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CURBING LITIGATION ABUSES:
JUDICIAL CONTROL OF ADVERSARY ETHICS—THE MODEL RULES OF PROFESSIONAL CONDUCT AND PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

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It is impossible to consider seriously the vital elements of a fair trial without concluding that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice.

I. INTRODUCTION

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

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2 See M. Green, Basic Civil Procedure 112-13, 141 (2d ed. 1979); 4 J. Moore, Federal Practice § 26.00[4] (2d ed. 1982). One commentator has noted that the proper function of a system of civil procedure is to provide "a mechanism of investigation where there is a reasonable suspicion of legal wrong," thereby preventing the "wolves" from hiding "among the sheep." Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 MINN. L. REV. 1, 56 (1976). This investigatory function has become increasingly more important in today's world of modern technology which permits "actionable conduct to be secretly undertaken and easily concealed." Id. at 87.

3 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975). The Supreme Court has recognized that although liberalized discovery rules may produce relevant evidence necessary to determine the merits of a claim, they also allow a litigant with an essentially meritless claim to waste time and judicial machinery through excessive depositions and document production. Id. This latter aspect of liberalized discovery is a "social cost rather than a benefit." Id. Similarly, it has been noted that the federal pleading rules allow opposing parties "to inflict punitive expenses on each other in interminable discovery wars." Aldisert, State Courts and Federalism in the 1980's: Comment, 22 WM. & MARY L. REV. 821, 841 (1981).

4 Amendments to Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting). Many litigants are forced to abandon legitimate claims or settle illegitimate ones simply because of the unreasonably high litigation costs. Id. (Powell, J., dissenting). Justice Powell observed that the mere threat of delay and its consequential expense may operate to deprive litigants of comparatively limited means of their day in court, thus "cast[ing] a lengthening shadow over the basic fairness of our legal system." Id. (Powell, J., dissenting); see Comment, Tactical Use and Abuse of Depositions Under the Federal Rules, 59 YALE L.J. 117, 121, 126-34 (1949). See also 4 J. Moore, supra note 2, § 26.02[3], at
abuse, often entering the fray of litigation indifferent to the burdens it may impose on others. Not surprisingly, cases arise in which neither the plaintiff nor his counsel has reasonable grounds for initiating the litigation, but have proceeded simply in the hope that some basis for suit may materialize during discovery. Similarly, defendants often succumb to the temptations of liberal pleading and discovery rules, asserting sham defenses and counterclaims, and filing flurries of motions in the hope of discouraging the plaintiff and delaying a judgment.

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

In response to the flood of unchecked litigation abuse, intense pressures currently are being exerted on the legal profession for procedural and ethical reform. One manifestation of this is the proliferation of malicious prosecution actions against trial counsel. Within the profession, an American Bar Association (ABA) committee has labored to secure approval of a comprehensive revision of the Code of Professional Responsibility, including certain model rules specifically addressed to counsel's duty to expedite litigation and refrain from vexatious conduct. Additionally, the Ju-

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9 The "shotgun" complaint names as defendants every person or institution having any connection with the transaction in suit whether or not there is any reasonable basis for joinder at the time of filing. Singer & Giampietro, The Countersuit, 6 Litigation 18, 20 (Fall 1979); see, e.g., Kadar Corp. v. Milbury, 549 F.2d 230, 232 (1st Cir. 1977).


11 Lasker, The Court Crunch: A View from the Bench, 76 F.R.D. 245, 250 (1977); 4 J. Moore, supra note 2, ¶ 26.02[5]. For an interesting case illustrating judicial frustration with the current rules, see Brown v. Cameron-Brown Co., 30 Fed. R. Serv. 2d 1181 (E.D. Va. 1980), rev'd, 31 Fed. R. Serv. 2d 1362 (4th Cir. 1981), in which the trial judge relied on rule 83 to dismiss a complaint that survived attacks under rules 11, 12 and 56. The judge reasoned that notwithstanding compliance with all the rules, when any possibility of legitimate benefit is substantially outweighed by the costs "we are not dealing with a lawsuit... [but] instead, intended or not, with a 'heist.'" Id. at 1198. See also Bogosian v. Gulf Oil Corp., 561 F.2d 434, 457 (3d Cir. 1977) (Aldisert, J., dissenting).

12 Zilly, Recent Developments in Legal Malpractice Litigation, 6 Litigation 8, 12 (Fall 1979).

13 See Model Rules of Professional Conduct (Final Draft 1982) [hereinafter cited as Final Draft of Model Rules].

14 See id., Rule 3.2.

15 See id., Rules 3.1, 3.4.
Curbings of the United States has adopted yet another set of proposals for amending the Federal Rules of Civil Procedure, aimed at curbing abuses in pleading, motion practice and discovery.¹⁶

This Article addresses the effectiveness of these recent developments and proposals, and discusses them in the context of recent opinions illustrating the power of the trial judge to control the excesses of the adversary system. It rejects the countersuit as a time-consuming and costly means of controlling litigation abuses, and concludes that “tinkering changes”¹⁷ in the rules of procedure cannot bring about true reform. It is urged here that the burden resulting from abuse of litigation can only be relieved by changes which foster stronger judicial control of adversarial ethics, and greater judicial involvement in the pretrial stages of litigation.¹⁸

Any proposed change or reform, therefore, is evaluated from the perspective of whether the change will encourage trial judges to act resolutely in sanctioning errant counsel, without simultaneously producing a chilling effect on zealous advocacy.

II. Groundless Litigation

A. The Rise and Demise of Attorney Immunity from Countersuit

Postlitigation countersuits traditionally have been considered antithetical to the public policy that all persons be afforded free


¹⁷ 446 U.S. at 1000 (Powell, J., dissenting). Justice Powell considered the 1980 amendments to Federal Rules of Civil Procedure 4, 5, 26, 28, 30, 32, 33, 34, 37 and 45 to be mere “tinkering changes” that would only serve to “delay for years the adoption of genuinely effective reforms.” 446 U.S. at 1000 (Powell, J., dissenting); see Rosenberg, Discovery Abuse, 7 LITIGATION 8, 10 (Spring 1981).

¹⁸ See Herbert v. Lando, 441 U.S. 153, 176-77 (1979); id. at 180 (Powell, J., concurring); ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting for denial of certiorari). In his speech before the American Bar Association, Chief Justice Burger stated, “[w]here existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act.” Burger, Annual Report on the State of the Judiciary—1980, 66 A.B.A. J. 295, 296 (1980); see, Brazil, supra note 10, at 862-69; Rosenberg, supra note 17, at 10; cf. Chagnon v. Bell, 642 F.2d 1248, 1266 (D.C. Cir. 1980) (in suits against the government, close judicial control of discovery is essential to preserve immunity of governmental officials).
and unfettered access to the courts. At early common law, an absolute immunity was extended to protect all litigating parties from subsequent liability for defamatory statements published during the course of judicial proceedings.\textsuperscript{19} Because fear of countersuits for defamation might deter the litigant from fully pressing his claim, the suits were not to be entertained.\textsuperscript{20} Similarly, because of the potentially inhibiting effect of malicious prosecution actions, many courts have limited them to circumstances where an actual arrest or seizure of property has taken place.\textsuperscript{21} This "English" rule or "strict view" is based upon a number of beliefs: an award of costs provides an adequate remedy for any abuse; the judicial process should be free and open to all without fear of being sued in return; liberal allowance of malicious prosecution actions would cause endless litigation; and a defendant should not have a right to countersue since the plaintiff does not have equivalent redress if a defense is meritless and malicious.\textsuperscript{22}

These immunities were extended to an attorney representing a client in litigation primarily because the attorney is the client's avenue of access to the courts. It was feared that counsel's natural inclination to shield himself from future liability to his client's opponent might hamper him in the zealous representation of his client, and prevent him from fulfilling his fiduciary duty of representation with undivided loyalty.\textsuperscript{23} Thus, in his role as advocate, the attorney has enjoyed a privileged position in the law. Indeed, until recently, it has been held that the chilling effect of potential third-party claims justified counsel's \textit{absolute} immunity from liability

\begin{footnotes}
\footnote{See, \textit{e.g.}, \textbf{The King v. Skinner}, 98 Eng. Rep. 529, 530 (K.B. 1772).}
\footnote{Note, \textit{Absolute Immunity in Defamation: Judicial Proceedings}, 9 \textbf{COLUM. L. REV.} 463, 478 (1909); \textit{see, e.g.}, \textbf{Petty v. General Accident Fire & Life Assurance Corp.}, 365 F.2d 419, 421 (3d Cir. 1966). The absolute immunity afforded to judges, attorneys, witnesses, parties and jurors against defamation actions reflected the common-law view that the individual's right to be protected from defamation is outweighed by the public interest in freedom of expression by participants in judicial proceedings. 365 F.2d at 421.}
\footnote{Perry v. Arsham, 101 Ohio App. 285, 287, 136 N.E.2d 141, 143 (Ct. App. 1956). In contrast to the view inhibitive of malicious prosecution actions, the liberal view concerning countersuits requires only "provable injury," in addition to the other requisites of a malicious prosecution action, namely, that the prior suit was unfounded, maliciously brought, and terminated in favor of the plaintiff in the countersuit. \textit{Id.}}
\footnote{See, \textit{e.g.}, \textbf{Skarbinski v. Henry H. Krause Co.}, 378 F.2d 656, 657-58 (6th Cir. 1967); \textbf{Kalso Systemet, Inc. v. Jacobs}, 474 F. Supp. 666, 670 n.22 (S.D.N.Y. 1979).}
\footnote{Note, \textit{supra} note 20, at 482. One commentator has noted that an attorney is in greater need of the protection afforded by immunity than his or her client. \textit{Id.} To subject an attorney to liability would "fetter and restrain him in the fearless discharge of the duty which he owes to his client, and which the successful administration of justice demands." \textit{Id.}}
\end{footnotes}
under any theory, including malicious prosecution. 24

The rule of absolute immunity for the attorney, however, is no longer talismanic. Courts have grown dissatisfied with the "American" rule which prohibits the assessment of attorney's fees against an unsuccessful party litigant, 25 and have recognized the inadequacy of an award of costs. 26 Moreover, there is a perceived inability or reluctance by the bar to police its ranks through disciplinary actions. 27 Given the inequity inherent in the rule of attorney immunity and its purported role in promoting frivolous litigation, the courts have become more willing to invade the previously immunized world of the advocate. As a result, some courts are now permitting third-party actions against counsel for malicious prosecution. 28 In Raine v. Drasin, 29 for example, the Supreme Court of

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24 See, e.g., W.D.G., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397, 399-400 (Ct. App. 1978). The W.D.G. court considered it necessary to afford attorneys absolute immunity from a third-party action for malicious prosecution so as to ensure that the attorney would properly represent his client. Id. In another Ohio case, Beacon Journal Publishing Co. v. Zonak, Poulos & Cain, No. 79 AP-123 (Ohio Ct. App. 1979), the plaintiff's trial attorneys were sued by their client's former opponent after they unsuccessfully attempted to pursue an action in federal court, allegedly for the sole purpose of obtaining publicity. In an unpublished opinion the state's intermediate appellate court ruled that counsel were absolutely immune from suit.

25 See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 (1975). The American rule prohibiting an award of attorney's fees is founded on the public policy of promoting access to the courts. See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). Describing this rule, Chief Justice Warren noted that litigants "should not be penalized for merely defending or prosecuting a lawsuit." Id. He reasoned that the absence of such a rule would have an adverse impact on the poor, as they "might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." Id. See also Birnbaum, Physicians Countersuit: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003, 1083-84 (1977).


