

Pre-suit Investigation and the Pursuit of Frivolous Claims

I. Introduction and Overview

For litigation to exist, someone must of course file a lawsuit, administrative action, or demand for arbitration. Not surprisingly, one of the first professional responsibility issues a lawyer may have to confront is whether the lawsuit or other proceeding a client wishes to initiate is sufficiently well-founded to satisfy the relevant ethical standards in the forum. Once a lawsuit is filed, the corresponding first issue of professional responsibility for a lawyer hired to defend the litigation often is what defenses can ethically be asserted on the client's behalf and, in a related vein, whether that defendant may have its own claims that can ethically be asserted as counterclaims or third-party claims. Regrettably, lawyers too frequently treat these initial questions blithely. Failure to carefully analyze these issues may expose lawyers to a number of unfortunate consequences, including professional discipline, potential sanctions under court rules or statutory provisions, and even liability exposure in the form of actions for abuse of process or malicious prosecution. Moreover, these potential risks persist in the sense that lawyer are prohibited not only from *making* frivolous claims or contentions, but from *maintaining* them as well.

This chapter explores these central ethical obligations affecting both plaintiffs' lawyers and defense attorneys. Part II examines the ethical prohibition against the pursuit of frivolous claims and contentions and how the governing rule, along with others, obligates lawyers to undertake reasonable investigations before making a claim or contention on a client's behalf. Part III discusses a number of ethical provisions that restrict the lawyer's ability to communicate with others as a means of seeking to

satisfy this ethical duty of investigation before pursuing claims or contentions or that otherwise impose duties on the lawyer with respect to the rights of persons other than their own client. Part IV discusses a number of other important sources of law, beyond rules of professional conduct, that may be implicated by a lawyer's pursuit in litigation of a frivolous claim or contention.

II. The Ethical Prohibition against Pursuit of Frivolous Claims and the Lawyer's Duty to Investigate

Rules of professional conduct in almost every jurisdiction contain a prohibition against the pursuit of fatally deficient claims and contentions patterned after Model Rule of Professional Conduct 3.1. Model Rule 3.1, Meritorious Claims or Contentions, provides:

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis 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.¹

In addition to its obvious application to traditional client representations, Model Rule 3.1 applies to lawyers who represent themselves.²

It is worth noting at the outset that although Model Rule 3.1's title speaks of claims and contentions that are "meritorious," the text of the rule does not actually require lawyers to pursue only meritorious claims and contentions. Such a standard would be nearly impossible to enforce given the many factual and legal ambiguities that routinely exist in litigation. Plus, even where the law is clear there is always the potential for change. Accordingly, Model Rule 3.1 takes the more realistic approach of prohibiting lawyers from pursuing claims and contentions unless they have "a basis for doing so that is not frivolous."³ In other words, a claim or contention may be meritless without being frivolous.⁴ While Model Rule 3.1 does not attempt to define the term *frivolous*, it does provide significant guidance on the topic of legal argu-

1. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009).

2. *In re Shearin*, 765 A.2d 930, 936–37 (Del. 2000).

3. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009).

4. *See, e.g., In re Houston*, 675 S.E.2d 721, 723 n.1 (S.C. 2009) (finding that meritless racial profiling claim did not violate Rule 3.1).

ments by spelling out a few examples of instances that satisfy the “not frivolous” standard of the rule—namely, good-faith arguments for extensions of existing law, good-faith arguments for modifications of existing law, and good-faith arguments for reversing existing law.⁵

A reliable definition of what constitutes a frivolous claim or contention with substantial currency across the nation, and that seems to apply as readily to evaluating underlying factual assertions as to legal arguments, is found in the Restatement (Third) of the Law Governing Lawyers.⁶ The Restatement describes a claim or contention as being frivolous when it is one “that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal will accept it.”⁷ Applying this standard and, as a general rule, the fact that a lawyer believes that a particular claim or contention is likely to fail still does not render it frivolous. Nor is a claim frivolous merely because it proves to be unsuccessful.⁸

Lawyers may not defend against alleged Model Rule 3.1 violations on the basis that they did not know or understand the law, or made a “mistake of law.”⁹ For a lawyer to make such an argument would be to essentially confess incompetence. Courts and disciplinary authorities properly expect lawyers to know the law before they make particular claims or contentions, though lawyers are unlikely to be found to have violated the rule where the legal issue in question is unsettled.¹⁰

A. Lawyers’ Duty of Reasonable Inquiry

Model Rule 3.1 also requires that the lawyer’s conclusion that there is a non-frivolous basis for the claim or contention be obtained after reasonable inquiry. Accordingly, lawyers are obligated to undertake some form of preliminary investigation into clients’ intended claims and contentions.¹¹ Lawyers cannot avoid this obligation simply

5. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009). A comment to the Model Rule also explicitly mentions what is otherwise implied by the rule—that “a good faith argument on the merits of the action taken” is also sufficient to be not frivolous. *Id.* cmt. 2. A number of jurisdictions with rules patterned after Model Rule 3.1 add to the comment one example, originating from an older version of Model Rule 3.1, of when an action will be frivolous—when the client wants to pursue it “primarily for the purpose of harassing or maliciously injuring a person.” *See, e.g.,* ARIZ. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2009); TENN. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2009); VA. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2009).

6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

7. *Id.* § 110 cmt. d.

8. *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 597 N.W.2d 744, 755 (Wis. 1999).

9. *Thompson v. Sup. Ct. Comm. on Prof’l Conduct*, 252 S.W.3d 125, 128 (Ark. 2007).

10. *Id.*

11. *See, e.g., Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr. 2d 178, 181 (Cal. Ct. App. 1996) (“Frivolous litigation is frequently avoided by a careful lawyer’s investigation of a client’s claims before filing suit.”); *Idaho State Bar v. Hawkey*, 92 P.3d 1069, 1074 (2002) (calling a lawyer’s pre-suit investigation “trivial” in concluding that lawyer violated Rule 3.1); *Hunt v. Dresie*, 740 P.2d 1046, 1053

by asserting in a pleading that allegations are being made “upon information and belief.” The existence of a duty to investigate in order to satisfy the requirements of Model Rule 3.1 is, of course, entirely consistent with lawyers’ need to satisfy their duty of competence under Model Rule 1.1.¹² Nevertheless, the nature and extent of the investigation required will depend on a number of variable factors.¹³ These factors include the nature or complexity of the claims or contentions to be investigated or developed, the time in which the investigation must be conducted, the resources available to the lawyer to conduct the investigation, the availability and cooperation of potential fact and expert witnesses, whether expert witnesses must be consulted,¹⁴ the availability of evidence that can be obtained without formal discovery, whether any investigation has been conducted prior to the lawyer undertaking the representation, the existence of parallel proceedings that complicate or expedite matters, and probably more.

A comment to Model Rule 3.1 addresses to some extent the tensions that can exist with respect to the lawyer’s ethical obligations under this rule and the practical realities that lawyers may face depending on the circumstances they may encounter:

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 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.¹⁵

(Kan. 1987) (“It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise, the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client.”).

12. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); *see, e.g.*, *People v. Boyle*, 942 P.2d 1199, 1201 (Colo. 1997) (disciplining a lawyer who failed to learn of readily available evidence regarding client’s petition for asylum); *Attorney Grievance Comm’n v. Chasnoff*, 783 A.2d 224, 231 (Md. 2001) (involving a lawyer who violated Rule 1.1 by failing to visit scene of accident for two years and not attempting to locate witness believed to have favorable testimony for client).

13. Mich. Eth. Op. R-9, 1990 WL 504862, at *3 (State Bar of Mich. Standing Comm. on Prof’l & Judicial Ethics 1990); Va. State Bar, Standing Comm. on Legal Ethics, Op. 1445 (1992).

14. *See Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 597 N.W.2d 744, 759 (Wis. 1999) (discussing frivolous litigation under Wisconsin statutes and stating that while good practice may dictate that an expert be consulted prior to filing a claim upon which expert testimony will be required at trial, a per se rule requiring expert testimony cannot be reconciled with the objective standard by which lawyers’ investigations should be judged).

15. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2009).

In time-sensitive matters, as where, for example, a statute of limitations is about to expire, the obligation to investigate the merits of the client's claims or contentions before filing can be deferred until after the filing of the suit.¹⁶ Any deferral must be reasonable under the circumstances; legitimate urgency may temporarily postpone a lawyer's duty to investigate, but it does not eliminate or excuse it. The longer lawyers wait to conduct a reasonable post-filing investigation, the greater the risk of discipline or sanctions for pursuing frivolous claims. The question of how long is too long can only be answered on a case-by-case basis.

It is important to remember that Model Rule 3.1 and its analogs not only prohibit lawyers from bringing a proceeding where doing so would be frivolous, but also prohibit the pursuit of certain issues within a proceeding if those issues cannot be legitimately supported, even though other claims in the same proceeding are entirely valid. These prohibitions naturally apply with equal force to lawyers who are defending proceedings.

A number of decisions provide helpful insight into the contours of lawyers' ethical duty to satisfy themselves regarding claims and contentions proffered by clients, including addressing when, if ever, a lawyer can simply take a client at her word without investigating further. Not surprisingly, the duty is nearly universally measured by an objective standard.¹⁷ The court in *Wisconsin Chiropractic Ass'n v. State*¹⁸ thoroughly described the nature of lawyers' duty to inquire:

An attorney may rely upon his or her client for the factual basis for a claim when the client's statements are objectively reasonable, but this does not mean that an attorney always acts reasonably in accepting a client's state-

16. See, e.g., *CTC Imps. & Exps. v. Nigerian Petrol. Corp.*, 951 F.2d 573, 579 (3d Cir. 1991) ("The shorter the time the more reasonable it is for an attorney to rely on the client or forwarding counsel."); *Sanchez v. Liberty Lloyds*, 672 So. 2d 268, 273 (La. Ct. App. 1996) (refusing to sanction lawyer who filed general denial under time constraints to avoid an entry of default against client); *State Bar of Ga., Formal Adv. Op. 87-1*, at 2 (1989) (concluding that attorney facing expiration of statute of limitations acts ethically in filing suit if "a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim"); *Or. Eth. Op. 2005-59*, 2005 WL 5679648, at *1 (Or. State Bar Ass'n Bd. of Governors Aug. 2005) (concluding that when statute would run before attorney could investigate whether claim exists sufficient to justify joining additional defendants attorney could join defendants as long as target defendants will not agree to extend the limitations period or extension otherwise not feasible, attorney thereafter investigates diligently, and dismisses defendants promptly if no claim actually exists).

17. See *O'Brien v. Super. Ct.*, 939 A.2d 1223, 1231 (Conn. App. Ct. 2008); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990); *In re Disciplinary Action Against Hoffman*, 670 N.W.2d 500, 506 (N.D. 2003); *Lawyer Disciplinary Bd. v. Neely*, 528 S.E.2d 468 (W. Va. 1998). *But see In re Disciplinary Proceedings Against Osicka*, 765 N.W.2d 775, 784 (Wis. 2009) (applying a subjective standard to a lawyer's pursuit of a claim).

18. 676 N.W.2d 580 (Wis. Ct. App. 2004).

ments. Whether it is reasonable to rely on one's client depends in part upon whether there is another means to verify what the client says without discovery. A party and attorney may not rely on formal discovery after the filing of a suit to establish the factual basis for the cause of action when the required factual basis could be established without formal discovery. In addition, in deciding whether to rely on one's client for the factual foundation of a claim, an attorney must carefully question the client and determine if the client's knowledge is direct or hearsay and is plausible; the attorney may not accept the client's version of the facts on faith alone. Allegations by a client of serious misconduct of another may require a more serious investigation. While the investigation need not be to the point of certainty to be reasonable and need not involve steps that are not cost-justified or are unlikely to produce results, the signer must explore readily available avenues of factual inquiry rather than simply taking a client's word.¹⁹

Other courts agree that lawyers are entitled to rely upon clients' factual recitations when they are "objectively reasonable," and in some instances even when the client's factual construct is arguably questionable, but only if the lawyer's other attempts at investigating prior to filing were unsuccessful, or other sources of information simply were not available to verify or disprove the client's version of events.²⁰

A comparison of two Seventh Circuit cases presents a helpful contrast of circumstances as to when a lawyer's reliance on her client's assertions in pursuing a lawsuit

19. *Id.* at 589 (internal citations omitted).

20. *See, e.g.,* Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1329 (2d Cir. 1995) (discussing attorneys' ability to rely on objectively reasonable assertions of client); *CTC Imps. & Exps.*, 951 F.2d at 579 (refusing to sanction lawyer who had no reason to know or suspect underlying documents were forged and who was not in a position, given exigent circumstances, to obtain vital information before acting); *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990) (finding that lawyer who filed conspiracy claim for client acted properly where private investigator retained was unable to get target defendants to cooperate in providing information addressing client's allegations). *Cont'l Ins. Co. v. Constr. Indus. Servs. Corp.*, 149 F.R.D. 451, 453 (E.D.N.Y. 1993) (treating counsel's reliance upon information from in-house counsel for client regarding location of principal place of business as reliance upon an objectively reasonable assertion); *Slane v. Rio Grande Water Conserv. Dist.*, 115 F.R.D. 61, 62 (D. Colo. 1987) (explaining that lawyer who had received detailed responses from adverse parties demonstrating that claims were barred by *res judicata* and without basis before filing suit could not simply rely on his client's assurances); *Coburn Optical Indus. Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D.N.C. 1985) (involving defendant that asserted incorrect facts to justify objection to venue that were well within its control to have confirmed through investigation); *Neely*, 528 S.E.2d at 474 (reversing hearing panel finding of Rule 3.1 violation for allegation in complaint based on mother's description of treatment of child at development center where investigating lawyer received no cooperation from target defendants and mother's child was autistic and unable to be of assistance).

are reasonable.²¹ In *Kraemer v. Grant County*,²² the court agreed that a lawyer who had relied solely on his client's assertions in determining to file a lawsuit against Grant County had acted appropriately. The lawyer had advanced a position, consistent with the language in Comment 2 to Model Rule 3.1,²³ that filing the lawsuit alleging the existence of a conspiracy would permit the lawyer to pursue formal discovery to uncover information to verify the client's contentions. The court explained that, given the secretive nature of a conspiracy, the lawyer had done "all he reasonably could have done to investigate his client's account of events before the complaint was filed"; after all, it could not impose a standard that would require the lawyer to procure a confession from a conspirator prior to filing suit.²⁴ The Seventh Circuit stressed that the lawyer had made other efforts at inquiring about the facts before filing, including hiring a private investigator, but these efforts were to no avail, as the defendants did not cooperate in the investigation and effectively stonewalled the lawyer's efforts at obtaining information before filing the lawsuit.²⁵

In contrast, the conduct of a Wisconsin lawyer in *Jiminez v. Madison Area Technical College*²⁶ demonstrates that reliance upon obviously fraudulent documents does not constitute a reasonable investigation. As the Seventh Circuit explained, William J. Nunnery's representation of Elvira Jiminez began with a workers' compensation claim filed against her employer, Madison Area Technical College, based on Jiminez's assertion that college administrators had racially and sexually harassed her. In support of her claim, Jiminez produced a series of e-mails containing derogatory racial comments about her and discussing sexual harassment visited upon her.²⁷ In response, the college provided sworn statements from the purported authors of the e-mails denying having written them and characterizing the e-mails as a "complete fabrication" and a "forgery."²⁸ The college then asked Nunnery to produce the original e-mails relied upon by Jiminez. Nunnery did not produce originals, and ultimately Jiminez's workers' compensation claim was denied and she was fired by the college.²⁹ The "original" e-mails that Nunnery did not produce were plastic-laminated, although Jiminez had insisted they were authentic e-mails that she had laminated to "prevent them from being stolen."³⁰

21. *Jiminez v. Madison Area Technical Coll.*, 321 F.3d 652 (7th Cir. 2003); *Kraemer v. Grant County*, 892 F.2d 686 (7th Cir. 1990).

22. 892 F.2d 686 (7th Cir. 1990).

23. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2009) ("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.").

24. *Kraemer*, 892 F.2d at 689.

25. *Id.* at 690.

26. 321 F.3d 652 (7th Cir. 2003).

27. *Id.* at 653.

28. *Id.* at 654.

29. *Id.*

30. *In re Nunnery*, 725 N.W.2d 613, 619 (Wis. 2007).

