorrow, the impact of this bridge between legal ethics and professional responsibility on the one hand and litigation conduct on the other was the beginning of the federalization of litigation ethics, to wit:

[P]ersuasive federalism is currently at work in the area of lawyer ethics. Traditionally, state courts have been the primary source for regulating lawyers and articulating stan-

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17. Francis X. Buckley, Jr., Comment, *Deterring Dilatory Tactics in Litigation: Proposed Amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure*, 26 ST. LOUIS U. L.J. 895, 896-97 (1982) (footnotes omitted).

18. *Id.* at 895 (footnotes omitted). See also VAIRO, *supra* note 16, § 1.05 (discussing the 1983 amendments to Rule 11).

As additional background regarding this pre-1983-amendment timeframe, the vexatious litigator statute, 28 U.S.C. § 1927, was amended in 1980 to allow for the imposition of costs, attorney's fees, and expenses, as sanctions for certain frivolous conduct. See generally VAIRO, *supra* note 16, § 12.03[a][2] (discussing history and purpose of section 1927).

dards of legal ethics. Although federal courts have asserted inherent power to regulate the attorneys before them in the past, they have not been the dominant voice in defining the lawyer's role in our adversary system. When the Supreme Court amended Federal Rule of Civil Procedure Rule 11 in 1983, it gave federal district courts express authority to take greater control over the conduct of attorneys appearing in federal court. Despite its application solely to cases before federal courts, Rule 11 has begun to change the discussion about what constitutes proper attorney conduct.

The question of proper attorney conduct is bound up with the question of the attorney's role in the adversary system. . . . [C]hanges in ethical requirements for lawyers result in subtle shifts in the balance of lawyers' obligations to themselves, to their clients, and to society. As Rule 11 becomes the focus of discussion, it emerges as a vehicle to federalize our vision of an attorney's proper role in the adversary system.

. . . .

The Model Code and the Model Rules have a strong client-centered focus, coupled with a heavy dose of self-protection. But Rule 11 is subtly changing this client-dominated approach. Perhaps this changed relationship is indeed a better balance among lawyer, client, and society. It is happening, however, largely through an adversarial model developed by federal courts rather than through lawyers' self-developed standards or through a process designed to have greater meaningful public input. Rule 11 may be emerging as a method for federal judges "to mold the bar in their own image."<sup>19</sup>

Judge William W Schwarzer, an influential and early commentator on Civil Rule 11, had earlier provided a foundation for Profes-

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19. Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYUL REV. 959, 959-60, 975 (footnotes omitted).

Professor McMorrow has remained one of the leading commentators on litigation ethics. See, e.g., JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, *MOORE'S FEDERAL PRACTICE: THE FEDERAL LAW OF ATTORNEY CONDUCT* (2001).

sor McMorrow's point: "Rule 11, in focusing on the professional responsibilities of lawyers, also vests in the federal courts greatly enlarged powers and obligations to enforce those responsibilities."<sup>20</sup> Judge Schwarzer had also noted that:

The profession has, however, long recognized limits to zealous advocacy. While these limits are not marked by bright lines, the lawyer's concurrent obligations as an officer of the court have been repeatedly and clearly articulated. In the 1969 Code of Professional Responsibility of the American Bar Association, lawyers were enjoined from advancing a claim or defense not warranted by existing law or a good-faith argument for its extension, modification or reversal, and from pursuing an action that would serve merely to harass another. Under the 1983 ABA Model Rules of Professional Conduct, lawyers are barred from asserting frivolous claims or defenses. These pronouncements reflect a substantial consensus of the profession and place a gloss on Rule 11.<sup>21</sup>

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20. William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 204 (1985).

21. *Id.* at 189–90 (footnotes omitted).

Judge Schwarzer had added that the duty of candor is a "settled principle[] explicitly or implicitly acknowledged in the ABA's Model Rules of Professional Conduct." *Id.* at 193 (footnote omitted).

Which came first, the chicken or the egg, has been debated within the Civil Rule 11 context to some degree. For instance, one authoritative practice guide and reporting service has stated that "Model Rule 3.1 requires a lawyer to have a basis that is 'not frivolous' for any claim, defense, or contention in a proceeding. The 'not frivolous' standard was adopted to track the standard generally used in the law of procedure." LAWS. MAN. ON PROF. CONDUCT ¶ 61:106 (ABA/BNA) (1999) (citing THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 119 (1987) (comments of the reporter, Professor Geoffrey C. Hazard, Jr.)). On the other hand, Professor Underwood has noted that "the emphasis throughout the [M]odel [R]ules upon balancing the legitimate interests of the client against the resultant delay has been carried forward in the proposed amendments to Federal Rules of Civil Procedure 7, 11 and 26." Underwood, *supra* note 14, at 668. Since the development of these rules took several years, there was probably a lot of cross-fertilization going on, and it is most likely not subject to proof at this time as to which came first.

However, the federalism of litigation ethics envisioned by Professor McMorrow never fully materialized, and it is still under debate,<sup>22</sup> because the federal courts ostensibly interpreted the 1983 version of Civil Rule 11 as creating a standard of care (negligence standard) instead of a code of conduct (breach of fiduciary duty standard), among other reasons to be discussed below.<sup>23</sup>

For instance, in the leading case of *Hays v. Sony Corp. of America*,<sup>24</sup> the Seventh Circuit explained that by:

Restating the standard in negligence terms helps one to see that Rule 11 defines a new form of legal malpractice, and there is thus no more reason for a competent attorney to fear being sanctioned under Rule 11 than to fear being punished for any other form of malpractice. The difference is merely in the victim. In the ordinary case of legal malpractice the victim is the lawyer's client. . . . In the Rule 11 setting the victims are the lawyer's adversary, other litigants in the court's queue, and the court itself. By asserting claims without first inquiring whether they have a plausible grounding in law and fact, a lawyer can impose on an adversary and on the judicial system substantial costs that would have been—and should have been—avoided by a reasonable prepleading inquiry.<sup>25</sup>

But, at the same time as the federal courts were using this malpractice/negligence analogy, and the resulting “reasonably competent attorney” objective test,<sup>26</sup> they were, in fact, creating a strict liability

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22. See *infra* Parts V & VI.

23. See *infra* Part VI.

24. 847 F.2d 412 (7th Cir. 1988).

25. *Id.* at 418–19. See Lee Ann Pizzimenti, Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561, 1561–90 (1980) (discussing the ineffectiveness of abuse of process and malicious prosecution lawsuits, payment of court costs, and discipline by the bar, for frivolous conduct; proposing that privity in legal malpractice lawsuits be relaxed, and that the duty of care be expanded, in order to allow such suits by victims of frivolous conduct against the opposing side's attorney in negligence; arguing that the same standard of care used in typical legal malpractice lawsuits should be used in the new proposal); see also VAIRO, *supra* note 16, § 5.03 (discussing application of the objective standard for Civil Rule 11 motions).

26. See VAIRO, *supra* note 16, §§ 5.02–.03 (discussing the adoption and application of the objective standard).

code of conduct from scratch rather than by application of the principles underlying Model Rule 3.1. This is so, because:

Under an objective approach, the court being asked to impose sanctions assesses frivolousness as a *matter of law* by examining the merits of the positions in light of governing legal authority.

In contrast, the older, subjective standard focuses on the lawyer's own intent and the presence or absence of good faith. Under a subjective standard, sanctions are not imposed as long as the lawyer in good faith believed the claim had merit.<sup>27</sup>

Thus, unlike legal malpractice cases,<sup>28</sup> where evidence on the standard of care is required to be introduced by expert testimony,<sup>29</sup> and the finder of fact is then left to apply the facts to the law and to reach a judgment,<sup>30</sup> the 1983 and 1993 Civil Rule 11 case law gave rise to a "standard of care" as a matter of law—not fact, which is nothing less than the creation of a separate code of conduct.<sup>31</sup>

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27. LAWS. MAN. ON PROF. CONDUCT ¶ 61:104 (ABA/BNA) (1999) (citations omitted; emphasis added) (discussing meritorious claims and standards for frivolousness).

28. For a comprehensive treatment of the law of legal malpractice, see RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE (5th ed. 2000 & Supp. 2003). For a survey of this topic, see DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE (1980 & Supp. 2003). For a concise treatment of this area, see JAY M. FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES ch. 7 (2000); and LAWS. MAN. ON PROF. CONDUCT ¶¶ 301:101–:917 (ABA/BNA) (1998–99). See also SECTION OF LITIG., A.B.A., BUSINESS TORTS LITIGATION ch. 6 (George F. McGunnigle, Jr. ed., 1992) (discussing in tandem liability for accountants and lawyers).

For those interested in avoiding legal malpractice claims, see DUKE NORDLINGER STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE (1983 & Supp. 2003). See also LAWS. MAN. ON PROF. CONDUCT ¶¶ 301:1001–:1019 (ABA/BNA) (2000); STANDING COMM. ON LAW. PROF'L LIAB., A.B.A., LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE (Lynne S. Bassis ed., 2d ed. 1999).

29. See, e.g., 5 MALLIN & SMITH, *supra* note 28, §§ 33.15–.19 (explaining use of expert witnesses in legal malpractice cases).

30. *Id.* § 33.24 (discussing proving the underlying action via a trial by judge or jury).

31. *E.g.*, *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985) ("Because of our reluctance to constrain the discretion of attorneys in the vigorous advocacy of their clients' interests, we penalize them only where they have

In result, the case law that has developed since 1983 has reinvented the wheel,<sup>32</sup> when the courts could have just as easily looked to the already existing ABA Model Rules or Model Code then governing attorneys.<sup>33</sup> As catalogued by Professor Georgene M. Vairo in her exhaustive treatise on Civil Rule 11, this reinvention has created much confusion in the case law,<sup>34</sup> arguably because the courts have articulated a factual test to which they have paid only lip-service,<sup>35</sup> while all the time applying a legal test, which they have created without acknowledgment.<sup>36</sup>

Imagine what would happen if for the last twenty years, the federal courts had said that Civil Rule 11 would be governed by the reasonably competent attorney standard, imagine what would happen if no evidence was ever taken as to what that standard was, and imagine what would happen if the courts had made up *ad hoc* their own proxies for Model Rule 3.1 via Civil Rule 11. Now open your eyes to the jurisprudence of Civil Rule 11. If the courts were going to decide these cases as matters of law, why did they choose to ignore the

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failed to maintain a minimum standard of professional responsibility.”), *cert. denied sub nom.* Hyde v. Van Wormer, 474 U.S. 827 (1985).

32. See *infra* Part VII.

33. See *infra* notes 42–52 and accompanying text.

34. See, e.g., VAIRO, *supra* note 16, § 2.03 (discussing the attempts to interpret the 1983 amendments to Civil Rule 11).

35. For instance, there are no Civil Rule 11 cases that even discuss the admissibility of expert testimony in such proceedings. Author’s statistic determined by a LEXIS search conducted on Sep. 15, 2003 in the combined federal court cases library: [rule 11 /s expert /s admitt!]. No date restriction was used for this search.

36. For instance, there are no Civil Rule cases that even define the standard of proof or weight of evidence needed to support a sanctions finding. Author’s statistic determined by LEXIS searches conducted on Sep. 15, 2003 in the combined federal court cases library: [rule 11 /s “standard of proof” but not criminal]; [rule 11 /s “standard of evidence” but not criminal]; [rule 11 /s “clear and convincing” but not criminal]; [rule 11 /s “weight of evidence” but not criminal]; and [rule 11 /s “weight of the evidence” but not criminal]. No date restrictions were used for these searches.

This statistic is supported by the general sanctions literature. See GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 17(A)(5) (3d ed. 2000 & Supp. 2003) (noting that while the standard of proof or weight of evidence issue has not been directly addressed by the courts, some courts seem to have applied a preponderance of evidence standard, while others seem to have applied a clear-and-convincing evidence standard).

mandatory legal standards imposed upon all lawyers by Model Rule 3.1 or its predecessor Disciplinary Rule 7-102? This is the central inquiry of this Article.

After presenting the primary litigation ethics rules (Model Rules 3.1–3.4) and Civil Rule 11 in Parts II and III,<sup>37</sup> this Article examines the impact these litigation ethics rules have had on the Civil Rule 11 case law in Part IV.<sup>38</sup> Then, in Part V,<sup>39</sup> it discusses the criticism of using Civil Rule 11 to enforce these litigation ethics rules; and in Parts VI and VII,<sup>40</sup> this Article attempts to explain why these litigation ethics rules have generally been separated from Civil Rule 11 analysis as well as the consequences that have flowed there from. Finally in Parts VIII–X,<sup>41</sup> this Article explains why the litigation ethics rules should be the Civil Rule 11 standard for attorneys; it proposes a revision to Civil Rule 11 that integrates it with legal ethics and professional responsibility law; and it concludes that it is the obligation of the courts to enforce the litigation ethics rules, among others, through Civil Rule 11.

## II. PRIMARY LITIGATION ETHICS RULES

So what are these relevant litigation ethics rules?

The current ABA Model Rules of Professional Conduct contain numerous provisions that relate to legal ethics and professional responsibility in the litigation context, although the primary one is Model Rule 3.1:<sup>42</sup>

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37. See *infra* notes 42–54 and accompanying text.

38. See *infra* notes 55–125 and accompanying text.

39. See *infra* notes 126–147 and accompanying text.

40. See *infra* notes 148–200 and accompanying text.

41. See *infra* notes 201–225 and accompanying text.

42. There are many other Model Rules that relate to civil litigation, such as 3.5 (Impartiality and Decorum to the Tribunal), 3.6 (Trial Publicity), 3.7 (Lawyer as Witness), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), 4.4 (Respect for Rights of Third Persons), 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of Subordinate Lawyer), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 5.5 (Unauthorized Practice of Law; Multi-jurisdictional Practice of Law), and 5.6 (Restrictions on Right to Practice). In addition, many of the rules regarding the client-lawyer relationship, Model Rules 1.1 through 1.18, can impact civil litigation in many ways, such as in disqualification motions, fee applications, etc.

Rule 3.1 is one of many prohibitions against frivolous or baseless conduct in the course of litigation. Rule 3.4(d) bars frivolous pretrial discovery requests, and Rule 3.2 requires reasonable efforts to expedite litigation. A federal statute, 28 U.S.C. § 1927, penalizes lawyers who “unreasonably and vexatiously” multiply litigation; 28 U.S.C. § 1912 and Rule 38 of the Federal Rules of Appellate Procedure address frivolous appeals.

Rule 3.1 parallels and is best analyzed in tandem with Rule 11 of the Federal Rules of Civil Procedure.<sup>43</sup>

Model Rule 3.1, in addition to Model Rules 3.2 through 3.4, are set forth below (the “litigation ethics rules”), as these all impact Civil Rule 11.<sup>44</sup>

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43. ANNOTATED MODEL RULES, *supra* note 12, § 3.1, at 320–21 (citations omitted).

“For a full analysis of [Civil] Rule 11 and the interplay between [it and Model] Rule 3.1,” *id.* at 321, *compare* LAWS. MAN. ON PROF. CONDUCT ¶¶ 61:101–:125 (ABA/BNA) (1999) (discussing meritorious claims), *with id.* at ¶¶ 61:151–:189 (1994) (discussing Civil Rule 11). For a discussion of the relationship between Civil Rule 11 and Model Rules 3.2 & 3.4, see *id.* at ¶¶ 61:201–:203 (1996) (discussing expediting litigation). For a partial discussion of Model Rule 3.3, see *id.* at ¶¶ 61:301–:308 (1997) (discussing candor toward tribunals). For a survey of all of the remedies for frivolous conduct, see *id.* at ¶¶ 61:101–:125 (1999) (discussing professional discipline, Civil Rule 11, 28 U.S.C. § 1927, 28 U.S.C. § 1912 & Appellate Rule 38, Supreme Court Rule 49.2, inherent power, and tort liability). See *generally* JOSEPH, *supra* note 36, *passim* (detailed discussion of just these civil sanctions rules and statutes expanded to include sanctions under pre-trial, discovery, and local court rules, but not discussing professional discipline, the Supreme Court Rule, or tort liability).

44. See *generally* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* ch. 26 (3d ed. 2001 & Supp. 2003) (overall discussion of Part 3 of the Model Rules, which focus on the lawyer as advocate, their relationship with other parts of the Model Rules, and their relationship with the *Restatement (Third) of the Law Governing Lawyers*).



*A. Meritorious Claims and Contentions (Model Rule 3.1)*<sup>45</sup>

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>46</sup>

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45. For a general discussion of the law in this area, see RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* ch. 22 (2002) (discussing Model Rule 3.1 & Civil Rule 11). See also ANNOTATED MODEL RULES, *supra* note 12, § 3.1 (noting the 2002 change deleting client's motivation as a factor, among others, because it is irrelevant to an objective analysis; discussing relevant disciplinary cases under the rule); 2 HAZARD & HODES, *supra* note 44, at ch. 27 (detailed discussion of Model Rule 3.1 and Civil Rule 11 in comparison to the *Restatement (Third) of the Law Governing Lawyers* section 110(1 & 2)); LAWS. MAN. ON PROF. CONDUCT ¶¶ 61:101-:125 (ABA/BNA) (1999) (discussing meritorious claims).

46. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

The comments to this rule are as follows:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

*B. Expediting Litigation (Model Rule 3.2)*<sup>47</sup>

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”<sup>48</sup>

[3] The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

*Id.* cmts. 1–3.

The comparison to the Model Code is as follows:

DR 7-102(A)(1) provided that a lawyer may not “[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from “merely to harass or maliciously injure another” to the requirement that there be a basis for the litigation measure involved that is “not frivolous.” This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if “it can be supported by good faith argument for an extension, modification, or reversal of existing law.” Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer “knows or when it is obvious” that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no non-frivolous basis for defense.

MODEL RULES HISTORY, *supra* note 4, at 163–64.

47. For a general discussion of the law in this area, see ROTUNDA, *supra* note 45, § 23-1 (discussing Model Rule 3.2). See also ANNOTATED MODEL RULES, *supra* note 12, § 3.2 (noting the 2002 change expanding the scope of when an attorney may engage in delay; discussing relevant disciplinary cases under the rule); 2 HAZARD & HODES, *supra* note 44, at ch. 28 (detailed discussion of Model Rule 3.2 and Civil Rule 11 in comparison to the *Restatement (Third) of the Law Governing Lawyers* section 106 cmt. e); LAWS. MAN. ON PROF. CONDUCT ¶¶ 61:201–:203 (ABA/BNA) (1996) (discussing expediting litigation).

48. MODEL RULES OF PROF’L CONDUCT R. 3.2 (2003).

The comment to this rule is as follows:

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful

C. *Candor Toward the Tribunal (Model Rule 3.3)*<sup>49</sup>

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than

redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

*Id.* cmt. 1.

The comparison to the Model Code is as follows:

DR 7-101(A)(1) stated that a lawyer does not violate the duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provided that a lawyer "shall not . . . file a suit, assert a position, conduct a defense [or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

MODEL RULES HISTORY, *supra* note 4, at 165.

