Chapter 1

Pre-suit Investigation and the Pursuit of Frivolous Claims

I. Introduction and Overview

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

This chapter explores these central ethical obligations that affect both plaintiffs’ lawyers and defense attorneys. Part II examines the ethical prohibition against the pursuit of frivolous claims and contentions and how governing rules of professional conduct obligate lawyers to undertake reasonable investigations before making claims or contentions on clients’ behalf. Part III discusses a number of ethics rules that restrict a lawyer’s ability to communicate with others to satisfy this ethical duty of investigation or that otherwise impose duties on the lawyer with respect to the rights of persons other than her own client. Part IV discusses a number of other important sources of law beyond rules of professional conduct that a lawyer’s pursuit in litigation of frivolous claims or contentions may implicate.
II. The Ethical Prohibition Against Pursuing Frivolous Claims and Lawyers’ Duty to Investigate

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

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.1

In addition to its obvious application to traditional client representations, Model Rule 3.1 applies to lawyers who represent themselves.2 It is worth noting at the outset that although Model Rule 3.1’s title speaks of claims and contentions that are “meritorious,” the text of the rule does not actually require lawyers to only pursue meritorious claims and contentions. Such a standard would be nearly impossible to enforce given the many factual and legal ambiguities that routinely exist in litigation. Plus, even where the law is clear, there is always the potential for change. Accordingly, Model Rule 3.1 takes the more realistic approach of prohibiting lawyers from pursuing claims and contentions unless they have “a basis in law and fact for doing so that is not frivolous.”3 In other words, a claim or contention may be meritless without being frivolous.4 While Model Rule 3.1 does not attempt to define the term “frivolous,” it does provide significant guidance on the topic of legal arguments by spelling out a few examples of conduct or practice that satisfy

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4. See, e.g., Commonwealth v. Chmiel, 30 A.3d 1111, 1190 (Pa. 2011) (distinguishing frivolous claims from meritless ones); In re Houston, 675 S.E. 2d 721, 723 n.1 (S.C. 2009) (finding that a meritless racial profiling claim did not violate Rule 3.1); Johnson v. Miller, 818 N.W.2d 804, 809 (S.D. 2012) (quoting Stratmeyer v. Engberg, 649 N.W.2d 921, 926 (S.D. 2002)); In re S.C., 88 A.3d 1220, 1223–24 (Vt. 2014) (discussing frivolous arguments in the context of appellate practice and appointed counsel’s motion to withdraw based on Rule 3.1); see also Estate of McLemore v. McLemore, 63 So. 3d 468, 490 (Miss. 2011) (observing that a case may be “weak” or “light-headed” without being “frivolous” for the purpose of awarding sanctions).
the “not frivolous” standard of the rule; namely, good faith arguments for extensions of existing law, good faith arguments for modifications of existing law, and good faith arguments for reversing existing law.5

A reliable definition of what constitutes a frivolous claim or contention with substantial currency across the nation, and that seems to apply as readily to evaluating underlying factual assertions as to legal arguments, is found in the Restatement (Third) of the Law Governing Lawyers.6 The Restatement describes a claim or contention as being frivolous when it is one “that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal will accept it.”7 Courts often describe a contention or claim as being frivolous when it has no basis in fact or law.8 Applying either standard, and as a general rule, the fact that a lawyer believes that a particular claim or contention is likely to fail still does not render it frivolous.9 Nor is a claim or contention frivolous merely because it proves to be unsuccessful.10 This final point holds true even when a claim is defeated by way of a dispositive motion.11

Lawyers may not defend against alleged Rule 3.1 violations on the basis that they did not know or understand the law, or made a “mistake of law.”12 For a lawyer to make such an argument would be to confess incompetence. Courts and disciplinary authorities rightly expect lawyers to know the law before making particular claims or contentions, although lawyers are unlikely to be found to have violated Rule 3.1 where the legal issue in question is unsettled.13

5. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2015). A comment to the Model Rule also explicitly mentions what is otherwise implied by the rule—that “a good faith argument on the merits of the action taken” is also sufficient to be not frivolous. Id. cmt. 2. A number of jurisdictions with rules patterned after Model Rule 3.1 add to the comment an example, originating from an older version of Model Rule 3.1, indicating that an action will be deemed frivolous when the client wants to pursue it “primarily for the purpose of harassing or maliciously injuring a person.” See, e.g., ARIZ. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2014); TENN. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2014); VA. RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2014).


7. Id. § 110 cmt. d; see also Johnson, 818 N.W.2d at 808–09 (applying a similar standard).


9. See In re S.C., 88 A.3d at 1223 (“[T]he assertion of a claim that an attorney believes to be without merit or lacking any meaningful chance of success does not render an appeal ‘frivolous’ or unethical.”).


11. Johnson, 818 N.W.2d at 809 (referring to summary judgment).


13. Id.
A. Lawyers’ Duty of Reasonable Inquiry

Model Rule 3.1 also requires that the lawyer’s conclusion that there is a non-frivolous basis for the claim or contention be formed after reasonable inquiry. Accordingly, lawyers must conduct some type of preliminary investigation into clients’ intended claims and contentions. Lawyers cannot avoid this obligation by stating in a pleading that allegations are being made upon information and belief. Recognizing a duty to investigate in order to meet the requirements of Model Rule 3.1 is entirely consistent with lawyers’ need to satisfy their duty of competence under Model Rule 1.1. Nevertheless, the nature and extent of the investigation required will depend on a number of variable factors. These factors include the complexity or nature of the claims or contentions to be investigated or developed, the time in which the investigation must be conducted, the resources available to the lawyer to conduct the investigation, the availability and cooperation of potential fact and expert witnesses, whether expert witnesses must be consulted, the availability of evidence that can be obtained without formal discovery, whether any investigation has been conducted prior to the lawyer undertaking the representation, the existence of parallel proceedings that complicate or expedite matters, and probably more.

A comment to Model Rule 3.1 addresses to some extent the tensions that can exist between lawyers’ obligations under this rule and the practical realities of particular circumstances that lawyers may face:

14. See, e.g., Jorgensen v. Taco Bell Corp., 58 Cal. Rptr. 2d 178, 181 (Ct. App. 1996) (“Frivolous litigation is frequently avoided by a careful lawyer’s investigation of a client’s claims before filing suit.”); Idaho State Bar v. Hawkeye, 92 P.3d 1069, 1074 (2002) (calling a lawyer’s pre-suit investigation “trivial” in concluding that lawyer violated Rule 3.1); Hunt v. Dresie, 740 P.2d 1046, 1053 (Kan. 1987) (“It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise, the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client.”); Weatherbee v. Va. State Bar, 689 S.E.2d 753, 756 (Va. 2010) (concluding that lawyer violated Rule 3.1 where a preliminary investigation would have revealed the falsity of a number of his allegations).

15. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2015) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); see, e.g., People v. Boyle, 942 P.2d 1199, 1201 (Colo. 1997) (disciplining a lawyer who failed to learn of readily available evidence regarding client’s petition for asylum); Attorney Grievance Comm’n of Md. v. Chasnoff, 783 A.2d 224, 231 (Md. 2001) (violating Rule 1.1 by failing to visit an accident scene for two years and not attempting to locate a witness believed to have favorable testimony for the lawyer’s client).


17. See Jandrt ex rel. Brueggeman v. Jerome Foods, Inc., 597 N.W.2d 744, 759 (Wis. 1999) (discussing frivolous litigation under Wisconsin statutes and stating that while good practice may dictate that an expert be consulted prior to filing a claim upon which expert testimony will be required at trial, a per se rule requiring expert testimony cannot be reconciled with the objective standard by which lawyers’ investigations should be judged).
The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.\textsuperscript{18}

In time-sensitive matters—as where, for example, a statute of limitations is about to expire—the obligation to investigate the merits of the client’s claims or contentions can be deferred until after filing suit.\textsuperscript{19} Any deferral must be reasonable under the circumstances; legitimate urgency may temporarily postpone a lawyer’s duty to investigate, but it does not eliminate or excuse it. The longer lawyers wait to conduct reasonable post-filing investigations, the greater the risk of discipline or sanctions for pursuing frivolous claims. The question of how long is too long can only be answered on a case-by-case basis.

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

A number of decisions provide helpful insight into the contours of lawyers’ ethical duty to satisfy themselves regarding claims and contentions proffered by clients, including addressing when, if ever, a lawyer can simply take a client at her word without investigating further. Not surprisingly, the duty is nearly universally mea-

\textsuperscript{18} Model Rules of Prof’l Conduct R. 3.1 cmt. 2 (2015).

\textsuperscript{19} See, e.g., CTC Imps. & Exps. v. Nigerian Petroleum Corp., 951 F.2d 573, 579 (3d Cir. 1991) (“The shorter the time, the more reasonable it is for an attorney to rely on the client or forwarding counsel.”); Sanchez v. Liberty Lloyds, 672 So. 2d 268, 273 (La. Ct. App. 1996) (refusing to sanction lawyer who filed general denial under time constraints to avoid an entry of default against client); State Bar of Ga., Formal Advisory Op. 87-1, at 2 (1989) (concluding that attorney facing expiration of statute of limitations acts ethically in filing suit if “a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim”); Or. Eth. Op. 2005-59, 2005 WL 5679648, at *1 (Or. State Bar Ass’n, Bd. of Governors 2005) (concluding that when statute would run before attorney could investigate whether claim exists sufficient to justify joining additional defendants, attorney could join defendants as long as they will not agree to extend the limitation period or an extension is otherwise not feasible, attorney thereafter investigates diligently, and dismisses defendants promptly if no claim actually exists).
sured by an objective standard. The court in Wisconsin Chiropractic Ass’n v. State thoroughly described the nature of lawyers’ duty to inquire:

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

Other courts agree that lawyers are entitled to rely upon clients’ factual recitations when they are “objectively reasonable” and in some cases even when the client’s factual construct is arguably questionable, but only if the lawyer’s other pre-suit investigative efforts were unsuccessful or other sources of information were not available either to verify or to disprove the client’s version of events.


22. Id. at 589 (internal citations omitted).

23. See, e.g., In re Taylor, 655 F.3d 274, 284 (3d Cir. 2011) (explaining that it is “usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information”); Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1329 (2d Cir. 1995) (discussing attorneys’ ability to rely on clients’ objectively reasonable assertions); CTC Imps. & Expks., 951 F.2d at 579 (refusing to sanction lawyer who had no reason to know or suspect underlying documents were forged and who was not in a position, given exigent circumstances, to obtain vital information before acting); Kraemer v. Grant Cnty., 892 F.2d 686, 690 (7th Cir. 1990) (finding that a lawyer who filed a conspiracy claim acted properly where his private investigator was unable to get the target defendants to cooperate in providing information addressing his client’s allegations); Cont’l Ins. Co. v. Constr. Indus. Servs. Corp., 149 F.R.D. 451,
A comparison of two Seventh Circuit cases presents a helpful contrast of circumstances as to when a lawyer’s reliance on her client’s assertions in pursuing a lawsuit are reasonable. In *Kraemer v. Grant County*, the court agreed that a lawyer who had relied solely upon his client’s assertions in deciding to sue Grant County had acted appropriately. The lawyer had advanced a position, consistent with the language in Comment 2 to Model Rule 3.1, that filing the lawsuit alleging a conspiracy would permit him to pursue formal discovery to uncover information to verify the client’s contentions. The court explained that, given the secretive nature of a conspiracy, the lawyer did “all he reasonably could have done to investigate his client’s account of events” before filing the complaint; after all, it could not impose a standard that would require the lawyer to procure a confession from a conspirator before filing suit. The Seventh Circuit stressed that the lawyer had made other efforts at inquiring about the facts before filing suit, including hiring a private investigator, but those efforts were fruitless because the defendants did not cooperate in the investigation and stonewalled the lawyer’s efforts to obtain information.

In contrast, the conduct of Wisconsin lawyer William J. Nunnery in *Jiminez v. Madison Area Technical College* demonstrates that reliance upon obviously fraudulent documents does not constitute a reasonable investigation. Nunnery’s representation of Elvira Jiminez began with a workers’ compensation claim brought against her employer, Madison Area Technical College, based on Jiminez’s assertion that college administrators had racially and sexually harassed her. To support her claim, Jiminez produced a series of plastic-laminated e-mails containing derogatory racial comments about her and discussing sexual harassment visited upon her. As for the odd laminated...
tion of the e-mails, Jiminez insisted that the messages were authentic and said that she laminated them after printing to “prevent them from being stolen.” In response, the college provided sworn statements from the purported authors of the e-mails denying having written them and characterizing the e-mails as a “complete fabrication” and a “forgery.” The college then asked Nunnery to produce the original e-mails. He did not produce the originals and, ultimately, Jiminez’s workers’ compensation claim was denied and the college fired her.

After the workers’ compensation claim was dismissed, Nunnery continued to pursue Jiminez’s claims by suing the college in federal court for allegedly discriminating against her. An amended complaint added the purported authors of the e-mails as individual defendants and, after the district court dismissed the amended complaint for failing to state a claim, Nunnery filed a second amended complaint that expanded the factual allegations and specifically referred to the purported e-mails from the unsuccessful workers’ compensation action. The lawyers for the college again informed Nunnery that the individual defendants denied authoring the e-mails. When Nunnery would not drop the claims, the college moved for Rule 11 sanctions. After an evidentiary hearing, the district court ordered both monetary sanctions against Nunnery and the most severe sanction possible—the dismissal of Jiminez’s case. On appeal, the Seventh Circuit found that the district court had acted within its discretion and further concluded that Jiminez had knowingly manufactured the false e-mails to try to support her claim. The Seventh Circuit reasoned that Jiminez had “exploited the judicial process and subjected her former colleagues and employer to unnecessary embarrassment and mental anguish.” Nunnery, a solo practitioner who had never before been disciplined, was suspended from practice for two months as a disciplinary sanction imposed, in part, for his conduct in Jiminez. 