28 See Raine v. Drasin, 621 S.W.2d 895, 899-903 (Ky. 1981). Although the rule of absolute privilege has fallen into disfavor, courts continually reject actions against attorneys for negligence in the absence of privity. Hill v. Willmott, 561 S.W.2d 331, 335 (Ky. Ct. App. 1978); Spencer v. Burglass, 337 So. 2d 596, 601 (La. Ct. App. 1976); see Berlin, Countersuit, in LEGAL MED. 117, 121-29 (A. James, Jr., ed. 1980). In recent years, however, courts have allowed negligence suits by third parties in the absence of privity when the third party's interest in the attorney's activity was not adverse. See, e.g., Heyer v. Flaig, 70 Cal. 2d 223, 225-29, 449 P.2d 161, 168, 74 Cal. Rptr. 225, 229 (1969); Lucas v. Hamm, 56 Cal. 2d 583,
Kentucky recently affirmed a jury verdict awarding compensatory and punitive damages against an attorney who had filed a "shotgun" complaint against a radiologist and an orthopedic surgeon, alleging that their "careless and negligent" treatment of a heart attack victim had caused a fracture to the patient's shoulder. In truth, the defendant-doctors had only treated the patient after the injury was detected by an emergency room physician, a fact readily ascertainable from medical records in counsel's possession prior to the filing of the lawsuit. The court approved the introduction of expert testimony that counsel's conduct did not comply with the standard of care exercised by ordinary and prudent lawyers. The court reasoned that counsel's failure to investigate the facts and law prior to filing the malpractice actions was material to the question of whether counsel had probable cause to institute the litigation and that a lack of probable cause should subject the plaintiff's attorney to countersuit liability. Moreover, the court ruled that a physician may recover substantial general damages for injury to his reputation attributable to unfounded litigation. Such injury was held to be sufficient "special injury" to justify recognizing a claim

588-89, 364 P.2d 685, 688-89, 15 Cal. Rptr. 821, 824-25 (1961). The rationale underlying these decisions appears to be that a duty is owed to a person with a mutual interest. See Note, supra note 27, at 1570-79. Hence, although an attorney owes no duty of care to an adverse party, he may owe a duty to the party's beneficiary. Heyer v. Flaig, 70 Cal. 2d at 228-29, 449 P.2d at 165, 74 Cal. Rptr. at 229; Lucas v. Hamm, 56 Cal. 2d at 590, 364 P.2d at 688-89, 15 Cal. Rptr. at 824-25. See generally Note, supra note 27, at 1576-79.

30 621 S.W.2d 895 (Ky. 1981).

31 Id. at 898-900. In Raine, two doctors, the defendants in a medical malpractice suit, brought an action for malicious prosecution and abuse of process against two attorneys. Id. at 898. The attorney, Raine, had visited the hospital where the alleged malpractice occurred and reviewed records which clearly showed that the injury, the subject matter of the malpractice action, had occurred prior to either doctor's involvement with the injured plaintiff. Id. Nevertheless, Raine drafted a complaint against the two doctors. He did not, however, sign the complaint, having instead an associate ascribe to it. Id. The associate neither read the complaint nor investigated the underlying facts. Id.

In affirming the trial court's dismissal of the abuse of process action, the Raine court distinguished that action from one for malicious prosecution, noting that in the former, injury to reputation is not sufficient, but rather there must be actual injury to person or property. Id. at 902.

32 Id. at 898.

33 Id. at 900-01.

34 Id. The deposition of Professor David Leibson of the Ethics Committee of the Louisville Bar Association was admitted as relevant to the element of lack of probable cause, a necessary ingredient of a malicious prosecution action. Id. The additional element of malicious prosecution is the institution or continuation of a judicial proceeding terminating in favor of the defendant. Id. at 899; see RESTATEMENT (SECOND) OF TORTS § 676 (1976).
for malicious prosecution of a civil action. Although reaching an arguably "just" result, the Kentucky court not only adopted new rules for determining trial counsel's liability, but also ignored the long-established rule that pleadings are privileged. Moreover, the Raine court failed to consider the potential chilling effect inherent in awards of substantial general and punitive damages against counsel.

The countersuit has been touted as a much needed mechanism to provide compensation for the burden and expense of baseless and unwarranted litigation. One drawback to its benefits, however, is the threat it may pose to the attorney-client privilege. In con-

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35 See id. With respect to the issue of damages, the court initially noted that the physicians proved no "special, or out-of-pocket" injury. Id. The defendant-attorneys argued that under Harter v. Lewis Stores, Inc., 240 S.W.2d 86 (Ky. 1951), recovery without special injury is permitted only where the reputation of the plaintiff was "assailed." 621 S.W.2d at 900. The Harter court had stated that "where [a] claim is not only false but its prosecution was prompted by malice and without probable cause, the defendant has the right of recovery for expenses incurred and damages sustained." 240 S.W.2d at 88. Additionally, the Harter court specified that "where one's reputation ha[d] not been assailed," or one's property had not been seized, or one had not been imprisoned, one's damages in the malicious prosecution action are "confined to . . . loss of time and the reasonable expenses incurred in the defense of the action beyond the ordinary costs." Id. The Raine court rejected the defendant-attorney's interpretation of these statements, and construed Harter as indicating "that a plaintiff in a malicious prosecution action may recover for humiliation, mortification and loss of reputation." 621 S.W.2d at 900. Recovery of these elements of damage apparently is in lieu of the special damage requirement.

36 See, e.g., Theiss v. Scherer, 396 F.2d 646, 649 (6th Cir. 1968) ("[i]t is beyond argument that statements made in pleadings filed in a judicial proceeding come within the rule of absolute privilege"); Hyde Constr. Co. v. Koehring Co., 387 F. Supp. 702, 720-21 (S.D. Miss. 1974) (statements made in pleadings that are "in any way relevant to the subject matter of the action" are absolutely privileged even if made maliciously and with knowledge of falsehood), rev'd in part on other grounds, modified in part on other grounds sub nom. Dunn v. Koehring Co., 546 F.2d 1193 (5th Cir. 1977); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734, 741 (1952) (absolute privilege protects defendant from liability based on statements in pleadings). See also RESTATEMENT (SECOND) OF TORTS § 587 (1976).

37 Advocates of the countersuit suggest that such actions have a significant deterrent effect on the filing of medical malpractice actions, and cite impressive statistics to buttress their claims. See, e.g., Berlin, supra note 28, at 121. Unfortunately, such statistics do not evince the number of frivolous actions that are deterred. Moreover, other reliable statistics support the view that the vast majority of malpractice claims are not groundless. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, MEDICAL MALPRACTICE 10 (1973).

contrast, an award of fees directly against errant counsel as part of “costs,” pursuant to an appropriate standard of culpability, would serve as a sufficient deterrent to frivolous litigation, without the negative effects of a countersuit.90 The availability of meaningful judicial sanctions at the close of “vexatious” proceedings would ensure that some minimum reparation, as well as vindication, would be provided without further delay and with some degree of certainty.40 Unlike in countersuit litigation, the trial judge will have heard the evidence relevant to the issue of attorney misconduct in the course of the original litigation. The original presiding judge will be in the position to assess the harm done as well as the degree of counsel’s culpability, and to fashion a remedy adequately reflecting the egregiousness of the conduct and the public interest in assuring access to the courts.41 Unfortunately, judges have been reluctant to impose such sanctions. The restraint has occurred not because of a lack of faith in the sanctions, but because of a perceived absence of authority under the rules governing procedure and attorney discipline,42 and a natural reluctance to police their

90 Birnbaum, supra note 25, at 1083. Proponents of awarding attorney’s fees against errant counsel argue that such an approach would deter, if not eliminate, unjustified litigation. See, e.g., id. This approach has been criticized, however, as being detrimental to the redress of legitimate grievances. Id. Thus, it has been argued that “impos[ing] a penalty upon a lawyer every time he loses a malpractice action would have a chilling effect on the attorney’s obligation to pursue the interests of a client who has a meritorious claim containing complex and novel issues.” Id

40 See Renfrew, supra note 5, at 269-71. In emphasizing that courts should utilize local rules to provide sanctions for errant litigants and lawyers, one commentator has noted that the tort remedies of malicious prosecution and abuse of process cannot satisfactorily ameliorate litigation abuses. Id. at 270-71. The fact that a countersuit entails more litigation, considerable delay and ultimately may yield only an expensive defeat, apparently adds to its ineffectiveness. Cf. Risinger, supra note 2, at 44-45 (subsequent action in deceit against attorney).

41 See 1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 7 advisory committee note, at 5. It is unlikely that many countersuit plaintiffs will be able to prove actual damages attributable to the “wrongful” litigation. For example, the countersuit plaintiffs in Raine v. Drasin, see notes 29-35 and accompanying text supra, were unable to establish that the litigation caused them any out-of-pocket losses. 621 S.W.2d at 900. Their primary interest was vindication. The harm done by the “defamatory complaint” was, in all probability, significantly less than the plaintiffs imagined, and a judicially imposed sanction following dismissal of the original action would have “work[ed] whatever exculpation courts can give.” Cf. C. MoRIUS, ToRts 255, 307-09 (1953) (vindication of person injured by libel or slander).

brother lawyers under standards requiring a finding of subjective "bad faith.""43

B. The Model Rules of Professional Conduct

Aside from the privileges afforded the trial attorney at common law, it has been suggested that the institution of groundless litigation has been encouraged by the philosophy that an attorney need not judge the merits of his client's case.44 The "prevailing ethic" is said to require the lawyer "to assert any position on behalf of his client unless the lawyer is absolutely convinced that the position is frivolous or fraudulent."45 Presumably derived from the ABA Model Code of Professional Responsibility, this "ethic" prohibits the filing of a lawsuit only if counsel "knows" or if it is "obvious" to him that there is no basis for proceeding, and that to do so would be for the sole purpose of harassing or maliciously injuring another.46 Under this standard, it may fairly be stated that counsel is acting improperly only if he is in possession of facts that divest him of any plausible argument that his client's claims might have merit. In the absence of such, counsel may file the lawsuit based upon the information provided by his client and any arguable inferences derived therefrom.47 Moreover, although the code does not endorse the filing of an action for the sole purpose of ob-

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43 See F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Abney v. Ward, 440 F. Supp. 1129, 1132 (S.D.N.Y. 1977); Rosenberg, supra note 17, at 9. Since most judges maintain close personal ties with other members of the bar, they understand that lawyers may engage in practices that are "less than exemplary" in their zeal to represent their clients. Rosenberg, supra note 17, at 9.

44 See Note, supra note 27, at 1584.

45 Renfrew, supra note 5, at 279.

46 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981). The code provides:

(A) In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Id. (emphasis added).

47 Cf. State v. Zwillman, 112 N.J. Super. 6, 16-17, 270 A.2d 284, 289 (Super. Ct. App. Div. 1970) (in prosecution of attorney for false pretenses, responsibilities of counsel did not include ascertaining the veracity of his client's claim unless he had actual knowledge of its falsity or should have surmised its fraudulent nature). But see Note, supra note 27, at 1583-85 (an attorney's acts must reflect his determination of the claim's merit based on a thorough investigation).
taining publicity or coercing an unmerited settlement, and while a more objective standard for judging attorney misconduct may be unnecessary to guard against these particular excesses, it can be argued that the code’s subjective standards are unenforceable. Apparently, as an outgrowth of the “countersuit phenomenon,” these subjective standards traditionally applied by lawyers to judge the conduct of other lawyers have been reevaluated. The result of this reevaluation is a shift in focus toward a standard akin to that of gross negligence or recklessness.

In Tool Research & Engineering Corp. v. Henigson, the California Court of Appeals adopted such a standard to determine if counsel was amenable to an action for malicious prosecution. Although the Tool Research court rejected the argument that counsel should be liable to an opponent for negligently assessing whether a

48 See Model Code of Professional Responsibility, supra note 46, DR 7-102(A)(2). DR 7-102 provides that a lawyer should not “[k]nowingly advance a claim . . . that is unwarranted . . . .” Id.

49 See American College of Trial Lawyers, Code of Trial Conduct 1 (1972). The ACTL Code provides that “a lawyer . . . should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement.” Id. (emphasis added). The model code will not endorse the practice of naming defendants solely for the purposes of obtaining free discovery to determine if a valid claim exists against that defendant or others. Singer & Giampietro, The Countersuit, 6 Litigation 18, 20 (Fall 1979); see Raine v. Drasin, No. 79-CA-18-MR (Ky. Ct. App. 1980), aff’d in part, rev’d in part, 621 S.W.2d 895 (Ky. 1981). In Raine, the Court of Appeals of Kentucky concluded that counsel had acted with an improper or unlawful motive:

Among other things, there is evidence indicating that his motivation may have been to obtain discovery for his case against the hospital by suing the appellees rather than employing the proper means of discovery provided in the Civil Rules. No. 79-CA-18-MR, slip op. at 9.

