Zealous Advocacy or Sharp Practice?
The Ethical Limits on Hardball Tactics in Franchise Litigation

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I. INTRODUCTION

A lawyer practicing anywhere in the United States has an obligation zealously to represent his or her client in civil matters. On the other side of the coin, the attorney has an obligation not to present frivolous claims or claims designed to harass the opponent or needlessly increase the costs of litigation to the other side. A lawyer also has a general obligation not to use means to embarrass, delay or burden third persons.

There are a host of claims that can be made in franchise litigation against individuals, including officers, directors and other employees of the franchisor. There are also claims and motions that may be made against the opposing attorneys involved with the dispute. While the legitimate interest of the client is always paramount, an attorney must not forget his or her ethical obligations as an attorney when deciding whether such claims can be made or, perhaps more important for purposes of this paper, should be made.

This paper explores, against the backdrop of the ethical rules, hardball tactics in franchise litigation, including covert investigations, sanctions motions, suits against opposing counsel, and claims directed at individual owners and officers of franchisors and franchisees, along with the impact of the fiduciary shield doctrine, the Sarbanes-Oxley Act, the proposed new FTC Franchise Rule and the Bankruptcy Abuse Protection and Consumer Protection Act of 2005.

II. REVIEW OF THE ETHICAL RULES

The ABA Model Rules of Professional Conduct mark the line between sharp practices and zealous advocacy. The bars of 46 states have implemented an amended version of the Model Rules. The four exceptions are California, Illinois, Maine and New York. California has its own ethics code, while Illinois uses the structure of the Rules but includes much of the substance of the old Model Code. Maine follows the structure of neither the Model Rules nor the Code, but has adopted substance from both, and New York uses an amended version of the old Code with some substance from the Rules interwoven.

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1 The authors wish to thank Mark E. Ashton, a Schiff Hardin LLP associate, for his assistance with this paper.

2 Model Rules of Prof'l Conduct, Preamble.


4 Model Rules of Prof'l Conduct, Rule 4.4.

5 See Lawyers’ Manual on Professional Conduct 1:3 (BNA 2005). The federal district courts lack this level of uniformity, however, and do not necessarily apply the ethical rules of the states in which they sit. Although some federal district courts do apply those state rules, others use the Model Code, the Model Rules or rules of their own making. A chart reflecting the various approaches taken by the federal courts has been reproduced, with permission, at Appendix B. Judith A. McMorrow & Daniel R. Coquillette, Attorney Conduct: Federal District Courts, Moore's Federal Practice, § 802.06 (Matthew Bender 3d ed.). See generally Judith A. McMorrow, The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. . . continued
The Model Rules contain several provisions that seek to distinguish between sharp practices and zealous advocacy, albeit without providing a bright-line rule. The Preamble to the Rules articulates the duty to advocate for clients with zeal, providing that, “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”6 The Preamble qualifies this duty, however, by instructing that “a lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for . . . other lawyers.”7 The Comments to Rule 1.3, which mandates diligent representation of clients, add:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. 8

Thus, as echoed in the Preamble, all lawyers have an “obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”9

Although the language of the Preamble is aspirational, it provides the backdrop for several of the Rules pertaining to what might be characterized as overzealous representation. Rule 3.1, for example, instructs that “a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” The comments to this Rule emphasize that attorneys have an ethical duty “not to abuse legal procedure,” and require that they have at least “a good faith argument for an extension, modification, or reversal of existing law.” Some states, having apparently viewed Rule 3.1 as relatively toothless, have expanded their state versions of this rule and related provisions to apply directly to harassment through abuse of legal process.

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7 Id.

8 Model Rules of Prof’l Conduct R. 1.3, Cmt. 1 (2003). Rule 1.3 requires that a “lawyer shall act with reasonable diligence and promptness in representing a client.”

Additionally, Rule 3.2 requires a lawyer to “make reasonable efforts to expedite litigation consistent with the interests of the client,” such that efforts to delay litigation unreasonably or solely for improper strategic advantage violate the Rules. Similarly, Rule 4.4 prohibits lawyers from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person,” such as individual officers or directors of a franchised business or outlet, and Rule 4.2 prohibits lawyers from communicating about the subject matter of the dispute with a person that they know to be represented, without consent of the represented person’s counsel or authorization by law.\footnote{10}

Of course, attorneys often examine the conduct of their opponents, rather than themselves, when considering ethical prohibitions. As one commentator put it, “It is a rare trial lawyer who considers himself outrageous in his litigation practices. But he sees other lawyers, especially opponents, often behaving outrageously.”\footnote{11} Lawyers therefore may be tempted to use the Model Rules as a basis to sue their opponents, but the Rules do not themselves give rise to any causes of action, nor do they create a presumption that a legal duty has been breached.\footnote{12} Nevertheless, the Rules make plain that a “violation of a Rule may be evidence of breach of the applicable standard of conduct.”\footnote{13}

Some attorneys may attempt to use the Rules as a tactical weapon against opposing counsel, rather than a means to address legitimate concerns, but this is a risky strategy. Take, for example, the situation where an attorney attempts to gain leverage over opposing counsel by threatening to report alleged ethical violations to disciplinary authorities. The threat itself may be characterized as unethical harassment, particularly in light of the requirements of Model Rule 8.3.