After the workers' compensation claim was dismissed, Nunnery continued to pursue Jiminez's claims by suing the college in federal court for allegedly discriminating against her. An amended complaint added the purported authors of the e-mails as individual defendants, and, after an order was entered dismissing the amended complaint for failing to state a claim, Nunnery filed a second amended complaint that expanded the factual allegations and specifically referred to the purported e-mails from the unsuccessful workers' compensation action.³¹ The attorneys for the college again informed Nunnery that the individual defendants denied authoring any of the e-mails. When Nunnery would not drop the claims, the college moved for Rule 11 sanctions.³²

The district court, after an evidentiary hearing, determined that sanctions should be imposed; the court ordered monetary sanctions against Nunnery and dismissed Jiminez's case. The dismissal of Jiminez's case was the most severe sanction possible. On appeal, the Seventh Circuit found that the district court acted well within its discretion and further concluded that Jiminez had knowingly manufactured the false e-mail evidence to try to support her claim. The court reasoned that Jiminez had "exploited the judicial process and subjected her former colleagues and employer to unnecessary embarrassment and mental anguish."³³ Nunnery, a solo practitioner who had never before been disciplined, was suspended from the practice of law for two months as a disciplinary sanction imposed, in part, for his conduct in *Jiminez*.³⁴

Let's pause to examine Nunnery's conduct. The fact that the college's lawyers insisted that the subject e-mails were fabricated was not enough, standing alone, to compel Nunnery to dismiss Jiminez's lawsuit or withdraw from her representation. Adversaries make baseless or exaggerated claims or threats with some regularity. Lawyers are entitled to rely on clients to furnish the factual bases for claims as long as the client's assertions are objectively reasonable, and lawyers are further entitled to give clients the benefit of the doubt in close cases. But the college's insistence on a fraud coupled with Jiminez's implausible claim to have laminated the e-mails to prevent their theft should have alerted Nunnery to the possibility that Jiminez's claims were not just groundless, but also frivolous. Whatever options Nunnery thought he had, they did not include accepting Jiminez's allegations on faith; some probing into the foundation for Jiminez's claims was clearly in order. Indeed, reasonable inquiry is

31. *Jiminez*, 321 F.3d at 654.

32. *Id.* at 654–55.

33. *Id.* at 657.

34. *In re Nunnery*, 725 N.W.2d at 614. The disciplinary proceedings against Nunnery included 14 counts for events spanning a six-year period. Several of the counts involved instances in which Nunnery was accused of pursuing meritless claims, including the pursuit of Jiminez's claims. *Id.* at 619–22.

generally called for any time a lawyer receives a communication from an adversary asserting that evidence has been falsified.

*Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*³⁵ illustrates pre- and post-suit frivolous claim concerns. The case was decided under Wisconsin statutes that prohibit both the filing and continuation of frivolous claims, but there is no reason to believe that the outcome would have been any different under the majority application of Rule 3.1. In *Jandrt*, Larry Brueggeman, a shareholder with the Previant firm, was contacted by Jonathan Sherman, another Wisconsin lawyer with whom he had worked in the past. Sherman told him that he represented a potential class of children who had suffered birth defects as a result of their mothers' exposure to toxic chemicals while working at Jerome Foods, Inc. (JFI). Sherman provided enough information to make the claims seem plausible, and ultimately three plaintiffs retained the Previant firm to represent them in February 1995. After being retained, an associate at Previant and the firm's librarian reviewed medical and scientific literature concerning the link between the two chemicals at issue and birth defects. The associate then interviewed the plaintiffs' mothers and two of the fathers and, based on her literature review and those interviews, concluded that there was a strong probability that the chemicals caused the plaintiffs' birth defects.³⁶ Still working to establish the necessary causal link, Brueggeman then consulted a doctor who regularly served as a consultant to lawyers in toxic tort actions. Although the doctor could not opine on causation, he stated that for the plaintiffs to obtain an expert on causation, it would be necessary to file suit and pursue discovery regarding the mothers' chemical exposure at JFI.³⁷ Brueggeman took the doctor at his word and did not consult a physician who could qualify as an expert on causation.

On March 1, 1995, the Wisconsin legislature approved a bill radically changing the law of comparative negligence in Wisconsin. The Previant firm and other plaintiffs' lawyers in the state received a number of warnings from authoritative sources, such as practice alerts from the Wisconsin State Bar and the bar-related insurer in Wisconsin, advising them that they could face malpractice liability if they did not file negligence actions before the effective date of the law.³⁸ Based on these warnings, Previant decided to file suit in early May 1995, one week before the new law took effect. The complaint included one paragraph alleging that "[u]pon information and belief," the plaintiffs' injuries were caused by their mothers' exposure to the subject chemicals during their employment at JFI.³⁹

35. 597 N.W.2d 744 (Wis. 1999).

36. *Id.* at 541.

37. *Id.* at 541–42.

38. *Id.* at 542.

39. *Id.* at 543.

In June 1995, Previant reviewed more than 200,000 documents at JFI's facility. After reviewing those documents, Brueggeman again consulted with the doctor with whom he had spoken previously and two other doctors who were experts on causation.⁴⁰ Both causation experts indicated that there were no scientific studies supporting the plaintiffs' claims and that they would thus be vulnerable on cross-examination. One of the experts suggested that the plaintiffs engage an epidemiologist to conduct a study to attempt to determine the causal link that the plaintiffs needed. For some reason, Brueggeman did not show the experts any of the documents the plaintiffs had obtained from JFI in discovery. In any event, Previant decided that an epidemiological study was prohibitively expensive. Accordingly, in late February 1996, Previant advised JFI's lawyers that the plaintiffs wished to voluntarily dismiss their complaint, which they did shortly thereafter.⁴¹

In the meantime, JFI had retained a qualified medical expert who opined that there was no causal link between the chemicals at issue and the plaintiffs' injuries, said there was no scientific or medical literature to support a causal link between them, and opined that the plaintiffs would never be able to prove causation.⁴² Thus, after Previant dismissed the suit, JFI moved for sanctions. The trial court sanctioned Previant for both filing and continuing a frivolous action, and awarded JFI over \$700,000 in attorneys' fees and costs. Previant appealed that decision to the Wisconsin Court of Appeals, which certified the case to the Wisconsin Supreme Court.

The Wisconsin Supreme Court considered this to be a "close case," but after considering the situation facing Previant when it initiated the action, the court determined that the firm did not frivolously file the lawsuit.⁴³ The court principally rested its decision on the time constraints under which the firm had been forced to operate. Although the plaintiffs' claims were not threatened by a looming statute of limitations, the impending change in Wisconsin tort law was a valid concern and reasonably contributed to Previant's decision to file the suit sooner than it would have otherwise done.⁴⁴ In addition, it was not as though Previant had undertaken no investigation; it conducted a literature search, interviewed the plaintiffs' mothers and two of their fathers, and consulted a physician.⁴⁵

The *Jandrt* court did agree with the trial court, however, that Previant continued a frivolous action. The trial court had concluded that Previant had frivolously continued the action because it did not (1) obtain an expert witness who supported the

40. *Id.* at 545.

41. *Id.* at 545–46.

42. *Id.* at 544.

43. *Id.* at 562.

44. *Id.* at 561.

45. *See id.* (mentioning the literature search and parent interviews, but not the medical consultation).

plaintiffs' causation theory, (2) interview any of the plaintiffs' treating physicians, (3) consult with an expert with the specific expertise required for the case, (4) review the plaintiffs' medical records, or (5) have an expert review the associate's literature study and the associate's resulting conclusions.⁴⁶

It was also established below that Previaint did not need to conduct formal discovery to obtain meaningful information about the chemicals used at the JFI plant and employees' exposure to them.⁴⁷ For all these reasons, the supreme court concluded that even resolving all doubts in Previaint's favor, there was "no reasonable basis" for the plaintiffs' claims, and Previaint had frivolously continued the action.⁴⁸ The supreme court remanded the case to the trial court to determine the amount of JFI's fees and costs attributable to Previaint's maintenance of the action as compared to its commencement, since only the maintenance of the action was frivolous and could therefore form the basis for a sanctions award.⁴⁹

Suing the wrong defendant is often a decent indication that an attorney's pre-suit fact investigation was insufficient under the circumstances.⁵⁰ A fairly remarkable example of a substandard pre-filing investigatory effort can be seen in the actions of a Virginia lawyer who sued a doctor for medical malpractice who was not even in the hospital at the time of the plaintiff's allegedly botched procedure.⁵¹ The lawyer in that case, Michael Weatherbee, had included among the defendants in his client's medical malpractice suit a surgeon named Dr. Ward P. Vaughan, who, as it turned out, was not only not present at the time of the plaintiff's operation, but did not even have privileges to practice at the hospital in question. Weatherbee's only justification for suing Vaughan was his belief that a "Bob Vaughan" who was listed in the medical records was the same person as Dr. Ward P. Vaughan.⁵² Making matters worse for Dr. Vaughan, the lawsuit received significant publicity not only in the form of a local television report, but "[a] local radio station repeatedly informed its listeners, approximately once each hour for a full day, that Dr. Vaughan had been sued for medical malpractice."⁵³ The Virginia Supreme Court faulted Weatherbee for failing to undertake even the most basic research which would have revealed that his client had absolutely no factual or legal basis for suing Dr. Vaughan, and affirmed the imposition of a public

46. *Id.* at 564–65.

47. *Id.* at 571.

48. *Id.* at 573.

49. *Id.* at 579–80.

50. Naming someone who has no colorable claims against the defendant as a member of a group of plaintiffs in a lawsuit can also evidence an inadequate pre-suit investigation. *See, e.g., Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010).

51. *Weatherbee v. Va. State Bar*, 689 S.E.2d 753 (Va. 2010).

52. *Id.* at 755.

53. *Id.* at 756.

reprimand against Weatherbee for violating Rule 3.1.⁵⁴ Dr. Vaughn must have thought that sanction awfully light.

Given the nature of the relevant standard, common sense dictates that how much a court will require from a lawyer in terms of a pre-filing investigation of facts alleged by the client can also be influenced by the nature of the allegations the client is leveling against its adversary. A South Carolina decision concluding that discussions with the client alone simply could not stand as a reasonable investigation by the lawyer because of the nature of the client's claim provides an example, albeit one subject to significant questions. *Ex parte Gregory*⁵⁵ arose out of a lawsuit by Annie Melton against her former attorney, Gerald Malloy, for allegedly misappropriating settlement funds belonging to Melton. George Gregory represented Melton. Prior to filing suit and after being told by Melton that more than two years had passed without receiving the almost \$15,000 in settlement funds she said she was entitled to receive, Gregory had communicated with the insurance agency for the party that was liable in his client's underlying matter and the adjuster who handled the claim, had reviewed the documents effectuating the settlement, and had reviewed telephone records showing how many times the client had called her former attorney, and was able to determine that the check containing the settlement funds had been presented for payment more than two years earlier.⁵⁶

Surprisingly, the South Carolina Supreme Court found that Gregory's pre-filing efforts did not constitute a reasonable investigation because he had not contacted Malloy. This, the court found, hamstrung the effectiveness of Gregory's investigation and, in the court's mind, prevented Gregory from learning that the settlement funds were still in Malloy's trust account because of a continuing issue relating to the nature and amount of a Medicaid lien. As the court saw it, "a simple phone call may have led to an explanation by [the former attorney] as to why the money was being held."⁵⁷ The court discounted Gregory's explanation that he had not contacted Malloy because he did not think that Malloy would respond and that he had not requested Malloy's file because he did not expect it would indicate anything he had not learned about from his communications with the insurance company and adjuster for the liable party.⁵⁸ The court went out of its way to make clear that its opinion should not be treated as establishing a strict rule always requiring a lawyer to go beyond merely discussing a claim with a client prior to filing suit, but the court clearly did draw a very bright line with its statement that "before alleging conversion against an attorney for misappropriation of client funds or legal malpractice, a reasonable investigation is necessary."⁵⁹

54. *Id.*

55. *Ex parte Gregory*, 663 S.E.2d 46 (S.C. 2008).

56. *Id.* at 48.

57. *Id.* at 51.

58. *Id.* at 50.

59. *Id.* at 51 & n.3.

There were, however, some additional facts that might diminish the surprise a detached lawyer might otherwise exhibit upon learning of the court's conclusion that what sounded like a responsible investigation was insufficient. First, Gregory's co-counsel asked Gregory whether they should perhaps communicate with Malloy before filing suit, but Gregory "did not think that it would 'do any good.'"⁶⁰ In other words, Gregory had dismissed a reasonable investigatory question raised by a seemingly trusted advisor out-of-hand. Moreover, in this instance, a simple phone call to Malloy would have avoided the litigation altogether. That conclusion clearly influenced the court's decision,⁶¹ although it should just as clearly be a case- and fact-specific consideration. Second, upon filing and serving the complaint, Gregory had his process server deliver a copy to a local newspaper reporter with whom Gregory then communicated. Gregory stated, in two articles written by the reporter, that Malloy "should have known he couldn't co-mingle funds" and that he "shouldn't have kept it in his pocket and collected all the interest on it."⁶² This plainly influenced the court; indeed, the court specifically stated that it was troubled by Gregory's "inflammatory statements" to the media without having first performed what it would consider an appropriate investigation of the conversion claim.⁶³ Another fact mentioned by the court in its recitation of events that may have colored the result was that Malloy had been representing Melton concerning the settlement on a pro bono basis.⁶⁴

Although the court in *Gregory* was certainly entitled to be irked by what it considered "inflammatory statements" to the media and might even have chafed at the notion that a lawyer doing free legal work was unfairly accused of misappropriating funds, its conclusion that Gregory had somehow acted unreasonably in not reaching out to Malloy is subject to significant criticism. This is especially true given that the court did not, for example, dedicate any of its opinion to discussing Malloy's reputation or otherwise provide a basis to conclude that members of the legal community might find it very difficult to believe that he would ever engage in such conduct. Certainly, a lawyer might expect, as a matter of professional courtesy, that a lawyer in Gregory's position may very well communicate directly before suing a fellow attorney, but the *Gregory* court, in establishing a bright-line requirement that a pre-filing investigation of a claim against a lawyer for misappropriation is not reasonable unless the lawyer contemplating the suit communicates first with the prospective defendant, smacks of favoritism being shown to members of the bar that would not be granted to members of other professions. Beyond that, a lawyer contemplating litigation may have good strategic reasons for not first communicating with the target—for ex-

60. *Id.* at 48.

61. *Id.* at 49.

62. *Id.*

63. *Id.* at 51.

64. *Id.* at 49.

ample, where the lawyer reasonably fears that the prospective defendant will somehow put the disputed funds beyond the client's reach, or initiate some sort of preemptive action against the client.

B. Advancing Factually or Legally Unsupportable Positions

As a general rule, lawyers cannot rely upon the possibility of mistakes by the other side to justify pursuing an otherwise unsupportable position, as demonstrated by a review of conduct that led to an indefinite suspension of an Iowa lawyer in *Iowa Supreme Court Board of Professional Ethics & Conduct v. Hohnbaum*.⁶⁵ *Hohnbaum* started as a simple negligence case. A car driven by defendant Audrey Biere rear-ended plaintiff Betty Schumann's car. Biere's insurer hired Donald Hohnbaum to defend Biere in a lawsuit brought by Schumann. Biere had admitted to Hohnbaum and in the accident report that she had rear-ended Schumann's vehicle and, accordingly, Hohnbaum admitted that fact in the answer he filed on her behalf.⁶⁶ So far, so good. Thereafter, however, Hohnbaum found another report in which a police officer had stated that the opposite had happened—that it was Schumann who had struck Biere. Hohnbaum then moved for leave to amend the answer to deny that Biere had rear-ended Schumann and the case proceeded to trial.

At the trial, Schumann testified that it was Biere who struck her vehicle from the rear; Biere did not appear at trial.⁶⁷ The jury, which had been permitted by the court to have access to both the accident report reflecting the original admission by Biere and the insurance company's file, returned a verdict for Schumann, and Hohnbaum's efforts to raise doubts about who was at fault fell on deaf ears. The Iowa Supreme Court explained that it was certainly appropriate for an attorney to seek to make the other side prove her case, but that Hohnbaum went well beyond that and persisted in the pursuit of a frivolous position.⁶⁸

Failing to adequately investigate the underlying facts supporting a claim is not the only way that a lawyer can end up pursuing litigation deemed to be frivolous. A lawyer can be fully cognizant of the facts but run into trouble because of the pursuit of an entirely unsupportable legal position. The Florida Supreme Court considered itself to be dealing with a prime example of such a situation in *Florida Bar v. Richardson*.⁶⁹

Richardson's troubles arose from his representation of the personal representative in a probate proceeding and the probate court's determination that his fee was excessive and had to be reimbursed to the decedent's estate. Richardson appealed that rul-

65. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Hohnbaum, 554 N.W.2d 550 (Iowa 1996).