Let’s pause to examine Nunnery’s conduct. The fact that the college’s lawyers insisted that the subject e-mails were fabricated was not enough, standing alone, to compel Nunnery to dismiss Jiminez’s lawsuit or withdraw from her representation. Adversaries make baseless or exaggerated claims or threats with some regularity. Lawyers are entitled to rely on clients to furnish the factual bases for claims as long as the client’s assertions are objectively reasonable, and lawyers are further entitled to

31. In re Disciplinary Proceedings Against Nunnery, 725 N.W.2d 613, 619 (Wis. 2007).
32. Jiminez, 321 F.3d at 654.
33. Id.
34. Id.
35. Id. at 654–55.
36. Id. at 657.
37. In re Disciplinary Proceedings Against Nunnery, 725 N.W.2d 613, 614 (Wis. 2007). The disciplinary case against Nunnery included 14 counts for events spanning a six-year period. Several of the counts involved instances in which Nunnery was accused of pursuing meritless claims, including Jiminez’s claims. Id. at 619–22.
give clients the benefit of the doubt in close cases. But the college’s insistence on a fraud coupled with Jimenez’s implausible claim to have laminated the e-mails to prevent their theft should have alerted Nunnery to the possibility that Jimenez’s claims were not just groundless but frivolous. Whatever options Nunnery thought he had, they did not include accepting Jimenez’s allegations on faith; some probing into the foundation for Jimenez’s claims was clearly in order. Indeed, reasonable inquiry is generally called for any time a lawyer receives a communication from an adversary asserting that evidence has been falsified.

_Board of Professional Responsibility v. Stinson_ provides another example of a lawyer taking reliance upon a client’s side of a story too far and demonstrates that, as circumstances change and new information is obtained, lawyers must reevaluate their clients’ positions. In _Stinson_, two surgeons in Cody, Wyoming, found themselves feuding following the acrimonious dissolution of their practice—a feud in which Stinson’s client, Dr. Schneider, turned out to be using a third party to fire his shots. Dr. Biles filed a federal lawsuit against an Indiana resident, Lisa Fallon, who allegedly sent a flyer to more than 14,000 Wyoming residents that accused him of having been arrested for DUI, being investigated for being drunk at work, and having lost a dozen lawsuits; only the DUI arrest claim was truthful. Dr. Biles was able to determine that Fallon’s only connection to Wyoming was a relationship with Dr. Schneider and his wife. Dr. Biles was also able to uncover a connection between Dr. Schneider and the company that printed the flyer that Fallon mailed.

Dr. Schneider met with Stinson after the lawsuit was filed and told him that Fallon was a close family friend who could not afford to hire an attorney to defend the suit. He asked that Stinson help find Fallon a lawyer and said that he would pay her attorney’s fees. Once Fallon had a lawyer, she answered Dr. Biles’s lawsuit and admitted that she created and mailed the flyer, and further admitted that she used someone else’s money to do so, but denied that she did any of it at anyone’s request. Fallon’s lawyer soon became highly skeptical of her version of events and told Stinson of his concerns that Fallon was not being truthful and that her version of events was “fanciful and [didn’t] make any sense.”

Further cause for doubt surfaced when the Park County attorney (Cody is in Park County) mailed three documents that had been printed from a thumb drive found in the pocket of men’s surgical scrubs in the laundry at West Park County Hospital to Dr. Biles’s and Fallon’s lawyers. These documents, which came to be known as the “laundry room documents” or “LRDs,” included an eight-page document that instructed

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38. 337 P.3d 401 (Wyo. 2014).
39. Id. at 403.
40. Id.
41. Id.
42. Id. at 404.
Fallon on how to testify in her deposition, referred to Dr. Schneider with the word “me,” and included many damning passages, perhaps none worse than “if you are able to withstand the heat of the deposition and ‘take a bullet,’ regardless of final economic damages in favor of [Dr.] Biles in any type of judgment, you will be taken care of far in excess of any paycheck. The amount he will get will be negligible and have no impact on your life.”43 The second document was a one-page summary of communications between Fallon and Dr. Schneider about the flyer and the lawsuit.44 The third document set forth draft answers for interrogatories served on Fallon.45 Fallon’s lawyer forwarded the LRDs and the letter from the county attorney to Stinson.46

Thereafter, Stinson had a “very heated” meeting with Dr. Schneider in which he sought an explanation for the LRDs and tried to find out whether Dr. Schneider was paying for Fallon’s testimony.47 Dr. Schneider told Stinson “that he was on the telephone with Ms. Fallon as he was typing the document and was merely helping to prepare her and typing the answers as she was providing them.”48 He also denied paying, or attempting to pay, Fallon for her testimony.

After this meeting, Stinson continued to assist Dr. Schneider, which he defended as “resolving the doubt in favor of his client,” including representing Dr. Schneider in seeking to quash third-party subpoenas issued by Dr. Biles and representing Dr. Schneider in a lawsuit by Dr. Biles that accused Dr. Schneider of RICO violations and defamation.49 In answering and counterclaiming on Dr. Schneider’s behalf, Stinson asserted that Dr. Biles’s allegations were known to be false, credited Fallon’s testimony in the federal lawsuit that she was the sole creator of the flyer, and recited a litany of unsavory conduct by Dr. Biles, including serial drunkenness and brandishing a gun in his office.50 Ultimately, even more damning e-mails between Fallon and Dr. Schneider surfaced that caused Stinson, after conferring with bar counsel, to disclose to the court during a hearing the contents of those messages. Dr. Schneider confidentially settled Dr. Biles’s lawsuit against him very soon thereafter.51

Stinson was found to have violated Wyoming Rule 3.1(c), a provision not found in the Model Rules and more akin to Rule 11. Yet, there is little reason to think that his conduct would be viewed differently under Model Rule 3.1. Even ardent advocates for permitting lawyers some latitude when it comes to giving clients the benefit of the

43. Id. at 405.
44. Id.
45. Id.
46. Id.
47. Id. at 405–06.
48. Id. at 406.
49. Id.
50. Id. at 406–07.
51. Id. at 407.
doubt on close questions ought to admit that the disclosure of the laundry room documents should have been a tipping point for Stinson. His willingness to believe Dr. Schneider’s strained explanation for the LRDs was objectively unreasonable given both the contents of the LRDs and the other information he had gathered by then. Remarkably, Stinson received only a public reprimand from the Wyoming Supreme Court.\(^{52}\)

Suing the wrong defendant is often a decent indication that an attorney’s pre-suit fact investigation was insufficient.\(^{53}\) A fairly remarkable example of a substandard pre-filing inquiry can be seen in the actions of a Virginia lawyer, Michael Weatherbee, who sued a doctor for medical malpractice who was not even in the hospital during the plaintiff’s allegedly botched procedure.\(^{54}\) Weatherbee had included among the defendants in his client’s medical malpractice suit a surgeon named Dr. Ward P. Vaughan, who was not only not present at the time of the plaintiff’s operation, but did not even have privileges to practice at the hospital in question. Weatherbee’s only justification for suing Vaughan was his belief that a “Bob Vaughan” who was listed in the medical records was the same person as Dr. Ward P. Vaughan.\(^{55}\) Making matters worse for Dr. Vaughan, the lawsuit received significant publicity in the form of a local television report and through a local radio station that “repeatedly informed its listeners, approximately once each hour for a full day, that Dr. Vaughan had been sued for medical malpractice.”\(^{56}\) The Virginia Supreme Court faulted Weatherbee for failing to undertake even the most basic research, which would have revealed that his client had no factual or legal basis for suing Dr. Vaughan, and affirmed the imposition of a public reprimand against Weatherbee for violating Rule 3.1.\(^{57}\) Dr. Vaughan must have thought that sanction awfully light.

Given the relevant standard, common sense dictates that how much a court will require from a lawyer in terms of pre-filing investigation can also be influenced by the nature of the client’s allegations against the adversary. A South Carolina decision concluding that the lawyer’s discussions with the client alone could not stand as a reasonable investigation because of the nature of the client’s claim provides an example, albeit one open to significant questions. \textit{Ex parte Gregory}\(^{58}\) arose out of a lawsuit by Annie Melton against her former lawyer, Gerald Malloy, for allegedly

\(^{52}\) Id. at 426.

\(^{53}\) Naming someone who has no colorable claims against the defendant as a member of a group of plaintiffs in a lawsuit can also evidence an inadequate pre-suit investigation. See, e.g., Merritt v. Int’l Ass’n of Machinists & Aerospace Workers, 613 F.3d 609, 626 (6th Cir. 2010).


\(^{55}\) Id. at 755.

\(^{56}\) Id. at 756.

\(^{57}\) Id.

\(^{58}\) \textit{Ex parte Gregory}, 663 S.E.2d 46 (S.C. 2008).
misappropriating settlement funds belonging to her. George Gregory represented Melton. Prior to filing suit and after being told by Melton that over two years had passed without her receiving the almost $15,000 in settlement funds she said she was owed, Gregory had communicated with the insurance agency for the party that was liable in the underlying matter and the adjuster who handled the claim, had reviewed the settlement documents, had reviewed telephone records showing how many times Melton had called Malloy, and was able to determine that the settlement check had been presented for payment over two years earlier. 59

Surprisingly, the South Carolina Supreme Court found that Gregory’s pre-filing efforts did not constitute a reasonable investigation because he had not contacted Malloy. This, the court found, hamstrung Gregory’s investigation and, in the court’s mind, prevented him from learning that the settlement funds were still in Malloy’s trust account because of a continuing issue relating to the nature and amount of a Medicaid lien. As the court saw it, “a simple phone call may have led to an explanation by [Malloy] as to why the money was being held.” 60 The court discounted Gregory’s explanation that he had not contacted Malloy because he did not think that Malloy would respond and that he had not requested Malloy’s file because he did not expect it would reveal anything he had not already learned from his communications with the insurance agency and adjuster for the tortfeasor. 61 The court stressed that its opinion should not be treated as establishing a strict rule always requiring a lawyer to go beyond merely discussing a claim with a client before suing, but the court clearly drew a very bright line with its statement that “before alleging conversion against an attorney for misappropriation of client funds or legal malpractice, a reasonable investigation is necessary.” 62

There were, however, some additional facts that might diminish the surprise a detached lawyer might otherwise exhibit upon learning of the court’s conclusion that what sounded like a responsible investigation was insufficient. First, Gregory’s co-counsel asked him whether they should perhaps communicate with Malloy before filing suit, but Gregory “did not think that it would ‘do any good.’” 63 In other words, Gregory had dismissed a reasonable investigatory step raised by a seemingly trusted advisor out-of-hand. Moreover, with the benefit of hindsight, a simple telephone call to Malloy would have avoided the litigation altogether. That conclusion clearly influenced the court’s decision, 64 although it should just as clearly be a case- and fact-specific consideration. Second, upon filing and serving the complaint, Gregory had his process server

59. Id. at 48.
60. Id. at 51.
61. Id. at 50.
62. Id. at 51 & n.3.
63. Id. at 48.
64. Id. at 49.
deliver a copy of the complaint to a local newspaper reporter, with whom Gregory then spoke. Gregory stated, in two articles written by the reporter, that Malloy “should have known he couldn’t co-mingle funds” and that he “shouldn’t have kept it in his pocket and collected all the interest on it.”65 This plainly influenced the court; indeed, the court specifically stated that it was troubled by Gregory’s “inflammatory statements” to the media without first performing an appropriate investigation of the conversion claim.66 Another fact mentioned by the court in its recitation of events that may have colored the result was that Malloy had represented Melton pro bono.67

Although the Gregory court was entitled to be irked by what it considered “inflammatory statements” to the media and might even have chafed at the notion that a lawyer doing free legal work was unfairly accused of misappropriation, its conclusion that Gregory acted unreasonably in not reaching out to Malloy is suspect. This is especially true given that the court did not, for example, dedicate any of its opinion to Malloy’s reputation or otherwise provide a basis for a reader to conclude that members of the legal community might find it hard to believe that he would ever engage in such conduct. Certainly, a lawyer might expect as a matter of professional courtesy that a lawyer in Gregory’s position would call or write before suing a fellow attorney, but the Gregory decision, in establishing a bright-line requirement that a pre-filing investigation of a claim against a lawyer for misappropriation is not reasonable unless the claimant’s lawyer first communicates with the prospective defendant, smacks of favoritism to members of the bar that would not be granted to other professionals. Beyond that, a lawyer contemplating litigation may have good strategic reasons for not first communicating with the target, as where the lawyer reasonably fears that the prospective defendant will somehow put the disputed funds beyond the client’s reach, or initiate some sort of preemptive action against the client.

B. Advancing Factually or Legally Unsupportable Positions

Failing to adequately investigate the circumstances surrounding a claim is, of course, one way that a lawyer can end up pursuing positions that are factually unsupportable. Unfortunately, there are also more pernicious, inexcusable ways, as demonstrated by the two lawyers whose conduct resulted in their suspensions from the practice of law in In re Rios.68 Shane Rios and Daniel Levy opened their own law firm after three years of practice at other personal injury firms and were only three months into that venture when they proceeded upon a course that involved improperly influencing their client’s story and then hiding portions of their file from co-counsel whom they retained to try the client’s case for them.69

65. Id.
66. Id. at 51.
67. Id. at 49.
69. Id. at 420–21.
Rios and Levy were approached by a former client whose mother had allegedly fallen on a “badly cracked sidewalk while exiting a church on Lockwood Avenue, in the Bronx.” They accepted the case. The client was unable to remember either the church’s name or its exact location. Rios and Levy determined through online searches that there was only one potential church on Lockwood Avenue, but it was in Yonkers—not in the Bronx. They gave notice of the claim to that church and then tried to determine via a Freedom of Information Law (FOIL) request whether the city had received prior notice of sidewalk defects.

They visited the scene without their client, who refused to accompany them, and saw no defects in the church’s sidewalk; however, they did notice a “badly cracked” sidewalk abutting a house across the street. The city’s response to their FOIL request indicated that there were no prior notifications of sidewalk defects, and thus no viable claim against the church. This led to a fateful meeting with their client, where, instead of explaining that she had no viable claim, “they decided to influence her by first explaining the law, emphasizing that if she fell on the sidewalk abutting the church, she would have no viable claim for her injuries. However, they indicated that if she fell across the street on the driveway, she had a viable case against the owner of the abutting property.” After securing their client’s assertion that she fell on the homeowner’s sidewalk, they sued the homeowner. When it was time to try the case, they retained experienced trial counsel, but did not tell trial counsel that the client originally said she had fallen elsewhere and “they removed [from the case file] the claim letter they initially sent to the church” and several other documents that showed the full story. For this conduct, which Rios and Levy remorsefully admitted during their disciplinary proceedings, both were suspended from the practice of law for nine months.