Rule 8.3 imposes an absolute obligation to report another lawyer’s violation of the Rules “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.”\footnote{14} Accordingly, the ABA and several state bar ethics committees have found that using a reporting threat as a bargaining point is unethical, because the duty to report is absolute – it may not simply be threatened.\footnote{15} Interestingly, the logical result is that a lawyer who is on the receiving end of such a threat is herself under an obligation to report the threat to the disciplinary authorities, because the threat itself is a violation of the Rules.

\footnote{10} “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” Model Rules of Prof’l Conduct, R. 4.2.


\footnote{12} MODEL RULES OF PROF’L CONDUCT, Scope (2003).

\footnote{13} Id.

\footnote{14} MODEL RULES OF PROF’L CONDUCT R. 8.3 (2003).

The older Model Code of Professional Conduct included disciplinary rules that arguably had more teeth than the Model Rules do, and courts sometimes turn to the older rules for guidance, including the one mandating that “a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”\textsuperscript{16} Several states have retained a variation of this provision, and many of them have extended it to include threats of civil or disciplinary action.\textsuperscript{17} Even in states that have not, the spirit of the older rules may be persuasive in the face of questionable conduct not squarely addressed by the Model Rules themselves.

### III. TYPES OF HARDBALL TACTICS

#### A. Deceptive or Covert Investigative Tactics

Franchise litigation, like other types of disputes, involves investigation of the disputed facts at issue. For example, a franchisor which suspects post-termination trademark infringement often undertakes an investigation, through site visits, Internet searches, telephone checks or other means, to determine if its former franchisee in fact is continuing to use its marks without authorization following termination. A franchisee hoping to pursue an encroachment claim against its franchisor for selling through an alternate channel may wish to investigate such facts as what the new source of supply is telling customers.

A zealous advocate may devise many creative approaches to investigating his or her client’s potential claims, but those investigative efforts must be made within ethical bounds, and the boundary lines are not always clear. As tempting as it may be to some counsel to operate “undercover,” attorneys may not misrepresent their identities or affiliations to third parties, nor have their agents do so at their direction.\textsuperscript{18}

A decision by the U.S. Court of Appeals for the Eighth Circuit, involving secret taping by both the franchisor and franchisee, provides a cautionary tale. In \textit{Midwest Motor Sports v. Arctic Cat Sales, Inc.},\textsuperscript{19} the Court affirmed evidentiary sanctions against a franchisor, finding that its counsel violated several ethical rules when it sent an investigator undercover to a dealership to record conversations in the hope of obtaining admissions useful to its position in litigation against the plaintiff, a former snowmobile franchisee which was suing it for wrongful termination. Counsel for the franchisor had directed a former FBI agent to visit the plaintiff’s and a non-party’s dealership – knowing they were both represented by counsel -- to observe the displayed products and “see what the salesman represented in the way of the products that they were promoting.” The investigator told the franchisor’s attorneys that he would wear a hidden wire and tape the conversations, which he did, and he provided the resulting tapes to the franchisor’s counsel and planned additional visits with them. The court imposed

\textsuperscript{16} \textit{MODEL CODE OF PROF’L RESPONSIBILITY DR 7-105} (1980).

\textsuperscript{17} Appendix A briefly summarizes potentially relevant differences between particular states’ ethics rules and the Model Rules. \textit{See also LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 1:11} (BNA 2005).

\textsuperscript{18} Model Rules of Prof’l Conduct, Rules 4.2, 8.4(c) and 5.3.

\textsuperscript{19} 347 F.3d 693 (8th Cir. 2003).
sanctions, holding that the franchisor’s attorneys directed the investigator’s conduct and therefore violated both Rule 4.2, which prohibits attorneys from communicating with represented parties, and Rule 8.4(c), which forbids attorneys (and, pursuant to Rule 5.3, those acting under their supervision) from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.”