66. *Id.* at 551.

67. *Id.*

68. *Id.* at 552.

69. 591 So. 2d 908 (Fla. 1992).

ing, claiming that the probate court lacked jurisdiction to make such a reimbursement order because his fee had been paid by the personal representative not from the assets of the estate, but out of personal funds. Richardson's appeal was unsuccessful on the merits, but the matter was remanded for a recalculation of the correct amount to be reimbursed.⁷⁰ After the recalculation was made by the probate court, Richardson appealed again, but this appeal was untimely and therefore was dismissed. Thereafter, Richardson's excessive fee resulted in a 90-day suspension from practice and two years of probation upon reinstatement.⁷¹ Richardson then unsuccessfully sought writs of mandamus from the Florida Supreme Court, one seeking reinstatement of the second appeal that had been dismissed as untimely and another to vacate the probate court judgment and force that court to withdraw jurisdiction over the matter. Most lawyers at that point would steadfastly obey the "first rule of holes" and stop digging. Richardson, however, was undaunted.

Richardson took his legal crusade to federal court, filing a lawsuit claiming that the Florida probate court order requiring reimbursement violated his civil rights because the probate court lacked jurisdiction. He sought both injunctive relief and \$1 million in damages, and named all of the Florida judges involved, his former client, and his former client's new attorneys as defendants.⁷² This federal suit, which the district court found to be "both manifestly frivolous and malicious," was dismissed and sanctions imposed against Richardson under Rule 11.⁷³ After further disciplinary proceedings were instituted against Richardson and a hearing convened, a disciplinary referee found that "[r]easonable inquiry by a graduate of a law school, a certified member of the Florida Bar, or any lay person would clearly show that the lawsuit as filed by . . . Richardson was clearly unwarranted," and recommended that Richardson be suspended for 90 days.⁷⁴ The Florida Supreme Court acknowledged that it was important not "to stifle innovative claims by attorneys," but distinguished Richardson's situation as "an obsessive attempt to relitigate an issue that has failed decisively numerous times."⁷⁵

Lawyers should not read *Richardson* to mean that they can never pursue a case in the face of directly adverse precedent without facing discipline or sanctions for frivolous litigation. Indeed, *Hunter v. Earthgrains Co. Bakery*⁷⁶ is a leading case that fur-

70. *Id.* at 909.

71. *Id.*

72. *Id.* at 909–10.

73. *Id.* at 910.

74. *Id.*

75. *Id.* Based on the fact of the other 90-day suspension against Richardson arising from this same underlying case, the Florida Supreme Court reduced the second 90-day suspension to a 60-day suspension. *Id.* at 911.

76. 281 F.3d 144 (4th Cir. 2002).

nishes a perfect example of when a lawyer's pursuit of a legal position directly contrary to existing precedent cannot be treated as being frivolous. In *Earthgrains*, a federal district court in North Carolina barred a lawyer from practicing before it for five years as a sanction. The lawyer, Pamela Hunter, was sanctioned for arguing for an outcome on a question of law that was contrary to clear precedent in the Fourth Circuit, the federal circuit in which North Carolina is housed. Specifically, in 1998, Hunter argued that the district court should rule that arbitration of a federal employment discrimination claim can only be required in a collective bargaining agreement by the use of specific language to that effect. Her argument contradicted a Fourth Circuit decision handed down just two years before.

The Fourth Circuit reversed the sanction order because, as of 1998 when Hunter made the argument, there were six other circuits that had rejected the Fourth Circuit's position and, in fact, the Fourth Circuit was the only circuit to have held as it did. Because the law on the question was in "flux" at the time, the Fourth Circuit correctly held that the district court was "reaching" in trying to characterize the lawyer's conduct as sanctionable.⁷⁷ The ultimate result in *Earthgrains* makes perfect sense, of course, given that the purpose behind Model Rule 3.1 and state equivalents is not to deter lawyers from making novel arguments or pursuing cases of first impression, nor to suppress good-faith arguments seeking outright reversal of existing precedent, but only to prohibit lawyers from pursuing truly frivolous positions.⁷⁸ While Hunter could expect the district court to rule against her clients because it was bound by the precedent with which she disagreed, she was entitled to contemplate that the Fourth Circuit might be persuaded to retreat from its prior position.⁷⁹ Failing that, she might have sought relief in the Supreme Court based on the circuit split. Hunter's only real offense was failing to thoroughly explain to the district court the circuit split and the potential import of a Supreme Court case giving her clients some ammunition for argument, but "that lack of thoroughness [did] not render her position frivolous."⁸⁰

The nature of the investigation lawyers must undertake to establish that legal arguments to be proffered in proposed litigation are not frivolous is much easier to determine as a general rule. Effectively summarized, it is a matter of performing the legal research required to determine whether governing law supports the legal arguments that would need to be advanced for the client to prevail and, if not, whether the

77. *Id.*

78. *See, e.g., Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998) ("[T]he purpose of Rule 11 is to deter frivolous lawsuits and not to deter novel legal arguments or cases of first impression."); *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988) ("Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way.").

79. *Earthgrains*, 281 F.3d at 156.

80. *Id.* at 156–57.

necessary legal arguments to be made can fairly be categorized as good-faith arguments for extension, modification, or reversal of that governing law.⁸¹ A good description of the process for determining whether the requisite “good faith” exists for such an argument is found in the Restatement (Third) of the Law Governing Lawyers:

[W]hether good faith exists depends on such factors as whether the lawyer in question or another lawyer established 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.⁸²

Although a lawyer generally cannot hope for an adversary to make a mistake to justify what would otherwise be the pursuit of a meritless position in litigation, it appears to be settled—even if subject to the charge of being intellectually inconsistent with what is normally expected from attorneys when it comes to candor and the duty not to pursue frivolous litigation—that it is not ethically improper for a lawyer to pursue a claim in the hope that the other side will miss a statute of limitations defense. Stated positively, a lawyer may ethically pursue a claim that he or she knows to be time-barred.⁸³

The best-known source for this proposition is ABA Formal Ethics Opinion 94-387.⁸⁴ In that opinion, the ABA Standing Committee on Ethics and Professional Responsibility explained that knowingly asserting a time-barred claim did not violate Rule 3.1 because:

The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court’s jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any

81. See, e.g., *In re Richards*, 986 P.2d 1117, 1120 (N.M. 1999) (“[W]hen relying upon an exception to a general rule of law, the position the lawyer asserts must either come within the exception, or provide a cogent argument for broadening the exception.”).

82. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000).

83. *But see Trainor v. Ky. Bar Ass’n*, 311 S.W.3d 719, 721 (Ky. 2010) (finding that lawyer violated Rule 3.1 by filing medical malpractice suit more than two years after the applicable statute of limitations ran).

84. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994).

number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim.⁸⁵

The Committee also explained that its opinion would be different if a particular jurisdiction were to treat an expired limitations period as a jurisdictional matter or if there were other circumstances surrounding the filing of a lawsuit knowing that it was untimely that could be viewed as indicia of bad faith.⁸⁶ One such set of circumstances noted by the Committee was an attorney's filing of a defamation claim *after* being told by the defendant that the claim was time-barred.⁸⁷ Similar conclusions have been reached by state ethics bodies interpreting their own rules.⁸⁸ Several courts have echoed these conclusions.⁸⁹ Not all courts agree with this approach, however, especially where the challenged suit is filed well beyond the applicable statute of limitations.⁹⁰

The rationale behind the prevailing view is that the running of a statute of limitations is merely an affirmative defense and can be waived by the defendant through a failure to raise it, and, moreover, such time restrictions do not divest a court of jurisdiction. On the surface, this approach seems quite sound, inasmuch as the public policy behind enacting and enforcing a statute of limitations is to provide defendants with certainty as to time periods in which actions may be pursued and not to protect courts from expending resources on the adjudication of stale claims. Hence the proposition that a plaintiff's lawyer should be free to roll the dice on a claim known to be time-barred solely based on the hope, however slim, that the defendant will fail to raise such a defense. Such a failure could occur because the defendant or its lawyer failed to apprehend the untimeliness of the claim, or even because the defendant has made a tactical decision that it would rather have the matter determined on the merits.

Yet, such logic can be readily extended to justify pursuit of other types of meritless

85. *Id.* at 4.

86. *Id.* at 5.

87. *Brubaker v. Richmond*, 943 F.2d 1363 (4th Cir. 1991) (finding the making of such a claim to be "groundless in law" and to justify a Rule 11 violation).

88. N.C. State Bar Ethics Comm., Formal Ethics Op. 2003-13, at 1 (2004); Pa. Eth. Op. 96-80, 1996 WL 928177, at *1 (Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, June 24, 1996).

89. *See, e.g., Hoover v. Armco Inc.*, 915 F.2d 355, 357 (8th Cir. 1990) ("The statute of limitations is an affirmative defense the defendant must raise . . . and Hoover did not have to anticipate Armco would raise it."); *Ford v. Temple Hosp.*, 790 F.2d 342, 348-49 (3d Cir. 1986) ("In the real world of litigation, counsel are not expected to be omniscient. No one knows for certain whether a potential affirmative defense will be in fact pled. The law books are replete with decisions where counsel has failed to file an affirmative defense or failed to file it timely."):

90. *See, e.g., Trainor v. Ky. Bar Ass'n*, 311 S.W.3d 719, 721 (Ky. 2010) (finding that lawyer violated Rule 3.1 by filing medical malpractice suit more than two years after the applicable statute of limitations ran).

claims as well based on the premise that, in the adversary system, the meritless nature of the claim might not be understood by the opposing party. In fact, one could imagine a lawyer being able to justify such conduct itself on the basis that it is a good-faith argument for an extension of the legal concept that permits pursuit of time-barred claims into other areas in which arguments that can dispose of the case are classified as affirmative defenses.⁹¹ For example, a lawyer might sue a defendant even though it is clear that the defendant's conduct was absolutely privileged. Is such a claim frivolous, or does the reasoning of Formal Opinion 94-387 permit the lawyer to file the suit? On one hand, the claim is arguably frivolous because "a lawyer of ordinary competence would recognize [it] as so lacking in merit that there is no substantial possibility that the tribunal will accept it."⁹² On the other hand, the defendant must plead its absolute privilege as an affirmative defense, the claim is enforceable by the court, and the privilege is not a bar to the court's exercise of jurisdiction over the matter.

Without extending the debate too far, under Formal Opinion 94-387 our hypothetical lawyer could file her client's claim notwithstanding the defendant's absolute privilege without violating Rule 3.1. The base test in this context seems to be whether the claim would deprive a court of subject matter jurisdiction; because this claim does not, filing it does not violate Rule 3.1 even though it will clearly fail if the defendant asserts its privilege as an affirmative defense.⁹³ If the defendant is awake and raises its absolute privilege as an affirmative defense, or perhaps responds to the suit by writing to the lawyer and demanding that she immediately dismiss the claim, then the lawyer must withdraw the claim to avoid a Rule 3.1 violation. And, of course, whether the lawyer's conduct violates Rule 3.1 is a separate question from whether it violates Federal Rule of Civil Procedure 11 or state analogs. Conduct that does not violate the former may violate the latter.

Naturally, the fact that a lawyer can ethically pursue a time-barred claim does not mean that the lawyer can engage in other misleading conduct in pursuit of that claim. For example, although a lawyer can file a complaint knowing that it is time-barred, he certainly cannot actively seek to hide that fact by alleging that it is timely filed or by falsely alleging that an event happened on a different date.⁹⁴ But how close to the line

91. Cf. Or. Eth. Op. 2005-21, 2005 WL 5679607, at *1 (Or. State Bar Ass'n Bd. of Governors, Aug. 2005) (opining that a lawyer can file complaint knowing that a valid affirmative defense to it exists because "it is up to Defendant or Defendant's own counsel to look after Defendant's interests and to discover and assert any available defenses").

92. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000).

93. In contrast, if the defendant enjoyed absolute *immunity* against the claim instead of an absolute privilege, the lawyer likely would violate Rule 3.1 by filing the claim so long as the defendant's immunity was of a type that would operate to deprive the court of subject matter jurisdiction.

94. *In re Shumate*, 647 N.E.2d 321, 322 (Ind. 1995).

can lawyers go without violating their duty of candor? May a lawyer set forth in the complaint allegations only the year in which an injury was incurred—for example, describing an automobile collision known to have occurred on December 12, 2007, as having occurred merely in 2007—to help obscure whether the lawsuit was timely filed?

The most straightforward answer is that a number of ethics rules coalesce to send a clear signal that lawyers are expected to understand and comply with their high obligations of candor, and that lawyers who find themselves wondering whether their conduct treads too close to the line likely are too close to the line. A lawyer pondering whether she can assert only that the collision occurred in 2007 to help obscure whether the lawsuit was timely filed needs to be concerned with the jurisdiction's equivalents of Model Rules 3.3(a), 4.1(a), 8.4(c), and 8.4(d). Model Rule 3.3(a)(1) prohibits a lawyer from making “a false statement of fact” to a tribunal,⁹⁵ and Model Rule 4.1(a) prohibits a lawyer from making “a false statement of material fact” to third persons.⁹⁶ The commentary to each of those rules notes that there are circumstances in which omissions can amount to misrepresentations sufficient to be the equivalent of an affirmative false statement.⁹⁷ Model Rule 8.4(c) broadly declares that it is unethical for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁹⁸ Finally, Model Rule 8.4(d) categorizes as professional misconduct any litigation conduct by a lawyer that is “prejudicial to the administration of justice.”⁹⁹ Even more fundamentally, a lawyer in this situation ought to be concerned that obscuring the date of the accident would ruin her credibility with the court when the truth is exposed, and that any loss of credibility will affect her and her clients in cases beyond this one.

C. Consequences of Rule 3.1 Violations and Abusive or Persistent Misconduct

If there is light at the end of the tunnel for lawyers charged with professional misconduct for pursuing frivolous claims or contentions, it generally reflects the professional discipline to be imposed. Disciplinary sanctions for Rule 3.1 violations tend to be of a lesser nature¹⁰⁰—such as a reprimand, admonition, or short suspen-

95. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009).

96. *Id.* R. 4.1(a).

97. *Id.* R. 3.3 cmt. 3 (“There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”); *id.* R. 4.1 cmt. 1 (“Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).

98. *Id.* R. 8.4(c).

99. *Id.* R. 8.4(d).

100. There are, of course, notable exceptions. *See, e.g., In re Caulfield*, 683 So. 2d 714, 715–19 (La. 1996) (involving illegal conduct in the form of a staged auto accident to obtain insurance proceeds); *In re Yao*, 680 N.Y.S.2d 546, 548 (N.Y. App. Div. 1998) (involving illegal conduct in the form of an extortion demand).

sion¹⁰¹—unless the lawyer has engaged in a pattern of such behavior. If the lawyer that pursued a frivolous claim or contention is a repeat or serial offender, indefinite or lengthy suspensions or even disbarment may result.¹⁰² One of the more egregious examples of serial misconduct led to a Missouri lawyer being disbarred first by the Missouri Supreme Court and then reciprocally by a Missouri federal court after she had been sanctioned for her pursuit of frivolous claims by four federal courts.¹⁰³

Not surprisingly, lawyers disciplined for violating Rule 3.1 often are deemed not only to have pursued unfounded allegations, but also to have done so for the purpose of harassing or intimidating an opponent.¹⁰⁴ Although Model Rule 3.1 is the most obvious and most direct rule prohibiting a lawyer's pursuit of a frivolous claim or defense, a number of other ethics rules prohibit types of conduct often present in a lawyer's pursuit of a frivolous claim or defense for some improper purpose. Model Rule 3.4(e), for example, prohibits lawyers, during trial, from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."¹⁰⁵ Model Rule 4.4(a) broadly makes it an ethical

101. See, e.g., *In re Spikes*, 881 A.2d 1118, 1119 (D.C. 2005) (suspending lawyer for 30 days for pursuing a defamation action based on statements made in a disciplinary complaint that were clearly protected by well-settled law governing the application of the litigation privilege to statements made in a report of attorney misconduct); *Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991) (imposing public reprimand and one-year probation on a lawyer who filed frivolous suit against other counsel in retaliation for representing clients opposing lawyer in another action); *In re Hackett*, 701 So. 2d 920, 922 (La. 1997) (imposing public reprimand against lawyers for filing of a frivolous motion to dissolve a temporary restraining order); *In re Panel Case No. 17289*, 669 N.W.2d 898, 906–07 (Minn. 2003) (admonishing lawyer, who had extensive prior disciplinary history including multiple past suspensions, who filed a frivolous defamation claim and who made allegations about damage to a car that could have been proven false simply by viewing vehicle).