50 See M. Freedman, Lawyers’ Ethics in an Adversary System 51-57 (1975). In a critique of Rule IV of the Federal Rules of Civil Procedure, Professor Risinger stated:

The problem with subjective standards is enforceability. The problems with objective standards is that they inevitably cover some people whose actions were only the result of negligence. . . . [A gross negligence] standard would encompass actions such as the filing of an unfounded suit which proper investigation would have revealed was unfounded, or the assertion of denials or defenses in similar circumstances. . . . [S]ome courts have already imposed such a duty of investigation . . . .

Risinger, supra note 2, at 60 n.193.

51 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (Ct. App. 1975). Tool Research involved a malicious prosecution action against a corporation, its directors and its counsel. Id. at 678, 120 Cal. Rptr. at 294. The respondent, plaintiff’s attorney in the original action, acted in good faith after investigating his client’s claim, and accepted the representation in the initial action. Id. at 679-80, 120 Cal. Rptr. at 294-95. A jury verdict was rendered for the defendants, however, and the present action was instituted. Id. at 681, 120 Cal. Rptr. at 296.
favorable judgment was probable, it did adopt a twofold test with an objective element:

The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard.

. . . So long as the attorney does not . . . [prosecute] a claim which a reasonable lawyer would not regard as tenable or . . . unreasonably [neglect] to investigate the facts and law in making his determination to proceed, his client's adversary has no right to assert malicious prosecution against the attorney if the lawyer's efforts prove unsuccessful.

This standard, in turn, influenced the drafters of the proposed model rules currently before the ABA. Model rule 3.1, Meritorious Claims and Contentions, provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." The comment and notes that accompany this model rule illuminate the drafters' intent that the phrase "a basis for doing so that is not frivolous" is to be read as an objective inquiry.

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52 Id. at 683, 120 Cal. Rptr. at 297; see Wong v. Tabor, 422 N.E.2d 1279, 1286 (Ind., Ct. App. 1981). In Wong, a physician filed a malicious prosecution action against the plaintiffs for instituting a malpractice action against him. 422 N.E.2d at 1282. The Court of Appeals of Indiana, in holding that the physician failed to meet his burden of proving the element of lack of probable cause, 422 N.E.2d at 1288-89; see note 33 supra, noted that counsel cannot be liable for "[m]ere negligence in asserting a claim," 422 N.E.2d at 1286; see R. MALLEN & V. LEVITT, supra note 38, at 123.

53 46 Cal. App. 3d at 683-84, 120 Cal. Rptr. at 297; see Wong v. Tabor, 422 N.E.2d at 1288 (reasonableness of attorney's action is assessed by objective standard: whether a reasonable attorney, based on facts known to him, would "consider that the claim was worthy of litigation").

54 Id. at 683, 120 Cal. Rptr. at 297; see Wong v. Tabor, 422 N.E.2d 1279, 1286 (Ind., Ct. App. 1981). In Wong, a physician filed a malicious prosecution action against the plaintiffs for instituting a malpractice action against him. 422 N.E.2d at 1282. The Court of Appeals of Indiana, in holding that the physician failed to meet his burden of proving the element of lack of probable cause, 422 N.E.2d at 1288-89; see note 33 supra, noted that counsel cannot be liable for "[m]ere negligence in asserting a claim," 422 N.E.2d at 1286; see R. MALLEN & V. LEVITT, supra note 38, at 123.

55 The notes following the model rule compare the new rule to DR 7-102(A)(1) of the Model Code of Professional Responsibility, see note 46 supra, noting three distinctions. The model rule changes the test for improper conduct by requiring a "nonfrivolous" basis for the claim compared with the disciplinary rule's requirement of action "merely to harass or maliciously injure another." FINAL DRAFT OF MODEL RULES, supra note 13, Rule 3.1 note (Code Comparison). Furthermore, it proposes an objective test whereas the disciplinary rule requires knowledge by the attorney "when it is obvious" that a claim is unwarranted before it applies. Id. Finally, the model rule advocates an exception in a criminal action so that a prosecutor must meet his burden of proof even if there is no "nonfrivolous" basis for the client's defense. Id. The 1981 Draft of the model rules provided that "[a] lawyer shall not bring or defend a proceeding . . . unless there is a reasonable basis for doing so . . . . " MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (Proposed Final Draft 1981) [hereinafter
Although the model rules have not yet been adopted by the ABA, the standard set forth in the comment and notes accompanying rule 3.1 should not only lead more state courts to retreat from a rule of attorney immunity, but more importantly, should encourage a more liberal interpretation of existing authority which permits judicially imposed sanctions. If there is agreement that more objective standards for controlling adversary ethics are needed and that judicially imposed fee awards are the preferred method of enforcing such standards, a critique of the efficacy of current statutes and rules of practice, as well as an examination of proposals for their modification, can be undertaken.66

C. Federal Rule 11 Sanctions as an Alternative to the Countersuit

The current text of federal rule 11 provides:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false . . . . For a wilful violation . . . an attorney may be subjected to appropriate disciplinary action.57

As presently written, rule 11 speaks in subjective terms.58 Specifically, counsel’s certification is only an assertion made “to the best of his knowledge, information, and belief,” and the rule’s enforcement provisions can only be invoked when an attorney signs a pleading with intent to defeat the purpose of the rule or “willfully” violates it.60 The only express remedy for a violation of the rule is


57 FED. R. CIV. P. 11.


59 It has been asserted that under rule 11 an attorney has some affirmative duty to investigate a client’s claim. See Risinger, supra note 2, at 54. If there exists a “circumstantial nexus” between the facts known to the attorney and the pleading to be filed, he may have an obligation to investigate depending on the type of case and the degree of difficulty.
CURBING LITIGATION ABUSES

dismissal of all or part of a claim or defense, or referral to disciplinary authorities. Moreover, courts have tended to require a showing of subjective “bad faith” as a prerequisite to the imposition of sanctions under rule 11. For example, judges have stated that “[a] pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis,” or that sanctions should be imposed only if there is “clear evidence” that the pleading was filed without a colorable claim and for an improper purpose.

Id. at 55. As a practical matter, however, this is the normal practice of a competent attorney and thus no willful violation of rule 11 will occur where a “circumstantial nexus” exists. Id. at 55-56.

Fed. R. Civ. P. 11. Courts have held that rule 11 does not sanction an award of attorney's fees even if there has been a willful violation of the rule. See, e.g., United States v. Standard Oil Co., 603 F.2d 100, 103 n.2 (9th Cir. 1979); Orenstein v. Compusamp, Inc., 19 Fed. R. Serv. 2d 466, 469 (S.D.N.Y. 1974). This, however, may be subject to the narrow exception which allows the assessment of attorney's fees against an unsuccessful litigant who has acted in “bad faith.” See Hall v. Cole, 412 U.S. 1, 5 (1973).

See Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); notes 87-95 and accompanying text infra. See also FINAL DRAFT OF MODEL RULES, supra note 13, Rule 3.3. The comment accompanying the rule asserts that an attorney's personal knowledge of matters contained in pleadings or other litigation documents is not required. FINAL DRAFT OF MODEL RULES, supra note 13 comment (Representations by a Lawyer). “However, an assertion purporting to be on the lawyer's own knowledge . . . may properly be made only when the lawyer knows . . . [it] is true or believes it to be true on the basis of a reasonably diligent inquiry.” Id.

Id. at 55. As a practical matter, however, this is the normal practice of a competent attorney and thus no willful violation of rule 11 will occur where a “circumstantial nexus” exists. Id. at 55-56.

60 Fed. R. Civ. P. 11. Courts have held that rule 11 does not sanction an award of attorney's fees even if there has been a willful violation of the rule. See, e.g., United States v. Standard Oil Co., 603 F.2d 100, 103 n.2 (9th Cir. 1979); Orenstein v. Compusamp, Inc., 19 Fed. R. Serv. 2d 466, 469 (S.D.N.Y. 1974). This, however, may be subject to the narrow exception which allows the assessment of attorney's fees against an unsuccessful litigant who has acted in “bad faith.” See Hall v. Cole, 412 U.S. 1, 5 (1973).

See Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); notes 87-95 and accompanying text infra. See also FINAL DRAFT OF MODEL RULES, supra note 13, Rule 3.3. The comment accompanying the rule asserts that an attorney's personal knowledge of matters contained in pleadings or other litigation documents is not required. FINAL DRAFT OF MODEL RULES, supra note 13 comment (Representations by a Lawyer). “However, an assertion purporting to be on the lawyer's own knowledge . . . may properly be made only when the lawyer knows . . . [it] is true or believes it to be true on the basis of a reasonably diligent inquiry.” Id.

61 Id. at 55. As a practical matter, however, this is the normal practice of a competent attorney and thus no willful violation of rule 11 will occur where a “circumstantial nexus” exists. Id. at 55-56.


64 Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980); see notes 86-94 and accompanying text infra. Such strict standards do not encourage resort to rule 11 as a source of judicial control over adversary ethics, and are anomalous in a system that does not favor, or generally permit, inquiry into the merits of claims and defenses prior to trial. See Risinger, supra note 2, at 613. The reluctance of trial judges to grant such relief in the form of plea-striking is evident. E.g., Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961) (in response to allegations that counsel had encouraged false verification of a shareholder derivative action, the court eschewed “trial by affidavit”); see Papilsky v. Berndt, 17 Fed. R. Serv. 2d 214, 217 (S.D.N.Y. 1973) (defendants may not create a trial on paper by their characterization of the pleadings). But see Rhinehart v. Stauffer, 638 F.2d 1169, 1170 (9th Cir. 1979) (complaint dismissed where plaintiff's counsel had not conferred with his client and was unable to conduct any meaningful discussion of the case with opposing counsel); Folding Cartons, Inc. v. American Can Co., 26 Fed. R. Serv. 2d 235, 242 & n.20 (N.D. Ill. 1979) (timing and circumstances surrounding the filing of an amended complaint, together with failure of plaintiff's counsel to offer any rational explanation for adding new defendants, evidenced fact that the amendment was made only to salvage plaintiff's "class action allegations"); Freeman v. Kirby, 27 F.R.D. 395, 399 (S.D.N.Y. 1961) (attorney must do more than
Notwithstanding its apparent shortcomings, several courts have relied upon rule 11 as a source of authority for the imposition of fee awards against trial counsel. For example, in *Kinee v. Abraham Lincoln Federal Savings & Loan Association*, plaintiff's counsel filed a “shotgun” complaint naming as defendants 177 mortgage and thrift institutions in a class action, alleging that their use of the “escrow” method of collecting tax prepayments violated the federal antitrust laws. At the time the complaint was filed, counsel did not know which institutions followed this particular practice, and chose to sue every individual or lending institution listed as a mortgage broker in the Philadelphia phone book. Later, forty-six defendants were voluntarily dismissed. The remaining defendants moved to dismiss, alleging that counsel had violated rule 11. Although the court refused to strike the pleadings on behalf of these remaining defendants, it did require plaintiff's counsel personally to reimburse the dismissed defendants for the costs and expenses incurred in appearing and defending. Although observing that there may be instances in which a potential defendant's refusal to cooperate with a pre-suit investigation might justify joinder, the court concluded that it is an “abuse of process” to use a complaint to discover which of a number of parties is a proper defendant.

Similarly, in *Textor v. Board of Regents of Northern Illinois University*, the women's athletic director of Northern Illinois University (NIU) brought an action against all the members of the Mid-America Conference, when it should have been apparent just lend his name to pleading).

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*365 F. Supp. 975 (E.D. Pa. 1973).*

*Id.* at 977.

*Id.* at 977 n.1.

*Id.* at 983. The court noted that the remaining defendants were not prejudiced by any improper actions of the plaintiff's attorney because an investigation would have revealed them as proper parties to the action. *Id.* Therefore, the court stated that these remaining defendants had suffered no injury and, accordingly, if the case were dismissed as to them, it simply would just be refiled, rendering the court's action futile. *Id.*

*Id.* The court vigorously denounced the plaintiff's counsel for sending out a “drag-net” and inconveniencing the parties that were voluntarily dismissed. *Id.* at 982; cf. *Miller v. Schweickart*, 413 F. Supp. 1059, 1061-62 (S.D.N.Y. 1976) (where attorney violated rule 11 by basing the complaint on unverified rumor and hearsay, the court exercised its discretion under section 11(e) of the Securities Act of 1933, awarding costs to the dismissed defendants).