49. For a general discussion of the law in this area, see ROTUNDA, *supra* note 45, at ch. 24 (discussing Model Rule 3.3). See also ANNOTATED MODEL RULES, *supra* note 12, § 3.3 (noting the 2002 change no longer requiring that the misrepresentation be material and requiring the lawyer to correct mistakes and take remedial measures, among others; discussing lawyer's role as an officer of the court and the corresponding duty of candor; discussing relevant disciplinary cases under the rule); 2 HAZARD & HODES, *supra* note 44, at ch. 29 (detailed discussion of Model Rule 3.3 and Civil Rule 11 in comparison to the *Restatement (Third) of the Law Governing Lawyers* sections 105, 111 & 120); LAWS. MAN. ON PROF. CONDUCT ¶¶ 61:301-:125 (ABA/BNA) (1997) (discussing candor toward tribunals).

the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.<sup>50</sup>

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50. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003).

The comments to this rule are as follows:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

*Representations by a Lawyer*

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordi-

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narily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

#### *Legal Argument*

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

#### *Offering Evidence*

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable be-

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lief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

#### *Remedial Measures*

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose

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the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

*Preserving Integrity of Adjudicative Process*

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

*Duration of Obligation*

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

*Ex Parte Proceedings*

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

*Withdrawal*

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client.

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Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

*Id.* cmts. 1-15.

The comparison to the Model Code is as follows:

Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

Paragraph (a)(2) is implicit in DR 7-102(A)(3), which provided that "a lawyer shall not . . . knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) is substantially identical to DR 7-106(B)(1).

With regard to paragraph (a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of paragraph (a)(4) resolves an ambiguity in the Model Code concerning the action required of a lawyer who discovers that the lawyer has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, did not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provided that a lawyer "who receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud upon . . . a tribunal shall [if the client does not rectify the situation] . . . reveal the fraud to the . . . tribunal . . ." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently required disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer had a duty to disclose the perjury.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the Model Code to paragraph (d).

MODEL RULES HISTORY, *supra* note 4, at 170-71.



*D. Fairness to Opposing Party and Counsel (Model Rule 3.4)*<sup>51</sup>

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and

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51. For a general discussion of the law in this area, see ROTUNDA, *supra* note 45, at ch. 24 (discussing Model Rule 3.4). See also ANNOTATED MODEL RULES, *supra* note 12, § 3.4 (discussing relevant disciplinary cases under the rule); 2 HAZARD & HODES, *supra* note 44, at ch. 30 (detailed discussion of Model Rule 3.4 and Civil Rule 11 in comparison to the *Restatement (Third) of the Law Governing Lawyers* sections 105–107, 110 & 116–117); LAWS. MAN. ON PROF. CONDUCT ¶¶ 61:701–:729 (ABA/BNA) (1997) (discussing fairness to opposing party).

For a detailed discussion of the law regarding spoliation of evidence, see MARGARET M. KOESEL, DAVID A. BELL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* (Daniel F. Gourash ed., 2000).

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.<sup>52</sup>

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52. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2003).

The comments to this rule are as follows:

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

*Id.* cmts. 1-4.

The comparison to the Model Code is as follows:

With regard to paragraph (a), DR 7-109(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that a lawyer "shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness . . ." DR 7-106(C)(7) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

## III. CIVIL RULE 11

The above-referenced litigation ethics rules, among others, are implicitly enforced by, or *de facto* impact the enforcement of, Civil Rule 11, in addition to being used within the disciplinary context. Both the 1983 and 1993 versions of Civil Rule 11 appear below.

## A. 1983 Version

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney

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With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(c) [sic] provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (c) is substantially similar to DR 7-106(A), which provided that "A lawyer shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Paragraph (d) has no counterpart in the Model Code.

Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to paragraph (f), DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. 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. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.<sup>53</sup>

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53. FED. R. CIV. P. 11 (1983) (Signing of Pleading, Motions, and Other Papers; Sanctions). *See also id.* at advisory committee's note (explaining the history and reasons for its revision).

The 1983 version of Rule 11 was technically amended in 1987, but those amendments were nonsubstantive. FED. R. CIV. P. 11 (1987) (Signing of Pleading, Motions, and Other Papers; Sanctions); *see also id.* at advisory committee's note (stating same).

The original 1937 version of Rule 11 provided as follows:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the aver-

*B. 1993 Version*

**(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are

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ments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. 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 intent to defeat the purpose of this 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. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1937) (Signing of Pleadings); *see also id.* at advisory committee's note (explaining the history and reasons for its enactment).

likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

**(1) How Initiated.**

**(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

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

**(2) Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanc-

tion may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

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

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

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

(d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.<sup>54</sup>

#### IV. IMPACT OF LITIGATION ETHICS RULES ON CIVIL RULE 11 CASE LAW

Given the fact that state litigation ethics rules—whether based upon the Model Code or the Model Rules—are mandatory for every lawyer practicing within that state, and given the fact that they are usually adopted by the federal courts within those jurisdictions,<sup>55</sup> one might expect that a civil rule allowing private enforcement of these

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54. FED. R. CIV. P. 11 (1993) (Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions); *see also id.* at advisory committee's note (explaining the history and reasons for its revision).

55. *See* MCMORROW & COUILLETTE, *supra* note 19, § 802.01 (discussing as of June 2001 how most federal courts govern attorney conduct by local rules that either adopt the rules of the state jurisdiction as modified (87%), the ABA rules verbatim (6%), or some sort of unique conduct rules—or no conduct rules altogether (remainder)). “For a chart of the various district court’s treatment of attorney conduct, see § 802.06.” *Id.*

rules by opposing parties in federal litigation would have engendered a lot of discussion within the sanctions case law. However, there has been almost no discussion of these litigation ethics rules in Civil Rule 11 decisions; specifically, from 1983 to date, only nine circuit court of appeals opinions have discussed the applicable litigation ethics rules in this context,<sup>56</sup> even though Civil Rule 11 gave rise to over 6,000 decisions within the first decade (1983 version),<sup>57</sup> and over 2,000 decisions within the second decade (1993 version).<sup>58</sup> The same search turned-up only seventeen such district court opinions.<sup>59</sup>

Even where the case law discussed the applicable litigation ethics rules, the discussion was generally superficial.<sup>60</sup> Not a single circuit court explicitly adopted these litigation ethics rules as the standard for Civil Rule 11,<sup>61</sup> and one circuit court actually rejected them as the standard over a rehearing *en banc* denial dissent by four judges of the Ninth Circuit.<sup>62</sup> One circuit court and a smattering of district courts seem to have implicitly adopted them as the standard;<sup>63</sup> but

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56. Author's statistic determined by a LEXIS search conducted on Sep. 22, 2003 in the combined federal court cases library: [sanctions /p (11 /s 3.1 or 3.2 or 3.3 or 3.4) and date(>1/1/1983)]. False positives were excluded; additional research was conducted. No research design is perfect, and additional cases would surely be found if the search was coordinated with the other sanctions rules and statutes besides Civil Rule 11.

57. See VAIRO, *supra* note 16, § 2.02[b][1][A] (discussing the Rule 11 cottage industry).

58. See Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765 (2004) (discussing empirical research conducted by Professor Joy on the incidence of Civil Rule 11 cases).

59. Author's statistic determined by a LEXIS search conducted on Sep. 22, 2003 in the combined federal court cases library: [sanctions /p (11 /s 3.1 or 3.2 or 3.3 or 3.4) and date(>1/1/1983)]. False positives were excluded; additional research was conducted. False positives were excluded; additional research was conducted. No research design is perfect, and additional cases would surely be found if the search was coordinated with the other sanctions rules and statutes besides Civil Rule 11.

60. See *infra* notes 65–82 and accompanying text.

61. See *id.*

Note that one circuit court seems to have implicitly adopted the litigation ethic rules as the standard. See *infra* notes 120–21 and accompanying text.

62. See *infra* notes 83–96 and accompanying text.

63. See *infra* notes 97–123 and accompanying text.



given the enormous number of Rule 11 cases, when so few courts have even addressed the issue, it is hard to describe this as creating a standard for the federal courts. This finding is consistent with the limited use of the Model Rules, in general, by the federal courts.<sup>64</sup>

Since so few cases have discussed the litigation ethics rules in this context, it may be useful to review what these courts have said about this interaction, and more specifically how they said it, with the hope that this review might shed some light on the apparent disconnect between these rules.

### A. *Litigation Ethics Rules Discussed Superficially*

Several federal court opinions have discussed the relevant litigation ethics rules within the context of Civil Rule 11, but they have done so only superficially and without analysis as to whether these rules give rise to a sanctions standard.

For instance, in *Lepucki v. Van Wormer*,<sup>65</sup> in upholding Rule 11 and 28 U.S.C. § 1927 sanctions against the plaintiff's counsel, and in issuing Appellate Rule 38 sanctions against him in addition to referring him to the state disciplinary authorities, the Seventh Circuit observed that:

Our system of jurisprudence is designed to insure [sic] that all disputants with colorable claims have access to the courthouse. Relatively low barriers to entry have, however, generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous. These claims clog court dockets and threaten to undermine the ability of the judiciary to efficiently administer the press of cases properly before it. Perhaps the greatest safeguard against this danger is the integrity and good sense of practicing lawyers who, as officers of the court, have both an ethical and a legal duty to screen the claims of their clients for factual veracity and legal sufficiency. Model Rule of Professional Conduct 3.1

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64. See MCMORROW & COUILLETTE, *supra* note 19, § 802.20[1] (describing research studies showing that Model Rules are infrequently used in federal court, and some rules are not used at all).

65. 765 F.2d 86 (7th Cir. 1985), *cert. denied sub nom.* Hyde v. Van Wormer, 474 U.S. 827 (1985).

(1983); Fed.R.Civ.P. 11. Lawyers have a unique opportunity to counsel restraint or recklessness, to craft imaginative arguments or to press empty challenges to well-settled principles. Because of our reluctance to constrain the discretion of attorneys in the vigorous advocacy of their clients' interests, we penalize them only where they have failed to maintain a minimum standard of professional responsibility. But we will not overlook such a failure when it occurs, in part because it evidences disdain for the public, whose claims lie dormant because frivolous suits have diverted away scarce judicial resources, disdain for adversaries, who must expend time and money to defend against meritless attacks, and disdain for clients, whose trust is rewarded with legal bills, dismissals, and court-imposed sanctions.<sup>66</sup>

However, the *Lepucki* court did not analyze the sanctions issue in terms of Model Rule 3.1, nor did it articulate a standard for future litigants.<sup>67</sup> Essentially, the court used Model Rule 3.1 and Civil Rule

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66. *Id.* at 87.

67. Likewise, in *Draper & Kramer, Inc. v. Baskin-Robbins, Inc.*, 690 F. Supp. 728 (N.D. Ill. 1988), the court *sua sponte* sanctioned the plaintiffs' lawyers under Civil Rule 11, and it noted that:

Rule 11 is not a toy. A lawyer who transgresses the rule abuses the special role our legal system has entrusted to him. He can suffer severe financial sanctions and, if his misconduct persists, he can find himself before a disciplinary commission. In short, a Rule 11 violation is a serious thing, and an accusation of such wrongdoing is equally serious.

*Id.* at 732 (citations omitted, but citing Model Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.")).

In a similar vein, in *McKenzie v. Crotty*, 738 F. Supp. 1287 (D.S.D. 1990), the court advised the defendants' counsel that it was considering imposing sanctions against him, *id.* at 1290, and it stated that:

Although [the] plaintiff has not moved for sanctions, the Court has inherent power to impose sanctions for abusive litigation practices. This power is recognized in Fed.R.Civ.P. 11, which states that "the court, upon motion or upon its own initiative, shall impose" sanctions against a party or his attorney for interposing a motion which is not well grounded in existing law or is interposed for an improper purpose. *Cf.* South Dakota Rules of Professional Conduct DR 3.1. The Court may also sanction defendants' attorney, under 28 U.S.C. § 1927,

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for unreasonably and vexatiously multiplying the proceedings in the case.

*Id.* at 1289 (citations omitted).

Following *Draper & Kramer*, in *Mid America Title Co. v. Kirk*, No. 86-C-2853, 1991 U.S. Dist. LEXIS 11168 (N.D. Ill. Aug. 7, 1991), *rev'd & remanded on other grounds*, 991 F.2d 417 (7th Cir. 1993), *cert. denied*, 510 U.S. 932 (1993), the magistrate judge recommended the imposition of Rule 11 sanctions against the plaintiff's counsel, and it cited Model Rule 3.3 without discussion, as follows:

We conclude that [the defendant's] counsel did not violate Rule 11 in filing this motion [to dismiss]. We further conclude that in demanding sanctions without a reasonable basis [the plaintiff's] counsel did. Rule 11 permits sanctions against a party who files a groundless request for sanctions. A Rule 11 claim, like anything else a lawyer puts into papers filed with the court, must be based on a reasonable review of the law and the facts. It is the law that a court can find a copyright invalid on legal grounds, notwithstanding its acceptance for registration. It is also the law that an advocate may disagree with the opinion of another district judge as to the meaning of a Court of Appeals decision.

A Rule 11 claim is a potent weapon, but he who shoots from the hip may shoot himself in the foot. As Judge Duff said in *Draper & Kramer, Inc. v. Baskin-Robbins, Inc.*:

This court appreciates that attorneys involved in heated litigation often employ rhetoric stronger than necessary, and the court can tolerate arguments harsher in tone than appropriate. This tolerance ends, however, when arguments turn into accusations of professional misconduct.

Rule 11 is not a toy. A lawyer who transgresses the rule abuses the special role our legal system has entrusted to him. He can suffer severe financial sanctions and, if his misconduct persists, he can find himself before a disciplinary commission. *See, e.g.*, Model Rule of Professional Responsibility 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."). In short, a Rule 11 violation is a serious thing, and an accusation of such wrongdoing is equally serious.

The court accordingly recommends a finding that [the plaintiff's] counsel . . . violated Rule 11 in asking for sanctions without proper grounds. Since [the defendant's] counsel's response consisted of one footnote, an award of attorney's fees of \$150 would be appropriate. We hope this modest penalty will encourage counsel to think carefully before accusing opponents of improper conduct and adding a spurious sanctions issue to a legitimate dispute.

*Id.* at \*31-\*33 (citations omitted, but citing *Draper & Kramer, Inc. v. Baskin-Robbins, Inc.*, 690 F. Supp. 728, 732 (N.D. Ill. 1988)).

11 merely to lecture the attorneys as to their obligations as officers of the court.

In *Harris v. Heinrich*,<sup>68</sup> the Eleventh Circuit reversed Rule 11 sanctions that had been awarded against the plaintiff, and it remanded the case for specific findings to support the same; but it noted in passing that:

The fact that an attorney was willing to take the appeal also supports [the plaintiff's] argument that it is inappropriate to impose Rule 11 sanctions on him. *Cf.* ABA Model Rules of Professional Conduct 3.1 (a lawyer shall not bring claims unless there is a basis for doing so that is not frivolous). On remand the district court should address this inconsistency.<sup>69</sup>

Thus, the *Harris* court reasoned that the attorney's assumed compliance with Model Rule 3.1 should have been a factor in analyzing whether Civil Rule 11 sanctions should have been imposed.<sup>70</sup>

In *DiSante v. Litton Industrial Automation Systems, Inc.*,<sup>71</sup> the Sixth Circuit affirmed a minimal Rule 11 sanction award against the

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The disposition of the magistrate's report and recommendation by the district court was not reported or otherwise available on-line.

68. 919 F.2d 1515 (11th Cir. 1990).

69. *Id.* at 1517.

70. In a similar vein, in *Woods-Leber v. Hyatt Hotels of Puerto Rico, Inc.*, 951 F. Supp. 1028 (D.P.R. 1996), *aff'd*, 124 F.3d 47 (1st Cir. 1997), in granting the defendants' motion for summary judgment, the court noted in passing that:

The plaintiffs' claims . . . were not merely novel, but came perilously close to the frivolous, given that no colorable argument could be made . . . . Although the claims did not cross the line into frivolousness, the plaintiffs should be aware that the filing of an opposition based on frivolous arguments may result in judicial sanctions under Rule 11. *See* Fed.R.Civ.P. 11(b)(2). Furthermore, although attorneys have an ethical duty to vigorously advocate their clients' interests, so, too, do they have an ethical duty not to assert frivolous positions. *See* Rule 3.1, Local Rules of Professional Responsibility (Local Rules of the Court App. II) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

*Id.* at 1035 n.5.

71. 928 F.2d 404 (6th Cir. 1991) (unpublished table decision), *opinion available at* 1991 U.S. App. LEXIS 4711.

plaintiff, but it rejected the trial court's finding and conclusion that the defendant had violated various litigation ethics rules. The court, without commenting as to whether the litigation ethics rules should have been taken into account, explained that:

The district court found in an oral opinion that the factual allegations of the complaint were not well grounded in fact and that no reasonable pre-filing inquiry had been made. . . . At a later hearing the district court reaffirmed this ruling, noting, however, the difficulty in conducting a pre-filing inquiry when a prospective defendant possesses most of the relevant information. It imposed sanctions in the amount of \$250.00, rather than the much larger amount of attorney fees [the] defendant actually incurred between the filing of the complaint and its dismissal.

In selecting what it termed a "minimal" sanction, the district court reasoned as follows::

[The] [d]efendant . . . was uncooperative from the start other than making a nominal offer of judgment, which led to a great deal of delay in the resolution of this matter. [The] [p]laintiff has had to file motions of various kinds including a motion to compel. . . . [The] [p]laintiff could have deposed various people within the corporation . . . but chose to wait . . . for the documents requested to better structure the depositions. . . . When the [d]efendants finally complied after stonewalling for weeks and months, [the] [p]laintiffs withdrew their opposition to [the] [d]efendant's motion for summary judgment. . . . If the [d]efendants had been more cooperative from the start, the [p]laintiffs would have dismissed the suit earlier and the court would not presently be dealing with a Rule 11 motion.

The district court then stated its view that there was a serious question whether defense counsel complied with Rule 3.2 or 3.4 of the Model Rules of Professional Conduct. Rule 3.2 requires a lawyer to make reasonable efforts to expedite litigation, consistent with the interests of his client. The district court opined that [the] defendant's "stonewalling" was not a reasonable effort to expedite litigation. Rule

3.4 mandates that a lawyer make a reasonably diligent effort to comply with a legally proper discovery request. The district court said that [the] defendant's activity in discovery was "questionable."

The district court concluded its remarks by saying that [the] defendant "could have avoided this whole thing by being forthright, coming up with the evidence that showed they had no case, presenting it to the [p]laintiff." In the court's opinion, [the] "[d]efendant was obstructive and uncooperative throughout discovery and hence practically all of the attorney fees accumulated by [the] [d]efendant could be attributed in part to [the] [d]efendant's own lack of cooperation."

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The trial court also properly considered Rule 11's goal of compensating opponents of Rule 11 violators. In connection with this issue, it correctly found the fact that much of [the] defendants' attorneys fees were attributable to its own strategy choices in responding to the litigation. The attorneys fees sought by [the] defendants exceeded \$200,000.00. Given the procedural posture of this case and the very limited discovery conducted, obvious questions exist concerning the reasonableness of the requested fee. The district court could have elected to award the amount of reasonable attorneys fees as a sanction, but it was not required to do so. Moreover, "[a] reasonableness inquiry necessarily requires a determination as to what extent [the defendant's] expenses and fees could have been avoided and were self-imposed." The trial court made a determination here that virtually all [the] defendant's fees could have been avoided. It could have decided that no monetary sanction at all was warranted, and its award of a minimal sanction cannot be considered an abuse of discretion.