In contrast, investigators who posed as customers and surreptitiously recorded salespeople to establish trademark infringement did not violate Rule 8.4(c), according to the district court in *Gidatex, S.r.L. v. Campaniello Imports, Ltd.* In ruling, the court rejected a literal interpretation of Rule 8.4, reasoning that the ethical rules concerning misrepresentations by attorneys are intended, in part, to “protect parties from being tricked” into making statements and “should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target.” This holding is consistent with the “prevailing understanding in the legal profession… that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”

In another frequently cited case, *Apple Corps v. International Collector’s Society*, plaintiffs’ counsel suspected that the defendants were violating a consent injunction by selling products bearing the image of the Beatles. To investigate, she placed a telephone order with the defendants for the products, using her maiden name, and directed others similarly. Her investigation established that the defendants had violated the consent decree, and she moved for contempt on behalf of her clients. In response, the defendants moved for sanctions on the ground that plaintiffs’ counsel had violated Rules 4.2 and 8.4(c) by speaking to defendants’ sales personnel without the consent of defense counsel and without identifying that they either were lawyers or were acting at a lawyer’s direction.

The district court disagreed, holding that Rule 4.2 “cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation.” The court similarly found that plaintiffs’

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20 Id. Apropos to the discussion in this paper, the court also briefly touched on the interplay of counsels’ obligations to advocate zealously and to conduct themselves civilly: “The Court recognizes that counsel on both sides of this dispute have provided spirited representation of their clients, as they should. Spirited representation, however, should not give rise to the acrimonious relationships between counsel that existed in this case.”


22 Id. (noting that “hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation”).


counsel had not violated the purpose of Rule 8.4(c); her deception was limited and was necessary to determine if the defendants were complying with the consent decree.25

Yet another district court, which held that secret videotaping of gas station attendants in connection with a discrimination suit was permissible, described the restrictions of the ethical rules this way:

Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course.26

Plainly, in jurisdictions where surreptitious recordings are illegal, lawyers who tape will be in violation of Model Rule 4.4, which prohibits a lawyer from "us[ing] methods of obtaining evidence that violate the legal rights of ... a [third] person." However, as was the case in Midwest Motor Sports, secret taping may lead to ethical sanctions even if legal under state law if a court determines that it was “accompanied by other circumstances that make it unethical,” such as misrepresentations as to identity and purpose.27 Accordingly, attorneys must use care in formulating their investigative strategies.

B. Sanctions Motions

Sanctions motions serve a legitimate purpose but are not always used legitimately, and attorneys who move for sanctions against their opponents must consider whether their pursuit of sanctions exposes them to potential sanctions. Courts necessarily inject their subjective determinations into even the most objective of sanctions standards, and typically find means, either through rules, statute or their inherent powers, to discipline those attorneys whom they believe to have crossed the line.

25 Id.

26 Hill v. Shell Oil Co., 209 F.Supp.2d 876, 880 (N.D. Ill. 2002) (secret videotapes of employees responding to persons posing as consumers in discrimination suit did not involve substantive conversations and were not in violation of ethical rules).

27 347 F.3d at 699; see also Formal Opinion 01-422, ABA Standing Committee on Ethics and Professional Responsibility, 2001 (unethical secretly to record without all parties’ consent in jurisdictions where it is illegal or “where it is accompanied by other circumstances that make it unethical.”); Jennifer L. Borum, “What’s Good For the Goose Gets the Gander in Hot Water,” Franchise Law Journal, Spring 2004; Kathryn A. Thompson, “Legal White Lies: Courts and Regulators Strive to Identify When a Little Deceptive Isn’t So Bad,” ABA Journal, March 2005. A very recent opinion by the California Supreme Court highlights the danger of covert recording, even in states which permit it. Kearney v. Salomon Smith Barney, Inc., ___ P.3d ___, 45 Cal. Rptr.3d 730 (Cal. 2006) (Company that recorded customer calls in Georgia, where state law permits recording without consent, nonetheless violated California privacy laws by recording calls from California residents).
1. **Rule 11 Sanctions**

Rule 11 of the Federal Rules of Civil Procedure is perhaps the best-known sanctions rule. Rule 11 provides for sanctions if a paper filed with a federal court in a civil case is for an improper purpose or is frivolous.\(^{28}\) Improper purposes are, among other things, to “harass or to cause unnecessary delay or needless increase in the cost of litigation.”\(^ {29}\) Rule 11, according to the comments to the Rule, seeks to strike a balance between zealous advocacy and inappropriate tactics:

The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

A discussion of the intricacies of Rule 11 and its application in various jurisdictions is beyond the scope of this paper,\(^ {30}\) and the line between acceptable

\(^{28}\) Rule 11(b) provides,

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

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

> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

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

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

\(^{29}\) Fed. R. Civ. Pro. 11(b)(1).

zealous advocacy and sanctionable misconduct is often in the eye of judicial beholder. Nevertheless, examples of the types of conduct which courts have sanctioned are instructive, and include, among many others, pursuing stale and rejected legal theories; making misleading statements or omissions about the facts or law; filing papers that contain abusive language about opposing counsel; commencing suit in an inconvenient forum for purposes of harassment; improperly naming parties without an adequate pre-filing inquiry; filing “shotgun” complaints in the hopes that “something will stick”; and pleading claims plainly barred by the applicable statute of limitations.