*87 F.R.D. 751 (N.D. Ill. 1980).*

*Id.* at 753. The Mid-America Conference is comprised of the following schools: Ball State University, Bowling Green State University, Kent State University, Miami University,
that in personam jurisdiction could not be obtained over any defendant other than NIU. Plaintiff's counsel made no effort to correct the situation when it was brought to his attention, and did not respond to defendants' motion to dismiss. The district court, after dismissing the moving defendants, thereby terminating the case as to all but NIU, imposed a fee award directly against plaintiff's counsel.

Kinee and Textor suggest that rule 11 may provide an alternative to the countersuit, at least in the most egregious cases. In Raine v. Drasin, the court could have required plaintiff's counsel to reimburse defendants for their attorneys' fees and expenses following the termination of the original malpractice action. A fee award would have compensated the victims of the unwarranted litigation for their out-of-pocket losses, and provided them with some measure of vindication, without the delay and expense of a second action. Similarly, the institutional defendant in Beacon Journal Publishing Co. v. Zonack, Poulos & Cain, which had been sued in an improper forum for an improper purpose, might have obtained expenses and attorney's fees upon motion following dismissal from the lawsuit. Each case presented clear and easily identifiable litigation abuse. By virtue of a rule 11 award, no windfall would have accrued to the former defendants, and any financial hardship, appropriately, would have fallen upon the best "risk-avoider," plaintiff's counsel. The desired deterrence would have been achieved

Central, Eastern, and Western Michigan Universities, Ohio University, and the University of Toledo. Id. at 753 n.1. All were named as defendants. Id.

* Id. at 753. None of the defendant universities, except NIU, had "any but the most tangential contacts" with the forum state. Id.

** Id. at 754.

*** Id. at 754-55. The court concluded that the plaintiff might have a legitimate claim against NIU and, therefore, was "reluctant to penalize" her by striking the complaint. Id. at 754. Thus, the court imposed fees against her attorney because of his willful violation of rule 11. Id. at 754-55. The court also assessed those fees against the plaintiff's counsel because of his failure to state the correct venue. Id.; cf. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1011 (1967) (it is unethical to intentionally file suit in the wrong venue in hope of securing a default judgment).

† 621 S.W.2d 895 (Ky. 1981); see notes 29-35 and accompanying text supra.

‡ See 9 KY. REV. STAT. ANN. CR-11 (Baldwin 1978). The Kentucky rule 11 is identical to the federal rule 11. Id.; see note 57 and accompanying text supra.

§ No. 79 Ap. 123 (Ohio Ct. App. 1979); see note 24 supra.

∥ See Board of Educ. v. Marting, 185 N.E.2d 597, 600 (Ohio C.P. 1962). In Marting, a malicious prosecution action was allowed to proceed against counsel. Id. The court stated that "an attorney, due to his background and education, is in much better position to minimize error." Id.
without the "chilling effect" of an award of general and punitive damages.  

To encourage the use of rule 11 as a sanctioning mechanism for deterring groundless litigation, the Judicial Conference of the United States has released a proposed amendment which modifies the present culpability threshold of absence of subjective "good faith," and expressly authorizes the imposition of fee awards against errant counsel. With respect to a culpability threshold for the imposition of sanctions, the proposed rule provides:

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

This proposed amendment would "codify" an attorney's duty to conduct at least a minimal investigation prior to filing a complaint or interposing a counterclaim. The Advisory Committee's comments to the 1981 draft of the proposed rules asserted that the "reasonableness" of the investigation must be judged in light of all the circumstances presented by the particular case at the time the pleading was filed. Some latitude is to be accorded the attorney in the event that there is insufficient time for an investigation, or

\[\text{\footnotesize \cite{78, 80, 81}}\]

\[\text{\footnotesize Presumably, rule 11 fee awards should also be imposed for frivolous denials and counterclaims. See In re Nat'l Student Mktg. Litig., 78 F.R.D. 726, 728 (D.D.C. 1978); cf. Arena v. Luckenbach Steamship Co., 279 F.2d 186, 188-89 (1st Cir. 1960) (counsel may not file answer creating issues); text accompanying note 92 \text{\scriptsize infra}. Of course, federal rules 36(a) (Request for Admission) and 37(c) (Expenses on Refusal to Admit) already provide a mechanism for shifting the costs of proof to a party who interposes groundless denials. See Fed. R. Civ. P. 36, 37(c). For an excellent introduction to the use of rule 36, see Epstein, Rule 36: In Praise of Requests to Admit, 7 LITIGATION 30 (Spring 1981).}

\[\text{\footnotesize 1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 11.}

\[\text{\footnotesize 80 1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 11 advisory committee note, at 8. The note suggests that the proposal creates a more rigid standard than the "good faith" qualification of rule 11 and thus will be available under more varied circumstances. Id. (citing Nemeroff v. Abelson, 620 F.2d 339, 349 (2d Cir. 1980)).}

\[\text{\footnotesize 81 1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 11 advisory committee note, at 8. One situation in which a failure to investigate may be warranted is where the statute of limitations prompts a filing with little investigation. For such a scenario, see Kirsch v. Duryea, 21 Cal. 3d 303, 311, 578 P.2d 935, 940, 146}\]
if an informal investigation would prove futile or unduly expensive.\textsuperscript{82} The notes accompanying the proposed amendment, however, clearly express the intent of its authors that the new culpability threshold should be interpreted as more stringent than the present "good faith" standard, and should be utilized in a greater number of situations.\textsuperscript{83}

A plausible interpretation of the proposed rule is that it establishes gross negligence or recklessness as the culpability threshold for the imposition of fee awards.\textsuperscript{84} Like the proposed model rules, the amendment injects an objective element into an otherwise subjective standard for attorney conduct.\textsuperscript{85} The question in any case becomes not simply whether counsel believed he was acting properly, but also whether, prior to filing, counsel made a reasonable inquiry and factual assessment upon which to predicate his subsequent activity.\textsuperscript{86}

In Nemeroff v. Abelson,\textsuperscript{87} the plaintiff sued certain "publishing defendants" alleging that they deliberately had leaked material, nonpublic information about forthcoming financial columns to

\textsuperscript{82}Risinger, supra note 2, at 55. The notes accompanying the 1981 draft of the proposed amendments to the federal rules suggest that counsel will be accorded some degree of latitude where he reasonably relies on the investigation of forwarding counsel or another member of the bar. See 1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 11 advisory committee note, at 8; cf. Raine v. Drasin, 621 S.W.2d 895, 902-03 (Ky. 1981) (attorney who signed complaint at request of trial attorney, but who otherwise did not participate in litigation, should not be held liable for malicious prosecution).

\textsuperscript{83}1981 DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, supra note 16, Rule 11 advisory committee note, at 8; see Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980).


\textsuperscript{85}See note 55 and accompanying text supra.

\textsuperscript{86}See Nemeroff v. Abelson, 620 F.2d 339, 348-50 (2d Cir. 1980). According to the "bad faith" exception to the American rule, a federal court may award counsel fees to a victorious party when opposing counsel or the opposing party acted vexatiously or for oppressive reasons. 6 J. Moore, supra note 2, ¶ 54.77[2], at 1709. The power to impose such an award is said to be based upon "the original authority of the chancellor to do equity in a particular situation." Hall v. Cole, 412 U.S. 1, 5 (1973) (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939)). It accords an equity court "the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978). See generally Note, Attorney's Fees and the Federal Bad Faith Exception, 29 Hastings L.J. 319, 323-30 (1977).

\textsuperscript{87}620 F.2d 339 (2d Cir. 1980).
certain investors, enabling the latter to trade at a profit.\textsuperscript{88} After discovery, the plaintiff conceded his inability to substantiate his theory of the case, and agreed to a stipulation of voluntary dismissal with prejudice.\textsuperscript{89} The publishing defendants then moved for an award of costs, disbursements, and attorney's fees contending that the action had been initiated in violation of rule 11 and in "bad faith."\textsuperscript{90} The district court awarded $50,000 in fees, to be paid by plaintiff and plaintiff's counsel.\textsuperscript{91} On appeal, the Second Circuit appeared to have some reservations about the authority of a trial court to award fees under rule 11,\textsuperscript{92} but avoided the issue by equating the culpability threshold of rule 11 with that required for an award of fees under the "bad faith" exception to the "American" rule. After reciting the traditional requirement that there "be 'clear evidence' that the claims are 'entirely without color and made for reasons of harassment or delay or for other improper purposes,'"\textsuperscript{93} and after reviewing the record for evidence of bad faith,

\textsuperscript{88} Id. at 341. Nemeroff was a shareholder of Technicare Corp. and argued that the negative comments made about the corporation would cause its stock to drop, thus allowing the defendants to trade at a profit by "selling Technicare short prior to publication and making covering purchases at a depressed price after publication." \textit{Id.}

\textsuperscript{89} \textit{Id.} at 342.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at 350. The court expressed no opinion on the validity of an attorney's fees award under rule 11 but merely assumed "arguendo" that such an award was sanctioned by the rule. \textit{Id.} Rule 11, if amended, would provide in part:

\begin{quote}
If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.
\end{quote}

\textsuperscript{93} \textit{Final Draft of Proposed Amendments to the Rules of Civil Procedure, supra note 16, Rule 11.}

the court cited the 1981 draft of the ABA model rules\textsuperscript{94} and held:

A claim is colorable, [and therefore not commenced in bad faith] for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established.\textsuperscript{95}

Adoption of the proposed amendments to rule 11 would codify the Nemeroff definition of "bad faith," and serve notice on attorneys practicing in federal court of their duty to refrain from instituting frivolous litigation. In addition, the amended rule might encourage similar developments by the states. Although substantial historical support exists for the proposition that any court of general jurisdiction may assess fees against counsel in summary proceedings,\textsuperscript{98} few state courts have recognized a "bad-faith" exception.\textsuperscript{97} Many states, however, have adopted federal rule 11 in its present form. Wider circulation of the Proposed Model Rules of Professional Conduct and adoption of the proposed amendments

\textsuperscript{94} See 620 F.2d at 348 n.16; 1981 DRAFT OF MODEL RULES, supra note 55, Rule 3.1; note 61 supra.

\textsuperscript{95} 620 F.2d at 348 (emphasis in original) (footnote omitted). The court noted that the plaintiff's attorney reasonably could have concluded that there were indications of several relationships and activities from which improprieties in the trading of Technicare stock could be inferred. Id. at 349. Furthermore, the court observed that "[e]ven if some or all of these facts were not in fact true," the beliefs of plaintiff's counsel were reasonable and sufficient to warrant his claim. Id. Although the court found that the action had been commenced in good faith, it remanded to the district court the issues of whether the conduct of the litigation was "intentionally dilatory," and whether at some point in the litigation prior to dismissal, the plaintiff became apprised of facts sufficient to require withdrawal of the action rather than continued prosecution. Id. at 350-51.

\textsuperscript{97} See Risinger, supra note 2, at 46-47. It has been observed that the summary proceeding was an effective alternative to a suit against an attorney for fees, since it was not controlled by the strict criminal proceedings involved in a contempt action, but was an exercise of the court's "inherent supervisory powers." Id. at 45.

to rule 11 could encourage parallel state rules or legislation, and
to rule 11 could encourage parallel state rules or legislation, and wider recognition by state trial judges of their “inherent power” to
sanction attorneys for abusing the judicial process.

III. DELAY

A. The Trial Attorney as an Officer of the Court

Perhaps the most pervasive hindrance to the administration of justice is delay in the disposition of actions commenced in “good faith.” All experienced trial counsel are familiar with the tactics and techniques of delay: the spurious counterclaim, the hypertechnical or noncolorable motion, the duplicative discovery request, or the dilatory and obstructive response interposed to frustrate a legitimate discovery request.98 Although several of the Federal Rules of Civil Procedure as well as their state counterparts specifically are intended to regulate dilatory litigation tactics and curb discovery abuse,99 generally it is conceded that the problem of delay demands modification, if not sweeping reform, of existing standards.100

As in the case of groundless litigation, the current version of the ABA Model Code of Professional Responsibility exhorts counsel to “seek the lawful objectives of his client through [all] reasona-


99 See Fed. R. Civ. P. 11, 37, 41(b). Rule 11 requires all pleadings to be signed by the attorney of record. Under this rule, the signature “constitutes a certificate . . . that . . . there is good ground to support [the pleading]; and that it is not interposed for delay.” Fed. R. Civ. P. 11. Violation of the rule may result in the striking of the pleading from the proceedings and disciplinary action against the attorney. Id. Rule 37 imposes costs and attorney’s fees upon a party who wrongfully refuses to answer questions during discovery proceedings, and upon a party who, without substantial justification, accuses another of refusing to answer. Fed. R. Civ. P. 37(a). Rule 41 provides for involuntary dismissal of an action for failure to prosecute. Fed. R. Civ. P. 41(b).