This court disagrees, however, with the implication in the district court's ruling that defense counsel violated ethical rules in this litigation—an implication unsupported by the record. To be sure, [the] defendant chose to resist vigor-

ously [the] plaintiffs' request for document production. Its choice perhaps resulted in the district court's choice of a minimal \$250.00 sanction. Yet there is nothing to suggest that [the] defendant's strategy decision was without any legal or factual basis, particularly in view of the rulings of the magistrate and district court on [the] plaintiffs' motion to compel.

The magistrate ruled that defendant was required to produce the documents, but said its position had "reasonable justification." The district court modified the magistrate's ruling in [the] defendant's favor, thus concluding that, to some extent, its objections had merit. Under these circumstances, the court cannot say that defendant acted inappropriately or unethically. Rather, [the] defendant simply made strategy decisions for which the district court could conclude, in its discretion, that [the] defendant should bear the cost.<sup>72</sup>

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72. 1991 U.S. App. LEXIS 4711, at \*7-\*13 (citations omitted).

Likewise, in *Saturn Systems, Inc. v. Saturn Corp.*, 659 F. Supp. 868 (N.D. Minn. 1987), in sanctioning the plaintiff's counsel, the court noted that "[t]he source of these errors may lie in plaintiff's counsel's failure to cite or discuss the Supreme Court's decision in [the controlling case] despite the fact that that decision sets forth the principles which determine proper venue in a Lanham Act case." *Id.* at 870 (footnote omitted). However, the court noted that:

Counsel's conduct in this regard did not offend the applicable standards of professional conduct, and this court does not base its decision to impose sanctions on a violation of these standards. The Code of Professional Responsibility of the American Bar Association, which D.Minn.R. 1(C) obligates counsel to observe, requires disclosure of adverse authority only if the authority in question is not disclosed by opposing counsel. A.B.A. Code of Prof. Resp. DR 7-106(B)(1). Counsel's obligation to disclose adverse authority under the Minnesota Rules of Professional Conduct is subject to the same qualification. Minn.R.Prof. Conduct 3.3(a)(3). Defendant's initial memorandum in support of its motion to dismiss or transfer cited and discussed both . . . decisions, thus relieving plaintiff's counsel of his obligation under these rules to disclose them. Defendant's disclosure of these decisions, however, did not relieve plaintiff's counsel of his obligation to undertake the reasonable prefiling inquiry required by Rule 11, an obligation counsel had already violated.

*Id.* at 870 n.2.

Thus, while the *DiSante* court found that one court's frivolous conduct is another's legitimate trial strategy, and while it disagreed with the trial court as to whether the defense counsel had acted unethically, it upheld the trial court's underlying reasoning as to why the sanctions awarded should be so low compared to the amount requested.

In *Hendrix v. Page (In re Hendrix)*,<sup>73</sup> the Seventh Circuit ordered the appellant's insurance carrier's counsel to show cause why he should not be sanctioned under Appellate Rules 38 and 46(c) for failing to cite controlling adverse authority, and it discussed Civil Rule 11 as follows:

Although . . . the circuits are divided (and we have not taken sides) on whether a failure to acknowledge binding adverse precedent violates Fed. R. Civ. P. 11, if [the appellant's] counsel *knowingly* concealed dispositive adverse authority it engaged in professional misconduct. *ABA Model Rules of Professional Conduct Rule 3.3(a)(3)* (1983) [sic]. The inference would arise that it had filed the appeal for purposes of delay, which would be an abuse of process and thus provide an additional basis for imposition of sanctions under Fed. R. App. P. 38 ("damages for delay"). A frivolous suit or appeal corresponds, at least approximately, to the tort of malicious prosecution, that is, groundless litigation; a suit or appeal that is not necessarily groundless but was filed for an improper purpose, such as delay, corresponds to—indeed is an instance of—abuse of process. Both, we hold, are sanctionable under Rule 38. . . .

. . . Rule 46(c) of the appellate rules authorizes us to discipline lawyers who practice before us. In deciding whether a lawyer has engaged in conduct sanctionable under that rule, we have looked not only to the rules of professional conduct but also to Rule 11 of the civil rules, which makes it sanctionable misconduct for a lawyer to sign a

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As a result, the *Saturn Systems* court sanctioned the plaintiff's counsel under Civil Rule 11 and 28 U.S.C. § 1927, *id.* at 871–72, but it did not explain what it would have done if it had found a violation of the relevant litigation ethics rules.

73. 986 F.2d 195 (7th Cir. 1993).



pleading or other paper, including a brief, if he has failed to make a reasonable inquiry into whether his position "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." Reasonable inquiry would have turned up [the controlling case].<sup>74</sup>

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74. *Id.* at 201 (citations omitted).

In a similar vein, in *Loftus v. Southeastern Pennsylvania Transportation Authority*, 8 F. Supp. 2d 458 (E.D. Pa. 1998), *aff'd mem.*, 187 F.3d 626 (3d Cir. 1999) (unpublished table decision), *cert. denied*, 528 U.S. 1047 (1999), the court imposed *sua sponte* sanctions under 28 U.S.C. § 1927 on the plaintiff's counsel, as Civil Rule 11 was not available under the circumstances of the case, as follows:

"In determining whether imposition of the sanctions contemplated by § 1927 is called for, the question to be addressed is whether the attorney sought to be sanctioned is fairly chargeable with actions taken which are tantamount to willful bad faith." The Court of Appeals for the Third Circuit has stated that the "intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay" may be indicative of bad faith. When a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense, bad faith can be implied. Additionally, "even if a lawsuit was initially filed in good faith, sanctions may be imposed on an attorney for all costs and fees incurred after the continuation of the lawsuit which is deemed to be in bad faith." "Courts, however, should be cautious in awarding counsel fees for fear of chilling the [litigants] exercise of constitutional rights."

A number of factors serve to convince the Court that the continuing prosecution of this case by [the plaintiff's counsel], once the Third Circuit had decided the [adverse controlling] case, was in willful bad faith. First, the material facts underlying the [that] case and [the plaintiff's] case were identical, i.e., both the [adverse controlling case] plaintiff and the instant plaintiff were terminated by [the defendant] for violation of [the defendant's] drug and alcohol testing policies and each sought to arbitrate their grievances pursuant to the same collective bargaining agreement. Second, the legal theories advanced in Count II of the [adverse controlling] case were identical to those advanced in the instant case, i.e., each plaintiff claimed that [the defendant] and [the union] conspired to deprive him of his due process right to pursue his grievances to arbitration. Third, the Third Circuit's decision in [the adverse controlling case] that the claim was flawed because, under state law, [the adverse controlling case plaintiff] had a right to petition the court of common pleas to compel arbitration, was equally applicable to the instant case. Fourth, on November, 16, 1995,

Thus, the *Hendrix* court regarded noncompliance with Model Rule 3.3 and Civil Rule 11 as one way to infer delay prohibited by Appellate Rule 38, which is the appellate frivolous conduct sanctions rule, but it did so within the context of a possible disciplinary proceeding as well.

In *Estate of Washington v. United States Secretary of Health & Human Services*,<sup>75</sup> the Tenth Circuit refused to sanction the plaintiff under 28 U.S.C. § 1927 or Appellate Rule 38, even though the plaintiff was found to be liable on the underlying claim, because the defendant's failure to cite controlling adverse authority was found to

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nine days after the Third Circuit rendered its decision in [the adverse controlling case], counsel for [the defendant] sent a letter to [the plaintiff's counsel] which cited [the adverse controlling case] and informed [him] that, based on [it], the claim asserted in [this case] was without legal or factual basis. Fifth, [the plaintiff's counsel] knew from past experience of his duty to discontinue litigation when an intervening event had rendered the litigation frivolous because he had been previously sanctioned in this court for pursuing a case after the Third Circuit had decided a case with "uncannily parallel fact pattern and a similar litany of legal theories" in a manner adverse to [the plaintiff's counsel's] case.

In his defense, [the plaintiff's counsel] appears to argue that, under our adversarial system of justice, he is not obligated to bring to the court's attention developments which are adverse to his client. [He] believes that such duty rests solely with his adversaries. In [his] words: "its not up to me to . . . stop representing my client because something happened. It's up to [opposing counsel] to have brought the [the adverse controlling case] result to the attention of the Court], they're advocates of the other side." [The plaintiff's counsel's] view of a lawyer's obligations to the court in the face of the frivolity of his case is mistaken.

As the Third Circuit has observed: "an attorney's obligation to the court is one that is unique and must be discharged with candor and with great care." [sic] Simply put, once [the plaintiff's] claim lost legal merit, [his counsel] had a duty to withdraw [from] the case. As an officer of the court, [the plaintiff's counsel] was not free to press on with a meritless claim until forced to surrender by the legal artillery of his adversaries.

*Id.* at 461–62 (citations omitted, but citing Pennsylvania Rules of Professional Conduct Rule 3.3 (describing attorney's duty of candor to the tribunal); Pennsylvania Rules of Professional Conduct Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . .")).

75. 53 F.3d 1173 (10th Cir. 1995).

have been the frivolous conduct, and the court discussed Civil Rule 11 as follows:

The [e]state therefore owes the government \$31,410.60.

This result may well have been reached far earlier, and at far less cost, if the government had been more forthcoming about the authority supporting its rejection of the [e]state's . . . theory. Rule 11 of the Federal Rules of Civil Procedure and Rule 3.3 of the Model Rules of Professional Conduct focus, respectively, on a movant's burden of "reasonable inquiry," and a lawyer's duty to disclose adverse controlling authority, as a means of protecting the judiciary's efficiency and integrity. Unfortunately, these rules do not protect lawyers from one another. Nevertheless, we think that counsel in the future would be well-advised to remember the spirit of the general standards enunciated in Canon 1 of the A.B.A. Model Code of Professional Responsibility ("A lawyer should assist in maintaining the integrity and competence of the legal profession."), and Model Code of Professional Responsibility DR 1-102(A)(5) (a lawyer shall not engage in "conduct that is prejudicial to the administration of justice").

. . . .

Rule 38 of the Federal Rules of Appellate Procedure provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." An appeal is considered "frivolous" when "the result is obvious, or the appellant's arguments of error are wholly without merit." To our mind, the present appeal is not "frivolous." . . .

We likewise refuse to compensate the government for its litigation costs by sanctioning the [e]state's attorneys under 28 U.S.C. § 1927. Their conduct does not rise to the level of recklessness or indifference that this Circuit has required to sanction an attorney under [section] 1927. Indeed, we find the government's charge that the [e]state has multiplied proceedings unreasonably and vexatiously to be highly ironic, given its own reluctance to disclose to the [e]state

the existence of cases that might well have shortened, or even avoided, the underlying litigation.<sup>76</sup>

Thus, the *Estate of Washington* court relied upon the government's noncompliance with Model Rule 3.3 to support its rejection of sanctions against the estate, yet it did not explain why it was doing so, when it had already affirmatively found that the appeal was *not* frivolous.

While *dicta*, the court's statement, as follows, does not make any sense either:

Rule 11 of the Federal Rules of Civil Procedure and Rule 3.3 of the Model Rules of Professional Conduct focus, respectively, on a movant's burden of "reasonable inquiry," and a lawyer's duty to disclose adverse controlling authority, as a means of protecting the judiciary's efficiency and integrity. Unfortunately, these rules do not protect lawyers from one another.<sup>77</sup>

Specifically, while these rules are certainly aimed at protecting the court, they are without question aimed at protecting the adverse parties as well.<sup>78</sup>

Finally, in *Duran v. Carris*,<sup>79</sup> the Tenth Circuit affirmed the dismissal of the plaintiff's second amended complaint. In doing so, it commented on the ghostwriting of the appellant's brief by his former attorney, in response to the appellee's motion for appellate sanctions—which it rejected *sub silentio*, and it discussed Civil Rule 11 as follows:

This court is concerned with attorneys who "author[] pleadings and necessarily guide[] the course of the litigation with an unseen hand." Fed. R. Civ. P. 11(a) requires that "every [sic] pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, shall be signed by the party." [The attorney's] actions in providing substantial legal assistance to [the plain-

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76. *Id.* at 1176 (citations omitted).

77. *Id.* (citations omitted).

78. *See, e.g.*, MODEL RULES PROF'L CONDUCT R. 3.4 (2003) (requiring fairness to opposing party and counsel).

79. 238 F.3d 1268 (10th Cir. 2001).

tiff] without entering an appearance in this case not only affords [him] the benefit of this court's liberal construction of pro se pleadings, but also inappropriately shields [the attorney] from responsibility and accountability for his actions and counsel.

As stated in a recent law review article:

The duty of candor toward the court mandated by Model Rule 3.3 is particularly significant to ghostwritten pleadings. If neither a ghostwriting attorney nor her pro se litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by the attorney, this could itself violate the duty of candor. The practice of undisclosed ghostwriting might be particularly problematic in light of the special leniency afforded pro se pleadings in the courts. This leniency is designed to compensate for pro se litigants' lack of legal assistance. Thus, if courts mistakenly believe that the ghostwritten pleading was drafted without legal assistance, they might apply an unwarranted degree of leniency to a pleading that was actually drafted with the assistance of counsel. This situation might create confusion for the court and unfairness toward opposing parties. It is therefore likely that the failure to disclose ghostwriting assistance to courts and opposing parties amounts to a failure to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," which is prohibited by Model Rule 3.3. Undisclosed ghostwriting would also likely qualify as professional misconduct under Model Rules 8.4(c) and (d), prohibiting conduct involving a misrepresentation, and conduct that is prejudicial to the administration of justice, respectively.

It is disingenuous for [the plaintiff and his attorney] to argue that ghost writing represents a positive contribution such as reduced fees or pro bono representation. Either of these kinds of professional representation are analogous to the concept of rescue in the field of torts. A lawyer usually

has no obligation to provide reduced fee or pro bono representation; that is a matter of conscience and professionalism. Once either kind of representation is undertaken, however, it must be undertaken competently and ethically or liability will attach to its provider.

Competence requires that a lawyer conduct a reasonable inquiry and determine that a filed pleading is not presented for an improper purpose, the positions taken are nonfrivolous, and the facts presented are well grounded. Fed. R. Civ. P. 11(b). Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers.

We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney. Other jurisdictions have similarly condemned the practice of ghost writing pleadings.

We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to “substantial” assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar’s ethics opinion that “an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney’s assistance to the court upon filing.” We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved.

Finally, in response to this court’s show cause order, [the attorney] claimed the high ground for “representing” [the

plaintiff] on appeal at a reduced fee. He suggest[ed] that his representation of [the plaintiff] in the trial court afforded him enough familiarity with the case to be able to offer [the plaintiff] assistance with his appeal at a much reduced fee. We note the irony in [the attorney's] rationalization that he should be commended for assisting [the plaintiff] on appeal at a reduced rate and yet failing to continue that representation on appeal, or to even acknowledge that some form of assistance was given. We do not allow anonymous testimony in court; nor does this circuit allow ghostwritten briefs. Therefore, we admonish [the attorney] that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions.<sup>80</sup>

Thus, the *Duran* court used Model Rule 3.3 in *dicta* to declare that ghostwriting violated Civil Rule 11 in the appellate context, even though Civil Rule 11 does not apply to appellate proceedings in the Tenth Circuit<sup>81</sup> or generally anywhere else.<sup>82</sup>

As shown by the above discussion, none of these courts used the Model Rules to develop a standard by which to measure Civil Rule 11, despite the fact that they used the Model Rules as a reference point to some degree or another. More importantly, none of these courts explained why they were *not* developing such a standard.

### *B. Litigation Ethics Rules Rejected as Civil Rule 11 Standard*

In contrast to the discussion above, in *Golden Eagle Distributing Corp. v. Burroughs Corp.*,<sup>83</sup> the Ninth Circuit reversed sanctions

80. *Id.* at 1271–73 (citations and footnotes omitted).

81. *E.g.*, *Brale v. Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (“Since its amendment in 1983, Fed. R. Civ. P. 11 has become increasingly important as a source of the courts’ authority to impose monetary sanctions, including attorney’s fees, against attorneys personally. But Rule 11, while its language is inclusive, empowers the imposition of sanctions at the trial court level, not on appeal.” (citations omitted)).

82. *Cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405–08 (1990) (suggesting that the standards under Appellate Rule 38 and Civil Rule 11 may be different); *see generally* VAIRO, *supra* note 16, § 3.03[b] (discussing appellate sanctions for papers filed in the court of appeals).

83. 801 F.2d 1531 (9th Cir. 1986).

against the defendant's counsel that had been awarded for a violation of the litigation ethics rules, and it flatly rejected the view that these rules have anything to do with Civil Rule 11:

The district court's application of Rule 11 in this case strikes a chord not otherwise heard in discussion of this Rule. The district court did not focus on whether a sound basis in law and in fact existed for the defendant's motion for summary judgment. Indeed it indicated that the motion itself was nonfrivolous. Rather, the district court looked to the manner in which the motion was presented. The district court in this case held that Rule 11 imposes upon counsel an ethical "duty of candor." The court drew its principles from Rule 3.3 of the ABA's Model Rules and the accompanying comment. It said:

The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rule of law relied on.

With the district court's salutary admonitions against misstatements of the law, failure to disclose directly adverse authority, or omission of critical facts, we have no quarrel. It is, however, with Rule 11 that we must deal. The district court's interpretation of Rule 11 requires district courts to judge the ethical propriety of lawyers' conduct with respect to every piece of paper filed in federal court. This gives us considerable pause.

We need not here definitively resolve the problems of the proper role of the courts in enforcing the ethical obligations of lawyers. We must consider only whether Rule 11 requires the courts to enforce ethical standards of advocacy beyond the terms of the Rule itself.

The district court's invocation of Rule 11 has two aspects. The first, which we term "argument identification" is the



holding that counsel should differentiate between an argument "warranted by existing law" and an argument for the "extension, modification, or reversal of existing law." The second is the conclusion that Rule 11 is violated when counsel fails to cite what the district court views to be directly contrary authority. We deal with each in turn, noting at the outset that many of our observations are applicable to both aspects of the court's interpretation of Rule 11.

....

We look first to the text of Rule 11. It requires that the lawyer certify that a pleading, motion or other paper is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The district court held that the lawyer in this case had a good faith argument for the extension of the law, but violated Rule 11 when he characterized his position as warranted by existing law.

The text of the Rule, however, does not require that counsel differentiate between a position which is supported by existing law and one that would extend it. The Rule on its face requires that the motion be either one or the other. Moreover, there is nothing in any of the statements of the proponents of the amended Rule or in the authorities we have surveyed since its adoption which suggests such a requirement.

The district court's ruling appears to go even beyond the principle of Rule 3.3 of the ABA Model Rules which proscribes "knowing" false statements of material fact or law. The district court made no finding of a knowing misstatement, and, given the well-established objective nature of the Rule 11 standard, such a requirement would be inappropriate. Both the earnest advocate exaggerating the state of the current law without knowingly misrepresenting it, and the unscrupulous lawyer knowingly deceiving the court, are within the scope of the district court's interpretation.