A lawyer can be fully cognizant of and forthright about the facts but nonetheless run into trouble by pursuing an unsupportable legal position. The Florida Supreme Court considered itself to be dealing with a prime example of such a situation in Florida Bar v. Richardson.

Richardson’s troubles arose from his representation of the personal representative in a probate proceeding and the probate court’s determination that his fee was excessive and had to be reimbursed to the decedent’s estate. Richardson appealed that ruling, arguing that the probate court lacked jurisdiction to order reimbursement because his fee had been paid by the personal representative not from the assets of the estate,

70. Id. at 420.
71. Id. at 421.
72. Id.
73. Id.
74. Id. at 422.
75. 591 So. 2d 908 (Fla. 1992).
but out of personal funds. Richardson’s appeal was unsuccessful on the merits, but the matter was remanded for a recalculation of the correct amount to be reimbursed.76 After the recalculation by the probate court, Richardson appealed again, but this appeal was dismissed as untimely. Thereafter, Richardson’s excessive fee earned him a 90-day suspension from practice and two years of probation upon reinstatement.77 He then unsuccessfully petitioned the Florida Supreme Court for two writs of mandamus, one seeking reinstatement of the second appeal that had been dismissed as untimely and another to vacate the probate court judgment and force that court to withdraw jurisdiction. Most lawyers at that point would obey The First Rule of Holes and stop digging. Richardson, however, was undaunted.

Richardson took his legal crusade to federal court, filing a lawsuit claiming that the Florida probate court order requiring reimbursement violated his civil rights because the probate court lacked jurisdiction. He sought both injunctive relief and $1 million in damages, and named as defendants all of the Florida judges involved, his former client, and his former client’s new attorneys.78 This federal suit, which the district court found to be “both manifestly frivolous and malicious,” was dismissed and sanctions were imposed against Richardson under Rule 11.79 After further disciplinary proceedings were instituted against Richardson and a hearing convened, a disciplinary referee found that “[r]easonable inquiry by a graduate of a law school, a certified member of the Florida Bar, or any lay person would clearly show that the lawsuit as filed by . . . Richardson was clearly unwarranted,” and recommended that Richardson be suspended for 90 days.80 The Florida Supreme Court acknowledged that it was important not “to stifle innovative claims by attorneys,” but distinguished Richardson’s situation as “an obsessive attempt to re-litigate an issue that has failed decisively numerous times.”81

Lawyers should not read Richardson to mean that they can never pursue a case in the face of directly adverse precedent without risking discipline or sanctions. Indeed, Hunter v. Earthgrains Co. Bakery82 is a leading case that furnishes a perfect example of when a lawyer’s pursuit of a legal position directly contrary to existing precedent cannot be treated as frivolous. In Earthgrains, a federal district court in North Carolina barred lawyer Pamela Hunter from practicing before it for five years as a sanction. Hunter was sanctioned for arguing for an outcome on a question of law that was

76. Id. at 909.
77. Id.
78. Id. at 909–10.
79. Id. at 910.
80. Id.
81. Id. Because of the other 90-day suspension against Richardson arising out of the same underlying case, the Florida Supreme Court reduced the second 90-day suspension to a 60-day suspension. Id. at 911.
82. 281 F.3d 144 (4th Cir. 2002).
contrary to clear precedent in the Fourth Circuit, which encompasses North Carolina. Specifically, in 1998, Hunter argued that the district court should rule that arbitration of a federal employment discrimination claim can be required in a collective bargaining agreement only by the use of specific language to that effect. Her argument contradicted a Fourth Circuit decision handed down just two years before.

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

The investigation lawyers must undertake to establish that legal arguments to be made in proposed litigation are not frivolous is relatively easy to determine. Effectively summarized, it is a matter of performing the legal research required to determine whether governing law supports the legal arguments that would need to be advanced for the client to prevail and, if not, whether those arguments can fairly be categorized as good faith arguments for extension, modification, or reversal of that governing law. A good description of the process for determining whether the requ-

83. Id.
84. See, e.g., Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998) (“[T]he purpose of Rule 11 is to deter frivolous lawsuits and not to deter novel legal arguments or cases of first impression.”); Operating Eng’rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) (“Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way.”).
85. Earthgrains, 281 F.3d at 156.
86. Id. at 156–57.
87. See, e.g., Att’y Grievance Comm’n of Md. v. Worsham, 105 A.3d 515, 528 (Md. 2014) (“A minimal amount of research would have alerted [the lawyer] to the frivolous nature of the arguments he made.”); In re Richards, 986 P.2d 1117, 1120 (N.M. 1999) (“[W]hen relying upon an exception to a general rule of law, the position the lawyer asserts must either come within the exception, or provide a cogent argument for broadening the exception.”).
site good faith exists is found in the Restatement (Third) of the Law Governing Lawyers:

[W]hether good faith exists depends on such factors as whether the lawyer in question or another lawyer established precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer’s position, or whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.  

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

At the trial, Schumann testified that it was Biere who struck her vehicle from the rear; Biere did not appear at trial. The jury, which the court had permitted to have access to both the accident report reflecting Biere’s original admission and the insurance company’s file, returned a verdict for Schumann. The Iowa Supreme Court explained that it was certainly appropriate for a lawyer to make the other side prove her case, but that Hohnbaum had stepped well over that line and persisted in the pursuit of a frivolous position.

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

89. 554 N.W.2d 550 (Iowa 1996).
90. *Id.* at 551.
91. *Id.*
92. *Id.* at 552.
Stated positively, a lawyer may ethically pursue a claim that she knows to be time-barred.93

The best-known source for this proposition is ABA Formal Ethics Opinion 94-387.94 In that opinion, the ABA Standing Committee on Ethics and Professional Responsibility explained that knowingly asserting a time-barred claim did not violate Rule 3.1 because:

The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court’s jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim.95

The committee also explained that its opinion would be different if a jurisdiction were to treat an expired limitations period as a jurisdictional matter or if there were other circumstances surrounding the filing of a lawsuit known to be untimely that could be viewed as indicia of bad faith.96 One such circumstance noted by the committee was an attorney’s act of filing a defamation claim after being told by the defendant that the claim was time-barred.97 Similar conclusions have been reached by state ethics bodies interpreting their own rules.98 Several courts have echoed these conclusions.99 Not all courts agree with this approach, however, especially where the challenged suit is filed well beyond the applicable limitation period.100

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93. But see Trainor v. Ky. Bar Ass’n, 311 S.W.3d 719, 721 (Ky. 2010) (finding that lawyer violated Rule 3.1 by filing a medical malpractice suit more than two years after the applicable statute of limitations had expired).
95. Id. at 4.
96. Id. at 5.
97. Brubaker v. Richmond, 943 F.2d 1363, 1385 (4th Cir. 1991) (finding that making such a claim is “groundless in law” and violates Rule 11).
99. See, e.g., Hoover v. Armaco Inc., 915 F.2d 355, 357 (8th Cir. 1990) (“The statute of limitations is an affirmative defense the defendant must raise . . . and Hoover did not have to anticipate Armaco would raise it.”); Ford v. Temple Hosp., 790 F.2d 342, 348–49 (3d Cir. 1986) (“In the real world of litigation, counsel are not expected to be omniscient. No one knows for certain whether a potential affirmative defense will be in fact pled. The law books are replete with decisions where counsel has failed to file an affirmative defense or failed to file it timely.”).
100. See, e.g., Trainor v. Ky. Bar Ass’n, 311 S.W.3d 719, 721 (Ky. 2010) (finding that lawyer violated Rule 3.1 by filing medical malpractice suit more than two years after the applicable statute of limitations ran).
The rationale behind the prevailing view is that the expiration of a statute of limitations is merely an affirmative defense and can be waived by the defendant through a failure to raise it, and, moreover, such time restrictions do not divest a court of jurisdiction. On the surface, this approach seems sound, inasmuch as the public policy behind enacting and enforcing statutes of limitations is to provide defendants with certainty as to times in which actions may be pursued and not to protect courts from expending resources on the adjudication of stale claims. Hence the proposition that a plaintiff’s lawyer should be free to roll the dice on a claim known to be time-barred based on the hope, however slim, that the defendant will not assert a statute of limitations defense. This might occur because the defendant or its lawyer did not apprehend the untimeliness of the claim, or even because the defendant made a tactical decision to have the matter determined on the merits.

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

Without extending the debate too far, under Formal Op. 94-387 our hypothetical lawyer could file her client’s claim notwithstanding the defendant’s absolute privilege without violating Rule 3.1. The base test in this context seems to be whether the claim would deprive a court of subject matter jurisdiction; because this claim does not, filing it does not violate Rule 3.1 even though it will clearly fail if the defendant asserts its privilege as an affirmative defense. If the defendant is alert and raises its
absolute privilege as an affirmative defense, or perhaps responds to the suit by writing to the lawyer to demand that she dismiss the claim, then the lawyer must withdraw the claim to avoid violating Rule 3.1. Furthermore, whether the lawyer’s conduct violates Rule 3.1 is a separate and distinct question from whether it violates Federal Rule of Civil Procedure 11 or 28 U.S.C. § 1927, or state analogs.104

Naturally, a lawyer’s ability to ethically pursue a time-barred claim does not mean that he can engage in other misleading conduct in pursuit of that claim. For example, while a lawyer can file a complaint knowing that it is time-barred, the lawyer cannot actively seek to hide that fact by alleging that it is timely filed or by falsely alleging that an event happened on a different date.105 But how close to the line can lawyers go without violating their duty of candor? May a lawyer set forth in a complaint only the year in which an injury was incurred—for example, describing an automobile collision known to have occurred on December 12, 2007 as having occurred merely in 2007—to help obscure whether the lawsuit was timely filed?

The most straightforward answer is that a number of ethics rules coalesce to send a clear signal that lawyers are expected to understand and comply with their obligations of candor, and that lawyers who find themselves wondering whether their conduct treads too close to the line likely are too close to the line. A lawyer pondering whether she can assert only that the collision occurred in 2007 to help obscure whether the lawsuit was timely filed needs to be concerned with the jurisdiction’s equivalents of Model Rules 3.3(a), 4.1(a), 8.4(c), and 8.4(d). Model Rule 3.3(a)(1) prohibits a lawyer from making “a false statement of fact” to a tribunal,106 and Model Rule 4.1(a) prohibits a lawyer from making “a false statement of material fact” to third persons.107 The commentary to each of those rules notes that there are circumstances in which omissions can amount to misrepresentations sufficient to equate to affirmative false statements.108 Model Rule 8.4(c) broadly declares that it is unethical for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”109 Finally, Model Rule 8.4(d) categorizes as professional misconduct any litigation conduct by a lawyer that is “prejudicial to the administration of justice.”110 Even more

107. Id. R. 4.1(a).
108. Id. R. 3.3 cmt. 3 (“There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”); id. R. 4.1 cmt. 1 (“Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).
109. Id. R. 8.4(c).
110. Id. R. 8.4(d).
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fundamentally, a lawyer in this situation ought to be concerned that obscuring the date of the accident would ruin her credibility with the court when the truth is exposed, and that any loss of credibility will affect her and her clients in other cases.

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

If there is a saving grace for lawyers charged with professional misconduct for pursuing frivolous claims or contentions, it generally resides in the discipline to be imposed. Disciplinary sanctions for Rule 3.1 violations tend to be of a lesser nature—such as an admonition, censure, reprimand, or short suspension—unless the lawyer has engaged in a pattern of such behavior. If the lawyer that pursued a frivolous claim or contention is a repeat or serial offender, indefinite or lengthy suspensions or even disbarment may result. One of the more egregious examples of

111. There are notable exceptions. See, e.g., In re Caulfield, 683 So. 2d 714, 715–19 (La. 1996) (involving illegal conduct in the form of a staged auto accident to obtain insurance proceeds); In re Hess, 406 S.W.3d 37, 41 (Mo. 2013) (involving a lawyer who attempted to further his employment dispute with his former law firm by frivolously claiming to continue to represent clients of the law firm and filing attorney liens on their cases); In re Rios, 965 N.Y.S.2d 418, 424 (App. Div. 2013) (involving two lawyers who intentionally induced their client to provide false information about the location of an accident and removed related evidence from the case file before sharing the file with trial counsel); In re Yao, 680 N.Y.S.2d 546, 548 (App. Div. 1998) (involving illegal conduct in the form of extortion demand).

112. See, e.g., In re Spikes, 881 A.2d 1118, 1119 (D.C. 2005) (suspending a lawyer for 30 days for pursuing a defamation action based on statements made in a disciplinary complaint that were clearly protected by well-settled law applying the litigation privilege to reports of attorney misconduct); Fla. Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991) (imposing public reprimand and one-year probation on a lawyer who filed a frivolous suit against other counsel in retaliation for representing clients opposing the lawyer in another action); In re Colvin, 336 P.3d 823, 831 (Kan. 2014) (imposing a public censure as discipline); In re Hackett, 701 So. 2d 920, 922 (La. 1997) (imposing public reprimand against lawyers for filing a frivolous motion to dissolve a temporary restraining order); In re Panel Case No. 17289, 669 N.W.2d 898, 906–07 (Minn. 2003) (admonishing lawyer with extensive prior disciplinary history, including multiple past suspensions, who filed a frivolous defamation claim and who made allegations about damage to a car that could have been proven false by viewing the vehicle); Bd. of Prof’l Responsibility v. Stinson, 337 P.3d 401 (Wyo. 2014) (censuring a lawyer for his assertions in a motion to quash and a separate answer on behalf of a doctor who was known to be funding vindictive litigation by a third party against the doctor’s former partner and who had documented efforts to improperly shape the third party’s testimony).

113. See, e.g., In re Yelverton, 105 A.3d 413, 428–32 (D.C. 2014) (suspending the lawyer for 30 days for violating Rule 3.1 but further requiring that he demonstrate his fitness to practice for reinstatement upon completion of his suspension because of his repeated assertions of objectively meritless positions).