100 See generally 4 J. MOORE, supra note 2, ¶ 26.02[3]; Kennelly, Pretrial Discovery—the Courts and Trial Lawyers are Finally Discovering That Too Much of It Can Be Counterproductive, 21 TRIAL LAW. GUIDE 458, 468-74 (1978); Liman, The Quantum of Discovery vs. The Quality of Justice: More Is Less, 4 LITIGATION 8, 8 (Fall 1977); Bonauie, Professional Responsibility, Practice and Procedure: A Disciplinary Void (pt. 2), N.Y.L.J., June 26, 1981, at 1, col. 1.
bly available means,"101 while refraining from "assert[ing] a posi-
tion, conduct[ing] a defense, delay[ing] a trial, or tak[ing] other
action on behalf of his client when he knows or when it is obvious
that such action would serve merely to harass or maliciously injure
another."102 On its face, the rule disapproves of only those tactics
which are intentionally dilatory. Thus, the rule may fairly be criti-
cized for not advancing a stronger position. Indeed, under the rule,
delay is permissible if the tactic arguably serves some other legiti-
mate purpose.103 Nevertheless, abuses not corrected by the rule
may be rectified by the court even in the absence of express statu-
tory authority. In Control Data Corp. v. Washington Metropolitan
Area Transit Authority,104 for example, trial counsel exhausted the
patience of the court with a series of motions which had "the ef-
fect, if not the purpose, of prolonging litigation that [had] already
been overlawyered and protracted beyond reason."105 After issuing
an order denying a motion as "frivolous," the court was served
with a fourteen-page "Memorandum of Points and Authorities"
seeking reconsideration of the prior order and a retraction of cer-
tain comments by the trial judge that appeared to reflect adversely
upon counsel's good faith in presenting the motion. In a diplomatic
response, the trial judge observed:

The increase in relatively complex civil litigation . . . has been
accompanied by increased opportunities for delay, obfuscation
and expense. A simple corollary to this change in circumstances is
a heightened need for counsel to bear in mind . . . their duty, as
officers of the Court, to cooperate in securing the "just, speedy,
and inexpensive determination of every action."

. . . .

The Court will hold the parties and counsel responsible by
sanctions and by disciplinary reference for any further failures by
counsel to conduct reasonable, forthcoming discovery, sensible
framing of the narrow issues to be tried, and efficient preparation
and trial of them pursuant to the letter and spirit of [the Federal

102 Id.
103 See, e.g., Edelstein, The Ethics of Dilatory Motion Practice: Time for Change, 44
Fordham L. Rev. 1069, 1073 (1976). The few ethical opinions addressing delay focus on
attorney conduct as deceit, without affirmatively rejecting delay as a legitimate litigation
objective. See, e.g., ABA Comm. On Professional Ethics, Informal Opinions, No. 557
(1963) (filing of a motion for changes of venue containing false statements).
105 Id. at 378.
Rules of Civil Procedure. 108

Control Data is one of several cases in which trial judges, notwithstanding the absence of any violation of the disciplinary rules, have exercised the court's inherent disciplinary power to prevent or correct abuse of the rules of procedure. 107 Aside from the court's inherent power, several modifications of DR 7-102(a)(1) have been advanced that attempt to minimize attorney abuse of the rules of ethics and procedure. For example, in a recent article on dilatory motion practice, Judge David Edelstein observed that situations frequently arise in which the unintentional delay attendant to a motion so outweighs the nondelay gain to counsel's client that the submission of the motion ought to be deterred. 108 Accordingly, he suggested that DR 7-102 be amended to provide that in the representation of a client, a lawyer "shall not . . . submit a motion intended primarily for delay or where the lawyer knows or should know that substantial delay will result and that if granted the motion will secure very insubstantial relief." 109 A similar proposal is advanced in model rule 3.2, which states, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." 110 The comment for the rule sets forth the appropriate standard: "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." 111

Both of these proposals affirmatively reject delay as a legitimate litigation objective. Under either proposed standard, it is not enough that some minimal nondelay benefit might accrue to the client. Indeed, if counsel had actual or constructive112 knowledge

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108 Id. at 379, 381 (quoting Fed. R. Civ. P. 1).
108 See Edelstein, supra note 103, at 1075-80. See also Final Draft of Model Rules, supra note 13, Rule 3.2.
108 Edelstein, supra note 103, at 1079.
110 Final Draft of Model Rules, supra note 13, Rule 3.2.
111 Id. comment.
112 See Edelstein, supra note 103, at 1077. In order to demonstrate the need for a more objective standard, Judge Edelstein offers the following hypothetical: [A] discovery motion [is filed] whose disposition would require extensive responsive argumentation by the respondent, consideration by the court of large numbers of legal arguments and great amounts of documentation, and perhaps an evi-
that only insubstantial relief would be obtained, then the interposition of a dilatory motion, request, or objection, would expose the attorney to court-imposed sanctions or referral to disciplinary authorities. Hence, it is clear that both contemporary judicial opinion and the proposed modifications of the federal rules echo the model rules' emphasis upon a more objective culpability threshold as a prerequisite for disciplinary action, and, in addition, call for a balance between legitimate ends and foreseeable delay of the litigation process.

B. The Insubstantial Counterclaim

Previously, reference was made to the assertion of frivolous denials and counterclaims as a method of securing delay. The trial court opinion in In re National Student Marketing Litigation presents a classic example of the insubstantial counterclaim. In that multidistrict securities fraud litigation, one group of defendants filed a counterclaim against the class plaintiffs and their counsel alleging fraud and professional misconduct in connection with a prior settlement. These charges were accompanied by defense counsel's request to the Securities and Exchange Commission to initiate disciplinary proceedings against plaintiffs' counsel. After granting summary judgment in favor of the class plaintiffs, the trial judge awarded them attorney's fees under the federal "bad faith" exception. The defendants based their opposition to an award of fees upon the "nonfrivolous" nature of their claim. The denial of attorney's fees was vacated, however, and the defendant attorneys' fees were again awarded. It is important to note that the defense motion to deny attorney's fees was filed after the trial judge granted summary judgment in favor of the class plaintiffs. The denial of attorney's fees was vacated, however, and the defendant attorneys' fees were again awarded.


115 Id. at 159. The complaint with the SEC was not supported by probative evidence of any wrongdoing, and violated the spirit, if not the letter, of DR 7-105(A).
court rejected their arguments, noting that the timing of the counterclaim and other dilatory conduct by the defendants demonstrated that the counterclaim was substantially motivated by either vindictiveness or a desire to delay the progress of the litigation. The court opined:

[T]he ["bad faith"] standard does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or mala fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him.116

A similar willingness to impose fee awards to discourage delay was exhibited by the Sixth Circuit in Grinnell Brothers, Inc. v. Touche Ross & Co.,117 in which the defensive maneuver was a removal from state to federal court. After securing a remand, plaintiffs moved for costs, including attorney's fees, alleging that the attempted removal was "obviously improper" and vexatious.118 The Sixth Circuit, without considering whether the removal was sought in "bad faith," affirmed the trial court's assessment of fees and costs "in the interests of justice."119

In both National Student Marketing and Grinnell Brothers, the respective courts appeared to focus more on the effect of the pleading or petition and less on the intent of the litigant or his counsel. In Grinnell, and, perhaps, even in National Student Marketing, counsel might have made a colorable argument that their conduct complied with DR 7-102(A), insofar as neither had intentionally sought to harass their adversary nor acted solely to secure delay. The approach in both cases, however, was consistent with the standard set forth in proposed model rule 3.2 as well as proposed amended rule 11. Both would regulate the filing of a counterclaim or removal petition, and both would encourage the trial judge to examine motions with multiple purposes to determine whether the nondelay interest of counsel's client substantially out-

116 Id.
117 655 F.2d 725 (6th Cir. 1981).
118 Id. at 725. In a civil action brought in state court, the defendant may file to have the action removed to a federal district court which otherwise would have original jurisdiction. See 28 U.S.C. §§ 1441, 1446 (1976 & Supp. I 1977). Removal divests the state court of jurisdiction, and may shift the locus of trial to a point more inconvenient for the state court plaintiff. See 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3737 (1978).
119 655 F.2d at 727. Contra, Cornwall v. Robinson, 654 F.2d 685 (10th Cir. 1981) (reversing an award of fees in the absence of findings of subjective "bad faith").
CURBING LITIGATION ABUSES

weighs the delay impact on the litigation as a whole.120

C. The Dilatory Motion

Although federal rule 7(b)(2) provides that "[t]he rules appli-
cable to captions, signing, and other matters of forms of pleadings
apply to all motions and other papers provided for by the rules,"
thereby incorporating by reference the certification requirements
of rule 11, there is a dearth of judicial authority considering rules
7(b)(2) and 11 in relation to litigation delay.121 Instead, the federal
bench predominantly has relied upon section 1927 of title 28,
which currently provides that "[a]ny attorney or other person ad-
mitted to conduct cases in any court of the United States... who
so multiplies the proceedings in any case unreasonably and vexa-
tiously may be required by the court to satisfy personally the ex-
cess costs, expenses, and attorney's fees reasonably incurred be-
cause of such conduct."122

This statute, however, patently requires more than the mere
multiplication of proceedings by an attorney. Indeed, the attor-
ney's conduct must be "unreasonable and vexatious" before the re-
sulting costs, expenses, and attorney's fees may be imposed. A ma-
jority of courts conclude, therefore, that the words "unreasonable
and vexatious" require a finding of "purposeful or malicious" be-
havior123 or "serious and studied disregard for the orderly
processes of justice,"124 and in so doing, severely undermine the
provision's effectiveness.125 The fine lines that must be drawn in

120 Old rule 11 speaks to pleadings "interposed for delay." Proposed amended rule 11
requires counsel to certify that the pleading is "not interposed . . . to cause unnecessary
delay, or needless increase in the cost of litigation." Final Draft of Proposed Amendments

121 Edelstein, supra note 103, at 1074.

did not expressly provide for an award of expenses and attorney's fees. See note 92 supra.

failure to appear is negligent or inadvertent, statute not applicable).

124 Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968). But see In
re Sutter, 543 F.2d 1030, 1035 (2d Cir. 1976).

125 Comment, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial
Process, 44 U. Chi. L. Rev. 619, 625-28 (1977); see Edelstein, supra note 103, at 1071. Judge
Edelstein proposed that the culpability threshold of the statute be amended to provide:
Any attorney or other person admitted to conduct cases in any court . . . may be
required by the court to satisfy personally such excess costs. Costs resulting from
the submission of a motion (1) intended primarily for delay, or (2) where the
attorney knew or should have known that substantial delay would result and
that if granted the motion would secure very insubstantial relief are such costs.
applying section 1927 can be illustrated by two recent cases involving attorney disqualification motions.\textsuperscript{126}

In \textit{North American Foreign Trading Corp. v. Zale Corp.},\textsuperscript{127} an action for breach of contract, the defendant filed a motion to disqualify plaintiff's counsel on the ground that the latter's associate previously had represented the defendant in a related matter.\textsuperscript{128} In fact, the defendant and defendant's counsel knew or should have known that the prior representation was on a matter wholly unrelated to any of the issues on the contract action. Moreover, the defendant's officers had made no objection to the alleged conflict when it was initially brought to their attention. Under the circumstances, the trial judge found that the motion was "patently frivolous" and "made and pursued solely for purposes of harassment and delay."\textsuperscript{129} The court observed that

\begin{quote}
[n]o purpose has been served by the instant motion other than to harass plaintiff and his counsel and to delay these proceedings further. The time has come to call a halt, or at least to have the burden of these puerile litigation tactics fall on counsel, where it belongs, rather than on the client or the court. This motion was instituted in bad faith. . . . The motion was a ploy and it was designed as a vexatious and oppressive tactic against plaintiff and its counsel.\textsuperscript{130}
\end{quote}

In contrast, a fee award was denied on substantially similar facts in \textit{R-T Leasing Corp. v. Ethyl Corp.},\textsuperscript{131} an unpublished opinion from the same district. In this action for breach of contract, the plaintiff, R-T Leasing, moved to disqualify defendant's counsel shortly after the defendant had moved for summary judgment, a circumstance strongly suggesting that the motion had been made

\begin{flushright}
Edelstein, supra note 103, at 1078 (emphasis in original).
\end{flushright}

\textsuperscript{126} Disqualification motions are often little more than "'tools of the litigation process, being used . . . for purely strategic purposes.'" Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977) (quoting Van Graafeiland, \textit{Lawyer's Conflict of Interest—A Judge's View} (pt. 2), N.Y.L.J., July 20, 1977, at 1, col. 2). The value of the disqualification motion as a delaying tactic specifically was noted in Armstrong v. McAlpin, 625 F.2d 433, 437-38 (2d Cir. 1980) (en banc), vacated and remanded on other grounds, 449 U.S. 1106 (1981). Recently, the Supreme Court responded to this problem by ruling that orders denying motions to disqualify are not immediately appealable. See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981).
\textsuperscript{127} 83 F.R.D. 293 (S.D.N.Y. 1979).
\textsuperscript{128} Id. at 294.
\textsuperscript{129} Id. at 296.
\textsuperscript{130} Id. at 296-97.
\textsuperscript{131} No. 79-1720 (S.D.N.Y. Nov. 30, 1979).
to delay the hearing on Ethyl Corporation's motion. Although plaintiff's counsel had been presented with evidence strongly indicating that no material relationship existed between defendant's trial counsel and R-T Leasing sufficient to justify disqualification, the court was unwilling to conclude that no fact existed that could form a reasonable basis for such a motion.