102. See, e.g., *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 522–23 (Iowa 1996) (finding disbarment justified for lawyer who filed two frivolous lawsuits against same defendant, frivolous lawsuit against judge, and other frivolous lawsuits against attorneys representing parties in the litigation); *In re Benson*, 69 P.3d 544, 546–48 (Kan. 2003) (disbarring attorney who, as plaintiff and representing himself, filed 14 meritless lawsuits against a number of parties); *In re Selmer*, 568 N.W.2d 702, 703–05 (Minn. 1997) (suspending lawyer for one year and imposing five-year probationary period upon reinstatement, as a result of involvement in numerous instances of asserting baseless race discrimination claims as defense against lawsuits seeking to require the lawyer to pay legitimate creditors).

103. *In re Caranchini*, 160 F.3d 420, 422–25 (8th Cir. 1998); *In re Caranchini*, 956 S.W.2d 910, 915–20 (Mo. 1997).

104. See, e.g., *Thompson v. Sup. Ct. Comm. on Prof'l Conduct*, 252 S.W.3d 125, 128 (Ark. 2007) (determining that lawyer violated Rules 3.1 and 4.4 by filing a frivolous *lis pendens* action); *In re Pelkey*, 962 A.2d 268, 280 (D.C. 2008) (finding that lawyer violated Rule 3.1 by filing a frivolous appeal and pursuing frivolous litigation and violated Rule 4.4 by frivolously attempting to set aside an arbitration award despite having agreed to arbitration, all in connection with a dispute with a former business partner).

105. MODEL RULES OF PROF'L CONDUCT R. 3.4(d) (2009).

violation for a lawyer to “use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”¹⁰⁶ And when it is determined that the lawyer has engaged in purposeful harassment or intimidation, as opposed to just being sloppy or negligent in terms of investigating the merits of clients’ allegations, it should also come as little surprise that the consequence in terms of the disciplinary sanction tends to be more severe.¹⁰⁷

An Arkansas case, *Dodrill v. Executive Director*,¹⁰⁸ illustrates this principle. The lawyer in that case, Lewis Dodrill, represented Bobby Bratton, a debtor in a bankruptcy proceeding. Dodrill, acting on Bratton’s behalf, filed a suit in federal court seeking approximately \$15,000 in damages from Bratton’s former bankruptcy attorneys, and then amended the complaint to add the trustee of Bratton’s bankruptcy estate and the trustee’s law firm as defendants.¹⁰⁹ The district court referred the case to the bankruptcy court. Once there, the various defendants filed dispositive motions of one sort or another and prevailed across the board. Dodrill did not appeal from any of those rulings. Rather, Dodrill moved to have the trustee removed for alleged fraud and waste. The bankruptcy court held a hearing on that motion and, when Dodrill offered no evidence to support the claim, entered judgment against Bratton. Undaunted, Dodrill then filed another complaint in bankruptcy court against many of the same defendants named in the earlier suit, but this time seeking over \$150,000 in damages.¹¹⁰

The perturbed defendants successfully moved to dismiss the second lawsuit and then sought sanctions against Dodrill under Bankruptcy Rule 9011, which is equivalent to Federal Rule of Civil Procedure 11. The bankruptcy court sustained the sanctions motions. In doing so, the bankruptcy judge stressed that the evidence simply revealed no misconduct by any of the defendants and indicated that Dodrill “continuously displayed a complete lack of competence in the practice of bankruptcy law.”¹¹¹

106. *Id.* R. 4.4(a); *see, e.g., In re Wagner*, 744 N.E.2d 418, 421–22 (Ind. 2001) (finding a Rule 4.4(a) violation where, after a homeowner had filed bankruptcy and discharged the obligation created by a judgment lien, the lawyer charged the homeowner \$1,000 to agree to release that lien).

107. *See, e.g., In re Blasi*, 660 N.Y.S.2d 151, 152–53 (N.Y. App. Div. 1997) (suspending lawyer for five years as a result of pursuit of meritless complaints and motion practice as means of dealing with personal disputes with neighbors); *In re Sandvoss*, 644 N.Y.S.2d 557, 558–59 (N.Y. App. Div. 1996) (suspending lawyer for two years for filing frivolous defamation suit against client as retaliation for client’s pursuit of disciplinary proceedings against lawyer); *In re Disciplinary Proceedings Against Eisenberg*, 778 N.W.2d 645, 661–62 (Wis. 2010) (disbarring a lawyer with a long prior disciplinary history who pursued entirely meritless litigation against his client’s wife, a victim of domestic violence, for the purpose of gaining leverage in his client’s divorce case by intimidating, harassing, and maliciously injuring her).

108. 824 S.W.2d 383 (Ark. 1992).

109. *Id.* at 384.

110. *Id.*

111. *Id.* at 385 (quoting from the letter of referral by the bankruptcy judge that indicated Dodrill had admitted during a hearing that he knew “nothing whatever about bankruptcy,” was “thoroughly incompetent in bankruptcy court,” and had “no business being there”).

The bankruptcy judge also referred the matter to the Arkansas disciplinary authorities. In the resulting disciplinary case, the bankruptcy judge testified that Dodrill had been “continually insulting, abusive, and disruptive to the court, to witnesses, and to opposing counsel despite repeated warnings.”¹¹² Rather than engaging in routine discovery, Dodrill had “assail[ed] opposing counsel as liars and embezzlers.”¹¹³ Dodrill confessed that he was incompetent to handle bankruptcy matters and admitted that the allegations in the second suit were not “founded in fact.”¹¹⁴ Dodrill apparently started out wanting only “a clarifying order in bankruptcy court,” but instead of pursuing that course, “he sued the attorneys involved for wrongful conduct.”¹¹⁵ All of this bolstered the Arkansas Supreme Court’s conclusion that Dodrill deserved a one-year suspension for pursuing litigation that “apparently [was] brought for the purposes of harassment and intimidation rather than for legitimate purposes.”¹¹⁶

D. Continued Pursuit of Claims or Contentions That Become Frivolous

Neither the mere fact that a case is ultimately unsuccessful nor the fact that an attorney narrows the nature of the case or claims ultimately presented to a jury necessarily means that it was somehow unreasonable or improper for the lawyer to continue to pursue the case and obtain a definitive ruling against her client.¹¹⁷ As Model Rule 3.1 makes clear, however, the obligation to not pursue frivolous litigation continues beyond the initial filing of the action. Thus, even if an attorney can ethically pursue an action at the outset, should events and circumstances change, or should the attorney later learn that continued litigation would require the pursuit of a frivolous claim, he has a duty to drop the case or offending claims.¹¹⁸ We saw an example of that rule in *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*,¹¹⁹ discussed earlier. Another illustra-

112. *Id.* at 387.

113. *Id.*

114. *Id.* at 386–87.

115. *Id.* at 387.

116. *Id.*

117. *Medtronic Navigation, Inc. v. Brainlab Medizinische Computersysteme GmbH*, 603 F.3d 943, 959 (Fed. Cir. 2010) (reversing a sanction of over \$4 million jointly entered against plaintiff and plaintiff’s counsel in patent infringement case).

118. *See, e.g., In re Caranchini*, 956 S.W.2d 910, 916 (Mo. 1997) (stating that “continuing to pursue a claim once it becomes apparent that there is no factual basis to support that claim is clearly contrary to the requirements of the rule”); *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 597 N.W.2d 744, 760 (Wis. 1999) (determining that continued pursuit of action in the absence of any evidence to support causation was frivolous as a matter of law). *But see* *Rose v. Tullos*, 994 So. 2d 734, 739 (Miss. 2008) (“No continuing duty exists to force an attorney to abandon a claim if it later appears to be without merit.”) (citing *Bean v. Broussard*, 587 So. 2d 908, 913 (Miss. 1991)).

119. 597 N.W.2d 744 (Wis. 1999).

tive example of such a transgression is found in the conduct of a Connecticut lawyer who received a reprimand for violating Rule 3.1 through continued efforts to overturn an arbitration ruling against his client.¹²⁰

The lawyer in *Brunswick v. Statewide Grievance Committee*,¹²¹ Max Brunswick, moved to vacate an arbitration award against his client, who had been represented by a different attorney. Brunswick alleged, among other things, that the award was procured by corruption, fraud, undue means, or the evident partiality of the arbitrators.¹²² The court denied the motion and referred Brunswick to state disciplinary authorities for making allegations without reasonable cause. A lower court found that Brunswick had violated Rule 3.1, and Brunswick appealed.

The appellate court acknowledged that the original act of filing the motion to vacate did not violate Rule 3.1 because under the commentary to the Connecticut rule, “[t]he filing of an action . . . 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.”¹²³ Brunswick was not required at the time he filed the motion to substantiate all of the allegations in it with evidentiary support.¹²⁴ In fact, Brunswick initially had sufficient grounds to assert the contention of partiality because of a time entry in opposing counsel’s billing records indicating a lengthy conference with one of the three arbitrators before the arbitration. Likewise, Brunswick was justified in originally making the claims of corruption, fraud, or undue means because “his client had ‘claimed to have been told, by a staff person in the office of her former counsel, that the former counsel had received money from’ the opposing party.”¹²⁵ That did not end the inquiry, however, because the court concluded that Rule 3.1 “prohibits an attorney from asserting at any time a claim on which the attorney is reasonably unable to maintain a good faith argument on the merits.”¹²⁶

Brunswick’s allegations simply did not stand the test of time. He was unable to develop any facts to support the allegations in the motion. His client never delivered a promised affidavit to establish the alleged fraud, corruption, or undue influence. The facts that he did develop were unhelpful. For example, it was clearly established that, notwithstanding the troubling time entry in the other lawyer’s billing records, the alleged conference with the arbitrator never in fact occurred. More remarkably, Brunswick retreated from that allegation only grudgingly, arguing as a fallback posi-

120. *Brunswick v. Statewide Grievance Comm.*, 931 A.2d 319 (Conn. App. Ct. 2007).

121. 931 A.2d 319 (Conn. App. Ct. 2007).

122. *Id.* at 332.

123. *Id.* at 330 (quoting the comment to the Connecticut rule).

124. *Id.*

125. *Id.* at 333.

126. *Id.* at 331.

tion that he was not actually alleging that the conference really happened but just that it was wrong for the opposing counsel to have billed for such a conference and sought to make Brunswick's client pay for a conference that never occurred.¹²⁷

Still retreating and now sensing serious trouble, Brunswick argued that although he had finally come to believe that he lacked a good-faith basis for pursuing the client's motion to vacate, his client refused to allow him to withdraw the offending allegations.¹²⁸ The court, however, noted that according to the commentary to Rule 1.2(a),¹²⁹ a lawyer is not required to pursue objectives or employ means simply because the client wishes him to do so. When a lawyer is aware that a good-faith basis for a claim or contention is lacking, the court observed, the lawyer's "duty as a minister of justice every time must trump a client's desire to continue an untenable allegation."¹³⁰

The court in *Brunswick* ultimately determined that Brunswick violated Rule 3.1 by "persisting" in the allegations that the arbitration award was wrongly procured "once he knew that he had no evidence to support those allegations at trial."¹³¹ Brunswick received a reprimand for his misguided tenacity.

It is common that claims or contentions that appeared to be perfectly valid at the time they were first made lose their luster. Claims and contentions weaken over time for a variety of understandable reasons. Witnesses who were expected to support allegations turn out to be uncertain or unreliable, and sometimes die or disappear. Clients' beliefs in certain facts, no matter how strongly held, prove to be incorrect or inaccurate in whole or part. Documents cannot be located or are vague. Adverse witnesses have better or more complete knowledge of events. Particular allegations may be dispelled by scientific testing of some sort. Experts cannot be located who will support a theory for which expert testimony will be required. The list goes on and on. When these things happen, lawyers on the short end of the stick must be prepared to abandon or withdraw the claims or contentions that they once considered to be valid. There is no dishonor in justifiable retreat. There potentially is, however, discipline waiting for lawyers who unreasonably persist in pursuing plainly meritless theories in litigation.

III. Ethical Restrictions Affecting Lawyers' Ability to Investigate Clients' Claims or Contentions

As discussed above, the duty to avoid making frivolous claims or contentions means that lawyers must adequately investigate clients' claims and contentions. The need to investigate often creates a need to communicate with persons other than clients, which

127. *Id.* at 330.

128. *Id.* at 334.

129. *Id.* ("The commentary to Rule 1.2(a) . . . states in relevant part that 'a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.'").

130. *Id.*

131. *Id.*

can raise a host of ethics issues. In a simple example, a lawyer for a plaintiff may first think to confirm the client's factual assertions by interviewing the potential defendant's current or former employees. Unfortunately for the diligent plaintiff's lawyer, her ability to conduct those interviews may be extremely limited as a result of the restrictions in Model Rule 4.2 and state counterparts.

Model Rule 4.2 provides that a lawyer representing a client "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."¹³² Rule 4.2 clearly applies to communications by a lawyer prior to filing a lawsuit if the target person is represented by counsel with respect to the matter encompassed by the contemplated lawsuit.¹³³ And, of course, a lawyer seeking to make an appropriate pre-filing investigation cannot simply employ the services of another—such as a private investigator or independent insurance claims adjuster—to engage in communications otherwise prohibited by Rule 4.2.¹³⁴

A surprisingly common situation in which an attorney's conduct runs afoul of Rule 4.2 occurs when the attorney is implicated in encouraging the client to obtain an affidavit from someone who is represented by counsel.¹³⁵ *In re Pyle*¹³⁶ is an interesting

132. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009).

133. See, e.g., *Penda Corp. v. STK, LLC*, No. Civ. A. 03-5578, Civ. A. 03-6240, 2004 WL 1628907, at *3 (E.D. Pa. July 16, 2004); *Stahl v. Wal-Mart Stores, Inc.*, 47 F. Supp. 2d 783, 789 (S.D. Miss. 1998); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. d (2000) (explaining that the matters encompassed within a particular representation, as well as their scope and contour, depend upon the particular circumstances).

134. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2009) (making it an ethical violation to violate another of the ethics rules "through the acts of another"); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 19 (1995) ("Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she . . . may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do."); see, e.g., *United States v. Smallwood*, 365 F. Supp. 2d 689, 694–97 (E.D. Va. 2005) (finding that an investigator's communications with represented person were ethically improper where it would have been unethical for attorney to have had the communications directly); *In re Complaint of PMD Enters., Inc.*, 215 F. Supp. 2d 519, 529 (D.N.J. 2002) (finding lawyer ethically responsible for investigator's communication with represented party where lawyer knew investigator would be contacting represented person); *State v. Clark*, 738 N.W.2d 316, 338–40 (Minn. 2007) (finding that police contacts with represented criminal defendant amounted to a Rule 4.2 violation attributable to state prosecutors); *Disciplinary Counsel v. Sartini*, 871 N.E.2d 543, 544–46 (Ohio 2007) (affirming public reprimand against two prosecuting attorneys for causing represented criminal defendant's mother to communicate a plea offer to the defendant).

135. See, e.g., *Holdren v. Gen. Motors Corp.*, 13 F. Supp. 2d 1192, 1195–96 (D. Kan. 1998) (granting a protective order as a result of a violation of Rule 4.2 where plaintiff's lawyer "facilitated" plaintiff's efforts in obtaining affidavits from defendant's employees); *In re Anonymous*, 819 N.E.2d 376, 279 (Ind. 2004) (imposing private reprimand against lawyer for violating Rule 4.2 by providing affidavit to client and instigating "a series of contacts calculated to obtain the employee's signature on the affidavit despite [the lawyer's] unsuccessful attempts to obtain the employee's signature through opposing counsel").