114. See, e.g., In re Stern, 11 N.E.3d 917, 921–22 (Ind. 2014) (suspending a lawyer for 18 months without automatic reinstatement); Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 522–23 (Iowa 1996) (disbarring a lawyer who filed two frivolous lawsuits against the same defendant, a frivolous lawsuit against a judge, and other frivolous lawsuits against attorneys for parties in the litigation); In re Benson, 69 P.3d 544, 546–48 (Kan. 2003) (disbarring an attorney who, as plaintiff
serial misconduct led to a Missouri lawyer being disbarred first by the Missouri Supreme Court and then reciprocally by a Missouri federal court after she had been sanctioned by four federal courts for pursuing frivolous claims.115

Not surprisingly, lawyers disciplined for violating Rule 3.1 often are deemed not only to have pursued unfounded allegations but also to have done so for the purpose of harassing or intimidating an opponent.116 Although Model Rule 3.1 is the most obvious and most direct rule prohibiting a lawyer’s pursuit of a frivolous claim or defense, several other ethics rules prohibit types of conduct often present in a lawyer’s pursuit of a frivolous claim or defense for some improper purpose. For example, Model Rule 3.4(e) prohibits lawyers from “allud[ing] to any matter [during trial] that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”117 Model Rule 4.4(a) broadly makes it unethical for a lawyer to “use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”118 And when it is determined that the lawyer has engaged in purposeful harassment or intimidation, as opposed to inadequately investigating the merits of the client’s allegations, it should also come as little surprise that the disciplinary sanction tends to be more severe.119

115. [Citation]

116. See, e.g., Thompson v. Sup. Ct. Comm. on Prof’l Conduct, 252 S.W.3d 125, 128 (Ark. 2007) (determining that lawyer violated Rules 3.1 and 4.4 by filing a frivolous lis pendens action); In re Pelkey, 962 A.2d 268, 280 (D.C. 2008) (finding that the lawyer violated Rule 3.1 by filing a frivolous appeal and pursuing frivolous litigation and violated Rule 4.4 by frivolously attempting to set aside an arbitration award despite having agreed to arbitration, all in connection with a dispute with a former business partner); In re Bandaries, 156 So. 3d 1152, 1160 (La. 2014) (finding that the lawyer violated Rule 3.1 by suing the defendant for the purpose of harassing her); Att’y Grievance Comm’n of Md. v. Mixter, 109 A.3d 1, 58 (Md. 2015) (agreeing with the hearing judge’s conclusion that the lawyer violated Rule 3.1 by filing numerous frivolous motions to bludgeon parties into complying with his excessive discovery requests); In re Hess, 406 S.W.3d 37, 41 (Mo. 2013) (describing a hearing board’s finding that the lawyer had filed a frivolous suit “for the purpose of harassing and burdening the [defendants] because of an employment dispute with [his former employer]”).


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

119. See, e.g., In re Blasi, 660 N.Y.S.2d 151, 152–53 (App. Div. 1997) (suspending the lawyer for five years for pursuing meritless complaints and motions as means of dealing with personal disputes with neighbors); In re Sandvoss, 644 N.Y.S.2d 557, 558–59 (App. Div. 1996) (suspending the lawyer for two years for filing a frivolous defamation suit against a client as retaliation for the client’s pursuit of
An Arkansas case, *Dodrill v. Executive Director*,120 illustrates this principle. The lawyer in that case, Lewis Dodrill, represented Bobby Bratton, a debtor in a bankruptcy proceeding. Dodrill, acting on Bratton’s behalf, filed a suit in federal court seeking approximately $15,000 in damages from Bratton’s former bankruptcy attorneys and then amended the complaint to add the trustee of Bratton’s bankruptcy estate and the trustee’s law firm as defendants.121 The district court referred the case to the bankruptcy court, where the defendants prevailed on dispositive motions. Dodrill did not appeal from any of those rulings. Rather, he moved to have the trustee removed for alleged fraud and waste. The bankruptcy court held a hearing on that motion and, when Dodrill offered no supporting evidence, entered judgment against Bratton. Undaunted, Dodrill then filed another complaint in bankruptcy court against many of the same defendants named in the earlier suit, but this time seeking over $150,000 in damages.122

The perturbed defendants successfully moved to dismiss the second lawsuit and then sought sanctions against Dodrill under Bankruptcy Rule 9011, which is equivalent to Federal Rule of Civil Procedure 11. The bankruptcy court sustained the sanctions motions. In doing so, the bankruptcy judge stressed that the evidence revealed no misconduct by any of the defendants and indicated that Dodrill “continuously displayed a complete lack of competence in the practice of bankruptcy law.”123 The bankruptcy judge also referred Dodrill to the Arkansas disciplinary authorities. In the resulting disciplinary case, the bankruptcy judge testified that Dodrill had been “continually insulting, abusive, and disruptive to the court, to witnesses, and to opposing counsel despite repeated warnings.”124 Rather than engaging in routine discovery, Dodrill had “assail[ed] opposing counsel as liars and embezzlers.”125 Dodrill confessed that he was incompetent to handle bankruptcy matters and admitted that the allegations in the second suit were not “founded in fact.”126 He apparently started out wanting only “a clarifying order in bankruptcy court,” but instead of pursuing that course, “he sued the attorneys involved for wrongful conduct.”127 All of this bolstered

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120. 824 S.W.2d 383 (Ark. 1992).
121. *Id.* at 384.
122. *Id.*
123. *Id.* at 385 (quoting from the letter of referral by the bankruptcy judge reporting that Dodrill had admitted during a hearing that he knew “nothing whatever about bankruptcy,” was “thoroughly incompetent in bankruptcy court,” and had “no business being there”).
124. *Id.* at 387.
125. *Id.*
126. *Id.* at 386–87.
127. *Id.* at 387.
the Arkansas Supreme Court’s conclusion that he deserved a one-year suspension for pursuing litigation that “apparently [was] brought for the purposes of harassment and intimidation rather than for legitimate purposes.”

D. Continued Pursuit of Claims or Contentions that Become Frivolous

Neither the mere fact that a case is ultimately unsuccessful nor the fact that an attorney narrows the nature of the case or claims ultimately presented to a jury necessarily means that it was somehow unreasonable or improper for the lawyer to continue to pursue the case and obtain a definitive ruling against her client. As Model Rule 3.1 makes clear, however, the obligation to not pursue frivolous litigation continues beyond the initial filing of the action. Thus, even if an attorney can ethically pursue an action at the outset, should events and circumstances change, or should the attorney later learn that continued litigation would require the pursuit of frivolous claims, the lawyer has a duty to drop the case or offending claims. We saw an example of that rule in Board of Professional Responsibility v. Stinson, discussed earlier. Another example is found in the conduct of a Connecticut lawyer who received a reprimand for violating Rule 3.1 through continued efforts to overturn an arbitration ruling against his client.

The lawyer in Brunswick v. Statewide Grievance Committee, Max Brunswick, moved to vacate an arbitration award against his client, who had been represented by a different lawyer. Brunswick alleged, among other things, that the award was procured by corruption, fraud, undue means, or the evident partiality of the arbitrators.

128. Id.
130. In re Olsen, 326 P.3d 1004, 1009 (Colo. 2014) (recognizing a lawyer’s ongoing professional duty to independently assess the factual and legal bases for a client’s claims); Att’y Grievance Comm’n of Md. v. Mixter, 109 A.3d 1, 59 (Md. 2015) (explaining that the lawyer violated Rule 3.1 by continuing to pursue a case after there was no good faith basis for doing so).
131. See, e.g., In re Caranchini, 956 S.W.2d 910, 916 (Mo. 1997) (stating that “continuing to pursue a claim once it becomes apparent that there is no factual basis to support that claim is clearly contrary to the requirements of the rule”); Jandt ex rel. Brueggeman v. Jerome Foods, Inc., 597 N.W.2d 744, 760 (Wis. 1999) (determining that continued pursuit of action in the absence of any evidence to support causation was frivolous as a matter of law). But see Rose v. Tullos, 994 So. 2d 734, 739 (Miss. 2008) (“No continuing duty exists to force an attorney to abandon a claim if it later appears to be without merit.”) (citing Bean v. Broussard, 587 So. 2d 908, 913 (Miss. 1991)).
135. Id. at 332.
The court denied the motion and referred Brunswick to state disciplinary authorities for making allegations without reasonable cause. A lower court found that Brunswick had violated Rule 3.1 and Brunswick appealed.

The appellate court acknowledged that the original act of filing the motion to vacate did not violate Rule 3.1 because under the commentary to the Connecticut rule, “‘the filing of an action . . . is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.’”136 Brunswick was not required at the time he filed the motion to have evidence to substantiate all of the allegations in it.137 In fact, he initially had sufficient grounds to allege the arbitrators’ partiality because a time entry in opposing counsel’s billing records reflected a lengthy conference with one of the three arbitrators before the arbitration. Likewise, Brunswick was justified in originally making the claims of corruption, fraud, or undue means because “his client had ‘claimed to have been told, by a staff person in the office of her former counsel, that the former counsel had received money from’ the opposing party.”138 That did not end the inquiry, however, because the court concluded that Rule 3.1 “prohibits an attorney from asserting at any time a claim on which the attorney is reasonably unable to maintain a good faith argument on the merits.”139

Brunswick’s allegations simply did not stand the test of time. He was unable to develop any facts to support the allegations in the motion. His client never delivered a promised affidavit to establish the alleged fraud, corruption, or undue influence. The facts that he did develop were unhelpful. For example, it was clearly established that, notwithstanding the troubling time entry in the other lawyer’s billing records, the alleged conference with the arbitrator never occurred. More remarkably, Brunswick retreated from that allegation only grudgingly, arguing as a fallback position that he was not actually alleging that the conference really happened but just that it was wrong for the opposing counsel to have billed for such a conference and sought to make Brunswick’s client pay for a conference that never occurred.140

Still retreating and now sensing serious trouble, Brunswick argued that although he had finally come to believe that he lacked a good faith basis for pursuing the motion to vacate, his client refused to allow him to withdraw the offending allegations.141 The court, however, noted that according to the commentary to Rule 1.2(a),142 a lawyer is not required to pursue objectives or employ means simply because the

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136. Id. at 330 (quoting the comment to the Connecticut rule).
137. Id.
138. Id. at 333.
139. Id. at 331.
140. Id. at 330.
141. Id. at 334.
142. Id. (“The commentary to Rule 1.2(a) . . . states in relevant part that ‘a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.’”).
client insists. When a lawyer is aware that a good faith basis for a claim or contention is lacking, the lawyer’s “duty as a minister of justice every time must trump a client’s desire to continue an untenable allegation.”

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

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

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

As discussed above, the duty to avoid making frivolous claims or contentions means that lawyers must adequately investigate clients’ claims and contentions. The need to investigate often creates a need to communicate with third parties, which can raise a host of ethics issues. In a simple example, a lawyer for a plaintiff may first think to confirm the client’s factual assertions by interviewing the potential defendant’s current or former employees. Unfortunately for the diligent plaintiff’s lawyer, her ability to conduct those interviews may be extremely limited as a result of the restrictions in Model Rule 4.2 and state counterparts.

Model Rule 4.2 provides that a lawyer representing a client “shall not communicate about the subject of the representation with a person the lawyer knows to be

143. *Id.*

144. *Id.*

145. See, e.g., Jandt ex rel. Brueggeman v. Jerome Foods, Inc., 597 N.W.2d 744, 760–65 (Wis. 1999) (finding that a lawsuit, though not frivolous when filed, was frivolously maintained because the plaintiffs never came forward with competing expert testimony once faced with expert testimony proffered by the defendants that no causal link existed between birth defects and exposure to toxic chemicals).
represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.\textsuperscript{146} Rule 4.2 clearly applies to communications by a lawyer prior to filing a lawsuit if the target person is represented by counsel in the matter encompassed by the contemplated lawsuit.\textsuperscript{147} And, of course, a lawyer seeking to make an appropriate pre-filing investigation cannot simply employ the services of another—such as a private investigator or independent insurance claims adjuster—to engage in communications otherwise prohibited by Rule 4.2.\textsuperscript{148}

A surprisingly common situation in which an attorney’s conduct runs afoul of Rule 4.2 occurs when the attorney is implicated in encouraging the client to obtain an affidavit from someone who is represented by counsel.\textsuperscript{149} In re Pyle\textsuperscript{150} is an interesting case in point. There, Thomas Pyle represented Sallie Moline in a trip-and-fall case against Ricci Gutzman. Moline, who alleged that she hurt her knee tripping over a dog cable in Gutzman’s driveway, was romantically involved with Gutzman. Prior to suing on Moline’s behalf, and before Gutzman was represented by counsel, Pyle prepared an affidavit for Gutzman’s signature which, among other things, contained a statement by Gutzman

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\item \textsuperscript{146} \textit{Model Rules of Prof’l Conduct} R. 4.2 (2015).
\item \textsuperscript{147} See, e.g., Penda Corp. v. STK, LLC, No. Civ. A. 03-5578, Civ. A. 03-6240, 2004 WL 1628907, at *3 (E.D. Pa. July 16, 2004); Stahl v. Wal-Mart Stores, Inc., 47 F. Supp. 2d 783, 789 (S.D. Miss. 1998); \textit{see also Restatement (Third) of the Law Governing Lawyers} § 99 cmt. d (2000) (explaining that the matters encompassed within a particular representation, as well as their scope and contour, depend upon the particular circumstances).
\item \textsuperscript{148} \textit{Model Rules of Prof’l Conduct} R. 8.4(a) (2015) (making it an ethical violation to violate another ethics rule “through the acts of another”); \textit{see also ABA Comm. on Ethics & Prof’l Responsibility}, Formal Op. 95-396, at 19 (1995) (“Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do.”); see, e.g., United States v. Smallwood, 365 F. Supp. 2d 689, 694–97 (E.D. Va. 2005) (finding that an investigator’s communications with a represented person were improper where it would have been unethical for the attorney to have had the communications directly); \textit{In re Complaint of PMD Enters.}, Inc., 215 F. Supp. 2d 519, 529 (D.N.J. 2002) (finding a lawyer ethically responsible for an investigator’s communication with a represented party where the lawyer knew the investigator would be contacting a represented person); State v. Clark, 738 N.W.2d 316, 338–40 (Minn. 2007) (finding that police contacts with a represented criminal defendant amounted to a Rule 4.2 violation attributable to state prosecutors); \textit{Disciplinary Counsel v. Sartini}, 871 N.E.2d 543, 544–46 (Ohio 2007) (affirming public reprimand against two prosecutors for causing a represented criminal defendant’s mother to communicate a plea offer to the defendant).
\item \textsuperscript{149} See, e.g., Holdren v. Gen. Motors Corp., 13 F. Supp. 2d 1192, 1195–96 (D. Kan. 1998) (granting a protective order as a result of a violation of Rule 4.2 where the plaintiff’s lawyer “facilitated” the plaintiff’s efforts in obtaining affidavits from the defendant’s employees); \textit{In re Anonymous}, 819 N.E.2d 376, 379 (Ind. 2004) (reprimanding the lawyer for violating Rule 4.2 by giving an affidavit to his client and instigating “a series of contacts calculated to obtain the employee’s signature on the affidavit despite [the lawyer’s] unsuccessful attempts to obtain the employee’s signature through opposing counsel”).
\item \textsuperscript{150} 91 P.3d 1222 (Kan. 2004).
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admitting liability and taking full responsibility for Moline’s injuries. Pyle gave the affidavit to Moline to deliver to Gutzman. After suit was filed, Gutzman’s insurer hired John Conderman to defend him. Conderman filed an answer denying liability. Pyle went to the well again, creating another affidavit for Moline to take to Gutzman. Pyle provided that affidavit to Moline along with a cover letter stating: “As a party to the case, you have the right to communicate with Mr. Gutzman. Therefore, please talk with him and see if he will sign the enclosed affidavit.”