This gives rise to serious concerns about the effect of such a rule on advocacy. It is not always easy to decide whether

an argument is based on established law or is an argument for the extension of existing law. Whether the case being litigated is or is not materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place. Such questions can be close.

....

Amended Rule 11 of the Federal Rules of Civil Procedure does not impose upon the district courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments. Rather, Rule 11 is intended to reduce the burden on district courts by sanctioning, and hence deterring, attorneys who submit motions or pleadings which cannot reasonably be supported in law or in fact.<sup>84</sup>

Four judges on the Ninth Circuit dissented from the denial of a rehearing *en banc* in *Golden Eagle*.<sup>85</sup> They criticized the *Golden Eagle* panel for distorting the district court's opinion and for trying to divorce Civil Rule 11 from an attorney's ethical obligations, as follows:

This case is not ordinary in the attention with which it has been watched by the profession. Judge Schwarzer has written a leading article on Rule 11, "Sanctions Under the New Federal Rule 11—A Closer Look," 104 F.R.D. 181 (1985). Beyond the normal respect to be accorded the actions of a district judge, acknowledgment is owed to a pioneer authority on the Rule. We should also take into account that district courts, more than appellate courts, are plagued by misrepresentations. We face them on occasion, but common report has it that some trial lawyers are much less scrupulous with trial judges, who do not have the staff or time an appellate tribunal has to unmask misrepresentation. When an outstanding district judge has said, "Enough. I'll deal with misrepresentation under Rule 11," this court should at least have responded to what he has actually done.

Denial of rehearing *en banc* does not foreclose the opportunity to point out where the opinion distorts what the dis-

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84. *Id.* at 1538–40, 1542 (citations and footnotes omitted).

85. 809 F.2d 584 (9th Cir. 1987) (*en banc*).

strict court did, to underline certain difficulties the opinion creates, and finally to point out alternative avenues that the opinion does not cut off.

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The standards of the Model Code are substantially followed in the Model Rules of Professional Conduct of the American Bar Association. Rule 3.3 under the heading, "Candor Toward the Tribunal" makes it a black letter rule that a lawyer should not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly diverse [sic] to the position of the client and not disclosed by opposing counsel." Model Rules 3.3(a)(3) [sic]. The note on this Rule goes on to say, "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. . . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

In black letters the Model Rules also provide, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Model Rule 3.1. Commentary on this Rule explicitly links it to DR 7-102(A)(ii) [sic] of the Model Code.

Amazingly, the opinion of the court fails to acknowledge the source for the language of Rule 11 that a paper should be "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Both the ABA's Model Rules, adopted on August 2, 1983, and Rule 11, which became effective August 1, 1983, are properly seen as based on DR 7-102(A)(ii) [sic] of the Model Code in their treatment of what a lawyer should not do. If the objective standard of Rule 11 is higher than the subjective standard of Model Rule 3.3, that is no reason for the court to ignore the link between Rule 11 and the ethical standards of the bar.

It is equally surprising that the opinion of the court does not acknowledge that in the ABA's Model Rules, frivolousness is specifically defined by the absence of "a good faith argument for an extension, modification or reversal of existing law." Frivolousness does not only consist, as the court appears to assume, in making a baseless claim. Frivolousness also consists in making a legal argument without a good faith foundation.

... Not only does the opinion suggest a view of unrestrained advocacy repudiated by modern authorities, it favors a type of analysis sponsored by the Eighth Circuit and overruled by the Supreme Court. The opinion takes the position that a requirement of truthful argumentation "tends to create a conflict between the lawyer's duty zealously to represent his client" and "the lawyer's own interest in avoiding rebuke."

Precisely such an analysis was offered by the Eighth Circuit in relieving the lawyer of an obligation not to present perjury. That court found "a conflict of interest" between the lawyer's duty to represent his client zealously and the lawyer's ethical duty not to present perjury. Reversing the Eighth Circuit, the Supreme Court noted that there was no conflict of duties when the lawyer was asked by his client to assist "in the presentation of false testimony."

A client has as little right to the presentation of false arguments as he has to the presentation of false testimony. No conflict exists when a lawyer confines his advocacy by his duty to the court. The opinion is insensitive and unresponsive to the teaching of the Supreme Court that a restraint on the freedom of a lawyer to present falsity as truth does not create any true conflict. The lawyer has a duty to work within the boundaries of professional responsibility. He is not free to suborn testimony, to perjure himself, to offer perjured testimony, or to misrepresent facts or law. No conflict exists between his duty to work within these restraints and his duty to his client. The opinion suggests that there is the possibility of conflict over a duty to serve a client and a duty not to misrepresent the law. Fidelity to the

relevant opinion of the Supreme Court and to the modern standards of the profession lead to a different conclusion.<sup>86</sup>

In *Golden Eagle*, the Ninth Circuit judges seemed to be talking past each other, but at least they were addressing the intersection of legal ethics and professional responsibility with Civil Rule 11, which is something that no other court of appeals has explicitly done.

Specifically, the panel's opinion was based upon the philosophy that it is not the court's job to enforce litigation ethics rules through Civil Rule 11, which is exactly what it said: "We need not here definitively resolve the problems of the proper role of the courts in enforcing the ethical obligations of lawyers. We must consider only whether Rule 11 requires the courts to enforce ethical standards of advocacy beyond the terms of the Rule itself."<sup>87</sup> This philosophy was buttressed by the extreme exaggeration that to do so would "require[] district courts to judge the ethical propriety of lawyers' conduct with respect to every piece of paper filed in federal court."<sup>88</sup> Obviously, the courts would only have to examine those papers brought to their attention by motion or by their own choice *sua sponte*.<sup>89</sup>

What the panel probably meant was that, given the trial court's finding that the relevant motion was nonfrivolous,<sup>90</sup> it did not want to have district courts abandoning the "Paper as a Whole" doctrine,<sup>91</sup> which rejected sanctions, if the paper as a whole was nonfrivolous.<sup>92</sup> Until its *en banc* decision in *Townsend v. Holman Consulting Corp.*,<sup>93</sup> the Ninth Circuit was the leading proponent of the "Paper as a Whole" approach, which was also rejected by the 1993 amendments to Civil Rule 11.<sup>94</sup> Even then, the *Townsend* court distin-

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86. *Id.* at 584–85, 588–89 (citations omitted).

87. 801 F.2d at 1539 (footnote omitted).

88. *Id.*

89. See VAIRO, *supra* note 16, § 7.03[d] (discussing how to raise a Civil Rule 11 motion).

90. 801 F.2d at 1538.

91. See VAIRO, *supra* note 16, § 4.01[e] (discussing the "Paper as a Whole" controversy).

92. *Id.*

93. 929 F.2d 1358 (9th Cir. 1991) (*en banc*).

94. See VAIRO, *supra* note 16, § 4.01[e] (discussing the "Paper as a Whole" controversy).

guished *Golden Eagle*, because that case “did not purport to deal with unwarranted allegations or claims; rather it held that legal arguments advanced by counsel do not violate Rule 11 simply by virtue of the fact that counsel’s conduct does not comport with ethical rules of the American Bar Association.”<sup>95</sup> Thereafter and continuing under the 1993 amendments, the duty of candor has been the litigated topic arising out of *Golden Eagle*,<sup>96</sup> and the underlying concept advocated by the rehearing *en banc* denial dissent, that Civil Rule 11 is inextricably intertwined with the litigation ethics rules, seems to have fallen by the wayside.

### C. *Litigation Ethics Rules Adopted as Civil Rule 11 Standard*

Several federal courts have had occasion to find that a violation of the relevant litigation ethics rules could be equated with a Civil Rule 11 violation.

For instance, in *Glover v. Libman*,<sup>97</sup> the district court sanctioned two of the plaintiffs and their counsel, who had filed a frivolous motion to disqualify, and it discussed Civil Rule 11 as follows:

The court, however, finds that given the conduct of [the attorney and his clients] at both the relevant time at which these events occurred and the hearing of the instant motion, the motion for disqualification was brought solely for tactical reasons, and not for any sensitivity to ethical concerns. This court firmly believes that such conduct cannot be condoned and in fact warrants sanctions of its own. Pursuant to DR 1-103(A), one has a duty to move to disqualify whenever there is a non-trivial possibility of a conflict of interest. Rule 11 of the Federal Rules of Civil Procedure provides that the signature of an attorney “constitutes a certificate by him that he has read the pleading; that to his best knowledge, information, and belief there is good ground to support it; and that *it is not interposed for delay.*” Furthermore, Model Rule 3.2 provides as follows: “A lawyer shall

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95. 929 F.2d at 1363.

96. See VAIRO, *supra* note 16, § 5.03[c][1 & 2] (discussing the duty of disclosure).

97. 578 F. Supp. 748 (N.D. Ga. 1983).

make reasonable efforts to expedite litigation consistent with the interests of the client.”

Similarly, DR 7-102(A)(1) provides that, “A lawyer shall not . . . file a suit, assert a position, conduct a defense [or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” In the Comment to the Model Rule, the [American] Bar [Association] states the following: “Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. . . . *Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.*”<sup>98</sup>

As a result, the *Glover* court sanctioned two of the co-plaintiffs and their counsel for having violated the relevant litigation ethics rules, which it equated with frivolous conduct violative of Civil Rule 11, 28 U.S.C. § 1927, and the court’s local rules.<sup>99</sup>

Of importance, the *Glover* court noted that:

[It] has the power and responsibility to regulate the conduct of attorneys who practice before it. This is essential to both the quality and appearance of justice.

In evaluating the issues brought by this motion, this court is guided by the standard of professional conduct of the members of the bar of this court, which includes “the current canons of professional ethics of the American Bar Association.” Accordingly, the court is guided by the ABA Code of Professional Responsibility as well as the ABA Model Rules of Professional Conduct . . . .<sup>100</sup>

Thus, the *Glover* court used the litigation ethics rules as a guideline for evaluating Civil Rule 11 motions.

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98. *Id.* at 769 (citation corrected; incorrect block quote reformatted).

99. *Id.*

100. *Id.* at 750 (quoting Local Court Rule 71.54).

In *In re Ronco, Inc.*,<sup>101</sup> the district court sanctioned the attorneys for the creditor's committee under Civil Rule 11 after observing that:

[I]t is not a coincidence that the newly-inserted language in Rule 11 . . . [the 1983 version] mirrors the standards in ABA Code of Professional Responsibility DR 7-102(A)(2) and in ABA Model Rule of Professional Conduct Rule 3.1 and its accompanying comment. All of them—Rule 11, the DR and the Model Rule—teach that a lawyer's duty to his or her client cannot be permitted to override his or her duty to the justice system, defined by all three of those rules.<sup>102</sup>

Thus, the *Ronco* court specifically used Model Rule 3.1 to “define” the conduct violative of Civil Rule 11,<sup>103</sup> which was the logical next step from the *Glover* court.

In *Fleming Sales Co. v. Bailey*,<sup>104</sup> the district court sanctioned the plaintiff and its counsel under Civil Rule 11 after noting that:

Litigation lawyers have a broad responsibility under Rule 11 and the Code of Professional Responsibility (now the Model Rules of Professional Conduct): to confer with the client about the facts—and not to accept the client's version on faith, but to probe the client in that respect (“reasonable inquiry”); to do the lawyers' homework on the law; and then to counsel the client about just which claims the law reasonably supports in terms of the facts the lawyers' proper investigation has disclosed. That often involves counseling the client—sometimes against the tide of the client's displeasure—as to how best to vindicate the client's interests without abusing another's. In some instances that may involve advising a client not to pursue a claim or a theory of recovery that in a technical sense (of surviving a Rule 12(b)(6) motion) might perhaps go forward, but by rights should not. When a lawyer fails in that respect—when a lawyer accepts or even encourages the role of a

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101. 105 F.R.D. 493 (N.D. Ill. 1985), *appeal dismissed mem. & remanded*, 793 F.2d 1295 (7th Cir. 1986) (unpublished table decision), *vacated & remanded*, 838 F.2d 212 (7th Cir. 1988).

102. *Id.* at 497.

103. *Id.*

104. 611 F. Supp. 507 (N.D. Ill. 1985).



“hired gun” in the worst sense—the costs to the parties and to the courts are often substantial, as they have been here.

. . . .

Just last week our Court of Appeals decided to issue . . . an opinion [that] illustrates why Rule 11 applies to part, but does not quite cover the bulk, of [the plaintiff’s] Count I and III claims (including the involvement of [the plaintiff’s] counsel in those claims):

Our system of jurisprudence is designed to insure [sic] that all disputants with colorable claims have access to the courthouse. Relatively low barriers to entry have, however, generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous. These claims clog court dockets and threaten to undermine the ability of the judiciary to efficiently administer the press of cases properly before it. Perhaps the greatest safeguard against this danger is the integrity and good sense of practicing lawyers who, as officers of the court, have both an ethical and a legal duty to screen the claims of their clients for factual veracity and legal sufficiency. Model Rule of Professional Conduct 3.1 (1983); Fed.R.Civ.P. 11. Lawyers have a unique opportunity to counsel restraint or recklessness, to craft imaginative arguments or to press empty challenges to well-settled principles. Because of our reluctance to constrain the discretion of attorneys in the vigorous advocacy of their clients’ interests, *we penalize them only where they have failed to maintain a minimum standard of professional responsibility.* But we will not overlook such a failure when it occurs, in part because it evidences disdain for the public, whose claims lie dormant because frivolous suits have diverted away scarce judicial resources, disdain for adversaries, who must expend time and money to defend against meritless attacks, and disdain for clients, whose trust is rewarded

with legal bills, dismissals, and court-imposed sanctions.<sup>105</sup>

Thus, like the *Glover* and *Ronco* courts, the *Fleming Sales* court linked Model Rule 3.1 with Civil Rule 11.

In *Pope v. Federal Express Corp.*,<sup>106</sup> the district court, in sanctioning the plaintiff and her attorney under Civil Rule 11, stated that:

When [the] plaintiff testified repeatedly at her supplemental deposition on October 12, 1989 that she had received the original note on her desk, and that she was definite that the note had original writing, written on paper with some type or writing instrument by a human being, she was testifying falsely because an original document as she described never existed. It was and is impossible for such an original document to exist. The court has examined Exhibit 203 and the transparent plastic overlays made from it. The court has positioned each word of the you "feel" good! statement from the transparent overlay on each corresponding word of [the] [d]efendants [sic] Exhibits FEL 42 and FEL 124. The court has observed that the words match perfectly; even better than if they had been traced. One need not be an expert to see that [t]he you "feel" good! statement was manufactured from a copy of either of [the] [d]efendants [sic] Exhibits FEL 42 or 124, then was pasted on a copy of the sales goal document, and a photocopy was made.

[The] [p]laintiff's attorney had the same opportunity to make such examination on October 12, 1989, and thereafter. [The] [p]laintiff's attorney hearing plaintiff testify at that deposition that she had the original document on the date she claimed it was placed on her desk [sic]. At that time, [the] plaintiff's attorney was put on notice that her client was testifying falsely. If [the] plaintiff's attorney had any doubts that Exhibit 203 was manufactured she should

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105. *Id.* at 519–20 (quoting *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985) (emphasis added; some alterations in original), *cert. denied sub nom.* *Hyde v. Van Wormer*, 474 U.S. 827 (1985)).

106. 138 F.R.D. 675 (W.D. Mo. 1990), *modified*, 138 F.R.D. 684 (W.D. Mo. 1991), *modified*, 1991 U.S. Dist. LEXIS 7760 (W.D. Mo. June 6, 1991), *aff'd in part, vacated in relevant part & remanded*, 974 F.2d 982 (8th Cir. 1992).

have had it examined and compared to [the] [d]efendants' Exhibits FEL 42 and FEL 124. [The] [p]laintiff's attorney saw in the deposition how defense counsel had examined and compared Exhibit 203 with the other exhibits, so [the] plaintiff's counsel easily could have commissioned a separate test to verify the contention of fabricated evidence. An independent test would have satisfied [the] plaintiff's counsel whether an original writing ever could have existed, or it was a cut-and-paste job such that an original never could have existed. Upon making a finding that the evidence was manufactured, [the] plaintiff's attorney had an ethical responsibility to stop relying on Exhibit 203 as evidence in [the] plaintiff's case.

Missouri Supreme Court Rule 3.1 on Professional Conduct provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law . . . ."

Rule 11, Fed.R.Civ.P., provides: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signor's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . ."

[The] [p]laintiff's answers to interrogatories, her responses to requests for production, her motion for sanctions against defendants, her first and second amended designations of experts and of events giving rise to allegations of Title VII violations, and her supplemental deposition testimony on October 12, 1989, all constituted violations of Rule 11. Those pleadings were certified by [the] plaintiff, or her counsel on her behalf, when plaintiff knew the pleadings were not well-grounded in fact. By relying upon Exhibit 203, when [the] plaintiff knew it was false, she was interposing those pleadings for improper purposes, including harassment and a needless increase in litigation costs.

The findings herein lead the court to conclude overwhelmingly that [the] plaintiff violated Rule 11. Furthermore, the inescapable conclusion must be that [the] plaintiff's attorney was in violation of Rule 11 from and after October 12, 1989.<sup>107</sup>

So like the *Glover*, *Ronco*, and *Fleming Sales* courts, the *Pope* court specifically linked Model Rule 3.1 with Civil Rule 11.

In *D.C.I. Computer Systems, Inc. v. Pardini*,<sup>108</sup> in sanctioning the plaintiffs' counsel under Civil Rule 11, the local rules of court, and its inherent power, the district court noted in regards to in-court misrepresentations and omissions as follows:

At the ex parte hearing on the Writ, all of [the] plaintiffs [sic.] then counsel . . . failed to inform the court of the state court action and orders, made misrepresentations of the sort contained in the papers, or failed to correct those misrepresentations. [The] [p]laintiffs' attorneys concede their lack of candor, but argue it was not material. This was an ex parte proceeding, requiring more candor towards the court than those counsel may be accustomed to providing. For this reason and those discussed above, the court finds [the] plaintiffs' then attorneys' lack of candor both highly material and highly egregious [sic].

These in-court misrepresentations and omissions are not sanctionable under Rule 11, as Rule 11 does not apply to oral misrepresentations. However, [the] plaintiff's attorneys' conduct did violate the Local Rules of the Eastern District of California. Local Rule 110 provides that:

Failure of counsel . . . to comply with these Rules . . .

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107. *Id.* at 681–82. *But cf.* *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99-Civ.-10175-(JSM), 2002 U.S. Dist. LEXIS 491 (S.D.N.Y. Jan. 16, 2002) (issuing, *sua sponte*, non-monetary Rule 11 sanctions against defense counsel for submitting a false affidavit in violation of Model Rule 3.3(a)(3) using an objective standard), *vacated sub nom. In re Pennie & Edmonds LLP*, 323 F.3d 86 (2d Cir. 2003) (requiring a showing of subjective bad faith for *sua sponte* Rule 11 sanctions).

108. No. CV-F-89-268-REC, 1990 U.S. Dist. LEXIS 16476 (E.D. Cal. June 20, 1990), *aff'd*, 978 F.2d 1265 (9th Cir. 1992) (unpublished table decision), *opinion available at* 992 U.S. App. LEXIS 29951.

may be ground for imposition by the Court of any and all sanctions authorized by statute or Rule or within the inherent power of the Court, including, without limitation, dismissal of any action, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions.