136. 91 P.3d 1222 (Kan. 2004).

case in point. There, Thomas Pyle represented Sallie Moline in a trip-and-fall case against Ricci Gutzman. Moline, who alleged that she hurt her knee tripping over a dog cable in Gutzman's driveway, was romantically involved with Gutzman. Prior to suing on Moline's behalf, and before Gutzman was represented by counsel, Pyle prepared an affidavit for Gutzman's signature which, among other things, contained a statement by Gutzman admitting liability and taking full responsibility for Moline's injuries. Pyle gave the affidavit to Moline to deliver to Gutzman.¹³⁷ After suit was filed, Gutzman's insurer hired John Conderman to defend him. Conderman filed an answer denying liability. Pyle went to the well again, creating an affidavit for Moline to take to Gutzman. Pyle provided that affidavit to Moline along with a cover letter stating: "As a party to the case, you have the right to communicate with Mr. Gutzman. Therefore, please talk with him and see if he will sign the enclosed affidavit."¹³⁸ Pyle was ultimately charged with violating Rule 4.2. In rejecting Pyle's argument that Moline could not be considered his agent when he was in fact her agent, the court discussed two similar cases where lawyers had used their clients to deliver documents to a represented party contemplating that a signature would be obtained without that party's lawyer's knowledge¹³⁹ and concluded that Pyle violated Rule 4.2 "by encouraging his client to do that which he could not."¹⁴⁰ Pyle was publicly censured for his misconduct in representing Moline.

*Bratcher v. Kentucky Bar Ass'n*¹⁴¹ provides a recent example of how a lawyer can unthinkingly run afoul of the ethics rules as a result of communications by an agent. A former employee of R.C. Components, Inc., Dennis Babbs, hired Pamela Bratcher to represent him in a wrongful termination lawsuit. Bratcher, in turn, hired a company in the business of determining what listed references will say about former employees, Document Reference Check (DRC), to contact the owner of R.C. Components to see what he would say about Bratcher's client.¹⁴² A DRC employee telephoned the owner, said she was an employer considering hiring Babbs, and transcribed a copy of the conversation for Bratcher. Bratcher, sensing no wrongdoing, produced the transcript to R.C. Components in discovery.¹⁴³ In the underlying litigation, R.C. Components successfully moved to suppress the transcript and also was able to disqualify Bratcher. After unsuccessfully fighting the disqualification order in the underlying litigation, Bratcher admitted that her conduct constituted an ethical violation in the

137. *Id.* at 1225.

138. *Id.* at 1227.

139. *Holdren v. Gen. Motors Corp.*, 13 F. Supp. 2d 1192 (D. Kan. 1998); *In re Marietta*, 569 P.2d 921 (Kan. 1977).

140. *Pyle*, 91 P.3d at 1229.

141. 290 S.W.3d 648 (Ky. 2009).

142. *Id.* at 649.

143. *Id.*

disciplinary proceedings and asked that the discipline against her be limited to a public reprimand.¹⁴⁴ The Kentucky Supreme Court accepted her position and publicly reprimanded her for violating Rule 4.2(a).

Rule 4.2 can pose thorny problems for investigating lawyers where potential witnesses are employed by a represented organization. Because organizations can act only through their constituents, lawyers must be able to judge who within a business organization is considered to be represented by the lawyer representing the business organization. Different jurisdictions take different approaches to this issue. Comment 7 to Model Rule 4.2 lays out the preferred approach:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.¹⁴⁵

Jurisdictions adopting this approach often refer to the individuals within this sphere as the “control group” or the organization’s “alter egos.” These people are presumptively treated as being represented by counsel for the organization. Under the ABA approach, however, an organization’s in-house lawyers are not off-limits under Rule 4.2, and consent from outside counsel for the organization is not required to communicate with in-house lawyers as long as they are not part of the constituent group of the organization described in the comment to Model Rule 4.2 or are not separately represented.¹⁴⁶ This approach to *ex parte* communications with in-house lawyers makes sense, and, in fact, going further to even permit *ex parte* contact with in-house counsel regardless of whether they are solely acting as a lawyer for the organization would also make sense, given that “[t]he purpose of Rule 4.2 is to prevent a skilled advocate from taking advantage of a non-lawyer.”¹⁴⁷

Some jurisdictions have deviated from the ABA approach and adopted a “managing-speaking agent test.”¹⁴⁸ Under this test, lawyers are prohibited from commu-

144. *Id.*

145. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [7] (2009).

146. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-443, at 2 (2006) [hereinafter ABA Formal Op. 06-443]; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. c (2000) (“Inside legal counsel for a corporation is not generally within [the definition of a represented nonclient] and contact with such counsel is generally not limited by [the general anti-contact rule].”).

147. ABA Formal Op. 06-443, *supra* note 146, at 2.

148. *See, e.g.*, *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 764 N.E.2d 825, 833 (Mass. 2002); *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237, 1247–48 (Nev. 2002).

nicating ex parte with organizational employees who possess “speaking authority” for the organization—those “who ‘have managing authority sufficient to give them the right to speak for, and bind the corporation.’”¹⁴⁹ A ready example of how lawyers can run afoul of the ethical restriction on communications with off-limits employees of a represented organization in an investigation is presented by *Microsoft Corp. v. Alcatel Business Systems*.¹⁵⁰ In that patent litigation, the lawyers for Microsoft were not disqualified for their actions but were monetarily sanctioned. Basically, the lawyers purchased a piece of equipment that contained components that allegedly infringed the patents at issue and arranged for the equipment to be installed by an employee of the represented defendant.¹⁵¹ The employee, Po Ching Lin, consistent with his job duties, provided “training on the administration, use and configuration” of the equipment to the Microsoft lawyers.¹⁵² The Microsoft lawyers actively questioned Lin about those topics. The court ultimately determined that Microsoft’s lawyers violated Rule 4.2 based on Lin’s “position and level of responsibility with respect to the [equipment] and because he was directed (as an employee of a represented party) to engage in conduct directly relevant to the subject matter of this litigation by [Microsoft’s lawyers].”¹⁵³

In addition to needing to be aware of differences with regard to the language within the comments adopted in relevant jurisdictions, application of Rule 4.2 itself to particular factual situations can be a delicate endeavor and one for which predicting the ultimate outcome is no easy task. The Third Circuit’s determination that an attorney’s communications with an administrative assistant to managerial agents of a represented organization did not violate Pennsylvania’s Rule 4.2 readily demonstrates how easily reasonable minds can differ on the scope of Rule 4.2’s application.¹⁵⁴ In *EEOC v. Hora, Inc.*,¹⁵⁵ the district court disqualified Jana Barnett, the intervening plaintiff’s counsel, because Barnett communicated with Deborah Richardson, an administrative assistant to the manager and partner-owner of the Days Inn where the plaintiff had worked. Apparently motivated by Barnett’s communications, Richardson gathered a variety of information that supported the plaintiff’s sexual harassment claims.¹⁵⁶ Once defense counsel learned of these communications, they moved to disqualify Barnett. The district court concluded that, given the small number of employees working in the hotel and Richardson’s position of intimate business trust as a

149. *Messing*, 764 N.E.2d at 833 (quoting *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984)).

150. Civ. No. 07-090-SLR, 2007 WL 4480632 (D. Del. Dec. 18, 2007).

151. *Id.* at *1.

152. *Id.*

153. *Id.*

154. *EEOC v. Hora Inc.*, 239 F. App’x 728 (3d Cir. 2007).

155. No. 03-cv-01429, 2005 WL 1387982 (E.D. Pa. June 8, 2005).

156. *Id.* at *2.

result of being the only assistant to both the manager and the hotel's part-owner, Richardson could be treated as having managerial responsibilities for purposes of Rule 4.2.¹⁵⁷ The Third Circuit reversed the district court's disqualification order based on the lack of evidence in the record to support a conclusion that Richardson came within the scope of Rule 4.2. There certainly was no evidence that Richardson had regularly consulted with defense counsel in the matter, nor was there evidence that her acts could provide a basis for imputing liability to Days Inn.¹⁵⁸

Jurisdictions also take differing approaches to ex parte communications with former officers, agents, or employees of a represented organization, but mostly only as to the question of what precautionary measures a lawyer must take to protect against causing a former officer or employee from disclosing confidential or privileged information. Courts generally agree that a lawyer is free to communicate with a former employee of an organization without first obtaining the consent of the organization's lawyer.¹⁵⁹ The ABA clearly ratified that approach in the 2002 amendments to Model Rule 4.2, which added language to Comment 7 stating: "Consent of the organization's lawyer is not required for communication with a former constituent."¹⁶⁰ A few jurisdictions, however, deviate from the majority approach with respect to ex parte contact with former employees of an organization.¹⁶¹

157. *Id.* at **12–13 ("While the standard for determining who has . . . 'authority to bind' a business entity is somewhat imprecise, it includes employees below the level of corporate management because otherwise the third category of employees mentioned in Rule 4.2 would be redundant. . . .") (quoting *Weeks v. Indep. Sch. Dist.*, 230 F.3d 1201, 1209 (10th Cir. 2000)).

158. *Hora*, 239 F. App'x at 731.

159. *See, e.g., In re Digitek Prod. Liab. Litig.*, 648 F. Supp. 2d 795, 799 (S.D. W. Va. 2009); *Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968, 979 (N.D. Ohio 2008); *Bryant v. Yorktowne Cabinetry, Inc.*, 538 F. Supp. 2d 948, 949–53 (W.D. Va. 2008); *United States v. W.R. Grace*, 401 F. Supp. 2d 1065, 1068–69 (D. Mont. 2005); *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004); *Olson v. Snap Prods., Inc.*, 183 F.R.D. 539, 545 (D. Minn. 1998); *In re Prudential Ins. Co.*, 911 F. Supp. 148, 154 (M.D. Pa. 1995); *Browning v. A.T. & T. Paradyne*, 838 F. Supp. 1564, 1567 (M.D. Fla. 1993); *Lang v. Superior Ct.*, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); *DiOssi v. Edison*, 583 A.2d 1343, 1345 (Del. Super. Ct. 1990); *H.B.A. Mgmt., Inc. v. Estate of Schwartz*, 693 So. 2d 541, 544–46 (Fla. 1997); *Sanifill of Ga., Inc. v. Roberts*, 502 S.E.2d 343, 345 (Ga. 1998); *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729, 737 (Ind. Ct. App. 2002); *Humco, Inc. v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000); *Schmidt v. Gregorio*, 705 So. 2d 742, 743–44 (La. Ct. App. 1993); *Clark v. Beverly Health & Rehab. Servs.*, 797 N.E.2d 905, 911–12 (Mass. 2003); *Smith v. Kan. City S. Ry.*, 87 S.W.3d 266, 272–75 (Mo. Ct. App. 2002); *Klier v. Sordoni Skanska Constr. Co.*, 766 A.2d 761, 770 (N.J. Super. Ct. App. Div. 2001); *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992); *State ex rel. Charleston Area Med. Ctr. v. Zakaib*, 437 S.E.2d 759, 763–64 (W. Va. 1993); *Strawser v. Exxon Co.*, 843 P.2d 613, 622 (Wyo. 1992).

160. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).

161. *See, e.g., Michaels v. Woodland*, 988 F. Supp. 468, 470–74 (D.N.J. 1997) (treating Rule 4.2 as prohibiting contact with former employees who were previously members of the organization's litigation control group); *Camden v. State of Md.*, 910 F. Supp. 1115, 1122–24 (D. Md. 1996) (construing Rule 4.2 to prohibit ex parte contact with former employees who had been exposed to an extensive

As for precautionary measures, the comment to Model Rule 4.2 states only that “[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.”¹⁶² Not surprisingly, courts routinely interpret Rule 4.2 to prohibit lawyers from asking former employees about privileged information.¹⁶³ The Restatement (Third) of the Law Governing Lawyers takes a similar position regarding the propriety of lawyers seeking such information from non-clients.¹⁶⁴ A lawyer or law firm that obtains confidential information from a former employee known to be likely to have had access to it will likely be disqualified from continued representation of its client in the matter.¹⁶⁵

With respect to current and former employees who are unprotected by or under Rule 4.2, lawyers for the organization who are concerned about opponents’ *ex parte* communications with such persons may *ask* the current or former employees not to voluntarily speak with opposing counsel outside their presence.¹⁶⁶ Such a request can only be made if the lawyer for the organization has a reasonable belief that stiff-arming opposing counsel will not adversely affect the targeted person.¹⁶⁷ Whether the person chooses to comply is, of course, entirely up to her. But one thing that the

amount of privileged information); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (concluding that *ex parte* contact with a former employee who has managerial responsibilities as to the litigation’s subject matter violates Rule 4.2).

162. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2009).

163. *See, e.g.*, *W.R. Grace*, 401 F. Supp. 2d at 1067; *Kalamazoo Ophthalmology*, 322 F. Supp. 2d at 890–91; *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157, 1167 (D. Nev. 1998); *Jenkins v. Wal-Mart Stores, Inc.*, 956 F. Supp. 695, 697 (W.D. La. 1997); *Concerned Parents v. Hous. Auth.*, 934 F. Supp. 406, 409 (M.D. Fla. 1996); *Valassis v. Samuelson*, 143 F.R.D. 118 (E.D. Mich. 1992); *Clark v. Beverly Health & Rehab. Servs.*, 797 N.E.2d 905, 911–12 (Mass. 2003); *Neil S. Sullivan Assocs., Ltd. v. Medco Containment Servs., Inc.*, 607 A.2d 1386, 1390 (N.J. Super. Ct. Law Div. 1992).

164. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 (2000) (“A lawyer communicating with a nonclient . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.”).

165. *See, e.g.*, *Arnold v. Cargill*, No. 01-2086, 2004 WL 2203410, at **8, 13 (D. Minn. Sept. 24, 2004) (disqualifying law firm based on its review and retention of privileged and confidential materials obtained from a former high-ranking employee of defendant who law firm knew “was extensively exposed to confidential and privileged information”). *But see Forward v. Foschi*, No. 9002/08, 2010 WL 1980838, at *17 (N.Y. Sup. Ct. May 18, 2010) (declining to disqualify where improperly obtained information did not provide a “blue print” to litigating or defending the case, the opposing party was aware of the other side’s acts in obtaining information and delayed seeking a remedy, and where party would be “severely prejudiced” by the disqualification).

166. MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1) (2009). Before making such a request in any criminal matter or a matter involving governmental or regulatory actions, a lawyer should make certain that such a request would not constitute obstruction of justice.

167. *Id.* R. 3.4(f)(2).

lawyer may not do is attempt to *instruct* opposing counsel not to communicate with persons affiliated with, or previously affiliated with, the organization unless the lawyer actually represents those persons in the matter.¹⁶⁸

A topic that is increasingly discussed but is, and should continue to be, well-settled and easy to comprehend is that an attorney's act of visiting the public website of an adversary is not a violation of Model Rule 4.2. This is true even if the lawyer goes beyond simply reading information posted on the website, as long as the lawyer engages in purely one-way communications, such as ordering products.¹⁶⁹ Even accessing an archived version of an opponent's public website through a database such as the "The Wayback Machine,"¹⁷⁰ or other similar Internet archive websites, cannot be said to violate Model Rule 4.4 because it does not constitute obtaining evidence in violation of the legal rights of anyone.¹⁷¹ A Pennsylvania federal court made this point in granting summary judgment against a plaintiff that claimed that by viewing older versions of its website through The Wayback Machine, a law firm violated copyright law and the Computer Fraud and Abuse Act.¹⁷²

*Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*¹⁷³ involved a lawsuit by a patient advocacy organization, Healthcare Advocates, Inc.(HAI), that had previously been unsuccessful in trademark and trade secret misappropriation litigation against a competitor. The competitor was represented in the litigation by the Harding firm, and copies of screenshots of older versions of HAI's website obtained by the Harding firm through The Wayback Machine were an important factor in the successful defense of that suit.¹⁷⁴ After summary judgment was entered against HAI in the underlying litigation, HAI filed a multiple-count lawsuit against the Harding firm that, at its core, claimed that the Harding firm engaged in unlawful "hacking" when it used The Wayback Machine to view historical screenshots of HAI's website and that

168. *Matusick v. Erie County Water Auth.*, No. 07CV489A, 2010 WL 681062, at *3 (W.D.N.Y. Feb. 22, 2010); *Patriarca v. Ctr. for Living & Working, Inc.*, 778 N.E.2d 877, 880–81 (Mass. 2002); *Utah Eth. Op. 04-06*, 2004 WL 2803333, at *1 (Utah State Bar, Ethics Advisory Op. Comm. Dec. 2, 2004).