Pyle was ultimately charged with violating Rule 4.2. In rejecting Pyle’s argument that Moline could not be considered his agent when he was in fact her agent, the court discussed two similar cases where lawyers had used their clients to deliver documents to a represented party contemplating that a signature would be obtained without that party’s lawyer’s knowledge, and concluded that Pyle violated Rule 4.2 “by encouraging his client to do that which he could not.” The Kansas Supreme Court publicly censured Pyle for his misconduct.

Bratcher v. Kentucky Bar Ass’n provides a relatively recent example of how a lawyer can unthinkingly run afoul of the ethics rules as a result of communications by an agent. A former employee of R.C. Components, Inc., Dennis Babbs, hired Pamela Bratcher to represent him in a wrongful termination lawsuit. Bratcher, in turn, hired a company in the business of determining what listed references will say about former employees, Document Reference Check (DRC), to contact the owner of R.C. Components to see what he would say about Babbs. A DRC employee telephoned the owner, said she was an employer considering hiring Babbs, and transcribed the conversation for Bratcher. Bratcher, sensing no wrongdoing, produced the transcript to R.C. Components in discovery. R.C. Components successfully moved to suppress the transcript and to disqualify Bratcher. After losing the disqualification battle in the underlying litigation, Bratcher admitted in her disciplinary case that her conduct constituted an ethical violation and asked that the discipline against her be limited to a public reprimand. The Kentucky Supreme Court accepted her position and publicly reprimanded her for violating Rule 4.2(a).

Rule 4.2 can pose thorny problems for investigating lawyers where potential witnesses are employed by a represented organization. Because organizations can only

151. Id. at 1225.
152. Id. at 1227.
154. Pyle, 91 P.3d at 1229.
155. 290 S.W.3d 648 (Ky. 2009).
156. Id. at 649.
157. Id.
158. Id.
act through their constituents, lawyers must be able to judge who within a business organization is considered to be represented by the lawyer representing that organization. Different jurisdictions take different approaches to this issue. Comment 7 to Model Rule 4.2 lays out the preferred approach:

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

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

Some jurisdictions have deviated from the ABA approach and adopted a “managing-speaking agent test.” Under this test, lawyers are prohibited from communicating ex parte with organizational employees who possess “speaking authority” for the organization—those who “have managing authority sufficient to give them the right to speak for, and bind the corporation.”

159. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2015).
160. In re Grievance Proceeding, No. 3:01GP6(SRU), 2002 WL 31106389, at *3 (D. Conn. July 19, 2002); In re Woodham, 769 S.E.2d 353, 356–57 (Ga. 2015); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-443, at 2 (2006) [hereinafter ABA Formal Op. 06-443]; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. c (2000) (“Inside legal counsel for a corporation is not generally within [the definition of a represented nonclient] and contact with such counsel is generally not limited by [the general anti-contact rule].”).
163. Messing, 764 N.E.2d at 833 (quoting Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984)).
Microsoft Corp. v. Alcatel Business Systems164 illustrates how lawyers can run afoul of the ethical restriction on ex parte communications with protected employees of a represented organization. In that patent case, the lawyers for Microsoft were not disqualified for their actions but were monetarily sanctioned. Basically, they purchased a piece of equipment that contained components that allegedly infringed the patents at issue and arranged for the equipment to be installed by an employee of the represented defendant.165 The employee, Po Ching Lin, consistent with his job duties, provided “training on the administration, use and configuration” of the equipment to the Microsoft lawyers.166 The Microsoft lawyers questioned Lin about those topics. The court determined that Microsoft’s lawyers violated Rule 4.2 based on Lin’s “position and level of responsibility with respect to the [equipment] and because he was directed (as an employee of a represented party) to engage in conduct directly relevant to the subject matter of this litigation by [Microsoft’s lawyers].”167

In addition to needing to be aware of differences with regard to the language within the comments adopted in relevant jurisdictions, application of Rule 4.2 itself to particular factual situations can be a delicate endeavor and one for which predicting the ultimate outcome is no easy task. The determination by the Third Circuit that an attorney’s communications with an administrative assistant to managerial agents of a represented organization did not violate Pennsylvania’s Rule 4.2 readily demonstrates how easily reasonable minds can differ on the scope of Rule 4.2’s application.168

In EEOC v. Hora, Inc.,169 the district court disqualified Jana Barnett, the intervening plaintiff’s counsel, because Barnett communicated with Deborah Richardson, an administrative assistant to the manager and part-owner of the Days Inn where the plaintiff had worked. Apparently motivated by Barnett’s communications, Richardson gathered a variety of information that supported the plaintiff’s sexual harassment claims.170 Once defense counsel learned of these communications, they moved to disqualify Barnett. The district court concluded that, given the small number of employees working in the hotel and Richardson’s position of intimate business trust as a result of being the only assistant to both the manager and the hotel’s part-owner, Richardson could be treated as having managerial responsibilities for purposes of Rule 4.2.171 The Third Circuit reversed the district court’s disqualification order based

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165. Id. at *1.
166. Id.
167. Id.
168. EEOC v. Hora Inc., 239 F. App’x 728 (3d Cir. 2007).
170. Id. at *2.
171. Id. at *12–13 (“While the standard for determining who has . . . ‘authority to bind’ a business entity is somewhat imprecise, it includes employees below the level of corporate management because otherwise the third category of employees mentioned in Rule 4.2 would be redundant. . . .”) (quoting Weeks v. Indep. Sch. Dist., 230 F.3d 1201, 1209 (10th Cir. 2000)).
on the lack of evidence to support a conclusion that Richardson came within the scope of Rule 4.2. There was no evidence that Richardson had regularly consulted with defense counsel in the matter, nor was there evidence that her acts could provide a basis for imputing liability to Days Inn.172

Jurisdictions also take differing approaches to ex parte communications with former officers, agents, or employees of a represented organization, but mostly only as to the question of what precautionary measures a lawyer must take to protect against causing a former officer or employee from disclosing confidential or privileged information. Courts generally agree that a lawyer is free to communicate with a former employee of an organization without first obtaining the consent of the organization’s lawyer.173 The ABA clearly ratified that approach in the 2002 amendments to Model Rule 4.2, which added language to Comment 7 stating: “Consent of the organization’s lawyer is not required for communication with a former constituent.”174 A few jurisdictions, however, deviate from the majority respect with regard to ex parte contact with former employees of an organization.175

Regarding precautionary measures, the comment to Model Rule 4.2 states only that in communicating with a current or former constituent of an organization, a

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172. *Hora*, 239 F. App’x at 731.


175. See, e.g., Michaels v. Woodland, 988 F. Supp. 468, 470–74 (D.N.J. 1997) (treating Rule 4.2 as prohibiting contact with former employees who were previously members of the organization’s litigation control group); Camden v. State of Md., 910 F. Supp. 1115, 1122–24 (D. Md. 1996) (construing Rule 4.2 to prohibit ex parte contact with former employees who had been exposed to an extensive amount of privileged information); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986) (concluding that ex parte communication with a former employee who has managerial responsibilities with respect to the litigation’s subject matter violates Rule 4.2).
lawyer must not use methods of obtaining evidence that violate the organization’s legal rights. Not surprisingly, courts routinely interpret Rule 4.2 to prohibit lawyers from asking former employees about privileged information. The Restatement (Third) of the Law Governing Lawyers takes a similar position regarding the propriety of lawyers seeking such information. A lawyer who obtains confidential information from a former employee known to be likely to have had access to it will probably be disqualified from continued participation in the matter.

With respect to current employees who are not protected by or under Rule 4.2, lawyers for the organization who are concerned about opponents’ ex parte communications with these employees may ask the current employees not to voluntarily speak with opposing counsel outside their presence. Such a request can only be made if the lawyer for the organization has a reasonable belief that stiff-arming opposing counsel will not adversely affect the targeted person. Whether the employee chooses to comply is entirely up to her. As to former employees who are unprotected by or under Rule 4.2, lawyers for the organization cannot make the kind of request they could make of a current employee, but nothing in Rule 3.4(f) restricts the organization’s lawyer from telling the former employee that she has the legal right to insist on being subpoenaed before providing information. Nor does Rule 3.4(f) prevent the organization’s lawyer from asking the former employee if she is willing to ask that the organization’s lawyer be included in any telephone conversations or meetings. But one thing that the lawyer may not do regarding current and former employees alike is

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178. Restatement (Third) of the Law Governing Lawyers § 102 (2000) (“A lawyer communicating with a nonclient . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.”).
179. See, e.g., Arnold v. Cargill, No. 01-2086, 2004 WL 2203410, at *8, 13 (D. Minn. Sept. 24, 2004) (disqualifying a law firm based on its review, and retention of, privileged and confidential materials obtained from a former high-ranking employee of defendant who the law firm knew “was extensively exposed to confidential and privileged information”). But see Forward v. Foschi, No. 9002/08, 2010 WL 1980838, at *17 (N.Y. Sup. Ct. May 18, 2010) (declining to disqualify a law firm where improperly obtained information did not provide a “blueprint” to litigating or defending the case, the opposing party was aware of the other side’s acts in obtaining information and delayed seeking a remedy, and where the party would be “severely prejudiced” by the disqualification).
180. Model Rules of Prof’l Conduct R. 3.4(f)(1) (2015). Before making such a request in any criminal matter or a matter involving governmental or regulatory actions, a lawyer should make certain that it would not constitute obstruction of justice.
181. Id. R. 3.4(f)(2).
A topic that is frequently discussed, but that is well-settled and easy to comprehend, is that an attorney’s act of visiting an adversary’s public website is not a communication that violates Model Rule 4.2. This is true even if the lawyer goes beyond simply reading information posted on the website as long as the lawyer engages in purely one-way communications through the site, such as ordering products. Even obtaining an archived version of an opponent’s public website through a database such as the “The Wayback Machine” or similar Internet archive websites cannot be said to violate Model Rule 4.4 because it does not constitute obtaining evidence in violation of anyone’s legal rights. A Pennsylvania federal court made this point in entering summary judgment against a plaintiff who claimed that, by viewing older versions of its website through The Wayback Machine, a law firm violated copyright law and the Computer Fraud and Abuse Act.

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

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184. The Wayback Machine is a service provided by the Internet Archive, a nonprofit organization, which was begun in 1996. Web users can input the URL of a website for which they would like to view archived versions and then select from a variety of dates of available archived materials to see the archived screenshot of that website on the selected dates.
185. MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2015) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”).
188. Id. at 630.
firm must have circumvented HAI’s electronic protective measures. Specifically, HAI had implemented an exclusion policy offered by The Wayback Machine to website owners, the robots.txt protocol, whereby a website owner that did not want pages of its website to be archived and viewable could insert a robots.txt file at its website. But, as it turned out, at the time the Harding firm performed its search, The Wayback Machine’s servers had malfunctioned. Because of that malfunction, The Wayback Machine’s servers did not recognize the robots.txt exclusions, and this allowed the Harding firm to see archived versions of HAI’s website that HAI did not want to be archived and viewable. Given that the Harding firm had simply used The Wayback Machine “in the manner it was intended to be used” by any user with a normal web browser, the court rightly concluded that the Harding firm’s conduct was lawful.

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

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189. *Id.* at 630–31.
190. *Id.*
191. *Id.* at 648–49.
192. See, e.g., United States v. Ford, 176 F.3d 376, 382 (6th Cir. 1999) (interpreting Kentucky’s version of Rule 4.2); Miller v. Material Sciences Corp., 986 F. Supp. 1104, 1106–07 (N.D. Ill. 1997) (determining that communication by plaintiff’s attorney in a federal securities class action with party that was represented in a related SEC investigation but not in the federal class action was permissible); Miano v. AC&R Adver., Inc., 148 F.R.D. 68, 80 (S.D.N.Y. 1993) (finding that corporate employees were not off-limits as a result of ethics rules when the corporation had not retained counsel with respect to the specific matter that was the focus of communications); State *ex rel.* Okla. Bar Ass’n v. Harper, 995 P.2d 1143, 1147 (Okla. 2000) (concluding that interview of driver by defense lawyer did not violate Rule 4.2 because it involved separate claim of passenger, not other claims involved in same accident on which driver was represented by counsel).
193. 925 N.E.2d 1122 (Ill. 2010); see also Griffin-El v. Beard, No. 06-2719, 2009 WL 2929802, at *7 (E.D. Pa. Sept. 8, 2009) (concluding that there was no violation of Rule 4.2 when defense lawyers communicated with corrections facility officer in his role as custodian of records when officer was represented by counsel only in another lawsuit filed by their client and not in the matter in which his status as custodian made him a potential witness).
195. *Id.* at 1129–30.
When a lawyer knows that a person with whom she wishes to speak is represented in a matter, the lawyer can always seek the other lawyer’s consent to the communication. If there is more than one lawyer representing the person, the lawyer need only obtain consent from one of them. The strictures of Rule 4.2 only come into play, however, if the lawyer actually knows that the person is represented by counsel. 196 Because a lawyer’s knowledge can be inferred from circumstances, 197 however, a lawyer cannot turn a blind eye to the obvious with respect to the fact of representation. Although it can be prudent to do so, there is no requirement in the rules mandating that a lawyer ask someone if they are represented by counsel before speaking with them. 198

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

[S]hall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. 199

196. See, e.g., The Turfgrass Grp., Inc. v. Ne. La. Turf Farms, No. 10-1354, 2013 WL 6145294 at *4 (W.D. La. Nov. 20, 2013) (finding that, in the absence of any indication that lawyer was aware of representation by counsel, court cannot conclude lawyer violated ethics rules “by employing an undercover investigator to determine whether [defendant] had violated protected patent and trademark rights”); Humco, Inc. v. Noble, 31 S.W.3d 916, 919 (Ky. 2000) (explaining that the mere fact that in-house counsel was copied on a letter sent by employee of defendant company did not constitute actual knowledge on part of plaintiff’s lawyer).