Local Rule 180(e), "Standards of Professional Conduct," requires that attorneys follow various ethical codes, including the Model Rules of Professional Conduct of the American Bar Association. These rules expressly require candor in *ex parte* proceedings. ABA Model Rule 3.3, "Candor toward the Tribunal," provides: In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

A court may impose attorney's fees under the Local Rules if it finds counsel acted in bad faith, willfully, recklessly, or with gross negligence. [The] [p]laintiffs' attorneys' in-court omissions and misrepresentations at the very least were grossly negligent. Indeed, the court is convinced that counsel were attempting to circumvent state court discovery orders and deliberately failed to inform the court of those orders and that action. Thus, the court finds that [the plaintiffs' attorneys] willfully and in bad faith failed to inform the court of material facts at the *ex parte* hearing, and are liable for attorney's fees under the Local Rules.<sup>109</sup>

Thus, the *D.C.I. Computer Systems* court used its local rules, which incorporated the Model Rules, to sanction the plaintiffs' counsel, because the 1983 version of Civil Rule 11 did not cover oral statements, which are now covered under the "later advocating" pro-

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109. *Id.* at \*7-\*10 (citation omitted).

This case was decided under the 1983 version of Civil Rule 11, but under the 1993 version, oral misrepresentations are covered under the "later advocating" provision of the rule, and thus this case would support a relationship between the current version of Civil Rule 11 and Model Rule 3.3. See generally VAIRO, *supra* note 16, § 4.02[d] (discussing oral assertions under both the 1983 and 1993 version of Civil Rule 11).

vision of the 1993 version of Civil Rule 11.<sup>110</sup> Had the *D.C.I. Computer Systems* court been dealing with the current version of Civil Rule 11, assumably it would have found the same link between the litigation ethics rules and Civil Rule 11 that was described by the *Glover, Ronco, Fleming Sales, and Pope* courts.

In *Storment v. Gossage*,<sup>111</sup> in entering sua sponte Civil Rule 11 sanctions against the plaintiff, the district court noted in denying the plaintiff's own motion for sanctions that:

[The plaintiff] asserts that [the defendant's] supplemental response should be stricken under [Civil Rule] 12(f) and that she should be sanctioned under Rule 11 and Illinois Rules of Professional Conduct 3.3(9). Rule 12(f) allows the court to strike any pleading that is impertinent or scandalous. Rule 11 provides for sanctions against an attorney who files a pleading that is not grounded in existing fact or filed for an improper purpose. Illinois RPC 3.3(9) states that a lawyer shall not "intentionally degrade a . . . person by stating or alluding to personal facts concerning that person which are not relevant to the case[.]"

The [c]ourt notes that people who live in glass houses shouldn't throw stones. [The plaintiff's] language in his reply to the motion to remand clearly fails to meet the standards for professional conduct enunciated in RPC 3.3(9). His accusation that [the] [d]efendants tried to conceal the alleged existence of a partnership by changing the sign outside of their office is a fine example of alluding to personal facts which are not relevant to the case in view of the fact that [the] [d]efendants changed their sign, well before [the] [p]laintiff began this vendetta, for unrelated reasons.

As for [the defendant's] supplemental response which accused [the plaintiff] of having a series of shortcomings including lack of good judgment and dishonesty, this [c]ourt notes that those unflattering characterizations are not without factual support. In *In re Marriage of Granger*, the court stated:

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110. FED. R. CIV. P. 11.

111. 791 F. Supp. 215 (C.D. Ill. 1992).

[The plaintiff] has attempted to . . . character[ize] the disputed statements and conversations here [between Plaintiff and Ms. Granger] as a legitimate effort on his part to determine the facts from his client and to formulate a strategy to counter obviously damning testimony from an unexpected, adverse witness. We cannot accept this view. The clear import of those conversations [between Plaintiff and Ms. Granger] and statements is that [Plaintiff] urged his client to commit perjury. . . . There was nothing subtle or ambiguous about his approach. Indeed, we cannot recall a more blatant disregard for the provisions of Rule 7-102 of the Code of Professional Responsibility, which provides that in his representation of a client, a lawyer shall not “participate in the creation or preservation of evidence when he knows or when it is obvious that the evidence is false” or “counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.”

[The plaintiff’s] violation of the canons of ethics is for other authorities to pursue. We note, however, that in advising his client to lie, [the plaintiff] did more than breach his ethical obligations. He appears to have committed a criminal offense, attempt to suborn perjury.

Although this Court *IN NO WAY CONDONES* slinging mud at other parties—regardless of the truth of the assertions—it finds, in light of the *Granger* opinion and pleadings filed by [the plaintiff], that [the defendant] did have a factual basis for the statements she made concerning him. Furthermore, as previously noted, [the plaintiff] initiated the volley of cheap shots when he implied that [the defendants] had improper motives for changing their business sign. Naturally, once [the plaintiff] made such an accusation, [the] [d]efendants were entitled to respond. Consequently, this Court cannot find that [the defendant] violated Rule 11 or Illinois RPC 3.3(9).

However, this [c]ourt must note that if it weren’t for the fact that this case will be closed and barred from refile on

the basis of [the defendant's] motion for summary judgment, this [c]ourt would have stricken [the plaintiff's] reply to [the defendant's] initial response and [the defendant's] supplemental response and ordered that new ones be filed. But, for the sake of everyone, including the taxpayer who provides our court systems, this [c]ourt wants to end this matter *post haste*. Although it understands the frustration that [the defendant] is going through as a result of [the plaintiff's] OUTRAGEOUS and ATROCIOUS behavior, nevertheless, this Court must caution that it expects and demands that the attorneys who appear before it conduct themselves in a professional manner and not cast aspersions on the characters of opposing parties when the same point could be made absent such conduct.<sup>112</sup>

Thus, the *Storment* court, like the other cases discussed in this subsection above, equated Model Rule 3.1 with Civil Rule 11.

In *Giangrasso v. Kittatinny Regional High School Board of Education*,<sup>113</sup> the district court adopted the magistrate judge's report and recommendation and sanctioned the plaintiff's counsel under Civil Rule 11 as well as the court's local rules as follows (in addition to monetary penalties that were imposed):

[The] court may impose non-monetary sanctions where appropriate to deter future violation of Rule 11. Therefore, to ensure that [the plaintiff's counsel] will not continue to file frivolous suits against defendants, I recommend that the court permanently enjoin [him] from filing, as an attorney, any complaint in this court involving [the defendant]. To protect other parties from similar abuse, I also recommend that the court direct the [c]lerk to refuse to accept any other complaint [the plaintiff's counsel] attempts to file, unless and until the complaint is approved for filing by the duty judge sitting on the day of the attempted filing.

The [Advisory] Committee Notes on the revision of Rule

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112. *Id.* at 218–20 (some alterations in original) (quoting *In re Marriage of Granger*, 197 Ill. App. 3d 363, 375–76, 554 N.E.2d 586, 594 (Ill. App. Ct. 1990) (some alterations in original; quotation marks corrected)).

113. 865 F. Supp. 1133 (D.N.J. 1994).



11 recognize that “the court has available a variety of possible sanctions to impose for violations, such as . . . referring the matter to disciplinary authorities.” Moreover, Local Rule 7(E) codifies the court’s traditional authority to supervise and monitor the conduct of attorneys admitted to practice. Local Rule 7(E)(2) provides that: “[w]hen misconduct or allegations of misconduct which, if substantiated, would warrant discipline of an attorney, shall come to the attention of a Judge of this Court, and the applicable procedure is not otherwise mandated by these Rules, that Judge shall refer the matter in writing to the Chief Judge.”

During the course of this litigation, [the plaintiff’s counsel] has violated several Rules of Professional Conduct. By filing this lawsuit, [the plaintiff’s counsel] violated R.P.C. 3.1, which prohibits an attorney from bringing a frivolous proceeding. [The plaintiff’s counsel] repeatedly failed to meet case management deadlines, therefore violating R.P.C. 3.2. Rule 3.2 directs attorneys to make reasonable efforts to expedite litigation. In failing to file opposition to a dispositive motion, [the plaintiff’s counsel] appears to have violated R.P.C. 1.3, which requires that an attorney act with reasonable diligence and promptness in representing a client.

[The plaintiff’s counsel’s] appalling conduct in attempting to serve subpoenas at [defendants’ counsels’ office], which I find to have been an abuse of process, appears to have violated R.P.C. 8.4(d). Rule 8.4(d) prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. Moreover, his misrepresentation to the court regarding the existence of the OAL petition filed by his parents appears to have violated R.P.C. 8.4(c).

Based on the foregoing examples of [the plaintiff’s counsel’s] misconduct in this litigation, I recommend that the court refer the matter to [the] Chief Judge . . . , pursuant to Rule 11 and Local Rule 7(E)(2), for such investigation and

further proceedings as may be deemed appropriate.<sup>114</sup>

Yet again, the *Giangrasso* court, like the other cases discussed in this subsection above, equated violations of several Model Rules with Civil Rule 11 sanctions.

In *Frye v. Pena*,<sup>115</sup> the district court denied the plaintiff's motion for Rule 11 sanctions, and it ordered him to show cause as to why he should not be sanctioned under Civil Rule 11, 28 U.S.C. § 1927, and the court's local rules, as follows:

[Numerous cases] establish that [the plaintiff's counsel] knew his legal arguments in this case were "unwarranted by existing law" and that they could not be considered "non-frivolous argument for the extension, modification, or reversal of existing law" in violating of Fed. R. Civ. P. 11(b)(2). Indeed, [the plaintiff's counsel] has been sanctioned by district courts for his obstinacy apparently without effect.

Under ER 3.1, "[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rules of Professional Conduct, ER 3.1. A lawyer is ethically obligation [sic] to exhibit candor to the court: "A lawyer shall not knowingly, make a false statement of material fact or law to a tribunal." ER 3.3(a)(1). [The plaintiff's counsel's] conduct in this case implicates both of those rules. Under Local Rule 1.6(a), "any member of the bar of the Court may be disbarred or otherwise disciplined after such hearing as the Court may in each particular instance direct." The [c]ourt shall consider application of Rule 1.6 to this case.

One final point, federal law provides:

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114. *Id.* at 1142–43 (citation omitted).

115. No. CIV-97-10-TUC-RMB, 1997 U.S. Dist. LEXIS 16966 (D. Ariz. May 19, 1997), *modified*, 1997 U.S. Dist. LEXIS 16453 (D. Ariz. Oct. 2, 1997), *aff'd mem.*, 199 F.3d 1332 (9th Cir. 1999) (unpublished table decision), *opinion available at* 1999 U.S. App. LEXIS 26903, *cert. denied sub nom.* *Frye v. Slater*, 531 U.S. 814 (2000).

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

28 U.S.C. § 1927.

In light of the fact that the [c]ourt required [the plaintiff's counsel] to re-evaluate the merits of this case and he chose to proceed, sanctions under § 1927 may be appropriate.

Based on the foregoing, [the plaintiff's counsel] shall be required to show cause hearing as to why attorney should not be sanctioned for violating Fed. R. Civ. P. 11(b)(1) and (2), Ethical Rules 3.1 and 3.3(a)(1), 28 U.S.C. § 1927 and this [c]ourt's . . . Order. The [c]ourt will consider whether action under Local Rule 1.6 and a complaint to the State Bar of Arizona is appropriate. [The plaintiff's counsel] is directed to address the applicability of each of these violations in his brief. In response, [the] [d]efendants are to submit an accounting of their attorneys' fees to be considered as one of the appropriate sanctions.

. . . .

IT IS FURTHER ORDERED that [the plaintiff's counsel] shall file a brief on . . . why he should not be disbarred from practicing in the District Court of Arizona, why a State Bar Complaint should not be filed and why he should not be sanctioned for violations of Fed. R. Civ. P. 11, E.R. 3.1 and 3.3(a)(1); 28 U.S.C. § 1927; and th[is] [c]ourt's . . . Order.<sup>116</sup>

Thereafter, the *Frye* court discussed the plaintiff's counsel's ethical obligations as follows:

A lawyer practicing in federal court in Arizona is required to follow the Rules of Professional Conduct as set forth in Rule 42 of the Rules of the Supreme Court of the State of

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116. *Id.* at \*21-\*25 (citations omitted).

Arizona. See Rules of Practice of the United States District Court for the District of Arizona, Rule 1.6(d). Under Arizona's ER 3.1, "[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." 17A A.R.S. S. Ct. Rules, Rules of Professional Conduct, Rule 42, ER 3.1 (1985). A lawyer is also ethically obligated to exhibit candor to the court: "A lawyer shall not knowingly, make a false statement of material fact or law to a tribunal." *Id.* at ER 3.3(a)(1).

The Federal Rules of Civil Procedure provide that an attorney who files a pleading is:

[C]ertifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fed. R. Civ. P. 11(b)(1) and (2). Thus, Rule 11 provides for the imposition of sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose. Frivolous filings are "those that are both baseless and made without a reasonable and competent inquiry." A claim that is unfounded on existing law, but that straight-forwardly seeks a change in existing law that is not utterly implausible, should, in the absence of clear evidence of a different subjective intent, be considered brought in good faith. That is not the case here.

Additionally, federal law provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case

unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

Section 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun." As such, an attorney is subject to sanctions under this section for all proceedings other than the filing of the complaint. Before a court may engage in any fee-shifting sanctions under § 1927, it must find that "the attorney acted recklessly or in bad faith." The Ninth Circuit has further defined this requirement to hold that section 1927 sanctions "must be supported by a finding of subjective bad faith." "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent."<sup>117</sup>

In considering the appropriate sanction to award, the *Frye* court noted:

When determining an appropriate sanction, ABA Standard 3.0 suggests courts consider: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's conduct; and (4) the existence of aggravating and mitigating factors. See ABA Standards For Imposing Lawyer Sanctions 3.0 (1986). Here, [the plaintiff's counsel] violated his ethical duty to this [c]ourt, opposing counsel and his client. The [c]ourt lacks the expertise to question [the plaintiff's counsel's] mental state. The expense of his lawsuits is well-documented. One mitigating factor is [the plaintiff's counsel's] respectful demeanor at hearings. This does not excuse his conduct, however. Therefore, the [c]ourt shall consider whether it is appropri-

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117. *Frye v. Pena*, No. CIV-97-10-TUC-RMB, 1997 U.S. Dist. LEXIS 16453, at \*5-\*8 (D. Ariz. Oct. 2, 1997) (citations omitted; paragraph structure corrected), *aff'd mem.*, 199 F.3d 1332 (9th Cir. 1999) (unpublished table decision), *opinion available at* 1999 U.S. App. LEXIS 26903, *cert. denied sub nom. Frye v. Slater*, 531 U.S. 814 (2000).

ate to impose [the] [d]efendants' attorneys fees and costs as a sanction.<sup>118</sup>

After considerable analysis, the *Frye* court sanctioned the plaintiff's counsel as follows: (1) disbarment from the federal courts in Arizona, (2) an award of attorney's fees and expenses under 28 U.S.C. § 1927, (3) forfeiture of a bond towards the satisfaction of these monetary sanctions, and (4) referral to the Arizona State Bar Disciplinary Commission.<sup>119</sup>

On appeal, the Ninth Circuit affirmed sanctions under Rule 11, 28 U.S.C. § 1927, and its inherent power, against the plaintiff's attorney, and it reasoned as follows:

[The plaintiff's attorney] filed a complaint challenging the Department of Transportation's authority to suspend [the plaintiff's] pilot certificate. The complaint also alleged that the Federal Aviation Administration's ("FAA's") administrative proceedings violated [the plaintiff's] Fifth Amendment due process rights, and that the FAA violated the Administrative Procedures Act by failing to publish its policies regarding license penalties. [The plaintiff's attorney] had previously filed numerous actions raising the same contentions. The actions had been uniformly rejected.

The district court granted defendants' motion to dismiss citing several Ninth Circuit cases where [the plaintiff's attorney] had personally raised the same frivolous claims. The district court held a hearing on its order to show cause as to why [the plaintiff's attorney] should not be disbarred from practicing in the District Court of Arizona and should not be sanctioned for violating Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927 and Arizona Ethical Rules 3.1 and 3.3(a)(1). The district court found that [the plaintiff's attorney]: (1) had filed a frivolous lawsuit in bad faith and for the sole purpose of harassing defendants; (2) had made intentional misstatements designed to mislead the court; (3) had disobeyed the court's prior injunction precluding him from filing similar lawsuits; and, (4) given the opportunity

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118. *Id.* at \*21–\*22.

119. *Id.* at \*32–\*33.

to dismiss the case, had refused to do so, thereby needlessly multiplying the proceedings.

The district court then ordered [the plaintiff's attorney]: (1) disbarred from the practice of law in the federal courts of the District of Arizona; (2) to pay defendants reasonable attorneys' fees in the amount of \$34,117.68 and travel costs in the amount of \$578.51; and (3) to forfeit to defendants as partial payment for assessed fees and costs a \$20,000.00 bond the court had ordered [the plaintiff's attorney] to post as a condition precedent to the court's granting discovery in this case. . . .

We agree with the district court's careful, thorough, and painstaking analysis of the issues presented in this case. The district court's reasoning amply demonstrates that [the plaintiff's attorney] brought and pressed frivolous claims, made personal attacks on various government officials in bad faith and for the purpose of harassment, and demonstrated a lack of candor to, and contempt for, the court. The district court was well within its discretion in imposing monetary sanctions against Smith under 28 U.S.C. § 1927 and in disbaring him under Rule 11.<sup>120</sup>

Thus, *Frye* presents the only instance where a circuit court seems to have implicitly adopted a violation of the litigation ethics rules as the Civil Rule 11 standard.<sup>121</sup>

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120. *Frye v. Pena*, 199 F.3d 1332 (9th Cir. 1999) (unpublished table decision), *opinion available at* 1999 U.S. App. LEXIS 26903, at \*2–\*4 (citation omitted), *cert. denied sub nom. Frye v. Slater*, 531 U.S. 814 (2000).

121. The courts have been more willing to sanction attorneys under their inherent power for violations of other Model Rules, while side-stepping the Civil Rule 11 issue. For instance, in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (D.S.D. 2001), *aff'd*, 347 F.3d 693 (8th Cir. 2003), the district court sanctioned the defendant for its counsel's violation of the anti-contact rule, Model Rule 4.2, by excluding certain evidence obtained in violation of that rule from the trial. *Id.* at 1149. However, it refused to further sanction defense counsel, because the court felt that the law had been somewhat unclear at the time of the infraction. *Id.* at 1159–60. In explaining its use of its inherent power, rather than Civil Rule 11 or other discovery sanction rules, the court stated that it "accept[ed] its responsibility to impose necessary discipline on lawyers in order to assure preservation of the judicial process." *Id.* at 1150. The district court's refusal to disqualify defense counsel or to im-

Finally, in *Obert v. Republic Western Insurance Co.*,<sup>122</sup> the district court imposed sanctions under Rule 11 and 28 U.S.C. § 1927 against the defendant's counsel, as follows:

This matter is before the court on objections to the attached Report and Recommendation of [the magistrate]. Objecting are [the defendant's] former attorneys in this matter . . . admitted pro hac vice, as well as [the defendant's] local counsel . . . and their law firm . . . .