169. *Or. Eth. Op. 2001-164*, 2001 WL 167177, at **1–2 (Or. State Bar Ass'n Bd. of Governors Jan. 2001).

170. The Wayback Machine is a service provided by the Internet Archive, a nonprofit organization, that was begun in 1996. Web users can input the URL of a website for which they would like to view archived versions and then select from a variety of dates of available archived materials to see the archived screenshot of that website on certain particular dates.

171. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2009) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

172. *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 649 (E.D. Pa. 2007).

173. 497 F. Supp. 2d 627 (E.D. Pa. 2007).

174. *Id.* at 630.

in doing so, the Harding firm must have circumvented certain electronic protective measures HAI had in place.¹⁷⁵ Specifically, HAI had taken advantage of an exclusion policy offered by The Wayback Machine to website owners, the robots.txt protocol, in which a website owner that did not want pages of its website to be archived and viewable could insert a robots.txt file at its website. HAI had done so, but, at the time the Harding firm had undertaken its search, The Wayback Machine's servers had malfunctioned. Because of that malfunction, The Wayback Machine's servers did not recognize the robots.txt exclusions, and this allowed the Harding firm to see archived versions of HAI's website that HAI did not want to be archived and viewable.¹⁷⁶ Given that the Harding firm had simply used The Wayback Machine "in the manner it was intended to be used" by any user with a normal web browser, the court rightly concluded that the Harding firm's conduct was entirely lawful.¹⁷⁷

The Rule 4.2 prohibition on ex parte communications is generally considered to be matter-specific,¹⁷⁸ as demonstrated in *People v. Santiago*.¹⁷⁹ In *Santiago*, the Rule 4.2 question was whether communications by prosecutors investigating potential criminal child endangerment charges against Evelyn Santiago were prohibited by Rule 4.2 because Santiago was represented by appointed counsel in juvenile court proceedings seeking to have her children made wards of the state for their protection. Because it was undisputed that the lawyer representing Santiago in the juvenile court matter had not been engaged to represent her in the criminal investigation, the Illinois court concluded that Rule 4.2 was not violated despite the overlapping case facts.¹⁸⁰ The only "matter" in which Santiago was represented by counsel was the juvenile court case.¹⁸¹

When a lawyer knows that a person with whom she wishes to speak is represented

175. *Id.* at 630–31.

176. *Id.*

177. *Id.* at 648–49.

178. *See, e.g.,* United States v. Ford, 176 F.3d 376, 382 (6th Cir. 1999) (interpreting Kentucky's similar version of Rule 4.2); Miller v. Material Sciences Corp., 986 F. Supp. 1104, 1106–07 (N.D. Ill. 1997) (determining that communication by plaintiff's attorney in a federal securities class action with party that was represented in a related SEC investigation but not in the federal class action was not prohibited); Miano v. AC&R Adver., Inc., 148 F.R.D. 68, 80 (S.D.N.Y. 1993) (finding that corporate employees were not off-limits as a result of ethics rules when the corporate entity had not retained any counsel with respect to the specific matter that was the focus of communications); State ex rel. Okla. Bar Ass'n v. Harper, 995 P.2d 1143, 1147 (Okla. 2000) (interview of driver by defense lawyer did not violate Rule 4.2 because it involved separate claim of passenger, not other claims involved in same accident on which driver was represented by counsel).

179. 925 N.E.2d 1122 (Ill. 2010); *see also* Griffin-El v. Beard, No. 06-2719, 2009 WL 2929802, at *7 (E.D. Pa. Sept. 8, 2009) (concluding that there was no violation of Rule 4.2 when defense lawyers communicated with corrections facility officer in his role as custodian of records when officer was represented by counsel only in another lawsuit filed by their client and not in the matter in which his status as custodian made him a potential witness).

180. *Santiago*, 925 N.E.2d at 1128–31.

181. *Id.* at 1129–30.

by an attorney in a matter, the lawyer can always seek the attorney's consent to the communication. If there is more than one attorney representing the person, the lawyer need only obtain consent from one of them. The strictures of Rule 4.2 only come into play, however, if the lawyer has actual knowledge that the person is represented by counsel.¹⁸² Of course, a lawyer's knowledge can be inferred from circumstances;¹⁸³ thus, a lawyer cannot turn a blind eye to the obvious with respect to the fact of representation. Although it can be prudent to do so, there is no requirement in the rules mandating that a lawyer ask if someone is represented by counsel before speaking with that person.¹⁸⁴

If a lawyer does not actually know that a person is represented, or if the person is not represented by counsel in the matter about which the communication is to be made, then the lawyer's communications with the person are governed by a different rule altogether: the jurisdiction's version of Model Rule 4.3. Model Rule 4.3 provides that when acting on behalf of a client, a lawyer who interacts with an unrepresented person:

[S]hall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.¹⁸⁵

Model Rule 4.3 limits the lawyer's ability to exploit the situation by overreaching or otherwise exercising improper influence over the unrepresented person.¹⁸⁶ By requiring the lawyer to disclose the nature of her interest in the matter, the rule seeks to ensure that the unrepresented person will appreciate the risks associated with commu-

182. See, e.g., *Humco, Inc. v. Noble*, 31 S.W.3d 916, 919 (Ky. 2000) (explaining that the mere fact that in-house counsel was copied on a letter sent by employee of defendant company did not constitute actual knowledge on part of plaintiff's lawyer that employee was represented by counsel).

183. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2009).

184. *Metrahealth Ins. Co. v. Anclote Psychiatric Hosp., Ltd.*, 961 F. Supp. 1580, 1583 (M.D. Fla. 1997) (quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 7 (1995)); *Fed. Sav. & Loan Ins. Corp. v. Hildenbrand*, Civ. A. No. 89-A-535, 1989 WL 107377, at *4 (D. Colo. Sept. 8, 1989).

185. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009).

186. See *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998); *People v. Mascarenas*, 103 P.3d 339, 345 (Colo. 2003).

nicating with the lawyer and be able to rationally decide whether to do so. In evaluating the propriety of communications with unrepresented persons, lawyers may wish to consider any strictures potentially imposed by federal or other state law.¹⁸⁷

Of course, the general prohibition in Rule 4.1 against making false statements of material fact or law to third parties applies to lawyers' communications with unrepresented persons.¹⁸⁸ And because the Rule 4.4(a) prohibition against using "methods of obtaining evidence that violate the legal rights of such a person"¹⁸⁹ readily applies to interactions with unrepresented persons, it is important to evaluate whether the questions to be asked of the unrepresented person would yield the disclosure of privileged or confidential information. A number of courts, in fact, have gone as far as to provide scripts, or the equivalents of scripts, to be followed when an attorney seeks to speak with, for example, an unrepresented employee or former employees of a represented organization.¹⁹⁰

IV. Other Liability Concerns Arising from the Pursuit of Frivolous Claims

Lawyers' concerns related to the pursuit of allegedly frivolous claims are not confined to ethics violations. First, lawyers' pursuit of allegedly frivolous claims or contentions is more commonly the subject of motions for sanctions under court rules or statutes. Second, tort liability for abuse of process or malicious prosecution may be a legitimate concern.

187. See, e.g., *Arons v. Jutkowitz*, 880 N.E.2d 831, 837–43 (N.Y. 2007) (explaining that an attorney can proceed with an interview in private of the treating physician of an adverse party but must be mindful of requirements imposed by federal privacy laws and rules); *Givens v. Mullikin*, 75 S.W.3d 383, 409 (Tenn. 2002) (concluding that a treating physician's private conversations with defense counsel about the plaintiff's medical information violated the physician's duty to the patient under an implied covenant of confidentiality and acknowledging that under certain circumstances that could subject defense counsel to potential liability for inducing such a breach).

188. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009).

189. *Id.* R. 4.4(a); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 (2000) ("A lawyer communicating with a nonclient . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.").

190. See, e.g., *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 112 (M.D.N.C. 1993) (mandating that, prior to interview, attorney or investigator must fully disclose representative capacity, state the reason the interview is sought, inform individual of right to refuse, inform individual of right to own counsel, and not seek privileged or work-product information); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1021 (Del. Super. Ct. 1990) (ordering that "[n]o interview of any former employee of Monsanto shall be conducted unless the following script is used by the investigator or attorney conducting the interview" and setting forth script as part of order); *In re Env'tl. Ins. Declaratory Judgment Actions*, 600 A.2d 165, 173 (N.J. Super. Ct. Law Div. 1991) (declaring that "[n]o interview of any former employee shall be conducted unless the following script is used by the investigator or attorney conducting the interview" and providing detailed script).

A. Rule 11 and Other Sanctions for Frivolous or Vexatious Litigation

Although lawyers' pursuit of frivolous claims or contentions may lead to professional discipline for violating ethics rules, lawyers accused of such conduct are more frequently targets of sanctions motions. Federal courts and all state courts have rules established to permit lawyers to be sanctioned for pursuing frivolous claims. State court rules are all derived, more or less, from Federal Rule of Civil Procedure 11.¹⁹¹ Subsection (b) of that rule provides:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the [attorney'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, cause unnecessary delay, or needlessly increase the cost of the litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely 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 belief or a lack of information.¹⁹²

Unlike Model Rule 3.1, Rule 11 does not directly address whether a paper or pleading must be frivolous in its entirety or only in part.¹⁹³ Nevertheless, as with the ethical restriction against pursuing frivolous claims, courts have concluded that Rule 11 requires an analysis of each separate claim or defense pursued in a lawsuit and not just the merits of the lawsuit or defense as a whole.¹⁹⁴

191. Likewise, in proceedings before U.S. Bankruptcy Courts, lawyers must comply with Bankruptcy Rule 9011, which is patterned after Federal Rule of Civil Procedure 11.

192. FED. R. CIV. P. 11(b).

193. The language in Rule 11(c)(2) regarding the ability to file a motion for sanctions if the targeted attorney or party has not taken advantage of the safe-harbor provision by withdrawing “the challenged paper, claim, defense, contention, or denial” strongly implies that a paper or pleading frivolous only in part would violate Rule 11.

194. *See, e.g.,* *Kearney v. Dimanna*, 195 F. App'x 717, 722 (10th Cir. 2006) (“Each claim must be individually evaluated and the merit, or potential merit, of one legal claim does not diminish the command of Rule 11 that each claim have the necessary legal support.”); *Holgate v. Baldwin*, 425 F.3d 671, 676–77 (9th Cir. 2005) (explaining that a pleading including multiple claims does not avoid violating Rule 11 merely because it contains one non-frivolous claim).

Not surprisingly, and particularly so in light of the mandatory procedural prerequisites for seeking Rule 11 sanctions—including the 21-day safe harbor provision¹⁹⁵—most Rule 11 rulings deal with allegations that entire lawsuits were frivolous, as where a New York attorney purported to represent a nonexistent entity, the Association of Holocaust Victims for Restitution of Artwork & Masterpieces (AHVRAM).¹⁹⁶

In *Association of Holocaust Victims for Restitution of Artwork & Masterpieces v. Bank Austria Creditanstalt AG*,¹⁹⁷ attorney Edward Fagan filed a lawsuit on behalf of AHVRAM against several defendants, including Bank Austria, for claims relating to alleged looting of artwork during the Holocaust. The first amended complaint he drafted did not set forth any basis for federal jurisdiction and, worse, was filed only after a comprehensive settlement had been completed of a separate lawsuit against Bank Austria.¹⁹⁸ The district court also took issue with the fact that AVHRAM was a fictitious entity, reasoned that by falsely claiming to be a member of AVHRAM and suing on the fictitious entity's behalf Fagan was engaged in champerty, and observed that he had made a number of other false statements in the first amended complaint.¹⁹⁹ The district court fined Fagan \$5,000 and ordered him to pay the over \$340,000 in attorney fees and costs incurred by defendants.²⁰⁰

As with analysis of lawyers' obligations under Model Rule 3.1 and state analogs, cases weighing potential Rule 11 violations turn upon an objective standard of reasonableness under the circumstances and not a question of a lawyer's good faith or other subjective motivation.²⁰¹ With respect to court-initiated Rule 11 sanctions, federal circuits are split on whether a finding of subjective bad faith on the part of the offending attorney is required.²⁰² Consistent with the language in the rule regarding "inquiry rea-

195. FED. R. CIV. P. 11(c)(2).

196. *Ass'n of Holocaust Victims for Restoration of Artwork & Masterpieces v. Bank Austria Creditanstalt AG*, No. 04 CV 3600(SWK), 2005 WL 2001888 (S.D.N.Y. Aug. 19, 2005).

197. No. 04 CV 3600(SWK), 2005 WL 2001888 (S.D.N.Y. Aug. 19, 2005).

198. *Id.* at **1–2.

199. *Id.* at **4–5.

200. *Id.* at 6; *In re Fagan*, 869 N.Y.S.2d 417, 418 (N.Y. App. Div. 2008). Matters ultimately got worse for Fagan. After he failed to make any more than \$250 in payments of the fine and sanctions, he was disbarred. *In re Fagan*, 869 N.Y.S.2d at 421.

201. *See, e.g., Jenkins v. Methodist Hosp.*, 478 F.3d 255, 263–65 (5th Cir. 2007) (finding a Rule 11 violation when plaintiff's lawyer, in a brief filed in a race discrimination case, modified a quotation from an affidavit to twice add the racially inflammatory term "Boy"); *Tropf v. Fid. Nat'l Title Ins. Co.*, 289 F.3d 929, 939 (6th Cir. 2002); *Zuk v. E. Pa. Psychiatric Inst.*, 103 F.3d 294, 299–300 (3d Cir. 1996) (affirming Rule 11 sanctions because of lawyer's failure to conduct reasonable investigation with respect to copyright infringement claims and explaining that it was not a sufficient excuse for lawyer to admit unfamiliarity with copyright law).

202. *Compare In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003) (requiring subjective bad faith), *with Young v. Providence ex rel. Napolitano*, 404 F.3d 33, 39 (1st Cir. 2005) (rejecting any distinction in the standard based on whether party moves or court acts sua sponte), *and Kaplan v. DaimlerChrysler AG*, 331 F.3d 1251, 1256 (11th Cir. 2003) (finding reasons to "excuse" it from

reasonable under the circumstances,”²⁰³ courts have generally concluded that Rule 11 requires lawyers to conduct a reasonable investigation before filing suit and that satisfaction of that duty in a particular case will require fact-specific analysis.²⁰⁴ Courts have explained, by way of examples, that reliance upon a newspaper article that relies heavily on anonymous sources,²⁰⁵ an affidavit from a client that a reasonable lawyer should recognize as perjurious,²⁰⁶ and even investigations performed by, or representations made by, other attorneys²⁰⁷ may not suffice as substitutes for a thorough investigation.

The First Circuit affirmed sanctions against New Hampshire lawyer Gordon Blakeney for not having made the kind of investigation reasonably necessary before filing a disqualification and sanctions motion alleging that the city of Concord had engaged in communications that amounted to obstruction of justice.²⁰⁸ In *Northwest Bypass Group v. U.S. Army Corps of Engineers*,²⁰⁹ Blakeney filed suit against the Army Corps of Engineers over its issuance of a highway construction permit that required two plaintiffs, the Tuttle, to relocate property designated as historical. The City of Concord had been discussing relocation with the Tuttle for years and had been trying to find an acceptable lot. After unsuccessfully attempting to obtain a variance necessary to relocate the Tuttle’s property to a particular new lot and after the lawsuit had been filed against the city, a city employee, Martha Drukker, called the Tuttle to inform them that the variance had been denied and that the city might not further investigate potential lots for their property given their lawsuit. Mr. Tuttle indicated to Drukker that Blakeney was not representing him and that he had not sued the city.

The city then wrote to Blakeney regarding that communication and requesting that he clarify in writing his authority to represent the Tuttle. In response, Blakeney

having to determine whether the mens rea requirement should be subjective bad faith), and *In re Keegan Mgmt. Co. Secs. Litig.*, 78 F.3d 431, 434 (9th Cir. 1996) (rejecting use of subjective standards in reviewing court-initiated Rule 11 sanctions); see also *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (applying standard for court-initiated Rule 11 sanctions that is “akin to contempt”).