Model Rule 4.3 limits the lawyer’s ability to exploit the situation by overreaching or otherwise exercising improper influence over the unrepresented person.\(^{200}\) By requiring the lawyer to disclose the nature of her interest in the matter, the rule seeks to ensure that the unrepresented person will appreciate the risks associated with communicating with the lawyer and be able to rationally decide whether to do so. In evaluating the propriety of communications with unrepresented persons, lawyers may wish to consider any strictures potentially imposed by federal or other state law.\(^{201}\)

Of course, the general prohibition in Rule 4.1 against making false statements of material fact or law to third parties applies to lawyers’ communications with unrepresented persons.\(^{202}\) And because the Rule 4.4(a) prohibition against using “methods of obtaining evidence that violate the legal rights of such a person”\(^{203}\) applies to lawyers’ interactions with unrepresented persons, it is significant to evaluate whether the questions to be asked of the unrepresented person would yield privileged or confidential information. In fact, a number of courts have gone as far as to provide scripts or the equivalent thereof to be followed when a lawyer seeks to speak with unrepresented employees or former employees of a represented organization.\(^{204}\)

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

Lawyers’ concerns related to the pursuit of allegedly frivolous claims are not confined to ethics violations. First, lawyers’ pursuit of allegedly frivolous claims or


\(^{201}\) See, e.g., Arons v. Jutkowitz, 880 N.E.2d 831, 837–43 (N.Y. 2007) (explaining that an attorney can proceed with an interview in private of the treating physician of an adverse party but must be mindful of requirements imposed by federal privacy laws and rules); TENN. CODE ANN. § 29-26-121(f) (2014) (requiring a petition and order from the trial court in a healthcare liability action before defense counsel can privately interview a plaintiff’s treating physician).


\(^{203}\) Id. R. 4.4(a); see also Restatement (Third) of the Law Governing Lawyers § 102 (2000) (“A lawyer communicating with a nonclient . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.”).

\(^{204}\) See, e.g., McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 112 (M.D.N.C. 1993) (mandating that, prior to interview, attorney or investigator must fully disclose his representative capacity, state why the interview is sought, inform the individual of right to refuse, inform the individual of her right to her own counsel, and not seek attorney-client privileged or work product information); Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013, 1021 (Del. Super. Ct. 1990) (ordering that “[n]o interview of any former employee of Monsanto shall be conducted unless the following script is used by the investigator or attorney conducting the interview” and setting forth script as part of order); In re Envtl. Ins. Declaratory Judgment Actions, 600 A.2d 165, 173 (N.J. Super. Ct. Law Div. 1991) (declaring that “[n]o interview of any former employee shall be conducted unless the following script is used by the investigator or attorney conducting the interview” and providing detailed script).
contentions is more commonly the subject of motions for sanctions under court rules or statutes. Second, tort liability for abuse of process or malicious prosecution may be a legitimate concern.

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

Although lawyers’ pursuit of frivolous claims or contentions may lead to professional discipline, lawyers accused of such conduct are more frequently targets of sanctions motions. Federal courts and all state courts have rules established to permit lawyers to be sanctioned for pursuing frivolous claims. State court rules are all derived, more or less, from Federal Rule of Civil Procedure 11.205 Rule 11(b) provides:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the [attorney’s] knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.206

Unlike Model Rule 3.1, Rule 11 does not directly address whether a paper or pleading must be frivolous in its entirety or only in part.207 Nevertheless, as with the ethical restriction against pursuing frivolous claims, courts have concluded that Rule

205. In bankruptcy court proceedings, lawyers must comply with Bankruptcy Rule 9011, which is patterned after Federal Rule of Civil Procedure 11. See, e.g., In re Taylor, 655 F.3d 274, 285–86 (3d Cir. 2011) (affirming imposition of sanctions under Rule 9011 for failure of reasonable inquiry in filing of proof of claim that relied on erroneous information received from a third-party vendor’s computer system in circumstances the court described as “abdicat[ing] . . . professional judgment to a black box”).


207. The language in Rule 11(c)(2) regarding the ability to move for sanctions if the targeted attorney or party has not taken advantage of the safe-harbor provision by withdrawing “the challenged paper, claim, defense, contention, or denial” strongly implies that a paper or pleading frivolous only in part would violate Rule 11.
Rule 11 requires an analysis of each claim or defense in a lawsuit and not just the merits of the action or defense as a whole.\textsuperscript{208}

Not surprisingly, and particularly so in light of the mandatory procedural prerequisites for seeking Rule 11 sanctions—including the 21-day safe harbor provision\textsuperscript{209}—most Rule 11 controversies deal with allegations that entire lawsuits were frivolous, as where a New York attorney purported to represent a nonexistent entity, the Association of Holocaust Victims for Restitution of Artwork & Masterpieces (AHVRAM).\textsuperscript{210} In \textit{Association of Holocaust Victims for Restitution of Artwork & Masterpieces v. Bank Austria Creditanstalt AG},\textsuperscript{211} attorney Edward Fagan filed a lawsuit on behalf of AHVRAM against several defendants, including Bank Austria, for claims relating to alleged looting of artwork during the Holocaust. The first amended complaint he drafted did not set forth any basis for federal jurisdiction and, worse, was filed only after a separate lawsuit against Bank Austria was comprehensively settled.\textsuperscript{212} The district court also took issue with the fact that AHVRAM was a fictitious entity, reasoned that by falsely claiming to be a member of AHVRAM and suing on the fictitious entity’s behalf Fagan was engaged in champerty, and observed that he had made a number of other false statements in the first amended complaint.\textsuperscript{213} The district court fined Fagan $5,000 and ordered him to reimburse the defendants for over $340,000 in attorneys’ fees and costs.\textsuperscript{214}

As with analysis of lawyers’ obligations under Model Rule 3.1 and state analogs, cases weighing potential Rule 11 violations turn upon an objective standard of reasonableness under the circumstances and not the lawyer’s good faith or other subjective motivation.\textsuperscript{215} With respect to court-initiated Rule 11 sanctions, federal circuits are

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\bibitem{208} See, \textit{e.g.}, Kearney v. Dimanna, 195 F. App’x 717, 722 (10th Cir. 2006) (“Each claim must be individually evaluated and the merit, or potential merit, of one legal claim does not diminish the command of Rule 11 that each claim have the necessary legal support.”); Holgate v. Baldwin, 425 F.3d 671, 676–77 (9th Cir. 2005) (explaining that a pleading alleging multiple claims does not avoid Rule 11 merely because it contains one non-frivolous claim); Perez v. Posse Comitatus, 373 F.3d 321, 325 (2d Cir. 2004) (explaining that a complaint challenged under Rule 11 is not analyzed as an indivisible unit; rather, claims are analyzed individually); Hanson v. Loparex, Inc., Civ. No. 09-1070 (SRN/FLN), 2011 WL 4808180, at *4 (D. Minn. Oct. 11, 2011) (quoting Kearney, 195 F. App’x at 723).

\bibitem{209} \textit{Fed. R. Civ. P. 11(c)(2)}.


\bibitem{211} \textit{Id.} at *1–2.

\bibitem{212} \textit{Id.} at *4–5.


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split on whether a finding of subjective bad faith on the offending attorney’s part is required.\textsuperscript{216} Consistent with the language in the rule regarding “inquiry reasonable under the circumstances,”\textsuperscript{217} courts have generally concluded that Rule 11 requires lawyers to conduct a reasonable investigation before suing, and that satisfaction of that duty in a particular case will require fact-specific analysis.\textsuperscript{218} Courts have determined that reliance upon a newspaper article that relies heavily on anonymous sources,\textsuperscript{219} an affidavit from a client that a reasonable lawyer should recognize as perjurious,\textsuperscript{220} and even investigations performed or representations made by other attorneys\textsuperscript{221} may not substitute for a thorough investigation. As with the corresponding ethical duty under Rule 3.1, lawyers’ Rule 11 duty to reasonably investigate or inquire may be postponed because of exigent circumstances, but not excused.

The First Circuit affirmed sanctions against New Hampshire lawyer Gordon Blakeney for not having made the kind of investigation reasonably necessary before filing a disqualification and sanctions motion alleging that the City of Concord had engaged in communications that amounted to obstruction of justice.\textsuperscript{222} In \textit{Northwest Bypass Group v. United States Army Corps of Engineers},\textsuperscript{223} Blakeney sued the Army

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\item \textsuperscript{215} See, e.g., Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 263–65 (5th Cir. 2007) (finding a Rule 11 violation when the plaintiff’s lawyer, in a brief filed in a race discrimination case, modified a quotation from an affidavit to twice add the racially inflammatory term “boy”); Tropf v. Fid. Nat’l Title Ins. Co., 289 F.3d 929, 939 (6th Cir. 2002); Zuk v. E. Pa. Psychiatric Inst., 103 F.3d 294, 299–300 (3d Cir. 1996) (affirming Rule 11 sanctions because of lawyer’s failure to conduct a reason-
\item \textsuperscript{216} Compare \textit{In re Pennie & Edmonds LLP}, 323 F.3d 86, 90 (2d Cir. 2003) (requiring subjective bad faith), with \textit{Young v. Providence ex rel. Napolitano}, 404 F.3d 33, 39 (1st Cir. 2005) (rejecting any distinction in the standard based on whether party moves or court acts sua sponte), and \textit{Kaplan v. DaimlerChrysler AG}, 331 F.3d 1251, 1256 (11th Cir. 2003) (finding reasons to “excuse” it from having to determine whether the mens rea requirement should be subjective bad faith), and \textit{In re Keegan Mgmt. Co. Secs. Litig.}, 78 F.3d 431, 434 (9th Cir. 1996) (rejecting use of subjective standards in reviewing court-initiated Rule 11 sanctions); \textit{see also} Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002) (applying standard for court-initiated Rule 11 sanctions that is “akin to contempt”).
\item \textsuperscript{217} \textsc{Fed. R. Civ. P. 11(b)}.
\item \textsuperscript{218} See, e.g., \textit{In re Abbott Labs. Sec. Litig.}, 813 F. Supp. 1315, 1320 n.11 (N.D. Ill. 1992) (“What constitutes a reasonable investigation, in turn, depends on the circumstances of the given case.”).
\item \textsuperscript{219} Walker v. S.W.I.F.T. SCRL, 517 F. Supp. 2d 801, 806–07 (E.D. Va. 2007). \textit{But see} \textit{In re Keegan Mgmt.}, 78 F.3d at 433 (explaining that an article in the \textit{Wall Street Journal} regarding controversy about weight loss system’s safety tended to support the claims advanced).
\item \textsuperscript{222} Nw. Bypass Grp. v. U.S. Army Corps of Eng’rs, 569 F.3d 4 (1st Cir. 2009).
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Corps of Engineers over its issuance of a highway construction permit that required two of the plaintiffs, the Tuttles, to relocate property designated as historical. The City of Concord had been discussing relocation with the Tuttles for years and had been trying to find an acceptable lot. After unsuccessfully attempting to obtain a variance necessary to relocate the Tuttles’s property to a particular new lot and after the lawsuit had been filed, a city employee, Martha Drukker, called the Tuttles to tell them that the variance had been denied and that Concord might not further investigate relocation given their lawsuit. Mr. Tuttle indicated to Drukker that Blakeney was not representing him and that he had not sued the city.

The city then wrote to Blakeney to ask that he clarify in writing his authority to represent the Tuttles. In response, Blakeney filed the motion to disqualify Concord’s counsel and seeking sanctions against the city, which the district court concluded, and the First Circuit agreed, was “ill-founded, frivolous, and without legal or factual foundation.”224 The First Circuit had before it Drukker’s affidavit making clear that she “did no more than explain to the Tuttles that it was not clear the city would make yet another effort since they were suing the city.”225

Given the nature of Blakeney’s allegations—namely that the city was attempting to criminally obstruct justice—the First Circuit explained that the charge should not have been made until Blakeney had made “an adequate investigation and found a realistic basis on which to make such a claim. Nothing . . . establishe[d] that [Blakeney] made such an investigation, let alone that he uncovered evidence that justified this charge.”226 The First Circuit easily shrugged off Blakeney’s argument that it was unfair to judge his conduct in hindsight. The court just as easily dispatched his defense that the fact that he had made a right-to-know request and secured handwritten notes from the city employee, which the First Circuit found consistent with the affidavit later filed by that city employee, justified filing the motion.227 “Zeal is to be expected in litigation,” the court wrote, “but not of this kind.”228

Northwest Bypass Group, like Ex parte Gregory229 in the Rule 3.1 context, raises an interesting question: do different types of allegations impose on lawyers a greater or higher duty to investigate under Rule 11? Would the First Circuit so readily have affirmed the sanctions against Blakeney had he not accused his opponent of criminal obstruction of justice? There is nothing in the language of Rule 11 that suggests the existence of tiered investigation standards. Nor is there any basis for differing stan-

223. 569 F.3d 4 (1st Cir. 2009).
224. Id. at 6.
225. Id. at 7.
226. Id.
227. Id. at 8.
228. Id.
standards, because frivolous litigation unfairly taxes parties and unnecessarily burdens the judicial system regardless of the exact nature of the case or allegations. As a practical matter, however, lawyers must realize that some allegations are especially inflammatory or offensive and accordingly increase the likelihood of a responsive Rule 11 motion if they are unfounded. A similar phenomenon seemingly exists with respect to disciplinary complaints alleging violations of Rule 3.1.230 Thus, when preparing to assert claims or make contentions that might reasonably be expected to especially incense, inflame, or insult an adversary, lawyers are well advised to make sure that their investigations into the bases for those allegations can withstand judicial scrutiny under the bright light of hindsight.