On May 1, 2002, this [c]ourt ordered pro hac vice counsel to show cause why their pro hac vice status should not be revoked based on their actions in pursuit of an unsuccessful motion to recuse that they filed on behalf of their client. In response to this [c]ourt's invitation, [the] [p]laintiff's attorneys also filed a motion for sanctions stemming from those same activities.

This [c]ourt referred both matters to the magistrate judge, who, after a two day hearing, concluded that [the two defense counsel] had violated the Rhode Island Rules of Professional Conduct [Rules 3.1, 3.2, 3.3, 3.5 & 8.4] and that all defense counsel had violated Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The magistrate judge recommended revoking the pro hac vice status of [the two defense counsel], and imposing monetary sanctions on all involved, including the[ir] law firms . . . . In addition, he recommended requiring [one of the two], as a "Rule 11 recidivist," to complete a legal ethics course sponsored by his local bar association.

There is no need to rehearse here the well-traversed

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pose monetary sanctions upon the same was upheld on appeal. *Midwest Motor Sports, Inc.*, 347 F.3d 693, 700–01 (8th Cir. 2003). See also *infra* note 150 and accompanying text.

For an overview of the federal common law of lawyering, see MCMORROW & COUILLETTE, *supra* note 19, at ch. 807 (introduction to the common law of lawyering; discussing the inherent power of the federal courts to regulate the conduct of attorneys). For a discussion of the same in the context of investigation and discovery in civil cases, see *id.* at ch. 809, and for a discussion of the same in the context of Model Rule 4.2, see *id.* at ch. 810.

122. 264 F. Supp. 2d 106 (D.R.I. 2003).



ground of this litigation or the events that precipitated the instant proceedings. Having reviewed the parties' memoranda and heard oral arguments, this [c]ourt without further ado adopts the disposition recommended by the magistrate judge, subject to the following revisions. The magistrate judge recommended that the sanctioned parties be required to pay [the] [p]laintiff's attorneys' fees jointly; it is more accurate to say that they are jointly *and severally* liable for those payments. Furthermore, requiring [the one attorney] to complete an ethics course is unnecessary, as revocation of his pro hac vice status and the imposition of sanctions should serve Rule 11's purpose of deterring similar conduct in the future.

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In conclusion, this [c]ourt hereby (1) revokes [the two attorneys'] pro hac vice status; (2) approves [another attorney's] withdrawal from the case; and (3) orders [the defendants' counsel and their law firms] to pay [the] [p]laintiff's attorneys' fees in the amount of \$31,331.25, for violating Rule 11 and 28 U.S.C. § 1927. Those individuals and law firms are jointly and severally liable for those payments.<sup>123</sup>

The *Obert* decision is yet just another example of tying violations of the Model Rules to Civil Rule 11 violations.

#### D. Summary of Case Law Review

As shown by the above discussion, a few courts have used the Model Rules to develop a standard by which to measure violations of Civil Rule 11, even though the extent of their reliance has varied from case to case. Given the overall paucity of such cases discussed here, and given the huge number of Civil Rule 11 cases, it is hard to say that these courts have actually established a standard that other courts will follow; but these courts have certainly shown the way, just as the *Golden Eagle* rehearing *en banc* dissent did.<sup>124</sup>

What is surprising, however, is that none of these cases, except for *Golden Eagle*, have given any reason why the litigation ethics

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123. *Id.* at 110–12 (citations and footnote omitted).

124. *See supra* notes 85–86 and accompanying text.

rules have not been used as the standard in the over 8,000 Civil Rule 11 cases to date, and the reason given for not using them in *Golden Eagle* is now obsolete.<sup>125</sup> All that we know for a fact from the above review is that the litigation ethics rules have not been used as the Civil Rule 11 standard in over ninety-nine percent of the Civil Rule 11 cases.

#### V. CRITICISM OF USING CIVIL RULE 11 TO ENFORCE THE LITIGATION ETHICS RULES VERSUS REFERRAL TO THE DISCIPLINARY SYSTEM

In addition to the panel decision in the *Golden Eagle* case,<sup>126</sup> there has been some intermittent criticism about using Civil Rule 11 to enforce litigation ethics rules, not to mention professionalism,<sup>127</sup> the decline of which seems to be a never ending lament of the bar.<sup>128</sup>

As pointed out by Professor McMorrow, who has previously noted the impact that Civil Rule 11 has had on federalizing litigation ethics rules,<sup>129</sup> there are dangers to such federalization as well, to wit:

A clear and national vision of the lawyer's ethical duties may well help the legal profession better define its role in

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125. See *supra* notes 90–96 and accompanying text.

126. See *supra* notes 83–84 and accompanying text.

127. See Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 366 (1989) (“Neither professionalism nor civility will, in our opinion, be served by encouraging such motions except where a lawyer’s conduct has been willful or irresponsible.”).

128. *Id.* at 365–66 (“Another product of the sanctions explosion is the erosion of civility. This is somewhat ironic since the incivility engendered by litigation abuses was a contributing cause of the 1983 rule amendments. We remember when civility and mutual respect were more characteristic of relations between trial adversaries than they are today, when most litigators did not view a decent working relationship with an opponent as a personal weakness or betrayal of a client.”). See also Thomas F. Maffei, *Rule 11—The Wrong Approach to Professionalism in Civil Litigation*, 73 MASS. L. REV. 98, 98–99 (1988) (arguing that guidelines of professional courtesy and various bar associations’ efforts on promoting professionalism may be the better answer to the problem that Civil Rule 11 was meant to resolve); see generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM § 1(B) (1996) (discussing the decline in professionalism and describing the prevalent themes among various commentators on the problem).

129. See *supra* note 19 and accompanying text.

the adversary process. The impact of Rule 11 is at least getting lawyers to talk about central issues of their role in the adversary system—if only to complain about it. A national standard, however, is not without cost. The potential dangers of having a dominant vision of competence derived from the federal judiciary are threefold. First, judges differ from lawyers in their evaluation of lawyer conduct. Second, this vision of lawyering is being made by federal judges who may come from different backgrounds and experience than the bar in general or the general public. Finally, and related to these first two points, the judicial process may not be well suited for creating a community of interest.<sup>130</sup>

From another angle, Professor William I. Weston has argued that, although Model Rule 3.1 varies slightly from the 1983 version of Civil Rule 11, the “use of the established grievance procedure enhances the profession and maintains the balance between the attorney and the court.”<sup>131</sup> Moreover, he has argued that Civil Rule 11 unnecessarily “duplicate[s] the traditional attorney discipline procedures. These procedures take into account the interests of all participants in the legal system. . . . Utilization of court-ordered sanctions diminishes the value and credibility of the grievance process.”<sup>132</sup>

In contrast, Professors Stephen R. Ripps and John N. Drowatzky have argued that “the federal district courts are usurping the function of the bar association and disciplinary processes [only] when no local court rules refer substantial Rule 11 violations to these bodies.”<sup>133</sup> In conducting their study on Civil Rule 11, they noted that:

Judges reported violations to bar association disciplinary committees a small percent of the time, and they reported that no local rule required them to do so. Further, a large

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130. McMorrow, *supra* note 19, at 981.

131. William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 925 (1990).

132. *Id.* at 927–28.

133. Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 69 (1997).

majority of the judges and bar associations [surveyed] did not expect all violations to be reported. . . . In addition, the judges were more likely than bar associations to view violations of Rule 11 as a small problem.<sup>134</sup>

Likewise, Professor Jeffrey A. Parness has argued that:

Disciplinary referrals should be guided by the principles that serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge presiding in the relevant civil case. The distinction between serious and less serious misconduct is difficult to draw, yet should normally be based on the reporting duties for judges and lawyers in the state in which the misconduct occurred. As noted earlier, the distinction drawn in the American Bar Association's model codes involves conduct violative of professional norms "that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness." Violations raising such substantial questions are better left to state agencies, as federal courts typically defer to state authority on the standards for competent legal practice. The internal disciplinary bodies of federal district courts, where they exist, simply do not have the expertise and experience, and perhaps resources, of traditional state agencies.<sup>135</sup>

Whereas Professor Lonnie T. Brown, Jr. has argued that all Civil Rule 11 motions should be reported, because:

Although Rule 11 protects lawyers only from sanctions within federal trial courts, it has the effect of creating a much broader zone of protection because there is an undeniable link between Rule 11 and Model Rule 3.1. When there has been a violation of Rule 11, there will almost certainly have been a violation of Model Rule 3.1, as well as Model Rules 3.2, 3.4(c), and 8.4(d), irrespective of whether or not Rule 11 sanctions are ultimately imposed. Specifi-

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134. *Id.* at 88.

135. Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 59-60 (1993) (footnotes omitted).

cally, at the moment when an attorney determines that there has been a violation of Rule 11 and decides to prepare and serve the requisite "notice" motion on opposing counsel, that lawyer will also necessarily have determined that there was a violation of Model Rule 3.1, among others, as well. Moreover, it goes without saying that such a determination meets the "knowledge" requirement of Model Rule 8.3(a) no matter what level of knowledge is deemed appropriate. Thus, the duty to report is activated.<sup>136</sup>

Professor Brown's idea was first championed by Professor Victor H. Kramer, who noted that:

To maximize the deterrent effect of Rule 11 sanctions, courts should ensure that the identity of sanctioned lawyers is a matter of public record, and should routinely report imposition of sanctions on lawyers to the state bar disciplinary bodies of the fifty states. Unfortunately, district courts sometimes impose sanctions without filing published opinions, and appellate court opinions all too often fail to make clear whether the district court imposed the sanction on the client, the client's lawyer, or both. As a result, it is impossible to know on whom the court imposed a sanction, at least without going to the record in the district clerk's office. Although a reviewing court may be understandably reluctant to publicize the name of a sanctioned attorney when the lower court improperly imposed the sanction, it is difficult to justify anonymity when the appellate court af-

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136. Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1604-05 (2001) (footnotes omitted).

Professor Brown has advocated mandatory reporting of all Civil Rule 11 motions, which would then be entered into some sort of a national database, so that patterns of such violations could be spotted for future use by the courts and the disciplinary system. See *id.* at 1606-16.

The ABA Standing Committee on Lawyers' Professional Liability runs the National Legal Malpractice Data Center ("NLMDC"), and that would be one possible database repository, if the federal courts did not wish to create their own. For more information on the NLMDC, see American Bar Association Standing Committee on Lawyer's Professional liability at <http://www.abanet.org/legalservices/lpl> (last visited Nov. 3, 2003).

firms the sanction. As noted above, the adverse publicity to a sanctioned lawyer can be an important part of the deterrent effect of sanctions. If the public is not made aware of the discipline, the professional ignominy of having been sanctioned or otherwise disciplined is far less intense.

Once a court has imposed a sanction on an attorney, it is difficult to justify not reporting the sanction to the disciplinary body of the jurisdiction which has authorized the sanctioned attorney to engage in the practice of law. Reporting of Rule 11 sanctions will give state disciplinary authorities an opportunity to review the records of attorneys who previously had violated the state's code of professional responsibility in light of their Rule 11 violations. Regular reporting of all Rule 11 sanctions to state disciplinary authorities also would disclose multiple Rule 11 sanctions against the same lawyer. To effectively use this information, state disciplinary bodies should investigate every lawyer who has received more than one Rule 11 sanction. Reporting by federal district clerks to state authorities would make this salutary practice possible.<sup>137</sup>

The Eight Circuit explained the proper response to this type of criticism in *Harlan v. Lewis*,<sup>138</sup> where, in upholding inherent power sanctions against the defendant's attorney for having violated Model Rule 3.4, it stated that:

[The defendant's counsel] next argues that the district court abused its discretion by imposing sanctions instead of referring [the defense counsel's] conduct to state disciplinary authorities. [He] asserts that "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice [before it]

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137. Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 808-09 (1991) (footnotes omitted).

For an overview of the current status of the misconduct reporting rule, see Nikki A. Ott & Heather F. Newton, Note, *A Current Look at Model Rule 8.3*, 16 GEO. J. LEGAL ETHICS 747 (2003).

138. 982 F.2d 1255 (8th Cir. 1993), *modified*, 1993 U.S. App. LEXIS 3403 (8th Cir. Feb. 26, 1993), *cert. denied sub nom.* *Hall v. Harlan*, 510 U.S. 828 (1993).

*unless the questioned behavior taints the trial of the cause before it.*" [He] also argues that "[w]here there is no threat to the integrity of further proceedings, possible ethical violations which 'surfac[e] during the litigation are generally better addressed by the comprehensive machinery of the state and federal bar.'"

We entertain no doubt that the district judge was authorized to preserve the integrity of the proceedings before him by imposing sanctions. The questioned behavior tainted the trial of the cause and threatened the integrity of further proceedings. The district judge saw [the defense counsel's] misconduct as having a significant negative effect on both the discovery process and the eventual trial. A district judge must have the power to deal with conduct of attorneys in litigation without delegating this responsibility to state disciplinary mechanisms. State disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court. In addition, the state disciplinary body could not have repaired the damage [that the defense counsel] caused by attempting to restrict the flow of relevant information and discovery and by planting implied threats in the minds of potential witnesses. Under these circumstances, the district court was correct in resolving both the disciplinary and remedial questions in a single action.<sup>139</sup>

Thus, the *Harlan* court cut to the bottom line, which is that, as a practical matter, referral to the applicable bar association or state disciplinary authority for misconduct in a pending case is ineffective at solving the problem *in the pending case, itself*. For this reason, trying to argue that the federal courts should not have jurisdiction to enforce the litigation ethics rules for violations thereof during litigation is like trying to push the proverbial boulder uphill, because the over-

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139. *Id.* at 1260–61 (some alterations in original; citations omitted).

all historical and political reasons for having granted the federal courts this power in the first place have not diminished.<sup>140</sup>

Moreover, “[t]he ethical prohibitions against nonmeritorious claims and defenses overlap a great deal with court rules and statutes that authorize monetary or other sanctions for unnecessary or groundless litigation. Court-imposed sanctions for frivolous litigation and professional discipline for the same misbehavior are not mutually exclusive,”<sup>141</sup> and referral to the disciplinary system is one of the recommended sanctions for a Civil Rule 11 violation.<sup>142</sup>

In fact, as Professor Kramer has argued:

To help resolve these inconsistencies, . . . courts should consider and interpret Rule 11 primarily as a tool to enforce the Rules of Professional Conduct in litigation rather than as a means to compensate litigants who become the victims of unprofessional conduct: deterrence rather than reimbursement should be the primary purpose of sanctioning lawyers. For many years, state rules have made it unethical for lawyers to file suits or take other action in litigation that is legally insupportable or designed to harass the opposing side. The state lawyer-disciplinary bodies, however, have failed to enforce these provisions. Rule 11 thus offers the federal courts an opportunity to enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce. To the extent that federal courts interpret Rule 11 as a device to enforce these Rules, the circuits should resolve much of their disagreement.<sup>143</sup>

So the criticism that should have been advanced here is the following: Why isn’t the standard for violating Civil Rule 11 that which is encompassed within the Model Rules, and why hasn’t the

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140. See VAIRO, *supra* note 16, § 1.08[f] (discussing continuing attempts, sometimes successful, to return some areas of the law to the mandatory sanctions environment of the 1983 version of Civil Rule 11).

141. LAWS. MAN. ON PROF. CONDUCT ¶ 61:117 (ABA/BNA) (1999).

142. FED. R. CIV. P. 11 advisory committee’s note (1993). See generally VAIRO, *supra* note 16, § 9.03[b][2][B] (discussing disciplinary action as being one of the non-monetary sanctions available under the current version of Civil Rule 11).

143. Kramer, *supra* note 137, at 797–98 (footnotes omitted).



Civil Rule 11 sanction process been officially incorporated into the overall attorney disciplinary process?

These questions are important, because as explained by Professor Peter A. Joy in his recent study, the Civil Rule 11 sanctioning process has *sub silentio* taken the place of the disciplinary process for violations of these litigation ethics rules; specifically, during the last decade of over 2,000 Civil Rule 11 cases, only four of these have resulted in referral of the attorney to the disciplinary system,<sup>144</sup> even though some 274 of these cases resulted in some form of Civil Rule 11 sanctions against attorneys at the district court level.<sup>145</sup> Moreover, of these 274 lawyers, only twenty-two were publicly disciplined after their Civil Rule 11 violations had occurred; and of these twenty-two, only three were ultimately disciplined in connection with their Civil Rule 11 violations.<sup>146</sup>

In discussing the institutional choices underlying the relationship between Civil Rule 11 sanctions and professional discipline, Professor Joy explained that:

The empirical analysis demonstrating a negligible correlation between the Rule 11 sanctions and reported lawyer discipline for that same conduct suggests a number of institutional choices underlying the relationship between Rule 11 sanctions and disciplinary enforcement of ethics violations for Rule 11 conduct. The empirical analysis points to an implicit division of authority concerning the regulation of lawyer litigation conduct in federal courts. In this division of authority, federal district court judges wield primary control over the litigation conduct of lawyers appearing before them. Structural features of both Rule 11 and prevailing ethics rules, both of which do not require either judges or lawyers to report Rule 11 violations to lawyer disciplinary authorities, reinforce this division of authority by virtually guaranteeing that in most instances the Rule 11 sanctions will be the only public sanctions imposed on lawyers for their litigation conduct.

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144. Joy, *supra* note 58, at 792.

145. *Id.* at 789.

146. *Id.* at 796.

In addition to the structural features of Rule 11 and the ethics rules, which do not require either referrals to or reporting of Rule 11 sanctions, there are at least four additional institutional choices that underlie the primacy of federal judges in controlling litigation conduct before them: first and foremost, lawyer discipline agencies are unable or unwilling to control litigation conduct; second, the legal profession has determined that trial judges are more effective in controlling litigation conduct in pending matters; third, prevailing standards for enforcing lawyer discipline and standards for imposing lawyer sanctions downplay imposing public sanctions for litigation conduct; and fourth, the legal profession's failure to coordinate federal courts' actions with and state lawyer disciplinary agencies contributes to vesting federal judges with the primary responsibility for enforcing norms of acceptable lawyer litigation conduct in bringing lawsuits and making other court filings.<sup>147</sup>

So what we know from the above discussion is that even though some commentators have argued for Civil Rule 11 violations to be reported to the bar, this has not occurred. The bar has not generally disciplined lawyers who have violated Civil Rule 11, and thus the only *de facto* enforcement of the litigation ethics rules has come from the courts. As such, if we are going to use Civil Rule 11 to enforce the litigation ethics rules, shouldn't we at least acknowledge this fact and measure an attorney's conduct by these litigation ethics rules?