203. FED. R. CIV. P. 11(b).

204. See, e.g., *In re Abbott Labs. Sec. Litig.*, 813 F. Supp. 1315, 1320 n.11 (N.D. Ill. 1992) (“What constitutes a reasonable investigation, in turn, depends on the circumstances of the given case.”).

205. *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 806–07 (E.D. Va. 2007). But see *In re Keegan*, 78 F.3d at 433 (discussing that an article in *The Wall Street Journal* regarding controversy about weight loss system’s safety tended to support the claims advanced).

206. *Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175(JSM), 2002 WL 59434, at **7–9 (S.D.N.Y. Jan. 16, 2002).

207. *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994); *S.A. Auto Lube, Inc. v. Jiffy Lube Int’l, Inc.*, 131 F.R.D. 547, 549 (N.D. Ill. 1990).

208. *Nw. Bypass Group v. U.S. Army Corps of Eng’rs*, 569 F.3d 4 (1st Cir. 2009).

209. 569 F.3d 4 (1st Cir. 2009).

filed the motion to disqualify the city's counsel and requesting sanctions against the city, which the district court concluded, and the First Circuit agreed, was "ill-founded, frivolous, and without legal or factual foundation."²¹⁰ The First Circuit had before it Drukker's affidavit making clear that she "did no more than explain to the Tuttle that it was not clear the city would make yet another effort since they were suing the city."²¹¹

Given the nature of Blakeney's allegations, namely that the city was attempting to criminally obstruct justice, the First Circuit explained that the charge should not have been made until Blakeney had made "an adequate investigation and found a realistic basis on which to make such a claim. Nothing we have seen establishes that [Blakeney] made such an investigation, let alone that he uncovered evidence that justified this charge."²¹² The First Circuit easily shrugged off Blakeney's argument that it was unfair to judge his conduct in hindsight. The court just as easily dispatched his defense that the fact that he had made a right-to-know request and secured handwritten notes from the city employee, which the First Circuit found consistent with the affidavit later filed by that city employee, justified filing the motion.²¹³ "Zeal is to be expected in litigation," the court wrote, "but not of this kind."²¹⁴

Northwest Bypass Group raises an interesting question: Do different types of allegations trigger a greater or higher duty to investigate on lawyers' part? Would the First Circuit so readily have affirmed the sanctions against Blakeney had he not accused his opponent of criminal obstruction of justice? There is nothing in the language of Rule 11 that suggests the existence of tiered investigation standards. Nor is there any basis for differing standards because frivolous litigation unfairly taxes parties and unnecessarily burdens the judicial system regardless of the exact nature of the case or allegations. As a practical matter, however, lawyers must realize that some allegations are especially inflammatory or offensive, and accordingly increase the likelihood of a responsive Rule 11 motion if they are unfounded. A similar phenomenon seemingly exists with respect to disciplinary complaints alleging violations of Rule 3.1.²¹⁵ Thus, when preparing to assert claims or make contentions that might reasonably be expected to especially incense, inflame, or insult an adversary, lawyers are well-advised to make sure that their investigations into the bases for those allegations can withstand judicial scrutiny under the bright light of hindsight.

210. *Id.* at 6.

211. *Id.* at 7.

212. *Id.*

213. *Id.* at 8.

214. *Id.*

215. *See, e.g., Idaho State Bar v. Hawkey*, 92 P.3d 1069, 1074 (Idaho 2002) (concluding that a lawyer who alleged that the defendants had conspired to violate his client's civil rights had violated Rule 3.1 and stating that "[t]he extent of the investigation he identified was trivial in light of the extent and seriousness of the charges he made").

As with Rule 3.1 violations, Rule 11 sanctions can readily flow from suing the wrong defendant.²¹⁶ This is especially true where attorneys fail to acknowledge and correct their mistakes, as in *Ratliff v. Stewart*.²¹⁷ The lawyers in *Ratliff* sued Dr. Lawrence Stewart when they should have sued his father, Dr. Edsel Stewart. The plaintiffs' lawyers, who knew that their client had been prescribed medication by a Dr. Stewart, failed to check to see which of the two doctors was actually involved in their client's case. The district court initially imposed Rule 11 sanctions requiring the plaintiff's lawyers to pay almost \$4,500 in fees and costs incurred by the defendant. Although the Fifth Circuit ultimately concluded that the district court acted correctly in later vacating that order and imposing the sanctions pursuant to a separate federal statute,²¹⁸ the court made clear that this was solely because a Rule 11 procedural requirement had not been satisfied. The plaintiff's lawyers were faulted not merely for suing the wrong doctor, but for ignoring communications from defense counsel regarding the mistake, failing to even seek confirmation or denial from their own client, and first opposing a motion to dismiss filed by the doctor and then delaying for another month before finally admitting the mistake.²¹⁹

Much like courts weighing alleged Rule 3.1 violations, courts evaluating potential Rule 11 sanctions also consider lawyers to have a continuing obligation to reasonably inquire on an ongoing basis into the merits of their clients' positions and contentions.²²⁰ As with the corresponding ethical duty, lawyers' Rule 11 duty to reasonably inquire may be postponed because of exigent circumstances, but it is not excused.

Not surprisingly, courts evaluating the merit of Rule 11 sanctions expect the same standards in the filing of counterclaims that are imposed on lawyers filing original complaints. Lawyers who file unfounded counterclaims can face real peril, as a recent Seventh Circuit case imposing sanctions against a prominent national law firm amply demonstrates.²²¹ In *United Stars Industries, Inc. v. Plastech Engineered Products, Inc.*,²²²

216. See, e.g., *Montgomery v. Univ. of Chicago*, 132 F.R.D. 200, 201 (N.D. Ill. 1990) (imposing Rule 11 sanctions for naming the wrong defendant based on counsel's failure to distinguish between a Dr. Del Pero and a Dr. Del Piero).

217. 508 F.3d 225 (5th Cir. 2007).

218. 28 U.S.C. § 1927 (2005).

219. *Ratliff*, 508 F.3d at 235.

220. See, e.g., *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024–25 (5th Cir. 1994) (concluding that while initial investigation into client's hit-and-run claim was sufficient, after the defendant produced substantial evidence of a staged accident, lawyer's lack of actions that would be expected as reasonable further investigation of case supported Rule 11 violation); *S. Leasing Partners v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) ("When a lawyer learns that an asserted position, even if originally supported by adequate inquiry, is no longer justifiable he must not persist in its prosecution.")

221. *United Stars Indus., Inc. v. Plastech Engineered Prods., Inc.*, 525 F.3d 605, 609–10 (7th Cir. 2008).

222. 525 F.3d 605 (7th Cir. 2008).

the Seventh Circuit affirmed a sanctions award of just over \$121,000, which it characterized as “modest,” imposed against the law firm of Jones Day for filing a counterclaim alleging that its client, Plastech, had been overcharged by almost \$900,000.²²³

United Stars involved a dispute over stainless-steel tubing sales using an agreed fluctuating price point tied to costs of raw materials. The seller, United Stars, eventually determined it had undercharged Plastech, the buyer, by about \$700,000 as a result of using the wrong surcharge for its calculations. Plastech refused to pay, claiming instead that it had been overcharged by \$900,000. The parties met to resolve their dispute and agreed to resume doing business, with United Stars giving Plastech a \$200,000 credit. Plastech then continued to place orders and accept materials from United Stars but failed to make any further payments of any sort to United Stars. Once the amount owed by Plastech reached \$800,000, United Stars filed suit and ultimately obtained a judgment of almost \$1.3 million.

The district court found that the litigation, however, went to trial solely as a result of Plastech’s pursuit of a nearly \$900,000 counterclaim, which the court characterized as “baseless.”²²⁴ As the district court explained in sanctioning Plastech:

Although [Plastech] alleged that [United Stars] had overcharged [it] . . . [Plastech] never produced any evidence that it had a legitimate basis for the claim . . . it identified only one employee, Scott Ryan, as having information about [its claim]. It told plaintiff that Ryan had performed an “in-depth audit” and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an “internal audit staff” was. Undaunted, [Plastech] named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim. Even now, [Plastech] cannot point to any evidence to show that its counterclaim had any kind of foundation.²²⁵

Although the trial court had imposed the sanctions against Jones Day for vexatiously multiplying the litigation under 28 U.S.C. § 1927, that statute only authorizes awards against lawyers and not law firms, so the Seventh Circuit affirmed the sanctions based on Rule 11(c)(3), which does permit sanctions against a law firm.²²⁶ The Seventh Circuit, in an opinion authored by Chief Judge Easterbrook, explained that “Jones Day advanced a position that never had any evidentiary support, and thus

223. *Id.* at 609.

224. *Id.*

225. *Id.*

226. *Id.* at 610.

necessarily could not have been based on a reasonable investigation preceding the counterclaim.”²²⁷

Another source of liability in the form of sanctions for lawyers practicing in federal court arises from 28 U.S.C. § 1927, which permits the imposition of penal sanctions for “multiplying proceedings unreasonably and vexatiously.”²²⁸ The availability of sanctions under this statute differs in a number of significant ways from the operation of Rule 11. First, the standard to be met to justify an award of sanctions against a lawyer under § 1927 is both different from and significantly higher than Rule 11 in that many federal courts conclude that there must be a finding of bad faith on the part of counsel before sanctions can be awarded under § 1927.²²⁹ Second, unlike Rule 11, there exists no safe-harbor provision or other procedural requirement necessitating that the opposing party give the lawyer accused of conduct violating § 1927 an opportunity to cease the misconduct.²³⁰ Third, because the statutory language is not tied to the signing of a document and because it is a standard flowing from multiplying proceedings, conduct that can run afoul of § 1927 is of a much broader scope than Rule 11; sanctions can even be assessed against lawyers who are victorious for their client on the merits in the lawsuit.²³¹ Fourth, only a lawyer can be sanctioned for violating § 1927, not a party, and, unlike the vicarious liability that attends Rule 11, not a law firm in which the lawyer practices.²³²

227. *Id.*

228. The full text of the statute reads: “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 costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927 (2005).

229. *See, e.g., In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 278 F.3d 175, 188 (3d Cir. 2002) (“[B]efore a court can order the imposition of attorneys’ fees under § 1927, it must find willful bad faith on the part of the offending attorney.”); *see also Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001) (stating that attorney’s conduct, to be sanctionable, must objectively be viewable as intentionally or recklessly in disregard of the attorney’s duty to the court); *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997) (requiring that sanctionable conduct be of a kind “that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court”).

230. *See, e.g., Bolivar v. Pocklington*, 975 F.2d 28, 31 (1st Cir. 1992) (concluding that notice of voluntary dismissal did not divest court of jurisdiction to impose sanction under § 1927).

231. *See, e.g., Lynn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 291–92 (5th Cir. 2002) (imposing § 1927 sanctions against lawyer who failed to bring a needed witness to a scheduled court hearing); *Am. Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15, 18–19 (D.D.C. 1990) (imposing § 1927 sanctions against lawyer for groundlessly instructing his clients not to answer deposition questions).

232. *See, e.g., Sassower v. Field*, 973 F.2d 75, 80 (2d Cir. 1992) (“[I]t is unlikely that Congress intended the phrase ‘other person’ to include a person lacking lawyer-like credentials.”); *Smith Int’l, Inc. v. Texas Commerce Bank, N.A.*, 844 F.2d 1193, 1197 (5th Cir. 1988) (contrasting § 1927’s limitation in scope to attorneys only to Rule 11’s express application to attorney, client, or both).

Courts also can rely upon their inherent authority to sanction lawyers for misconduct in litigation.²³³ As with sanctions under 28 U.S.C. § 1927, in federal courts a determination that the lawyer has acted in bad faith is necessary to trigger a sanction pursuant to a court's inherent authority.²³⁴ Several state courts have likewise determined that they have this same type of intrinsic authority with respect to the actions of attorneys appearing before them.²³⁵ Both federal and state courts can opt to determine that a lawyer's misconduct with respect to the pursuit of frivolous litigation or litigation conduct undertaken in bad faith necessitates the revocation of pro hac vice admission previously granted to the lawyer.²³⁶

As our earlier discussion of *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*²³⁷ richly illustrated, lawyers have long had to be concerned about sanctions for pursuing frivolous actions under particular state statutes. Tort reform in a number of jurisdictions has heightened that risk through the enactment of further statutory provisions addressing sanctioning attorneys for pursuing meritless litigation that impose stricter standards than those that exist under the federal rules and statutes discussed above. Florida statutory law reveals an example of a state whose legislature has ratcheted up the risk of liability exposure for lawyers with respect to pursuit of unsuccessful claims by adopting a standard that, on its face, appears much less forgiving than Model Rule 3.1 or even Rule 11. The Florida statute provides that:

233. *Chambers v. NASCO Inc.*, 501 U.S. 32, 46–48 (1991); *Roadway Express Inc. v. Piper*, 447 U.S. 752, 764–65 (1980).

234. *Piper*, 447 U.S. at 764; *see, e.g.*, *Mickle v. Morin*, 297 F.3d 114, 125–26 (2d Cir. 2002) (explaining court's power, inherent in supervising and controlling proceedings before it, to sanction counsel for bad-faith conduct); *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 784 (3d Cir. 2001) (imposing this bad-faith requirement element with respect to judicial estoppel as an application of the court's inherent authority); *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998) (“In order to impose sanctions . . . under its inherent power, a court must make a specific finding of bad-faith action.”); *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 314 (6th Cir. 1997) (reversing district court imposition of sanctions under inherent authority because of lack of “actual findings of fact that demonstrate that the claims were meritless, that counsel knew or should have known that the claims were meritless, *and* that the claims were pursued for an improper purpose”) (emphasis in original).

235. *Moakley v. Smallwood*, 826 So. 2d 221, 226–27 (Fla. 2002); *Phillips v. Brisebois*, 808 P.2d 370, 372 (Haw. 1991); *Bean v. Broussard*, 587 So. 2d 908, 911–12 (Miss. 1991); *State ex rel. N.M. State Hwy. & Transp. Dep't v. Baca*, 896 P.2d 1148, 1151–53 (N.M. 1995); *Lewis v. Celina Fin. Corp.*, 655 N.E.2d 1333, 1338–39 (Ohio Ct. App. 1995); *In re Moseley*, 643 S.E.2d 190, 195 (Va. 2007).

236. *See, e.g.*, *Obert v. Republic W. Ins. Co.*, 264 F. Supp. 2d 106, 124–25 (D.R.I. 2003) (revoking pro hac vice admission of two lawyers upon finding that they acted in bad faith in filing a false affidavit), *modified by Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) (determining that settlement of case had rendered review of revocation of pro hac vice revocation moot).

237. 597 N.W.2d 744 (Wis. 1999).

Upon the court’s initiative or motion of any party, the court shall award a reasonable attorney’s fee to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

- (a) Was not supported by the material facts necessary to establish the claim or defense; or
- (b) Would not be supported by the application of then-existing law to those material facts.²³⁸

After Florida’s statute was revised, that state’s appellate courts explained that by moving away from a “frivolous” standard, “the bar for the imposition of sanctions has been lowered, but just how far it has been lowered is an open question requiring a case by case analysis.”²³⁹

Another example of such a statute is Mississippi’s Litigation Accountability Act, which provides:

In any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment, and in addition to any other costs otherwise assessed, reasonable attorneys fees and costs against any party or attorney if the court, upon motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment.²⁴⁰

Although ultimately concluding after rehearing that a trial court acted within its discretion in not sanctioning the plaintiff’s counsel, *Illinois Central Railroad Co. v. Broussard*²⁴¹ demonstrates the uncertainty that such statutes create for lawyers.

238. FLA. STAT. ANN. § 57.105(1) (2009).

239. *Wendy’s of N.E. Fla., Inc. v. Vandergriff*, 865 So. 2d 520, 524 (Fla. Dist. Ct. App. 2003); *see also de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 684 (Fla. Dist. Ct. App. 2007) (imposing sanctions under this statute against a lawyer who pursued an appeal of a breach of contract claim where there was no evidence of agreement on essential terms and noting that the lawyer had “made no effort to distinguish the applicable law or, in good faith, to argue for an extension, modification or reversal of existing law”).

240. MISS. CODE ANN. § 11-55-5(1) (2009).

241. 19 So. 3d 821 (Miss. Ct. App. 2009).