As with Rule 3.1 violations, Rule 11 sanctions may flow from suing the wrong party.231 This is especially true where attorneys fail to acknowledge and correct their mistakes, as in Ratliff v. Stewart.232 The lawyers in Ratliff sued Dr. Lawrence Stewart when they should have sued his father, Dr. Edsel Stewart. The plaintiffs’ lawyers, who knew that their client had been prescribed medication by a Dr. Stewart, failed to check to see which of the two doctors was actually involved in their client’s case. The district court initially imposed Rule 11 sanctions requiring the plaintiff’s lawyers to pay almost $4,500 in fees and costs incurred by the defendant. Although the Fifth Circuit ultimately concluded that the district court acted correctly in later vacating that order and imposing the sanctions pursuant to a separate federal statute,233 the court made clear that this was solely because a Rule 11 procedural requirement had not been satisfied. The plaintiff’s lawyers were faulted not merely for suing the wrong doctor, but for ignoring communications from defense counsel regarding the mistake, failing to even seek confirmation or denial from their own client, and first opposing a motion to dismiss filed by the doctor and then delaying for another month before finally admitting the mistake.234

Much like courts studying alleged Rule 3.1 violations, courts evaluating potential Rule 11 sanctions also consider lawyers to have a continuing obligation to reasonably inquire into the merits of their clients’ positions and contentions.235 It is also worth

230. See, e.g., Idaho State Bar v. Hawkley, 92 P.3d 1069, 1074 (Idaho 2002) (concluding that a lawyer who alleged that the defendants had conspired to violate his client’s civil rights had violated Rule 3.1 and stating that “[t]he extent of the investigation he identified was trivial in light of the extent and seriousness of the charges he made”).
231. See, e.g., Montgomery v. Univ. of Chi., 132 F.R.D. 200, 201 (N.D. Ill. 1990) (imposing Rule 11 sanctions for naming the wrong defendant based on counsel’s failure to distinguish between a Dr. Del Pero and a Dr. Del Piero).
232. 508 F.3d 225 (5th Cir. 2007).
234. Ratliff, 508 F.3d at 235.
remembering that those wronged by conduct that violates Rule 11 cannot unreasonably delay in taking remedial action. Miller v. Bridgeport Board of Education\textsuperscript{236} offers a ready example of how such delay can result in the denial of a significant Rule 11 sanction—that is, the award of fees incurred as a result of pleadings that should never have been filed—even when the offending lawyer’s misconduct is quite serious.

In Miller, the plaintiff, an African-American lawyer proceeding pro se, had narrowly avoided dismissal of her race discrimination complaint alleging that the City of Bridgeport would not pay for legal services provided by African-Americans by including three paragraphs in her amended complaint stating that the city had a policy, practice, and custom of not hiring African-American attorneys, had no such attorneys performing legal services, and that the city’s records confirmed those facts.\textsuperscript{237} The defendants then served a draft Rule 11 motion, with accompanying affidavits, demonstrating that the attorney knew or should have known that her allegations in those three paragraphs were untrue.\textsuperscript{238} Despite finding that the lawsuit should be dismissed as frivolous, assessing a $1,500 penalty against the plaintiff, and referring her to bar counsel for possible discipline because she knew that the subject allegations were false, the district court denied the defendants’ request for more than $21,000 in attorneys’ fees incurred in defending against the amended complaint that necessitated the Rule 11 motion.\textsuperscript{239}

The defendants waited until their motion to dismiss the amended complaint was denied before seeking Rule 11 sanctions, and that choice (although the court understood their reluctance to accuse opposing counsel of being unethical) was, in the court’s eyes, “mistaken.”\textsuperscript{240} As the court explained, by not “filing their motion at the earliest possible time” the defendants “allowed the litigation to continue, and it meant

\textsuperscript{236} See, e.g., Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1024–25 (5th Cir. 1994) (concluding that while the lawyer’s initial investigation into his client’s hit-and-run claim was sufficient, after the defendant produced substantial evidence of a staged accident, the lawyer’s failure to take steps that would be expected as reasonable further investigation of case supported Rule 11 violation); S. Leasing Partners v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (“When a lawyer learns that an asserted position, even if originally supported by adequate inquiry, is no longer justifiable he must not persist in its prosecution.”); see also E.E.O.C. v. Tricor Reference Labs., 493 F. App’x 955, 960–61 (10th Cir. 2012) (awarding fees against the EEOC for continuing to litigate claims after it was clear that there were no grounds on which to proceed).
\textsuperscript{238} \textit{Id.} at *3.
\textsuperscript{239} \textit{Id.} at *4. The defendants’ affidavits were from two African-American lawyers, one in-house with the city and one who was the director of a law firm employed as outside counsel by the city, each of whom detailed their communications with the plaintiff in other cases. \textit{Id.}
\textsuperscript{240} \textit{Id.} at *10.
that the authority and resources of the [c]ourt were unnecessarily expended to con-
sider and rule” on the second motion to dismiss. 241

Courts weighing Rule 11 sanctions enforce the same standards in the filing of
counterclaims that are imposed on lawyers filing original complaints. Lawyers who
file unfounded counterclaims face real peril, as a Seventh Circuit case sanctioning a
prominent national law firm amply demonstrates. In United Stars Industries, Inc. v.
Plastech Engineered Products, Inc., 242 the Seventh Circuit affirmed a sanctions award
of just over $121,000, which it characterized as “modest,” imposed against the law
firm of Jones Day for filing a counterclaim alleging that its client, Plastech, had been
overcharged by almost $900,000. 243

United Stars was a dispute over stainless steel tubing sales using a fluctuating
price tied to raw material costs. The seller, United Stars, determined it had under-
charged Plastech, the buyer, by about $700,000 as a result of using the wrong sur-
charge for its calculations. Plastech refused to pay, claiming instead that it had been
overcharged by $900,000. The parties met to resolve their dispute and agreed to
resume doing business, with United Stars giving Plastech a $200,000 credit. Plastech
continued to place orders and accept materials from United Stars but made no further
payments of any sort to United Stars. When Plastech’s debt reached $800,000, United
Stars sued and, ultimately, obtained a judgment of almost $1.3 million.

The district court found that the litigation, however, went to trial solely as a result
of Plastech’s pursuit of a nearly $900,000 counterclaim, which the court character-
ized as “baseless.” 244 As the district court explained in sanctioning Plastech:

Although [Plastech] alleged that [United Stars] had overcharged [it] . . .
[Plastech] never produced any evidence that it had a legitimate basis for the
claim . . . it identified only one employee, Scott Ryan, as having information
about [its claim]. It told plaintiff that Ryan had performed an “in-depth au-
dit” and was knowledgeable about the alleged overcharges. In fact, at his
deposition, Ryan expressed his ignorance of any damages. He denied having
ever conducted an audit or even knowing what an “internal audit staff” was.
Undaunted, [Plastech] named Ryan as a witness at trial and called him despite
his lack of knowledge about the alleged overcharges. It produced no other
witnesses to testify about its counterclaim. Even now, [Plastech] cannot point
to any evidence to show that its counterclaim had any kind of foundation. 245

241. Id.
242. 525 F.3d 605 (7th Cir. 2008).
243. Id. at 609.
244. Id.
245. Id.
Although the trial court had imposed the sanctions against Jones Day for vexatiously multiplying the litigation under 28 U.S.C. § 1927, that statute authorizes awards only against lawyers and not law firms, so the Seventh Circuit affirmed the sanctions based on Rule 11(c)(3), which does permit sanctions against a law firm. \(^{246}\) The Seventh Circuit explained that “Jones Day advanced a position that never had any evidentiary support, and thus necessarily could not have been based on a reasonable investigation preceding the counterclaim.” \(^{247}\)

As the trial court in *United Stars* was well aware, another source of liability in the form of sanctions for lawyers practicing in federal court arises from 28 U.S.C. § 1927, which permits the imposition of penal sanctions for “multiplying proceedings unreasonably and vexatiously.” \(^{248}\) The availability of sanctions under this statute differs in a number of significant ways from the operation of Rule 11. First, the standard to be met to justify an award of sanctions against a lawyer under § 1927 is both different from, and significantly higher than, Rule 11 in that many courts conclude that there must be a finding of bad faith on a lawyer’s part before sanctions can be awarded under § 1927. \(^{249}\) A court may infer bad faith where a lawyer pursues clearly frivolous claims. \(^{250}\) Second, unlike Rule 11, there is no safe harbor provision or other procedural requirement requiring the opposing party to give the offending lawyer an opportunity to cease the misconduct. \(^{251}\) Third, because the statutory language is not tied to the signing of a document and because it is a standard flowing from multiplying proceedings, conduct that can violate § 1927 is much broader in scope than that

\(^{246}\) *Id.* at 610.

\(^{247}\) *Id.*

\(^{248}\) The full text of the statute reads: “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927 (2006).

\(^{249}\) See, e.g., Blixseth v. Yellowstone Mountain Club, LLC, 796 F.3d 1004, 1007 (9th Cir. 2015) (requiring subjective bad faith for sanctions under § 1927); *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 278 F.3d 175, 188 (3d Cir. 2002) (noting that a court imposing sanctions under § 1927 must find bad faith but need not do so explicitly); E.E.O.C. v. Great Steaks, Inc., 667 F.3d 510, 522 (4th Cir. 2012) (“Bad faith on the part of the attorney is a precondition to imposing fees under § 1927.”); see also Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443, 445 (8th Cir. 2001) (stating that an attorney’s conduct, to be sanctionable, must objectively be viewable as intentionally or recklessly in disregard of the attorney’s duty to the court); Ridder v. City of Springfield, 109 F.3d 288, 298 (6th Cir. 1997) (requiring that sanctionable conduct be of a kind “that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court”).


\(^{251}\) See, e.g., Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992) (concluding that notice of voluntary dismissal did not divest court of jurisdiction to impose sanction under § 1927).
which is punishable under Rule 11; sanctions can even be assessed against lawyers who prevail on the merits in the litigation. Fourth, only a lawyer can be sanctioned for violating § 1927, not a party, and, unlike the vicarious liability that attends Rule 11, not a law firm in which the lawyer practices.

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


253. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1293 (9th Cir. 2015); BDT Prods., Inc. v. Lexmark Int’l, Inc., 602 F.3d 742, 750–51 (6th Cir. 2011); Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005).


255. Piper, 447 U.S. at 764; see, e.g., Sciarretta v. Lincoln Nat’l Life Ins. Co., 778 F.3d 1205, 1212 (11th Cir. 2015) (stating that the key to unlocking a federal court’s inherent power to sanction is bad faith); Mickle v. Morin, 297 F.3d 114, 125–26 (2d Cir. 2002) (explaining court’s power, inherent in supervising and controlling proceedings before it, to sanction counsel for bad faith conduct); Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 784 (3d Cir. 2001) (requiring bad faith with respect to judicial estoppel as an application of the court’s inherent authority); Crowe v. Smith, 151 F.3d 217, 236 (5th Cir. 1998) (“In order to impose sanctions . . . under its inherent power, a court must make a specific finding of bad faith action.”); Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 314 (6th Cir. 1997) (reversing district court’s imposition of sanctions under inherent authority because of a lack of “actual findings of fact that demonstrate that the claims were meritless, that counsel knew or should have known that the claims were meritless, and that the claims were pursued for an improper purpose”).


Lawyers have long had to be concerned about sanctions for pursuing frivolous actions under particular state statutes. Tort reform in a number of jurisdictions has heightened that risk through the enactment of further statutory provisions that address sanctioning attorneys for pursuing meritless litigation. Those additional provisions impose stricter standards than those that exist under the federal rules and statutes discussed above. Florida is an example of a state whose legislature has ratcheted up the risk of liability exposure for lawyers with respect to pursuit of unsuccessful claims by adopting a standard that, on its face, appears much less forgiving than Model Rule 3.1 or even Rule 11. The Florida statute provides that:

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

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

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

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

In any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment, and in addition to any

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258. See, e.g., Jandt ex rel. Brueggeman v. Jerome Foods, Inc., 597 N.W.2d 744, 755–65 (Wis. 1999) (determining that a lawsuit had been frivolously maintained but not frivolously filed, reversing in part, and remanding for a determination of appropriate lower amount of sanctions, a trial court’s ruling granting more than $700,000 in fees and expenses as a sanction for filing and maintaining a frivolous lawsuit).


260. Wendy’s of Ne. Fla., Inc. v. Vandergriff, 865 So. 2d 520, 524 (Fla. Dist. Ct. App. 2003); see also De Vaux v. Westwood Baptist Church, 953 So. 2d 677, 684 (Fla. Dist. Ct. App. 2007) (sanctioning a lawyer who pursued an appeal of a breach of contract claim where there was no evidence of agreement on essential terms and noting that the lawyer had “made no effort to distinguish the applicable law or, in good faith, to argue for an extension, modification or reversal of existing law”).
other costs otherwise assessed, reasonable attorneys’ fees and costs against any party or attorney if the court, upon motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment. 261

Although ultimately concluding after rehearing that a trial court acted within its discretion in not sanctioning the plaintiff’s counsel, Illinois Central Railroad Co. v. Broussard 262 demonstrates the uncertainty that such statutes create for lawyers. In Broussard, the attorneys for plaintiff Edwin Broussard filed suit on Broussard’s behalf to avoid the expiration of the statute of limitations on his claim relating to alleged asbestos exposure while employed by the railroad. Unfortunately, the attorneys had not kept in touch with Broussard and learned only after filing the suit that he had died some 20 months earlier. In arguing against sanctions, the attorneys pointed out that Broussard’s claim had originally been filed several years earlier as part of a mass tort action and that, although they had not communicated with him before filing to confirm that he was alive, they dismissed the lawsuit as soon as they learned of his death.