In order to provide a uniform test governing dilatory motion practice, the advisory committee proposed that rule 7 be substantially rewritten to provide a self-contained rule dealing with delay. The proposed revision tracked the language of proposed amended rule 11:

Every motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the motion or other paper and state his address. The signature of an attorney or party constitutes a certificate by him that he has read the motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry there is good ground to support it; and that it is not interposed primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a motion or other paper is not signed, it shall not be accepted for filing. If a motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion or other paper, including a reasonable attorney's fee.132

The thrust of this proposed rule was identical to that of proposed amended rule 11. A violation of the rule is occasioned when counsel's primary motivation is delay. More significantly, the existence of some other legitimate objective will not suffice to prevent discipline if that objective is not substantial.133 Additionally, an

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133 Judge Edelstein's proffer for a new rule 7 provides:
The court may treat as a nullity any motion which is (1) submitted primarily for delay, or (2) submitted by an attorney who knows or should know that substantial delay will result and that the motion if granted will secure very insubstantial relief. The court may impose disciplinary sanctions in an appropriate case.
Edelstein, supra note 103, at 1079.
obligation is imposed to make some inquiry into the factual support for the motion prior to filing. While the Judicial Conference did not deem it necessary to adopt this restatement, simply adopting proposed rule 11 by reference, it is hoped that the amended rule will draw attention to counsel's obligations, diminish if not overcome judicial reluctance to impose sanctions, and thereby further deter dilatory abuse.  

IV. DISCOVERY ABUSE

A. Excessive Demands and Stonewalling Counsel

Because an explosion of publicity ordinarily accompanies the uncovering of fabrication or suppression of evidence, most of the attention regarding misuse of litigation tactics has been focused on discovery misconduct. When Judge Charles Renfrew prepared his seminal article on discovery sanctions, he very properly singled out the Berkey Photo-Eastman Kodak antitrust litigation for purposes of illustration. That case climaxed dramatically in the institution of disciplinary proceedings against Wall Street attorneys who had secreted documents that their opponents had re-


135 See generally D. Segal, Survey of the Literature on Discovery from 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms 10-13 (1978); Brazil, supra note 10, at 824-46. One commentator has stated that discovery today exhausts more time than all other pretrial procedures combined and may make a lawyer's pretrial preparation more difficult than the actual trial. McElroy, Federal Pre-Trial Procedure in an Antitrust Suit, 31 Sw. L.J. 649, 680-81 (1977). Courts must spend increasingly greater amounts of time ruling on discovery motions. Id. at 681. McElroy calls for a "tightening of the free discovery reins. . . . at first informally, and perhaps in one federal jurisdiction at a time, and then finally in some new formal expressions in amendments to the discovery rules." Id. The Supreme Court has also recognized the potential for abuse of discovery procedures. Although the liberal discovery process is valuable to the extent it helps reveal the merits of asserted claims, to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975). Reasons given for widespread evasive practices are the desire to avoid disclosing potentially damaging information, "to capitalize on an opponent's laziness" hoping he will not follow up, to "buy-time," and to discourage additional suits by making the process costly and time consuming. Brazil, supra note 10, at 836 (discussion of rule 37 sanctions).

136 See Renfrew, supra note 5.

quested, while simultaneously representing to the court that the materials had been discarded inadvertently. While the Kodak case presented exceptional facts, Judge Renfrew's suggestion that the case was not an isolated instance of abuse has been borne out by several recent cases.

Penthouse International, Ltd. v. Playboy Enterprises, Inc. involved a letter sent by a Playboy employee to a number of advertising executives. The letter erroneously reported that Penthouse had not met the minimum circulation figures certified to the Audit Bureau of Circulations, an association of publishers and advertisers that audits its members' circulation claims. Penthouse brought an action for trade libel, seeking substantial damages for lost advertising revenues attributable to the letter as well as for corrective advertising. Playboy counterclaimed with charges of unfair competition, challenged the lost revenue claims, and attempted to demonstrate that having enjoyed increased revenues, Penthouse had spent additional sums for self-advertising as a matter of business judgment. Shortly after the litigation was commenced, Playboy served a document request demanding the production of all Penthouse estimates of anticipated advertising space sales beginning in 1972. This request was followed by interrogatories which sought the identities of all parties claiming to have refrained from advertising in Penthouse as a result of the letter. These interrogatories also contained demands for relevant schedules, charts, lists, and financial statements, as well as a renewed request for projections of advertising sales.

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139 Renfrew, supra note 5, at 265.
141 86 F.R.D. at 397.
142 Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 392 F. Supp. 257, 259-60 (S.D.N.Y. 1974). The plaintiff's motion for a preliminary order enjoining the defendants from continuing allegedly libelous conduct was heard in 1974, id. at 258, but was denied, id. at 262.
143 86 F.R.D. at 397.
144 Id. at 397.
145 Id. at 398. Playboy's document request called for production of "[p]rojections or estimates" of Penthouse's "anticipated advertising space sales" for all editions from January, 1972 to the date of the request. Id. In earlier depositions both the publisher and a vice-president of Penthouse testified to the existence of the projections. Id. The chief operations officer, however, stated that advertising projections did not exist. Id.
146 Id.
147 Id. at 399. Penthouse objected to each of Playboy's document requests stating that lost advertising revenues would not be proven through "specific accounts," id. at 398, and
Although several Penthouse employees, including its chief executive officer, had previously testified in depositions as to the existence of advertising projections, Penthouse did not produce the requested information.\(^\text{148}\) Instead, it embarked upon a course of obstruction “accompanied by subterfuge, misrepresentation and false testimony.”\(^\text{149}\) Specifically, Penthouse and its counsel failed to produce the estimates that were readily available,\(^\text{150}\) and despite an order requiring them to respond to the interrogatories, failed to comply until sanctions had been imposed.\(^\text{151}\) Subsequently, in response to the interrogatories requesting the identification of advertisers who allegedly had been influenced by the libelous letter, Penthouse stated that it had no intention of demonstrating advertising revenues by identifying particular accounts,\(^\text{152}\) and, further-

that the requested documents contained trade secrets and fell “within the attorney’s work-product privilege,” id. at 399.

\(^{148}\) Id. at 398; see note 145 supra.

\(^{149}\) 86 F.R.D. at 406.

\(^{150}\) See id. at 401. At trial, Penthouse’s attorney, publisher, controller, and accountant all testified that no written projections of advertising revenues had ever existed. Id. at 400-01. At a later hearing, Penthouse’s attorney stated that a further search for the documents had been made, uncovering the allegedly nonexistent projections. Id. at 401.

\(^{151}\) Id. at 398. Rule 3.4 of the Model Rules of Professional Conduct provides in part:

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act. . .

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . .

\(^{152}\) 86 F.R.D. at 398.
more, never appeared at a hearing scheduled to examine the adequacy of its responses.\textsuperscript{153} Although Penthouse initially contended that the information sought was privileged,\textsuperscript{154} it subsequently informed the trial judge that the projections had never existed.\textsuperscript{155} Before doing so, however, Penthouse attempted to justify its non-production through the assertion of claims that the renewed request was untimely and that, in any event, the estimates had not been "approved" and thus were not within the scope of the document request.\textsuperscript{156} Concluding that Penthouse and its counsel

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{153} Id. The court imposed costs of $150 on Penthouse because of its failure to appear at a hearing. \textit{Id.} in Sanchez v. Phillips, 46 Ill. App. 3d 430, 361 N.E.2d 36 (App. Ct. 1977), a default judgment was entered against the defendants after their attorney had failed to appear at a motion hearing on the plaintiff's motion to strike the defendant's answer for previous failures to appear. \textit{Id.} at 432, 361 N.E.2d at 38. The court stated that "an attorney has a duty to zealously represent a client in accord with the code of professional ethics." \textit{Id.} at 434, 361 N.E.2d at 40.

\item\textsuperscript{154} 86 F.R.D. at 405. Penthouse referred to the requested documents as "highly sensitive, confidential, commercial information and trade secrets." \textit{Id.} at 399. Parties may be granted an order protecting such confidential material where the court is convinced that the desirability of maintaining the secrecy of certain research outweighs the need for discovery. 4 J. Moore, \textit{supra} note 2, ¶ 26.75. However, "no absolute privilege... protects such information." \textit{Id.} Regardless of whether there is a trade secret issue, interrogatories must be answered. \textit{See} United States v. Standard Oil Co., 23 F.R.D. 1, 5 (S.D.N.Y. 1958). \textit{See also} Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir. 1978) (court has no need to determine or apply foreign secrecy laws, calling defendant's claim with reference to Swiss secrecy laws "no more than diversionary tactics"); Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116, 122 (S.D. Ohio 1976) (although 15 U.S.C. § 1681 (1976) prohibits certain disclosures of adverse information in a consumer report, discovery of such information is not prohibited as 15 U.S.C. § 1681b(1) provides for disclosure "[i]n response to the order of a court having jurisdiction to issue such an order").

\item\textsuperscript{155} 86 F.R.D. at 405. The court stated that Penthouse's attorney had made willful misrepresentations to the court. \textit{Id.} at 406. "[A]t the very least he was making representations to the court which he knew he had no basis to make. However, the strong probability is that [he] knew at least in a general way of the existence of the advertising projections and nevertheless stated that there were no such projections." \textit{Id.} The Penthouse attorney's conduct specifically is proscribed by the comment to model rule 3.3:

\begin{quote}
[An assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.]
\end{quote}

\textit{Final Draft of Model Rules, supra} note 13, Rule 3.3 comment.

\item\textsuperscript{156} 86 F.R.D. at 404-05. It is not uncommon for a party initially to deny that documents exist, and later attempt to advance strained construction of the language of the document request or court order requiring production. \textit{See, e.g.,} G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647-48 (9th Cir. 1978). One commentator lists "standard devices" used to resist discovery:

\begin{itemize}
\item Construing all inquiries and requests as narrowly as possible, thereby limiting the amount of useful information that must be divulged;
\end{itemize}
\end{itemize}
\end{footnotesize}
flagrantly had violated the discovery rules throughout the entire litigation, the trial judge dismissed the complaint.  