#### VI. WHY HAVE THE LITIGATION ETHICS RULES GENERALLY BEEN SEPARATED FROM CIVIL RULE 11 ANALYSIS?

In the original Scope of the Model Rules, the ABA stated that the:

[18] Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulat-

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147. *Id.* at 806-07 (footnotes omitted).

ing conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.<sup>148</sup>

During the drafting of this provision of the original Model Rules, this paragraph was "intended to make clear that the purpose of the Model Rules was to regulate lawyer conduct through the disciplinary process, not to serve as a basis for civil liability."<sup>149</sup>

However, as Professor Ronald D. Rotunda has observed:

[T]his determination that the ethics rules should not be used in malpractice cases or in disqualification motions may be likened to whistling past the graveyard. If one is concerned when crossing a graveyard at night, it does no harm to whistle, but the whistling provides no real protection either. In spite of the protestations in the *Scope* section, courts have often used the legal ethics rules to impose tort liability on lawyers[,] to reverse criminal prosecutions, and to disqualify lawyers. As one court acknowledged, it is "common lore that the Code, though it literally prescribes only the bases of lawyer discipline, is regularly used by courts to establish the criteria for lawyer disqualification as well."<sup>150</sup>

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148. MODEL RULES OF PROF'L CONDUCT scope ¶ 18 (1983).

149. MODEL RULES HISTORY, *supra* note 4, at 15 (comments of the reporter, Professor Geoffrey C. Hazard, Jr.).

150. ROTUNDA, *supra* note 45, § 1-8.2.3, at 41 (footnotes omitted). *See also* ANNOTATED MODEL RULES, *supra* note 12, at 5 ("The disclaimers notwithstanding, courts have long looked to the Rules as the standards of ethical conduct in myriad contexts, particularly contract and tort actions against lawyers, disqualification motions, and fee disputes."); *see generally* 1 HAZARD & HODES, *supra* note 44, § 4.1 (discussing the relationship between the law of legal malpractice and the Model Rules of Professional Conduct).

The 2002 amendments to the Model Rules changed the Scope as follows:

~~{18} [20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.<sup>151</sup>~~

So what has changed?

Two important sentences were added to the Scope section in 2002 to "reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases." ABA Report to the House of Delegates, No. 401 (Aug. 2001), Scope, Reporter's Explanation of Changes.

The most important change is the concession in paragraph

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As Professor Rotunda has noted, the Model Rules are commonly used in criminal cases, disqualification motions, fee disputes, and legal malpractice cases. ROTUNDA, *supra* note 45, § 1-8.2.3.

151. ANNOTATED MODEL RULES, *supra* note 12, Supplement at 3-4.

[20] that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.” This amendment reflects the position reached by a majority of courts. The *Restatement* takes a similar position. *Restatement (Third) of the Law Governing Lawyers* § 52(2) & cmt. f (2000) (Rule violation “may be considered by a trier of fact as an aid in understanding and applying” the duties of competence and diligence required to meet the standard of care).

Balancing this is the new sentence in paragraph [20] that notes that “violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.”<sup>152</sup>

So even today, the ABA has stubbornly refused to acknowledge or “sanction” the use of the Model Rules as the standard for Civil Rule 11 or any other motion practice, apparently because “the purpose of the [Model] Rules can be subverted when they are invoked by opposing parties as procedural weapons.”<sup>153</sup> However, the ABA has never explained or justified this position, which seems patently hypocritical. Moreover, as discussed by Professor Rotunda,<sup>154</sup> the courts have used the Model Rules in a variety of litigation contexts anyway.<sup>155</sup>

To some extent, the American Law Institute (“ALI”) has contributed to this problem by respecting the ABA’s turf, so-to-speak. As explained by Professors Geoffrey C. Hazard, Jr. and W. William Hodes, “[a]lthough the Restatement of the Law Governing Lawyers has a different organization from that of the Model Rules of Professional Conduct, . . . and is directly applicable only *outside* of the disciplinary process, it perforce covers almost all of the same ground.”<sup>156</sup> Thus, the ALI has attempted by its relatively new Re-

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152. *Id.* at 5.

153. MODEL RULES OF PROF’L CONDUCT scope ¶ 20 (2003).

154. See *supra* note 150 and accompanying text.

155. ROTUNDA, *supra* note 45, § 1-8.2.3.

156. 2 HAZARD & HODES, *supra* note 44, § 26.5 (cross-reference deleted).

statement<sup>157</sup> to carve out the non-disciplinary arena as its own domain, leaving the disciplinary arena to the ABA; yet this is a false demarcation, and it is too late to try to implement this now.<sup>158</sup> Of interest, Professor Hazard was the reporter for the 1983 Model Rules,<sup>159</sup> and he was the director of the ALI from 1984 to 1999.<sup>160</sup>

In the context of frivolous litigation, the ALI's *Restatement (Third) of the Law Governing Lawyers* has attempted to define at least a portion of the law relating to Civil Rule 11 as follows:

§ 110. Frivolous Advocacy

(1) A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

(2) Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.

(3) A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable

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157. The Restatement was begun in 1986, but it was not substantively approved until 1998. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS foreword (2000); see also ROTUNDA, *supra* note 45, §§ 1-3.1, 1-4.4 (brief historical discussion of this Restatement; noting that the official draft was not finalized until 2000 for minor and stylistic reasons).

158. See ROTUNDA, *supra* note 45, § 1-4 (gauging the influence of this Restatement).

159. *E.g.*, CTR. FOR PROF'L RESPONSIBILITY, A.B.A., THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 5 (1987) ("Professor Geoffrey C. Hazard, Jr., Reporter of the Commission, often introduced the proposed Rules and presented the rationale of each.").

160. University of Pennsylvania Law School Faculty, Geoffrey C. Hazard Jr., at <http://www.law.upenn.edu/cf/faculty/ghazard/cv.pdf> (last visited Oct. 25, 2003).

procedural requirements concerning discovery.<sup>161</sup>

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161. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 (2000).

The comments and illustrations to this section are as follows:

**Comment[s]:**

*a. Scope and cross-references.* Subsection (1) states the rule of professional codes requiring that a lawyer have a nonfrivolous basis for steps taken in advocacy for a client. On procedural rules found in most jurisdictions that impose a more exacting requirement, see Comment *c*. Subsection (2) states the more permissive requirement for advocacy in criminal-defense representations. On the requirements that a lawyer not misrepresent the law to a tribunal and that a lawyer cite controlling authority, see § 111. Several Sections in Topic 4 state additional duties in an advocate's dealings with witnesses and evidence. See also § 106 (prohibition against harassing third persons).

*b. Rationale.* Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

*c. Procedural sanction against unfounded assertions in litigation.* Procedural rules modeled on Rule 11 of the Federal Rules of Civil Procedure impose affirmative obligations going beyond a requirement of minimally plausible position. In addition, courts have inherent power to impose sanctions against frivolous or otherwise abusive litigation tactics (see generally § 1, Comment *b*).

Such procedural rules generally have four elements, although jurisdictions differ on particulars. First, a lawyer may file a pleading, motion, or other paper only after making an inquiry about facts and law that is reasonable in the circumstances. Second, the lawyer's conclusions as to the facts and law must meet an objective, minimal standard of supportability. Third, litigation measures may not be taken for an improper purpose, even in instances in which they are otherwise minimally supportable. Finally, remedies provided for violations may include sanctions such as fee shifting, which in appropriate cases may be imposed directly on an offending lawyer (see Comment *g*).

Federal Rule 11 and corresponding state procedural rules generally are applicable only to positions asserted in writings signed by a lawyer, such as a pleading or motion. Other sources of law may extend a court's power to other activities of an advocate. For example, in the federal system, § 1927 of Title 28 of the United States Code prohibits actions of a lawyer, not limited to writings, that unduly multiply proceedings. A similar authority is conferred on federal appellate courts

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under Federal Rule of Appellate Procedure 38. Many courts also recognize a residual inherent power to impose sanctions on lawyers for bad-faith litigation. Detailed consideration of Federal Rule 11 and similar procedural rules is beyond the scope of this Restatement.

*d. Frivolous positions in litigation.* A frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it. A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

**Illustrations:**

1. The supreme court of a jurisdiction held 10 years ago that only the state legislature could set aside the employment-at-will rule of the state's common law. In a subsequent decision, the same court again referred to the employment-at-will doctrine, stating that "whatever the justice or defects of that rule, we feel presently bound to continue to follow it." In the time since the subsequent decision, the employment-at-will doctrine has been extensively discussed, often critically, in the legal literature, and courts in some jurisdictions have overturned or limited the older decisions. Lawyer now represents an employee at will. Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction. On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous in the absence of reason to believe that there is a substantial possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance.

2. Following unsuccessful litigation in a state court, Lawyer, representing the unsuccessful Claimant in the state-court litigation, filed an action in federal court seeking damages under a federal civil-rights statute, 42 U.S.C. § 1983, against the state-court trial judge, alleging that the judge had denied due process to Claimant in rulings made in the state-court action. The complaint was evidently based on the legal position that the doctrine of absolute judicial immunity should not apply to a case in which a judge has made an egregious error. Although some scholars have criticized the rule, the law is and continues to be well settled that



absolute judicial immunity under § 1983 extends to such errors and precludes an action such as that asserted by Claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous.

It may be reasonably doubtful to a lawyer whether existing precedent supports a legal position or whether the lawyer should instead ask a court to extend, modify, or reverse existing law. When an advocate has adequately referred to the relevant authority (see § 111) the rule of this Section is not violated if the lawyer argues that existing precedent supports a legal position even though the tribunal concludes that the argument should more appropriately have been couched as an effort to modify existing law. In any event, a lawyer may not make a false statement of a material proposition of law to the tribunal (see § 111(1)).

*e. Abusive discovery practice.* As stated in Subsection (3), a lawyer may not, in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a proper discovery request of another party. Frivolousness is determined under the standard stated in Comment *d*. Whether a lawyer complying with a discovery request has made a reasonably diligent effort is determined by an objective standard. In any response, the Section permits a lawyer to assert on behalf of the client any nonfrivolous basis for noncompliance. A lawyer must not, for example, delay a discovery response beyond the time permitted by law without adequate justification, provide answers to discovery requests that the lawyer knows to be false and misleading, or knowingly withhold discoverable information in responding to proper requests for such material. Procedural rules (see generally Comment *c*) may impose more stringent standards for making or responding to discovery requests.

*f. Advocacy in a criminal-defense representation.* The rules in this Section apply generally to criminal-defense lawyers. However, as stated in Subsection (2), a lawyer defending a person accused of crime, even if convinced that the guilt of the offense charged can be proved beyond a reasonable doubt, may require the prosecution to prove every element of the offense, including those facts as to which the lawyer knows the accused can present no effective defense. A criminal-defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. With respect to propositions of law, a criminal-defense lawyer may make any nonfrivolous argument. Under decisions of the United States Supreme Court, a lawyer representing a convicted person on appeal may be required to file a so-called *Anders* brief in the event the lawyer concludes that there is no nonfrivolous ground on which the

In addition, the ALI has devoted an entire chapter of this Restatement to advocacy in general,<sup>162</sup> limits on advocacy,<sup>163</sup> advocates and tribunals,<sup>164</sup> and advocates and evidence,<sup>165</sup> all of which is com-

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appeal can be maintained.

*g. Remedies.* This Section restates requirements of the lawyer codes, violations of which are sanctioned through professional discipline. Many jurisdictions by legislation or rule provide for fee shifting as a sanction for frivolous advocacy, including sanctions against an advocate, a party, or both and often under standards stricter than those stated in the Section (see Comment *c*). In relatively rare instances, damages may be recovered in an independent action (see generally § 57, Comments *d* & *e*). Under some legislation or rules, an offending lawyer may be fined, reprimanded, otherwise sanctioned, or referred to a disciplinary agency.

Courts generally attempt to impose sanctions for unwarranted litigation on the lawyer or client (see § 29, Comment *d*) in proportion to their relative responsibility. In appropriate circumstances, when a sanction is focused upon a lawyer for deterrence purposes, a tribunal may order that the lawyer not seek reimbursement from a client. Allocating responsibility may be difficult. Achieving precise allocation may entail inquiry into matters that are generally protected by the attorney-client privilege (see § 68 and following) or the work-product immunity (see § 87 and following). In addition, such an inquiry may interject conflicts of interest between lawyer and client with respect to the burdens of the sanction (see Comment *b*). Particularly when the representation is not at an end and the relative fault of lawyer and client is doubtful, the preferable approach is to leave questions of ultimate responsibility between them to resolution after the proceedings are concluded.

*Id.* cmts. a–g.

For a discussion of the interrelationship between Restatement section 110 and Civil Rule 11, see ROTUNDA, *supra* note 45, § 22-2.4 (discussing the basic elements of the procedural rules against frivolous litigation).

162. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 105–109 (2000) (covering complying with the law and tribunal rulings, dealing with other participants in proceedings, prohibited forensic tactics, advocate as witness, and advocate’s public comment on pending litigation).

163. *Id.* §§ 110–112 (covering frivolous advocacy, disclosure of legal authority, and advocacy in *ex parte* and other proceedings).

164. *Id.* §§ 113–115 (covering improperly influencing a judicial officer, lawyer’s statement concerning a judicial officer, and lawyer contact with a juror).

165. *Id.* §§ 116–120 (covering interviewing and preparing a prospective witness, compensating a witness, falsifying or destroying evidence, physical evidence of a crime, and false testimony as evidence).

parable to the complete litigation ethics rules contained in the Model Rules.<sup>166</sup>

According to Professor Rotunda, “[w]hile the . . . Model Rules greatly influence courts in adopting rules of ethics, the purpose of the ALI’s Restatement is to influence courts in interpreting those ethics rules as well as other law governing lawyers and the practice of law.”<sup>167</sup>

So why have the federal courts ignored the Model Rules here, when they have adopted them as the national standard for other ethical areas such as disqualification motions?<sup>168</sup> Certainly, the ABA’s attempt to keep these rules out of the litigation context must have had some impact coupled with the ALI’s willingness to take over the role, its fourteen year delay from 1986 to 2000 in producing this Restatement, and the resulting “newness” of the same. In other words, to the extent that the ALI could have filled this void for the federal courts, its Restatement was unavailable to the courts during the majority of the time period in which the Civil Rule 11 jurisprudence was being created.

Another explanation is that since there is no rule of civil procedure for disqualification, fee disputes, legal malpractice, etc., the courts were forced to turn *somewhere* for guidance, when considering those issues. However, since Civil Rule 11 is, in fact, a rule of civil procedure, the federal courts have gotten stuck with their blinders on looking at the rule for substance, when the rule, by category, is

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166. See *supra* Part II.

167. See ROTUNDA, *supra* note 45, § 1-3.1.

168. See, e.g., *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (Model Rules reflect the “national standard” for disqualification motions); see generally RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES* § 2.2, at 28 (2003) (“It is generally agreed that courts have the inherent authority to disqualify counsel for violating any ethical rule—not just conflict of interest rules—and other types of ethical misconduct may justify invoking this remedy in certain circumstances.” (footnotes omitted)); *id.* §§ 1.1–1.4 (discussing the rules governing lawyer conduct, their purposes, their force and effect, and the consequences for violating them).

For a further discussion of the use of the litigation ethics rules in this and other litigation areas, see ROTUNDA, *supra* note 45, § 1-8.2.3 (noting that the Model Rules are commonly used in criminal cases, disqualification motions, fee disputes, and legal malpractice cases).

at least theoretically supposed to be one of procedure, *i.e.*, “how” and not “why” to sanction. This may be partly an historical accident, because when the 1983 version of Civil Rule 11 was being drafted, Model Rule 3.1 and its related litigation ethics rules were also in the drafting stage, and they both became effective within a day of each other in August of 1983.<sup>169</sup> Thus, because the drafters of the 1983 version of Civil Rule 11 were forced to create their own substantive standards, once the rule became effective, the federal courts went forward to create a federal common law of frivolous conduct without stopping to consider that the analog litigation ethics rules might provide a more helpful starting place instead.<sup>170</sup> In addition, since the courts had traditionally avoided the litigation ethics rules when creating the common law relating to inherent power sanctions,<sup>171</sup> they were probably predisposed to follow this route in interpreting Civil Rule 11, although recent inherent power cases have been centered around the Model Rules.<sup>172</sup>

Once the ball started rolling in the federal court arena, it never really stopped, possibly for one of the reasons explained by Professor McMorrow: that “Rule 11 may be . . . a method for federal judges ‘to mold the bar in their own image.’”<sup>173</sup> In addition, as described by Professors McMorrow and Daniel R. Coquillette, the federal courts have struggled since at least 1988 with how to regulate attorneys in federal court, and they cannot even agree on what ethical standards to use.<sup>174</sup> However, there is a consensus that they do not want to duplicate the state disciplinary systems.<sup>175</sup>

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169. See 2 HAZARD & HODES, *supra* note 44, § 27.3 (stating that the 1983 version of Civil Rule 11 became effective just one day before the adoption of the Model Rules).

170. MCMORROW & COQUILLETTE, *supra* note 19, § 807 (introduction to the common law of lawyering).

171. *Id.* § 807.02[1] (discussing the fact that federal courts often give scant attention to local rules addressing attorney conduct in the context of inherent power sanctions).

172. *E.g.*, *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1159 (D.S.D. 2001) (exclusion of evidence sanction for violation of Model Rule 4.2), *aff’d*, 347 F.3d 693 (8th Cir. 2003).

173. MCMORROW, *supra* note 19, at 975 (footnote omitted).

174. MCMORROW & COQUILLETTE, *supra* note 19, §§ 802.20–23 (describing and explaining current proposals for reform of the federal district court rules systems). See also Fred C. Zacharias & Bruce A. Green, *Federal Court*

So, while the cause of this separation cannot be proven, the factors that contributed to this result appear to be: (1) the ABA's resistance to the idea, (2) the ALI's desire to co-opt the area, (3) historical accident, and (4) the self-interests of the federal courts.

## VII. CONSEQUENCES OF HAVING SEPARATED THE LITIGATION ETHICS RULES FROM CIVIL RULE 11

There are, and have been, multiple adverse consequences resulting from the separation of the litigation ethics rules from Civil Rule 11, and this separation has resulted in an avalanche of litigation and uncertainty since the 1983 amendments to the rule, which then led, in part, to the 1993 amendments to the same.<sup>176</sup> This is true, in part, because the litigation ethics rules define or regulate most, if not all, of the circumstances falling within the purview of Civil Rule 11. However, a multitude of issues within the purview of the litigation ethics rules are not defined or regulated by Civil Rule 11. In other words, Civil Rule 11 is under-inclusive in terms of regulating attorney litigation conduct. This is true even when Civil Rules 26 and 37 are taken into account in regards to discovery sanctions.

For instance, years of litigation were spent on the issue of the overall purpose of Civil Rule 11, with the debate being one of penalty versus deterrence versus compensation.<sup>177</sup> This debate, how-

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*Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VANDERBILT L. REV. 1303, 1318-36 (2003) (discussing alternative visions of federal judicial regulation).

Professors McMorro & Coquillette have noted that one of the arguments against adopting the Model Rules as the national standard is that they are rarely cited in federal court, MCMORROW & COQUILLETTE, *supra* note 19, § 802.21[1], however, this Article proves that this reasoning is suspect, since the majority of Civil Rule 11 cases do not mention the litigation ethics rules, even though these rules are applicable to such cases. See *supra* notes 55-64 and accompanying text. Thus looking at the number of federal cases citing the Model Rules tells us nothing about the number of cases that have dealt with issues within the purview of these rules.

175. *Id.* § 802.22[1], at 802-74 (discussing coordination with state disciplinary enforcement).