In *Broussard*, the attorneys for plaintiff Edwin Broussard filed suit on Broussard's behalf to avoid the expiration of the statute of limitations on his claim relating to alleged asbestos exposure while employed by the railroad. Unfortunately for the attorneys (and for Broussard, for that matter), the attorneys had not kept in touch with Broussard and learned only after filing the suit that he had died some 20 months earlier. The attorneys, in arguing against the imposition of sanctions, pointed out that Broussard's claim had originally been filed several years earlier as part of a mass tort action and that, although they had not communicated with him before filing to confirm that he was still alive, they dismissed the lawsuit as soon as they learned of his death.

Although the trial court had rejected the defendant's motion for an award of sanctions, the Mississippi Court of Appeals initially opined that sanctions were absolutely required under the Mississippi Litigation Accountability Act because, at the time they filed the suit, there was no "hope of success" because the defendant had a complete defense as a result of Mississippi law providing that filing a lawsuit in the name of a deceased person is a nullity. Upon rehearing en banc, however, the Mississippi Court of Appeals reversed course and ultimately determined that the trial court had not erred in refusing to award sanctions in an opinion clearly seeking to reestablish interpretations of what is sanctionable under the Mississippi Litigation Accountability Act as being in keeping with what is sanctionable under Rule 11.²⁴²

B. Liability for Abuse of Process or Malicious Prosecution

Lawyers can also find some solace in the fact that courts have generally concluded that, although lawyers face the risk of discipline or sanctions for pursuing claims with insufficient investigation, they do not generally have any duty to attempt to independently determine whether the client's claim has merit prior to filing.²⁴³ Of course, going beyond the initial filing of an action and engaging in continued active pursuit

242. *Id.* at 824.

243. *See, e.g.,* CSX Transp. Inc. v. Gilkison, Civ. Action No. 5:05CV202, 2007 WL 858423 at *4 (N.D.W.Va. Mar. 16, 2007) (explaining that "the creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client") (quoting Clark v. Druckman, 624 S.E.2d 864, 869 (W.Va. 2005)); McKenna Long & Aldridge LLP v. Keller, 598 S.E.2d 892, 893 (Ga. Ct. App. 2004) (reversing trial court denial of judgment on the pleadings and concluding that opposing counsel in a legal dispute could owe no legal duty to opposing party); Nelson v. Miller, 607 P.2d 438, 451 (Kan. 1980) ("In representing their clients, lawyers are expected to use the legitimate sidearms of a warrior. It is only when a lawyer uses the dagger of an assassin that he should be subjected to . . . personal liability. We believe that the public is adequately protected from harassment and abuse by an unprofessional member of the bar through the means of the traditional cause of action for malicious prosecution.").

of a case lacking in merit can expose a lawyer to potential liability in the form of a cause of action for abuse of process or malicious prosecution by the opposing party.

Although lawyers' conduct in pursuing litigation, including communications at the preparatory stages of litigation, is typically protected by a robust litigation privilege,²⁴⁴ actions for malicious prosecution are universally acknowledged to fall outside the scope of that privilege.²⁴⁵

A claim for malicious prosecution arising out of pursuit of civil claims can be established by showing (1) the filing, or continued pursuit, of a civil lawsuit (2) in the absence of probable cause (3) that ends with a result in favor of the defendant in the lawsuit.²⁴⁶ In terms of lawyers' liability exposure, the defense of such claims distills to whether the lawyer had probable cause for filing, or continuing with the pursuit of, the lawsuit. If so, the lawyer can have no liability to a non-client for malicious prosecution.²⁴⁷ Thus, appropriately investigating clients' claims prior to suing can not only ensure that lawyers satisfy their ethical duties, but also erect a helpful shield against liability in any future suit for malicious prosecution.²⁴⁸

Given the nature of malicious prosecution claims, lawyers and law firms that are found to have engaged in malicious prosecution are quite likely to be hit with punitive damages. This point is well-demonstrated by the \$9.9 million punitive damage award

244. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

245. *Hagberg v. Cal. Fed. Bank FSB*, 81 P.3d 244, 249 (Cal. 2004); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 346 (D.C. 2001); *Dello Russo v. Nagel*, 817 A.2d 426, 433 (N.J. Super. Ct. App. Div. 2003); *Mantia v. Hanson*, 79 P.3d 404, 408 (Or. Ct. App. 2003); *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 27 (Tenn. 2007); *Clark v. Druckman*, 624 S.E.2d 864, 871 (W. Va. 2005).

246. *See* RESTATEMENT (SECOND) OF TORTS § 674 (1977).

247. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57(2) (2000); *see also* *Zamos v. Stroud*, 87 P.3d 802, 808 (Cal. Ct. App. 2003) (listing 11 other states that have concluded, in accord with the Restatement, that continuing to pursue a lawsuit after probable cause no longer exists can amount to malicious prosecution); RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1977) (“An attorney is not required or expected to prejudge his clients’ claim, and although he is fully aware that its changes of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.”).

248. *See, e.g.*, *Bird v. Rothman*, 627 P.2d 1097, 1101 (Ariz. Ct. App. 1981) (crediting lawyers’ pre-filing investigation that involved 25–30 hours of researching and investigating theories, contacting an architect regarding pertinent standard of care, and gathering witness statements regarding accident); *Cent. Fla. Mach. Co. v. Williams*, 424 So. 2d 201, 203 (Fla. Dist. Ct. App. 1983) (treating affidavits of attorneys regarding their investigative efforts before filing as sufficient to show reasonable investigation “to support a reasonable and honest belief in a tenable claim” in wrongful death lawsuit); *Prewitt v. Sexton*, 777 S.W.2d 891, 896 (Ky. 1989) (finding no cause of action against lawyer with respect to habeas corpus proceeding where, prior to filing, lawyer had attempted to check court files to confirm client statements regarding events and was denied access to file based on improper sealing but told by court clerk that no signed order had been entered by judge regarding removal of child from client’s custody).

against a law firm for filing a meritless lawsuit.²⁴⁹ In *Seltzer v. Morton*,²⁵⁰ Gibson, Dunn & Crutcher, LLP (GDC) was hit with a punitive award that was nine times the already stiff \$1.1 million compensatory damages awarded against it for its willful pursuit of a lawsuit against an art expert who had provided an unfavorable opinion regarding the authenticity of a particular piece of art to GDC's client, Steve Morton.²⁵¹ In fact, the punitive award against GDC was originally significantly higher, the jury having entered a punitive verdict of \$20 million, but was reduced based on application of constitutional factors under Supreme Court precedent.

The *Seltzer* case is a stark reminder that even the largest and most sophisticated law firms can find themselves felled by the poor judgment of just one or two of their lawyers. Morton owned a painting, "Lassoing a Longhorn," which he initially believed was a particularly valuable work by legendary western artist Charles M. Russell. The painting bore a signature that appeared to be Russell's. Morton purchased the piece from New York's Kennedy Galleries in 1972 for \$38,000. Morton did so without getting any proof other than oral assurances from the gallery that it was a Russell.²⁵²

In 1998, Morton contacted the director of the Coeur d'Alene Art Auction (CAA), Bob Drummond, about selling the painting at auction. Drummond assumed that the painting was an authentic Russell and thus appraised its market value at \$650,000. Prior to the planned auction, Drummond's partner, Stuart Johnson, grew suspicious that the painting was actually by an artist of a similar style and genre, O.C. Seltzer. Johnson accordingly encouraged Drummond to consult with Steve Seltzer, the world's foremost expert authority on the paintings of O.C. Seltzer, his grandfather, and who also was an expert on the paintings of Russell. Seltzer communicated his definitive opinion that the painting was a Seltzer.²⁵³ At Johnson's further recommendation, Drummond also sought an opinion from Ginger Renner, who was the foremost expert on Russell and, to a lesser extent, an expert on O.C. Seltzer. Renner opined that the painting was clearly a Seltzer and that the signature appeared to have been altered to look like Russell had signed the work.²⁵⁴ Armed with these expert opinions, Drummond informed Morton in January 2001 that CAA could not sell the painting as an authentic Russell because it in fact appeared to be the work of O.C. Seltzer. Unfortunately for Morton, Seltzer's paintings were substantially less valuable than paintings by Russell.²⁵⁵

249. *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007).

250. 154 P.3d 561 (Mont. 2007).

251. *Id.* at 570, 576.

252. *Id.* at 571.

253. *Id.* at 571–72.

254. *Id.* at 572–73.

255. *Id.* at 571.

After he was informed by Drummond that CAA was unwilling to sell “Lassoing a Longhorn” as an authentic Russell, Morton called Seltzer about his opinion. Seltzer explained the reasons for his opinion and followed up with a letter to Morton confirming them. Morton took the painting to Renner at her Arizona home, where she, too, confirmed her opinion that “it was unquestionably the work of O.C. Seltzer.”²⁵⁶ Morton then sent a letter to Renner thanking her and advising of his “state of shock” upon learning her opinion regarding the painting being a Seltzer; Morton also asked Renner to provide him with a formal letter expressing that opinion so that he could decide what to do next.²⁵⁷ Renner complied with Morton’s request in February 2001. Morton’s then-counsel wrote a letter to the Kennedy Galleries expressing Morton’s shock, indicating that “two recognized experts on Western Art have concluded that the painting is obviously a work by” Seltzer, describing the Kennedy Galleries’ actions as “fraudulent (or, at the very least, negligent) misrepresentations,” and indicating Morton’s intent to hold the Kennedy Galleries liable for his injuries.²⁵⁸ Morton subsequently attempted to sell the painting as an authentic Russell, but to no avail.

Morton then hired GDC senior counsel Dennis Gladwell to represent him. In April 2002, Gladwell sent a letter to Seltzer and to Renner demanding that they recant their opinions in a letter drafted to GDC’s specifications, agree to pay to Morton the difference between the painting’s current market price and what it could have sold for before they issued their opinions, and pay to Morton an additional \$50,000 for his troubles. The letter ominously concluded that GDC would sue on Morton’s behalf if these demands were not met, including a claim for punitive damages. Gladwell sent another similar demand letter in May 2002. In July 2002, GDC sued Seltzer for claims ranging from defamation to intentional interference with prospective economic advantage and sought compensatory and punitive damages.²⁵⁹ Gladwell appeared on the complaint for GDC, along with William Claster, a partner, and Erin Alexander, an associate.

The problems with this suit were, of course, legion. After Seltzer came forward with 10 experts who also agreed with his opinion as to the painting and after GDC was unable to secure any expert who would support Morton’s position, Morton finally agreed to a stipulation of dismissal.²⁶⁰ Seltzer then sued GDC for malicious prosecution. During those proceedings, Seltzer learned that despite having served discovery requests in the underlying litigation and having been told by GDC that Morton had produced everything responsive, GDC and Morton had actually failed to produce to

256. *Id.* at 573.

257. *Id.*

258. *Id.* at 574.

259. *Id.* at 576–77.

260. *Id.* at 578.

Seltzer copies of Morton's letter to Renner expressing his "state of shock," and his first lawyer's letter to the Kennedy Galleries that accused it of fraud and described Seltzer and Renner as "two recognized experts."²⁶¹ Seltzer also secured expert testimony from an experienced trial attorney who indicated that GDC's "failure, before filing the lawsuit, to obtain an expert willing to testify that the painting was a Russell, constituted a significant deficiency in their investigation."²⁶² The Montana Supreme Court, finding that GDC's conduct amounted to "legal thuggery" and was "truly repugnant to Montana's foundational notions of justice" and "highly reprehensible," affirmed the lower court award of both compensatory and punitive damages.²⁶³

A final risk for lawyers relating to the pursuit of frivolous claims worth keeping in mind is potential criminal liability, as is demonstrated by the New Hampshire Supreme Court's recent decision in *State v. Hynes*²⁶⁴ affirming an attorney's extortion conviction. In *Hynes*, the court held that Daniel Hynes's act of sending a letter to a salon seeking \$1,000 in order for him to refrain from filing suit amounted to extortion when he managed to obtain the salon's agreement to pay him \$500 to settle.²⁶⁵ The court explained that Hynes's threatened lawsuit accusing the salon of engaging in gender and age discrimination by charging women more for haircuts than men and even less for children was entirely without merit given that Hynes had no client, and did not himself have any standing to sue because he had never been a customer of the salon.²⁶⁶

Hynes, who had also sent similar letters to other New Hampshire salons, argued that he did have standing under a theory that private persons could pursue the elimination of discriminatory practices as an act of altruism. The court rejected that argument on the basis that obtaining satisfaction from seeing discrimination thwarted was far too "abstract" to amount to a "benefit" that would preclude application of the New Hampshire extortion statute.²⁶⁷ The New Hampshire statute provided that it is extortion for a person to obtain money by threatening to do something "which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships."²⁶⁸ Although the court easily concluded that Hynes's actions qualified as extortion, the court went to some length to explain

261. *Id.* at 573–74, 580–81.

262. *Id.* at 584.

263. *Id.* at 609, 615.

264. 978 A.2d 264 (N.H. 2009).

265. *Id.* at 268.

266. *Id.* at 269.

267. *Id.* at 271–72.

268. N.H. REV. STAT. § 637.5 (2009).

that its holding did not change the fact that accepting a settlement payment to forego filing a legitimate lawsuit generally does not constitute extortion.²⁶⁹

The *Hynes* decision is somewhat anomalous, especially given that *Hynes* had no client. Further, there is no shortage of cases that can be located where courts have concluded that the mere threat to file a lawsuit, even involving an entirely frivolous claim, will not support criminal liability for extortion.²⁷⁰ The *Hynes* court acknowledged those authorities but differed on their importance given New Hampshire's statute, which the court believed required it to not only be concerned with the nature of the threat but also the potential consequences.²⁷¹

V. Conclusion

The filing of a lawsuit can be one of the most important moments in a plaintiff's life, bringing with it the potential risk of years of stress and unrelenting scrutiny of what would be otherwise private details of the plaintiff's personal life. Likewise, being named a defendant in a lawsuit can be a monumental event for an individual and even for some entities. Even when entities are highly sophisticated or sufficiently large that being named in litigation can be commonplace, the increasing expense of litigation as a result of the rise of e-discovery means that the initiation of litigation by an adversary is not something easily shrugged off as inconsequential. For trial lawyers, however, the filing of lawsuits is the stuff of everyday life. Nevertheless, lawyers should not forget that the filing of a lawsuit or the defense of a lawsuit filed by another involves risk for them as well. To protect against those risks, attorneys must undertake an appropriate investigation of their client's claims before pulling the trigger in filing a lawsuit or in lodging claims, defenses, or contentions in defense of a lawsuit filed against a client. The nature of the investigation required will depend on the circumstances of the particular case.

269. *Id.*

270. *See, e.g.*, *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (holding that threat to file suit against county government, even if made in bad faith and supported by false affidavits, could not amount to extortion under Hobbs Act); *First Pac. Bancorp Inc. v. Bro.*, 847 F.2d 542, 547 (9th Cir. 1988) (determining that threat of a shareholder derivative suit could not qualify as predicate act of extortion for RICO liability); *I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984) (holding that threat to sue bank, even assuming it to be made in bad faith and entirely groundless, could not constitute the crime of extortion); *Rendelman v. State*, 927 A.2d 468, 481–82 (Md. Ct. Spec. App. 2007) (reversing conviction for extortion arising from demand letter threatening to sue because such a threat lacks the “capacity to instill fear” and because such a threat is not a threat to pursue anything other than “lawful means”).

271. *Hynes*, 978 A.2d at 270–71 (citing *United States v. Sturm*, 870 F.2d 769, 774 (1st Cir. 1989); *State v. Roth*, 673 A.2d 285, 290–91 (N.J. Super. Ct. App. Div. 1996)).

Further, attorneys must be prepared to reevaluate the merits of their clients' contentions as new and different facts are developed in the course of litigation. Litigation is dynamic, and claims that may have been sufficient at the outset of the litigation can become unsustainable through no one's fault. Case developments can trigger an attorney's ethical obligation to refrain from continuing to pursue claims or contentions beyond the point at which it becomes clear that the claim or contention is meritless. And, of course, lawyers should never knowingly pursue litigation for the purposes of embarrassing, harassing, or maliciously injuring another.

The consequences of failing to perform sufficient investigations prior to making assertions in litigation or of seeking to use a baseless lawsuit as an endeavor for pursuing spiteful ends can resonate well beyond the realm of ethical concerns. Additional risks include the threat of court-ordered sanctions or statutory awards, as well as potential liability exposure to claims for malicious prosecution and even, under the right circumstances, criminal liability.