In *Litton Systems v. AT&T*, Litton charged AT&T and its affiliates with violating the antitrust laws by monopolizing the sale and leasing of telephone terminal equipment. By way of defense, AT&T alleged that Litton's telephone subsidiary went out of business due to mismanagement, incompetence, and dishonesty. To establish its claims, AT&T sought the production of records of interviews conducted by Litton's house counsel with various Litton employees regarding financial improprieties in the operation of the company. Litton's trial counsel initially maintained that no such records existed other than notes of interviews with five persons under indictment for bribery. In fact, however, Litton's files contained handwritten notes of interviews with other employees relating to "skimming" and payment of "finder's fees." After discovering these additional notes, trial counsel failed to correct their prior misstatement and furnished copies of the notes of the interviews with the five indictees without the intervening pages con-
taining the additional interviews.\textsuperscript{164} Indeed, counsel represented that the omitted pages contained information wholly extraneous to the case.\textsuperscript{166} Notwithstanding his conclusion that the defendants were not prejudiced to any significant extent, the trial judge ruled that the gross negligence and willful misconduct of Litton's house and trial counsel warranted substantial sanctions.\textsuperscript{166} Although the trial judge refused to set aside a substantial jury verdict in favor of Litton, the court denied Litton costs and attorney's fees which would have "run well into the eight-figure range."\textsuperscript{167}

These examples of unjustified resistance to legitimate discovery requests reflect only one aspect of discovery abuse. Other widespread abuses include engaging in "fishing expeditions," delaying the completion of discovery, and forcing opposing counsel to incur unnecessary expenses by requesting inordinately large numbers of documents, producing requested documents in large, unorganized lots, or serving overly extensive interrogatories. For example, in \textit{In re U.S. Financial Securities Litigation},\textsuperscript{168} the defendant served the plaintiffs with interrogatories containing 2,736 questions that would have cost an estimated $24,000 to answer.\textsuperscript{169} Similarly, in \textit{Barouh Eaton Allen Corp. v. IBM},\textsuperscript{170} the trial court vacated 200 interrogatories that had been served by IBM almost simultaneously with notices of dispositions through which identical information could have been obtained.\textsuperscript{171} In addition, the trial judge imposed a $1,000 sanction upon IBM's attorneys which was to be paid by them personally prior to any further discovery.\textsuperscript{172}

\textsuperscript{164} \textit{Id.} at 417-18.  
\textsuperscript{166} \textit{Id.} at 418.  
\textsuperscript{166} \textit{Id.} at 420-21; see Litton Sys., Inc. v. AT&T, 91 F.R.D. 574, 578 (S.D.N.Y. 1981) (on reconsideration). When the court heard the discovery motion, the trial of the case already had proceeded for nearly 5 months. 90 F.R.D. at 421. Imposition of sanctions, therefore, was postponed "because of the risk that the lengthy ordeal [of trial] would have to be repeated, for example, if the Court of Appeals should reverse this Court's findings and conclusions as to the misconduct of the plaintiff's counsel or should disagree as to the sanctions imposed."
\textit{Id.}  
\textsuperscript{167} 91 F.R.D. at 578.  
\textsuperscript{168} 74 F.R.D. 497 (S.D. Cal. 1977).  
\textsuperscript{169} \textit{Id.} at 497-98.  
\textsuperscript{170} 76 App. Div. 2d 873, 429 N.Y.S.2d 33 (2d Dep't 1980).  
\textsuperscript{171} \textit{Id.} at 874, 429 N.Y.S.2d at 35.  
\textsuperscript{172} \textit{Id.}
B. The Attorney's New Ethical Duties Under the Proposed Model Rules

In response to the growing body of literature calling for discovery reform, the drafters of the Model Rules of Professional Conduct have proposed a rule that has no counterpart in the current ABA Model Code of Professional Responsibility. Model rule 3.4(d) prohibits an attorney from making frivolous discovery requests.\(^\text{x}\) Moreover, under rule 3.4(d), a reasonably diligent effort must be made to comply with proper discovery requests.\(^\text{y}\) According to the notes accompanying the 1981 draft of the proposed rule, the intent was to incorporate into the rule governing discovery practices the same objective standard adopted in rule 3.1 to regulate other abuses.\(^\text{z}\) This proposal is in accord with the Supreme Court decisions in National Hockey League v. Metropolitan Hockey Club, Inc.,\(^{\text{aa}}\) and Roadway Express, Inc. v. Piper.\(^{\text{bb}}\) National Hockey League involved the dismissal of a multidistrict antitrust suit after plaintiff's counsel callously disregarded their responsibility to answer interrogatories.\(^{\text{cc}}\) Although the Third Circuit reversed on the basis of an absence of bad faith,\(^{\text{dd}}\) the Supreme Court reinstated the dismissal, noting that severe sanctions are

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\(^{\text{x}}\) See Final Draft of Model Rules, supra note 13, Rule 3.4 comment. For attorneys' interpretations of the "prevailing ethic," see Brazil, supra note 10, at 836, 838.

\(^{\text{y}}\) See Final Draft of Model Rules, supra note 13, Rule 3.4(d).

\(^{\text{z}}\) 1981 Draft of Model Rules, supra note 13, Rule 3.4 comment.


\(^{\text{bb}}\) 447 U.S. 752 (1980).

\(^{\text{cc}}\) 427 U.S. at 643. The district court imposed the sanction of dismissal against the Metropolitan Hockey Club, pursuant to Rule 37 of the Federal Rules of Civil Procedure, for failure to comply with a discovery order. Id. at 640-41. Rule 37 grants trial courts the power to enforce compliance with the rules of discovery, provided the court exercises reasonable discretion as to the alternative sanctions. Fed. R. Civ. P. 37. Accordingly, rule 37(b)(2)(C) provides:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order . . . dismissing the action or proceeding or any part thereof.

Fed. R. Civ. P. 37(b)(2)(C). Thus, in finding that Metropolitan unjustifiably resisted discovery by failing to answer crucial interrogatories, the trial court held that dismissal was warranted. 427 U.S. at 641 (citing In re Professional Hockey Antitrust Litig., 63 F.R.D. 641, 656 (E.D. Pa. 1974)).

\(^{\text{dd}}\) 427 U.S. at 641. Noting that Metropolitan's untimely answer to interrogatories was not willful, the court of appeals concluded that the sanction of dismissal was improper. Id. (citing In re Professional Hockey Antitrust Litig., 531 F.2d 1188, 1195 (3d Cir. 1976)). Moreover, the court of appeals indicated that the record contained evidence of extenuating factors which would militate in favor of a less severe sanction. 427 U.S. at 641.
necessary to deter other litigants who otherwise might be tempted to flout discovery orders. The deterrent rationale was reemphasized in *Roadway Express*, in which the Court held that an attorney, as well as a party litigant, may be held liable for the expenses and attorney's fees resulting from failure to comply with a discovery order. The emerging deterrence orientation has led some

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180 427 U.S. at 643. The *National Hockey League* Court adhered to its prior decision in *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958), which ruled that bad faith is a requisite for dismissal under rule 37(b), id. at 212. See 427 U.S. at 640. While a case may not be dismissed, absent willfulness, for failure to comply with a discovery order, a showing of willfulness is unnecessary under rule 37(b). 357 U.S. at 207-08. Emphasizing the trial court's discretion in imposing sanctions, the *National Hockey League* Court reasoned that the district judge did not abuse his discretion by ordering dismissal under the factual circumstances. 427 U.S. at 643. Notably, the Court stated: 

"[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

*Id.*

181 447 U.S. at 763-64. The respondents in *Roadway Express* filed a civil rights class action in federal district court alleging employment discrimination. *Id.* at 754. Pursuant to Roadway's motion under Federal Rule of Civil Procedure 37, the district court dismissed the action without reaching the merits, due to the respondents' attorneys' misconduct. *Id.* at 755. The attorneys' misconduct included a failure to comply with a court discovery order, a failure to file a court-ordered brief and other "deliberate inaction" in handling the case. *Id.* (quoting Monk v. Roadway Express, Inc., 73 F.R.D. 411, 417 (W.D. La. 1977), vacated and remanded, 599 F.2d 1378 (5th Cir. 1979), rev'd in part sub nom. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). Relying on section 1927 of title 28, the court assessed the respondents' attorneys personally for petitioner's court costs and attorney's fees. 73 F.R.D. at 415, 417. On appeal, the court of appeals affirmed the district court's findings that the attorneys had increased the costs in the suit by their "unreasonable and vexatious multiplication of the proceedings." *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381 (5th Cir. 1979), rev'd in part sub nom. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Although the court of appeals concluded that the attorneys' actions justified the imposition of sanctions, the court nevertheless held that section 1927 did not authorize the award of attorney's fees. 599 F.2d at 1382-83. Despite its observation that section 1927 provides only for excessive costs, not attorney's fees, caused by the respondents' vexatious behavior, the Supreme Court held that the federal court had inherent authority to assess the opposing party's attorney's fees against an attorney for unreasonable conduct during the litigation. 447 U.S. at 765. In reaching this conclusion, the *Roadway Express* Court focused on the federal court's inherent power to protect the orderly administration of justice which allows the court to impose sanctions to deter abusive litigation. *Id.* (citing *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962)). Furthermore, the Court noted an exception to the general rule that a litigant cannot recover his attorney's fees. 447 U.S. at 765. Through its inherent equitable power, a federal court may award fees against a party who has litigated in bad faith. *Id.* at 765-66. The Court extended this bad faith exception to encompass attorneys, reasoning that "[i]f a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes." *Id.* at 766. Thus, an award of fees against an attorney effectively will deter the abusive litigation and concomitantly ensure the orderly administration of justice. This is especially true since most court orders
commentators to advocate the imposition of severe sanctions even when noncompliance is unintentional.\textsuperscript{182}

Unfortunately, it is more difficult to regulate excessive discovery than it is to deter unjustified resistance to discovery.\textsuperscript{183} In addition to perennial recommendations that a stricter relevance standard be incorporated into the rules,\textsuperscript{184} or that depositions and expressly preclude indemnity from counsel's client. See, e.g., Associated Radio Serv. Co. v. Page Airways, 25 Fed. R. Serv. 2d 218, 220 (N.D. Tex. 1977).

\textsuperscript{182} Note, Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37, 29 CASE W. RES. 603, 627-30 (1979); Comment, Preventing Abuse of Discovery in Federal Courts, 50 CATH. U.L. REV. 273, 303-05 (1981). Acknowledging a majority trend to impose sanctions for an unintentional or negligent failure to comply with a court's discovery order, several commentators have cautioned against such an extension, contending that ultimate sanctions should be imposed only where there is a showing of willfulness. See Epstein, Corcoran, Krieger & Carr, supra note 156, at 443-44; Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 HARV. L. REV. 1039, 1049-51 (1978); Note, Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Discovery Sanctions, 65 MINN. L. REV. 137 (1980) [hereinafter cited as Note, Defining a Feasible Culpability Threshold]. Despite such caution, some courts have concluded that gross negligence also should be subject to the severe sanctions imposed by Rule 37 of the Federal Rules of Civil Procedure. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1067-68 (2d Cir. 1979). Emphasizing the deterrence policy articulated in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976), the Cine court reasoned that "[n]egligent, no less than intentional, wrongs are fit subjects for general deterrence." 602 F.2d at 1067. Notably, the concurrence recognized that precautionary measures embodying a concern for the innocent client are necessary. Consequently, the concurrence observed, a trial judge should not impose harsh sanctions upon a client, absent the client's "knowledge, condonation, compliance, or causation" in the attorney's misconduct. Id. at 1068-69 (Oakes, J., concurring).

\textsuperscript{183} See Krupp, Rule 37; Sanctions for Discovery Resistance, 7 LITIGATION 32, 60 (Spring 1981). Krupp noted the difficulty inherent in providing clear-cut sanctions to control excessive discovery:

It is exceedingly difficult to legislate or make effective rules against overkill. Who is to say that two dispositions or ten are excessive in the context of a given action?
A case involving a relatively small amount may be very important to either of the parties because of its potential as precedent.

Id. Subsequently, an advisory committee was appointed and ultimately proposed some reform in the sanctions available to combat excessive discovery. For an excellent discussion of the various proposals, their scope and drawbacks, see Flegal & Umin, Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 B.Y.U. L. REV. 597, 597-603. Apparently, the advisory committee did not adequately address the corrective measures necessary to proscribe the problem of excessive use of discovery. See Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 522-23, 526-27, 541-44 (1980).

\textsuperscript{184} See D. SEGAL, supra note 135, at 17-20. Proposed by the Special Committee for the Study of Discovery Abuse of the American Bar Association, the suggested amendment to rule 26(b)(1) contains a discovery standard of relevance "to the issues raised by the claims or defenses of any party." Id. Rule 26(b)(1) of the Federal Rules of Civil Procedure currently provides a standard of relevance "to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." FED. R. CIV. P. 26(b)(1). The phrase "relevant to the
interrogatories be limited to an arbitrary number absent a showing of good cause, recent proposals have emphasized both a greater role for the court in expediting discovery and a preventive rather than a wholly sanction-oriented approach to the problem of excessive discovery.

subject matter involved in the pending action" has been construed to encompass "any matter that bears on, or that could lead to other matter that bears on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citation omitted).