176. See VAIRO, *supra* note 16, § 2.02 (discussing the Civil Rule 11 experience from 1983-1993).

177. See *id.* § 2.03[a] (discussing the purpose of the 1983 version of Civil Rule 11).

ever, was not completely resolved until the 1993 amendments made clear that the primary purpose of the rule was to deter frivolous conduct and not to penalize attorneys or to compensate victims.<sup>178</sup> Even so, a decade of litigation and revision could have been avoided had the discussion been framed by the Model Rules, which were designed to regulate attorney conduct and not to compensate victims of misconduct.<sup>179</sup>

Another example is the issue of the “Paper as a Whole” Doctrine,<sup>180</sup> which, as discussed above in regards to the *Golden Eagle* case,<sup>181</sup> was not totally abandoned until 1992.<sup>182</sup> Had Model Rule 3.1 set the standard, this debate never would have occurred, because that rule now commands that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>183</sup> This is true, because during the entire timeframe that the courts were declining to sanction unless the entire paper was frivolous, any frivolous issue contained in that paper still violated Model Rule 3.1 and thus constituted misconduct.<sup>184</sup>

There is another obvious problem that could have been avoided. While the 1983 version of Civil Rule 11 applied only to signed writings,<sup>185</sup> Model Rule 3.1 does not require a signing, and it does not on its face even require a paper. So, oral statements are already implicitly covered by Model Rule 3.1,<sup>186</sup> and they are explicitly covered by Model Rule 3.3.<sup>187</sup> But it took until the 1993 amendments to Civil Rule 11, and the addition of the prohibition of “later advocating,” to

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178. See *id.* § 2.04[a] (discussing the purpose of the 1993 amendments to Civil Rule 11).

179. MODEL RULES OF PROF'L CONDUCT Scope ¶ 18 (1983).

180. See VAIRO, *supra* note 16, § 4.01[e] (discussing the “Paper as a Whole” controversy).

181. See *supra* notes 90–96 and accompanying text.

182. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991) (en banc).

183. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

184. *Id.* R. 8.4(a).

185. See VAIRO, *supra* note 16, § 4.02[a] (discussing the signing requirement).

186. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

187. *Id.* R. 3.3.

outlaw frivolous oral statements to some extent.<sup>188</sup> So, in other words, much effort was spent to incorporate this provision into Civil Rule 11, when this prohibition already existed in Model Rules 3.1 and 3.3. It is unfathomable why so much time and effort was spent to outlaw conduct that was already outlawed and then to turn around and act like this was something new as reflected in the 1993 amendments to Civil Rule 11.<sup>189</sup>

Even worse, the "later advocating" provision in the 1993 amendments did not fully implement the duty of candor, which was part of the reason for the amendments.<sup>190</sup> Under the 1983 version of Civil Rule 11, frivolousness was judged at the time of filing, and there was no duty to update the paper, if it later became frivolous.<sup>191</sup> The 1993 version attempted to solve this problem by making the triggering event the "later advocating" of a position that had by then become frivolous.<sup>192</sup> Had the standard been Model Rule 3.3, there would have been a continuous duty of candor,<sup>193</sup> which would have obviated this entire discussion.

Moreover, even now the "later advocating" provision is insufficient in a variety of circumstances. For example, assume that one of the parties in a lawsuit files a motion for partial summary judgment, which is granted, but the remainder of the case goes to trial. Assume that the law changes between the granting of the partial summary judgment motion and trial, and that this change would compel the vacation of the partial summary judgment on a motion for reconsideration. Further assume that the benefited party is aware of this change but does not report it, and that the detrimented party remains unaware. In this case, there is no Civil Rule 11 liability for the bene-

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188. FED. R. CIV. P. 11(b). *See also* VAIRO, *supra* note 16, § 4.02[d][2] (discussing oral assertions under the 1993 amendments to Civil Rule 11 and the concept of "later advocating").

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

190. *Id.*

191. *See* VAIRO, *supra* note 16, § 5.04 (discussing the continuing duty theory under the 1983 version of Civil Rule 11 and "later advocating" under the 1993 version).

192. *See id.* § 5.04[b] (discussing "later advocating" under the 1993 version of Civil Rule 11).

193. MODEL RULES OF PROF'L CONDUCT R. 3.3(c) ("The duties stated [herein] continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.").

fited party, because there has been no “later advocating,” since the issue has already been decided. In contrast, under Model Rule 3.3, there is a continuing duty of candor,<sup>194</sup> which would require the attorneys to notify the court of a change in controlling law until the end of the case.

Thus, Civil Rule 11 fails its purpose here, because it still looks only to positive action (“later advocating”) rather than the failure to act (continuing duty of candor). Keep in mind that the attorney has still committed an ethical violation under Model Rule 3.3. The court, however, just cannot sanction him or her under Civil Rule 11. If the purpose of Civil Rule 11 is to deter only frivolous conduct as defined by positive action, this distinction may make sense; but if the purpose of the rule is to enforce the litigation ethics rules—which includes, but is not limited to, deterring frivolous conduct and all other litigation ethics violations—then it does not, for the reasons explained above.

The examples go on and on. If Model Rule 3.1 would have been used as the standard, then there would never have been any litigation over whether or not Civil Rule 11 required an objective standard.<sup>195</sup> If Model Rule 5.1 would have been used as the standard, there would never have been any litigation as to whether or not non-signers of a paper could be held liable for a Civil Rule 11 violation,<sup>196</sup> and that part of the 1993 amendments to Civil Rule 11 would have then become unnecessary.<sup>197</sup>

In short, the Model Rules already provided a ready-made road map for the implementation of the 1983 version of Civil Rule 11, but they were virtually ignored,<sup>198</sup> which resulted in a decade of litigation that culminated in the 1993 amendments.<sup>199</sup> Much of this would have been unnecessary had Civil Rule 11 been seen as simply the

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194. *Id.*

195. See VAIRO, *supra* note 16, § 5.02[a] (discussing early confusion under the 1983 amendments to Civil Rule 11 regarding the standard to be applied).

196. MODEL RULES OF PROF'L CONDUCT R. 5.1(c) (defining conditions for holding one lawyer liable for another's violation of the Model Rules).

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

198. See *supra* notes 55–64 and accompanying text.

199. See VAIRO, *supra* note 16, § 2.02 (discussing the Civil Rule 11 experience from 1983–1993).



procedural rule to implement the litigation ethics rules as championed by Professor Kramer.<sup>200</sup>

### VIII. WHY SHOULD THE LITIGATION ETHICS RULES BECOME THE CIVIL RULE 11 STANDARD?

Obviously, there are a number of reasons why the litigation ethics rules should be the Civil Rule 11 standard, and it is not too late for the courts to adopt this position, since the refinements evident in the 1993 amendments follow the teachings of the Model Rules to a large extent.<sup>201</sup>

First, this separation has forced the federal courts to develop a federal common law for frivolous conduct, which has taken up a great amount of judicial resources, and which was unnecessary and redundant for the reasons discussed above.<sup>202</sup> Moreover, this development created many conflicts within the circuit courts,<sup>203</sup> who, according to Professor Kramer, could have prevented or "resolve[d] much of their disagreement," if they "[had] interpret[ed] [Civil] Rule 11 as a device to enforce the[] [Model] Rules . . . ."<sup>204</sup>

Second, this separation has created multiple codes of conduct with which lawyers must comply, which is both confusing and sometimes contradictory.<sup>205</sup> As explained by Professor McMorrow, this should not be surprising, since the Civil Rule 11 jurisprudence was built "largely through an adversarial model developed by federal courts rather than through lawyers' self-developed standards or through a process designed to have greater meaningful public input."<sup>206</sup> Moreover, as a practical matter, asking lawyers to learn more than one ethical code of conduct is unrealistic, considering that it is hard enough to get them to learn even one.

Third, this separation has resulted in some violations of litigation ethics being subject to Civil Rule 11 sanctions, yet other viola-

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200. See *supra* note 137 and accompanying text.

201. Compare FED. R. CIV. P. 11 advisory committee's note (1993), with *supra* Part II.

202. See *supra* Part VII.

203. See, e.g., VAIRO, *supra* note 16, § 2.03[c][3] (discussing the unraveling consensus under the 1983 version of Civil Rule 11).

204. Kramer, *supra* note 137, at 797-98 (footnotes omitted).

205. See *supra* Part VII.

206. McMorrow, *supra* note 19, at 975.

tions not being subject to the rule.<sup>207</sup> It makes no sense for the federal courts to regulate some, but not all, litigation ethics violations, especially when the state disciplinary systems generally view it as the trial courts' responsibility to regulate the conduct before them.<sup>208</sup> Moreover, in the many instances where a federal court has adopted the Model Rules as the standard of conduct for lawyers,<sup>209</sup> the court and the litigants are faced with the hypocrisy of a mandatory rule of conduct specifying minimum standards—without the court's ability to enforce the same, other than by referral to one of the disciplinary agencies, which does not solve the immediate problem.<sup>210</sup>

Fourth, this separation has perpetuated a multitude of other sanctions rules and statutes, which would be largely unnecessary if Civil Rule 11 was standardized to follow the litigation ethics rules. It has also resulted in the attempt to hold *pro se* litigants to the litigation ethics rules, when they cannot possibly be expected to know or understand, let alone comply with, professional codes of conduct.<sup>211</sup> If Civil Rule 11 was correctly seen as the enforcement mechanism for the litigation ethics rules, then it would be silly to truly believe that lawyers' ethical rules can or should be applied to *pro se* litigants, whose conduct should be regulated and sanctioned—but not by professional standards applicable to lawyers. As a result, courts have made all sorts of accommodations to *pro se* litigants in the Civil Rule 11 context,<sup>212</sup> rather than just admitting that Civil Rule 11 is the wrong vehicle to use against them.

Fifth, this separation has encouraged a dual, if not triple, track of attorney discipline, whereby lawyers ostensibly are subject to discipline under the state disciplinary systems, under the Civil Rule 11

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207. See *supra* Part VII.

208. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. b (2000) ("Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse.").

209. See *supra* notes 154–55 and accompanying text.

210. See *supra* Part V.

211. See VAIRO, *supra* note 16, § 5.05[a] (discussing the differing application of Civil Rule 11 to *pro se* litigants as compared to attorneys).

212. *Id.*

procedure, and under the federal disciplinary system.<sup>213</sup> But apart from the limited referrals under Civil Rule 11,<sup>214</sup> the regulatory systems have been kept in the dark about the "civil misconduct" of lawyers.<sup>215</sup> Thus, rather than encouraging the unification of all systems affecting lawyer regulation,<sup>216</sup> as recommended by the ABA's McKay Report,<sup>217</sup> this separation has perpetuated the multiple attorney regulatory schemes, which seldom talk to each other.<sup>218</sup>

Finally, it should be the province of a court to regulate the conduct of attorneys practicing before it, and to discipline them accordingly, when needed, if for no other reason than that noted by Professor Kramer,<sup>219</sup> which is that the state agencies are not set-up to police litigation ethics violations, and they seldom do.<sup>220</sup> In a unified disciplinary system, a Civil Rule 11 motion would take on the same position as a grievance, and the resulting determination would be reported to a central lawyer regulatory body, as suggested by Professor Brown.<sup>221</sup> At the same time, under such a system, such "grievances" would be waived if not litigated in the relevant court proceeding, which would relieve state disciplinary agencies of the awful and time-consuming task of trying to assess litigation conduct (when they are asked to do so), when the courts are in the best position to do so anyway.<sup>222</sup> Civil Rule 11 proceedings should be viewed as part-and-parcel of lawyer regulation rather than as some sort of extra-disciplinary proceeding that has nothing to do with the lawyer's license. As noted by Professor McMorrow, this is especially true, be-

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213. See Joy, *supra* note 58.

214. See *id.* at 791-95.

215. See *id.* at 797-99.

216. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 1 (1999) (proposing a rule requiring a comprehensive lawyer regulatory system).

217. See also *Report of the Commission on Evaluation of Disciplinary Enforcement: Lawyer Regulation for a New Century Recommendation 3.2* (A.B.A. 1992) [hereinafter McKay Report] (advocating a central intake office for all complaints about lawyers).

218. See Joy, *supra* note 58, at 797-818.

219. See *supra* notes 137 & 143 and accompanying text.

220. Kramer, *supra* note 137, at 797-98.

221. See *supra* note 136 and accompanying text.

222. See VAIRO, *supra* note 16, § 8.04[c][2] (discussing the primary role of the district court in making findings of fact and conclusions of law as well as in selecting the appropriate sanction).

cause “[a]s the first public entity to see the manifestation of the lawyer’s conduct, it is probably inevitable that the courts will also be the first line of defense against attorney abuse.”<sup>223</sup>

#### IX. PROPOSED 2003 VERSION OF CIVIL RULE 11

So what would Civil Rule 11 look like if it was amended to become the vehicle to enforce the Model Rules in federal court?

Using the 1993 version of Civil Rule 11 as a template, the rule might be amended as follows:

**(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney’s individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer’s law firm or other legal entity, if applicable, address, and telephone number, facsimile number, and e-mail address, if any as applicable. In addition, every pleading, amended pleading, dispositive motion, and briefs or memorandums related to dispositive motions, shall be signed by every party on whose behalf it is filed. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

**(b) Conduct of All Attorneys of Record.** All attorneys of record, as well as their law firms or other legal entities, if applicable, shall comply at all times during the litigation with the ABA Model Rules of Professional Conduct [option: substitute State Rules of Professional Conduct], as amended and currently in force, especially, but not limited to, the litigation ethics rules, Model Rules 3.1–3.4. No attorney shall appear in court or in any proceeding related to the litigation, or otherwise participate in the same, without first having filed a notice of appearance in the case. This rule applies equally to a pro se party, who is also an attorney licensed to practice law in any state or federal court.

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223. McMorrow, *supra* note 19, at 979.

All papers filed with the court or served on anyone by an attorney of record shall be served on each and every client party of the attorney filing or serving such paper, and the certificate of service shall so specifically state. This does not mean that clients of opposing counsel shall be served in this manner directly, which would violate Model Rule 4.2. Instead, opposing counsel shall provide copies to their respective clients within five (5) days of receipt thereof.

**(bc) Representations to Court by Represented Party or Non-Attorney Unrepresented Party.** By presenting to the court directly or through counsel (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, a party represented through counsel or non-attorney ~~an attorney or~~ unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

All represented parties shall have an obligation to timely read all court papers submitted to them by their attorneys of record, and they shall have a duty to inform their attorneys in writing if, in their opinion, any court papers do not fully comply with this rule, so that such papers can be amended or withdrawn in due course, and this duty continues until

the conclusion of the litigation. It is assumed that unrepresented parties shall have read what they have personally filed or served. It is also acknowledged that the level of knowledge, information, and belief that a party may have under subsection (2) may vary considerably depending upon that party's sophistication.

**(ed) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) or (c) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms or other legal entities, or parties that have violated subdivision (b) or (c) or are responsible for the violation.

**(1) How Initiated.**

**(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) or (c). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged violation of the applicable Model Rule(s), or the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm or other legal entity shall be held jointly responsible for violations committed by its partners, associates, and employees. Sanctions against attorneys and their law firms or other legal entities shall be measured and judged by the law of legal ethics & professional responsibility, as well as the case law developed under this rule, and where applicable and not inconsistent, the case law developed under the previous versions of this rule. Sanctions against non-attorney parties shall be judged by the case law developed under this rule, and where applicable and not inconsistent, the case law

developed under the previous versions of this rule, however, in the instance of monetary sanctions, such persons may be sanctioned monetarily only as provided for in 28 U.S.C. § 1927.

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

**(2) Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. In the instance of non-attorney parties, they may be sanctioned monetarily only as provided for in 28 U.S.C. § 1927.

**(A)** Monetary sanctions may not be awarded against a non-attorney represented party for a violation of subdivision (b)(2). Monetary sanctions may not be awarded against a non-attorney unrepresented party for a violation of the same except as provided for in 28 U.S.C. § 1927.

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

**(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a viola-

tion of this rule and explain the basis for the sanction imposed.

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

This proposed amendment would achieve several goals:

First, it would require parties to actually sign all papers related to pleadings and dispositive motions, which would reinforce the notion that these are, in fact, their "claims, defenses, and other legal contentions."<sup>224</sup>

Second, it would define the conduct expected of attorneys of record as that required by the Model Rules, it would require attorneys to be of record to take any action in a case, it would de-emphasize the signature of the attorney in lieu of making all attorneys of record responsible for compliance with the Model Rules during the case, and it would specifically make Civil Rule 11 the mechanism whereby the court would enforce the ethical obligations of lawyers to the court, opposing counsel, and the parties. In addition, it would require the attorney of record to supply all court papers to his or her client on a timely basis for review.

Third, it would make the 1993 version representations specifically applicable to all parties, it would require the parties to actually read all of these court papers in a timely manner, and it would impose the 1993 version duties on them, which would continue throughout the case.

Fourth, it would adopt the law of legal ethics and professional responsibility as well as the 1993 version case law on sanctions, and where applicable and not inconsistent, the previous case law under the rule. In addition, it would limit monetary sanctions against non-attorney parties as provided in 28 U.S.C. § 1927.

Given the amount of ground covered by the Model Rules, this proposal may need revision after reflection as to the mechanics of the proposal, but it would accomplish the following public policy objectives:

1. It would allow the court to sanction attorneys of record for

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224. FED. R. CIV. P. 11(b)(2).



violations of the Model Rules;

2. It would allow the court to sanction parties for objectively frivolous conduct; and

3. It would prevent the court from imposing monetary sanctions against parties, unless they are found to have acted in bad-faith under 28 U.S.C. § 1927.

It is submitted that this proposal would expand the duties and obligations that could and should be enforced by the court, which should result in greater litigation efficiency, while continuing to make clear that monetary sanctions are disfavored, just as they are under the current 1993 version of Civil Rule 11.

## X. CONCLUSION

As discussed above, the Model Rules define the conduct required of all attorneys in and out of court, but Civil Rule 11 does nothing but outlaw frivolous conduct and allow the court to sanction the same. Surely, we can expect more from the courts in terms of demanding full compliance with all legal ethics and professional responsibility rules, and it seems odd that the courts have become fixated on frivolous conduct, as if that is the only thing that is dangerous to the legal system. When a lawyer fails to expedite litigation, lapses in his or her duty of candor, is unfair to the opposing side, etc., all of these ethical violations should be just as sanctionable as the violation of frivolous conduct. As we move into this new millennium, we can and should demand more of the courts, as the front line in battle so-to-speak, in enforcing ethical litigation conduct.

While Civil Rule 11 should always have been interpreted in light of the litigation ethics rules, that is not enough. Instead, Civil Rule 11 should be amended to allow the courts to require all attorneys of record to do what they are already required to do: namely, to comply fully with all of the ethical rules of the profession. It is hypocritical for the courts not to enforce the ethical obligations of its officers—those attorneys of record in cases before them. The things that courts let attorneys get away with does far more damage to the image of the legal profession than possibly anything else, and all any of us need

do to confirm this is to talk to litigation clients about their experiences.<sup>225</sup>

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225. See ROTUNDA, *supra* note 45, § 1-7 (discussing the public image of lawyers).