Although the trial court had rejected the defendant’s motion for sanctions, the Mississippi Court of Appeals initially opined that sanctions were required under the Mississippi Litigation Accountability Act because, at the time Broussard’s lawyers filed the suit, there was no “hope of success” because the defendant had a complete defense as a result of Mississippi law providing that a lawsuit filed in the name of a dead person is a nullity. 263 On rehearing en banc, however, the court changed course and determined that the trial court had not erred in refusing to award sanctions in an opinion clearly seeking to reestablish interpretations of sanctionable conduct under the Mississippi Litigation Accountability Act as being consistent with conduct that is sanctionable under Rule 11. 264

B. Liability for Abuse of Process or Malicious Prosecution

Lawyers can also find some solace in the fact that courts have generally concluded that although lawyers risk discipline or sanctions for pursuing claims with insufficient investigation, they do not generally have a duty to attempt to independently determine

262. 19 So. 3d 821 (Miss. Ct. App. 2009).
263. Id. at 824.
264. Id.; see also Sullivan v. Maddox, 122 So. 3d 75, 85 (Miss. Ct. App. 2013) (affirming award of sanctions of fees, expenses, and costs totaling over $40,000 for filing of quiet title action against the United States in state court with “no hope of success”).
whether a client’s claim has merit prior to filing.\textsuperscript{265} Of course, going beyond the initial filing of an action and engaging in continued active pursuit of a case lacking in merit can expose a lawyer to potential liability in the form of an action for abuse of process or malicious prosecution by the opposing party.

Although lawyers’ conduct in pursuing litigation, including communications at the preparatory stages of a case, is typically protected by a robust litigation privilege,\textsuperscript{266} malicious actions prosecution are universally acknowledged to fall outside the scope of that privilege.\textsuperscript{267} A claim for malicious prosecution arising out of the pursuit of civil claims can be established by showing (1) the filing, or continued pursuit, of a civil lawsuit (2) in the absence of probable cause (3) that ends with a result in favor of the defendant in the lawsuit.\textsuperscript{268} In terms of lawyers’ liability exposure, the defense of malicious prosecution claims distills to whether the lawyer had probable cause for filing, or continuing to pursue, the lawsuit. If so, the lawyer cannot be liable for malicious prosecution.\textsuperscript{269} Thus, appropriately investigating clients’ claims before su-

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

266. Restatement (Second) of Torts § 586 (1977).


268. See Restatement (Second) of Torts § 674 (1977).

269. See Restatement (Third) of the Law Governing Lawyers § 57(2) (2000); see also Zamos v. Stroud, 87 P.3d 802, 808 (Cl. App. 2003) (listing 11 other states that have concluded, in accord with the Restatement, that continuing to pursue a lawsuit after probable cause no longer exists can amount to malicious prosecution); Restatement (Second) of Torts § 674 cmt. d (1977) (“An attorney is not required or expected to prejudge his clients’ claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.”).
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Pre-suit Investigation and the Pursuit of Frivolous Claims

Pre-suit Investigation and the Pursuit of Frivolous Claims

Given the nature of malicious prosecution claims, lawyers and law firms that are found liable on this theory are likely to be hit with punitive damages. This point is illustrated by a $9.9 million punitive damage award against a respected law firm for filing a meritless lawsuit. In *Seltzer v. Morton*, Gibson, Dunn & Crutcher, LLP (GDC) was hit with a punitive award that was nine times the already stiff $1.1 million compensatory damages awarded against it for its ruthless pursuit of a lawsuit against an art expert who had unfavorably opined on the authenticity of a painting to GDC’s client, Steve Morton. In fact, the punitive award against GDC was originally significantly higher, the jury having entered a punitive verdict of $20 million, but the Montana Supreme Court reduced it based on constitutional factors mandated by Supreme Court precedent.

The *Seltzer* case is a stark reminder that even the largest and most sophisticated law firms can be felled by the poor judgment of just one or two of their lawyers. Morton owned a painting, “Lassoing a Longhorn,” which he initially believed was a valuable work by legendary western artist Charles M. Russell. The painting bore a signature that appeared to be Russell’s. Morton purchased the piece from New York’s Kennedy Galleries in 1972 for $38,000. Morton did so without getting any proof other than oral assurances from the gallery that it was a Russell. In 1998, Morton contacted the director of the Coeur d’Alene Art Auction (CAA), Bob Drummond, about selling the painting at auction. Drummond assumed that the painting was an authentic Russell and thus appraised its market value at $650,000. Prior to the planned auction, Drummond’s partner, Stuart Johnson, grew suspicious that the painting was actually by an artist of a similar style and genre, O.C. Seltzer. Johnson thus encouraged Drummond to consult with Steve Seltzer, the world’s foremost expert authority on the paintings of O.C. Seltzer, his grandfather, and who also was an expert on the

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270. See, e.g., Bird v. Rothman, 627 P.2d 1097, 1101 (Ariz. Ct. App. 1981) (crediting lawyers’ pre-filing investigation that involved 25–30 hours of researching and investigating theories, contacting an architect regarding pertinent standard of care, and gathering witness statements regarding accident); Cent. Fla. Mach. Co. v. Williams, 424 So. 2d 201, 203 (Fla. Dist. Ct. App. 1983) (treating affidavits of attorneys regarding their investigative efforts before filing as sufficient to show reasonable investigation “to support a reasonable and honest belief in a tenable claim” in wrongful death lawsuit); Prewitt v. Sexton, 777 S.W.2d 891, 896 (Ky. 1989) (finding no cause of action against lawyer with respect to habeas corpus proceeding where, prior to filing, lawyer had attempted to check court files to confirm client statements regarding events and was denied access to file based on improper sealing, but was told by court clerk that no signed order had been entered regarding removal of child from client’s custody).
272. 154 P.3d 561 (Mont. 2007).
273. *Id.* at 570, 576.
274. *Id.* at 571.
paintings of Russell. Seltzer offered his definitive opinion that the painting was a Seltzer.\textsuperscript{275} At Johnson’s further recommendation, Drummond also sought an opinion from Ginger Renner, who was the foremost expert on Russell and, to a lesser extent, an expert on O.C. Seltzer. Renner opined that the painting was clearly a Seltzer and that the signature appeared to have been altered to look like Russell had signed the work.\textsuperscript{276} Armed with these expert opinions, Drummond informed Morton in January 2001 that CAA could not sell the painting as an authentic Russell because it in fact appeared to be the work of O.C. Seltzer. Unfortunately for Morton, Seltzer’s paintings were worth substantially less than paintings by Russell.\textsuperscript{277}

After he was told by Drummond that CAA was unwilling to sell “Lassoing a Longhorn” as an authentic Russell, Morton called Seltzer about his opinion. Seltzer explained the reasons for his opinion and followed up with a letter to Morton confirming them. Morton took the painting to Renner at her Arizona home, where she, too, confirmed her opinion that “it was unquestionably the work of O.C. Seltzer.”\textsuperscript{278} Morton then sent a letter to Renner thanking her and advising of his “state of shock” upon learning her opinion regarding the painting being a Seltzer; Morton also asked Renner to provide him with a formal letter expressing that opinion so that he could decide what to do next.\textsuperscript{279} Renner complied with Morton’s request in February 2001. Morton’s then-counsel wrote a letter to the Kennedy Galleries expressing Morton’s shock, indicating that “two recognized experts on Western Art have concluded that the painting is obviously a work by” Seltzer, describing the Kennedy Galleries’ actions as “fraudulent (or, at the very least, negligent) misrepresentations,” and indicating Morton’s intent to hold the Kennedy Galleries liable for his damages.\textsuperscript{280} Morton subsequently tried to sell the painting as an authentic Russell, but to no avail.

Morton then hired GDC senior counsel Dennis Gladwell to represent him. In April 2002, Gladwell wrote to both Seltzer and Renner to demand that they recant their opinions in a letter drafted to GDC’s specifications, agree to pay to Morton the difference between the painting’s current market price and what it could have sold for before they issued their opinions, and pay Morton an additional $50,000 for his troubles. The letter ominously concluded that GDC would sue on Morton’s behalf if these demands were not met, including a claim for punitive damages. Gladwell sent another similar demand letter in May 2002. In July 2002, GDC sued Seltzer for claims ranging from defamation to intentional interference with prospective economic advantage and sought compensatory and punitive damages.\textsuperscript{281} Gladwell ap-

\begin{itemize}
  \item \textsuperscript{275} Id. at 571–72.
  \item \textsuperscript{276} Id. at 572–73.
  \item \textsuperscript{277} Id. at 571.
  \item \textsuperscript{278} Id. at 573.
  \item \textsuperscript{279} Id.
  \item \textsuperscript{280} Id. at 574.
  \item \textsuperscript{281} Id. at 576–77.
\end{itemize}
peared on the complaint for GDC, along with William Claster, a partner, and Erin Alexander, an associate.

The problems with this suit obviously were legion. After Seltzer produced ten experts who shared his opinion about the painting and GDC was unable to locate an expert who would support Morton’s position, Morton agreed to a stipulation of dismissal.\footnote{282. \textit{Id.} at 578.} Seltzer then sued GDC for malicious prosecution. In that action, Seltzer learned that, despite having served discovery in the underlying case and having been told by GDC that Morton had produced everything responsive, GDC and Morton had failed to produce copies of Morton’s letter to Renner expressing his “state of shock,” and his first lawyer’s letter to the Kennedy Galleries that accused it of fraud and described Seltzer and Renner as “two recognized experts.”\footnote{283. \textit{Id.} at 573–74, 580–81.} Seltzer also secured expert testimony from an experienced trial lawyer who opined that GDC’s “failure, before filing the lawsuit, to obtain an expert willing to testify that the painting was a Russell constituted a significant deficiency in their investigation.”\footnote{284. \textit{Id.} at 584.} The Montana Supreme Court, finding that GDC’s conduct amounted to “legal thuggery” and was “truly repugnant to Montana’s foundational notions of justice” and “highly reprehensible,” affirmed the lower court award of both compensatory and punitive damages.\footnote{285. \textit{Id.} at 609, 615.}

A final risk for lawyers relating to the pursuit of frivolous claims is potential criminal liability, as demonstrated by the New Hampshire Supreme Court’s decision in \textit{State v. Hynes}\footnote{286. 978 A.2d 264 (N.H. 2009).} affirming an attorney’s extortion conviction. In \textit{Hynes}, the court held that Daniel Hynes’s act of sending a letter to a salon seeking $1,000 for him to refrain from filing suit amounted to extortion when the salon agreed to settle for $500.\footnote{287. \textit{Id.} at 268.} The court explained that Hynes’s threatened lawsuit accusing the salon of engaging in gender and age discrimination by charging women more for haircuts than it charged men or children was utterly baseless, given that he had no client and did not himself have standing to sue because he had never been a customer of the salon.\footnote{288. \textit{Id.} at 269.}

Hynes, who had sent similar letters to other New Hampshire salons, argued that he had standing under a theory that private persons could pursue the elimination of discriminatory practices as an act of altruism. The court rejected that argument on the basis that obtaining satisfaction from seeing discrimination thwarted was far too “abstract” to amount to a “benefit” that would preclude application of the New Hampshire extortion statute.\footnote{289. \textit{Id.} at 271–72.} The New Hampshire statute provided that it is extortion for
a person to obtain money by threatening to do something “which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person’s health, safety, business, calling, career, financial condition, reputation, or personal relationships.” 290 Although the court easily concluded that Hynes’s actions qualified as extortion, the court went to some length to explain that its holding did not change the fact that accepting a settlement payment to forgo filing a legitimate lawsuit generally does not constitute extortion. 291

_Hynes_ is somewhat anomalous, especially given that Hynes had no client. Further, there are numerous cases where courts have concluded that the mere threat to sue, even involving an entirely frivolous claim, will not support criminal liability for extortion. 292 The _Hynes_ court acknowledged those authorities but differed on their importance given New Hampshire’s statute, which the court believed required it to not only be concerned with the nature of the threat but also the potential consequences. 293

V. Conclusion

A lawsuit can be one of the most important events in a plaintiff’s life, bringing with it the risk of sustained stress and unrelenting scrutiny of otherwise private aspects of the plaintiff’s personal life. Likewise, being named a defendant in a lawsuit can be a monumental event for an individual and even for some entities, and, even for entities that are so sophisticated or large that being named in litigation can be commonplace, the increasing expense of litigation as a result of the rise of e-discovery means that being sued is not something easily shrugged off. For trial lawyers, on the other hand, filing lawsuits is the stuff of everyday life. Nevertheless, lawyers should not forget that filing or defending a lawsuit involves risk for them as well. To protect against those risks, lawyers must appropriately investigate their clients’ claims before pulling the trigger in filing a lawsuit or in lodging claims, defenses, or contentions in defense

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291. _Id._
292. _See, e.g.,_ United States _v._ Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002) (holding that threat to sue county, even if made in bad faith and supported by false affidavits, could not amount to extortion under the Hobbs Act); First Pac. Bancorp _v._ Bro, 847 F.2d 542, 547 (9th Cir. 1988) (determining that the threat of a shareholder derivative suit was not a predicate act of extortion for RICO liability); I.S. Joseph Co. _v._ J. Lauritzen A/S, 751 F.2d 265, 267 (8th Cir. 1984) (holding that a threat to sue a bank, even assuming it was made in bad faith and was entirely groundless, could not constitute extortion); Rendelman _v._ State, 927 A.2d 468, 481–82 (Md. Ct. Spec. App. 2007) (reversing conviction for extortion based on demand letter threatening suit because such a threat lacks the “capacity to instill fear” and because it is not a threat to pursue anything other than “lawful means”).
of a lawsuit against a client. The nature of the investigation required will depend on
the circumstances of the case.

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

The consequences of failing to perform sufficient investigation before making as-
sertions in litigation or of using a baseless lawsuit to pursue spiteful ends can resonate
well beyond the realm of ethics. Additional risks include sanctions, potential tort liabil-
ity for abuse of process or malicious prosecution, and sometimes even criminal liability.