See D. Segal, supra note 135, at 49-50. Recognizing that reforms to limit the number of interrogatories a party may serve during discovery have not undergone much scrutiny, the advisory committee suggested that a limitation be imposed on the number of discretionary interrogatories within each district, rather than fix a threshold limitation. Id. at 50. Notably, this approach has been adopted by the local rules of several federal districts. See, e.g., Flegal & Umin, supra note 183, at 606 n.30. Typically, these rules provide:

No party shall serve on any other party more than twenty (20) interrogatories in the aggregate without leave of court. Subparagraphs of any interrogatory shall relate directly to the subject matter of the interrogatory. Any party desiring to serve additional interrogatories shall file a written motion setting forth the proposed additional interrogatories and the reasons establishing good cause for their use. N.D. Ill. R. 9(g). Although many jurisdictions have been receptive to this approach, other jurisdictions have opposed any limitation on the number of interrogatories as "unworkable." D. Segal, supra note 135, at 50 & n.140; cf. Bogorad, The Impact of the Amended Rules Upon Discovery Practice Before the Trademark Trial and Appeal Board, 66 TRADE-MARK REP. 28, 38 (1976) (trademark board eliminated the practice of limiting the number of interrogatories due to influx of motions for additional interrogatories and attorney ingenuity in circumventing the rule).

See Nordenberg, The Supreme Court and Discovery Reform: The Continuing Need for an Umpire, 31 SYRACUSE L. REV. 543, 562 (1980). Observing the trial confusion engendered by the pattern of minimal judicial involvement during discovery, as designed by federal rules, id. at 555-60, Professor Nordenberg opined that "[s]upervision and guidance from the court is, again, the only answer [for the proper management of discovery]." Id. at 562. Alternatively, a court-appointed referee to oversee the discovery may be required to reduce, yet not eliminate, court supervision. See Park-Tower Dev. Group, Inc. v. Goldfeld, 87 F.R.D. 96, 98 (S.D.N.Y. 1980) ("[i]t would be wholly unwarranted for any judge or magistrate to set aside the time that would be required to deal with [excessive discovery].... We feel that the Special Master . . . be put in charge [to supervise discovery]"; see also Eggleston v. Chicago Journeymen Plumbers Local 130, 657 F.2d 890, 904 (7th Cir. 1981) (where questioning by counsel was "excessive, burdensome, unnecessary and intrusive . . . [the court] recommended the appointment of a special master . . . to expedite further discovery").

See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976). In determining that an attorney's failure to comply with a court order to answer interrogatories justified dismissal of the action, the National Hockey League Court stressed the deterrent function of rule 37 sanctions. Id. at 642-43. Significantly, National Hockey League was the first case to interpret the rule 37 sanctions and thereby set the stage for the subsequent influx of decisions geared toward this preventive approach accorded the problem of excessive discovery. See Epstein, Corcoran, Krieger & Carr, supra note 156, at 418-43. One commentator notes that both an increased judicial role in discovery and a greater willingness to impose the sanctions have contributed to the current shift toward preventive discovery. See Pope, Rule 34: Controlling the Paper Avalanche, 7 LITIGATION 28, 57-58
C. Judicial Intervention Through Federal Rule 26

Federal Rule of Civil Procedure 26(f) currently provides for a discovery conference to be held on the motion of a party, or, when deemed necessary, by the court on its own motion. The motion must certify that counsel has made a "reasonable effort to reach agreement with opposing attorneys" and must provide a statement of the issues, a proposed discovery plan and schedule, and any proposed limitations on the discovery process. After the discovery conference, the court is required to identify the issues on which discovery may be had and establish any other limitations on the scope, timing or method of discovery. To assure counsel's cooperation in framing this discovery order, rule 37 was simultaneously amended to enable the court to require that a party or his attorney pay the reasonable expenses and attorney's fees resulting from his failure "to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f)."

The efficacy of rule 26(f) is discussed in the American College of Trial Lawyers' recommendations which concludes that it

(Spring 1981).

188 Fed. R. Civ. P. 26(f). The court may combine a discovery conference with the discretionary pretrial conference under rule 16, id., thereby encouraging the identification of issues before discovery begins. Accordingly, the advisory committee proposed that rule 16 be amended to include a mandatory scheduling conference, an expansion of the list of subjects to be discussed at pretrial, a settlement conference, the use of pretrial procedures to expedite discovery, the issuance of binding pretrial orders and the imposition of sanctions for failure to comply with the rule. 1981 Draft of Proposed Amendments to the Rules of Civil Procedure, supra note 16, Rule 16 advisory committee note, at 14-22. See also Brazil, Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1981 AM. B. FOUNDATION RESEARCH J. 875, 916-36 (recommending further proposals to amend rule 16).

190 Fed. R. Civ. P. 26(f)(1)-(5). Rule 26(f) imposes a good faith duty on each party and his attorney to participate in framing a discovery plan. Id. 26(f)(5).

191 Id. 26(f).

192 Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207, 221-25 (1981). Rule 26(f) of the Federal Rules of Civil Procedure is designed to promote the efficiency of the pretrial discovery process by narrowing and simplifying the issues for trial, through stipulations of uncontroverted facts and reduction of unnecessary discovery. Id. at 222; see, e.g., United States v. Cox, 664 F.2d 257, 259 (11th Cir. 1981) (appellant was given detailed list of items constituting converted property at pretrial discovery conferences); cf. United States v. Arcentales, 532 F.2d 1046, 1047 & n.4 (5th Cir. 1976) (pretrial discovery conference held pursuant to Federal Rule of Criminal Procedure 16). Discovery would then be limited to the issues agreed upon by the parties. See 90 F.R.D. at 222. The discovery process, however, would not be static. Discovery could be broadened or narrowed after a conference had taken place upon a showing to the court that there was a justification for doing so. Id. at 222-23.
functions as a valuable mechanism for avoiding the weaknesses inherent in the traditional "protective order" system by allowing the court to compel the litigant to state the issues, to "limit discovery to those issues," to discern those that are dispositive of the case, and to permit discovery regarding them. The advisory committee recommended that the discovery conference be supplemented with substantial amendments to rule 26. Proposed rule 26(b) provides the court with the authority to limit the use of discovery if

(i) the discovery sought is unreasonably cumulative [sic] or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice pursuant to a motion under subdivision (c).

The Control Data case demonstrates that judicial intervention

90 F.R.D. at 217-19. Local rules and practices have been promulgated in an effort to reduce discovery abuse. See Note, Recent Trends in the Enforcement of Discovery: Sanctions in the Federal Courts and in Illinois, 11 Loy. U. Chi. L.J. 773, 790 (1980). Some of these rules deal with the trial court's use of a pretrial discovery conference. See, e.g., M.D. N.C. R. 22; N.D. Ohio R. 2(a)(6); E.D. Pa. R. 7. These local rules have been upheld where they are deemed consistent with the intent of the Federal Rules of Civil Procedure. Beer Nuts, Inc. v. King Nut Co., 477 F.2d 326, 329-30 (6th Cir. 1973). Where, however, they require a virtual trial on the merits, the local rules have been struck down. See McCargo v. Hendrick, 545 F.2d 393, 402 (4th Cir. 1976). Fundamentally, the problem with the nonuniform rules was that they tended to place too great a burden on attorneys and circumvent the simple procedures envisioned by Rule 16 of the Federal Rules of Civil Procedure. See Note, Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts, 64 Va. L. Rev. 467, 474-75 (1978).

90 F.R.D. at 217.


often is necessary to prevent counsel from engaging in "discovery wars" or burying each other in "boilerplate," without furthering any legitimate interest of either client. Proposed rule 26(b) would provide the trial judge with the authority to limit or terminate cumulative or duplicative discovery,\(^{197}\) as well as enable him to require the use of one discovery device rather than another.\(^{198}\) The reported cases and commentary suggest that such a rule frequently may be invoked to curb the abuses associated with oppressive or duplicative interrogatories.\(^{199}\)

Finally, the preventive approach toward the problem of excessive discovery embodied in rule 26(f) and proposed rule 26(b) does not mean that the more objective standard of culpability advanced in the model rules went unnoticed. Characterized by one commentator as the "Truth in Discovery Rule,"\(^{200}\) proposed rule 26(g) mandates that every request, response or objection be signed individually by an attorney of record and contain his address.\(^{201}\) In the event a party is proceeding pro se, he must sign the request, objection, or response himself and give his address.\(^{202}\) This signature certifies that the request, response or objection is:

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... (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.
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\(^{198}\) Id.


\(^{200}\) Rosenberg, supra note 17, at 9.

\(^{201}\) Final Draft of Proposed Amendments to the Rules of Civil Procedure, supra note 16, Rule 26(g).

\(^{202}\) Id.

\(^{203}\) Id. It is hoped that the added responsibility of certification will induce an attorney to examine more carefully the factual basis of the intended discovery. This is deemed a rule of "reasonable inquiry." See Final Draft of Model Rules, supra note 13, Rule 3.3.
Unsigned requests, responses, or objections are deemed ineffective and may be stricken. Whenever certifications violative of proposed rule 26(g) are made, the court must impose appropriate sanctions, which may include an assessment of reasonable expenses and attorney's fees.

This provision adopts an "objective" standard identical to that advanced in the model rules and proposed rules 7 and 11. Like these other rules, proposed rule 26(g) will "protect lawyers who make honest errors of judgment while exercising the level of care observed by reasonably competent and ethical lawyers [and lead] attorneys to investigate a little more fully the claims that their clients want them to assert on their behalf."

V. Conclusion

Currently, pressure is being exerted on the legal profession to adopt procedural and ethical reforms which would prohibit the institution of groundless lawsuits and the use of motion and discovery devices for purposes of delay. An increasing number of jurisdictions have abandoned or modified the traditional rule granting trial counsel an absolute immunity from the claims of third-parties. Indeed, the proponents of the Model Rules of Professional

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207 *Renfrew, supra* note 5, at 274; *accord Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979); *Affanato v. Merrill Bros.*, 547 F.2d 138, 141 (1st Cir. 1977) (counsel's conduct amounted to more than mere negligence). *See also Note, Defining a Feasible Culpability Threshold, supra* note 182, at 157 (until standard of culpability is clarified, courts will have difficulty justifying the imposition of severe sanctions in all but the clearest cases of intentional abuse).

208 *E.g., ILL. ANN. STAT. ch. 110A, § 206(d) (Smith-Hurd 1968).* Section 206(d) provides in pertinent part:

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in any manner that unreasonably annoys, embarrasses, or oppresses the
Conduct have embraced the emerging standards of attorney liability.

Although there is considerable doubt regarding whether the model rules will gain the support of the bar, they have provided secondary authority for the formulation of a more objective standard of culpability governing the imposition of discovery sanctions in the federal courts. Moreover, the emphasis throughout the model rules upon balancing the legitimate interests of the client against the resultant delay has been carried forward in the proposed amendments to Federal Rules of Civil Procedure 7, 11 and 26. By allowing trial judges to determine whether a litigant’s legitimate nondelay interests outweigh the delay which would accompany the particular motion or request, these provisions should encourage trial judges to sanction errant counsel with greater frequency and thus deter the abusive practices that, previously, often went unpunished. In addition, the proposed amendments to the federal rules would supplement this approach by encouraging greater judicial participation in controlling the scope and timing of permissible discovery.

deponent or party, the court may order that the examination cease forthwith or may limit the scope and manner of taking the examination as provided by these rules. . . . Upon the demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to present a motion for an order. The court may require either party or the deponent to pay costs or expenses.

Id. See Renfrew, supra note 5, at 280-81 (use of the pretrial discovery conference will decrease the possibility that discovery abuses will go undetected and therefore unpunished). The proposed rules are also intended to provide the court with greater flexibility to impose necessary sanctions by streamlining procedures for their imposition. See McKinstry, Civil Discovery Reform, 14 Forum 790, 800 (1979). Under rule 26(f), and the companion proposed modification under rule 37(e), discovery abuses may now be dealt with summarily by imposing monetary sanctions. Id.