However, “Rule 11 is not a toy” -- or a weapon -- and counsel who misuse Rule 11 themselves may be sanctioned. Courts frequently have advised counsel that “Rule 11 is not to be used routinely” and “is reserved for exceptional circumstances.” The Third Circuit, for example, has stated:

The use of Rule 11 as an additional tactic of intimidation and harassment has become part of the so-called ‘hardball’ litigation techniques espoused by some firms and their clients. Those practitioners are cautioned that they invite retribution from courts which are far from enchanted with such abusive conduct.

Courts in other circuits have been equally displeased with such strategies and exercised their powers to curtail abusive practices. For this reason (if not for more noble reasons), lawyers should not threaten or move for sanctions without a legitimate basis and careful consideration.


Unlike Rule 11, 28 U.S.C. Section 1927, which provides for sanctions against attorneys for “unreasonably and vexatiously” multiplying litigation, applies to all aspects of both civil and criminal federal court actions, and to all stages of the litigation, from inception through appeal. Section 1927 provides:

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31 See also Joseph, supra note 11, at §12(B)(5) (“[T]he desire to curb abusive use of the judicial process competes with the desire to avoid chilling zealous advocacy. Precisely where to draw the line between valid and competing concerns of this sort is necessarily vague.”)

32 Joseph, supra note 11, Ch. 2.


34 Joseph, supra note 11, §14(D)(6).

35 Gaiardo v Ethyl Corp., 835 F.2d 479, 484-85 (3d Cir. 1987), quoted in Joseph, supra note 11.


37 In fact, a federal court may impose Section 1927 sanctions upon counsel even if the court does not have subject matter jurisdiction over the action. Joseph, supra note 11, § 25.
Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

Because Congress intended that Section 1927 “in no way will dampen the legitimate zeal of an attorney in representing his client,” courts strictly construe it, and impose sanctions in their discretion. The kinds of conduct that may be sanctioned, depending on the circumstances, include reliance on speculation instead of facts or reasonable inferences; pursuit of plainly meritless positions or already-rejected positions, including positions barred by collateral estoppel or res judicata; filing with the court too many papers, repetitive papers or boilerplate papers; and joining improper parties.

Just like other types of litigation, fiercely contested franchise disputes may lead to Section 1927 sanctions. As a recent example, in Dunkin’ Donuts v. N.A.S.T., Inc. -- a case that the presiding federal district judge called “distressingly acrimonious” with a history of “bad blood” between counsel -- the court imposed Section 1927 sanctions, in the form of reimbursement of the franchisor’s attorneys’ fees, due to four counterclaims made by franchisee, including a claim for breach of fiduciary duty which the court stated was made in spite of a contractual provision acknowledging that no fiduciary relationship between the parties existed. The franchisee withdrew the four claims (presumably in an attempt to avoid Rule 11 sanctions) but not before the franchisor had spent time and money litigating them, according to court. Because the court believed that the pursuit of the four claims multiplied the proceedings unreasonably and vexatiously, the district judge held that sanctions were appropriate, and pointedly noted that he would leave it to the franchisee and its counsel to work out between themselves which of them ultimately would be responsible for paying the sanction.

3. Other Sanctions

Courts also have other vehicles by which they may impose sanctions, depending upon the stage of litigation and the offending conduct, including under the federal discovery rules applicable to civil matters (Federal Rules of Civil Procedure 16(f), 26(g) and 37); the federal rules applicable to appeals (Federal Rules of Appellate Procedure 38 and 46(c)); a federal appellate statute (28 U.S.C. Section 1912), and the many state and local corollaries that vary by jurisdiction.

In addition, the federal courts have the inherent power, arising from the nature of the courts, to sanction parties or their counsel for abusive, bad faith conduct in district court or appellate litigation, even when no specific procedural rule or statute has been

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39 Id., §23(B)(2)(g).

40 266 F. Supp.2d 826 (N.D. Ill. 2003).
Among many other instances, courts have exercised their inherent powers to sanction attorneys whom they determine to have violated the ethical rules applicable to lawyers. For example, in the Midwest Motor Sports case discussed in Section III(A), supra, the court imposed its evidentiary sanctions against the franchisor for its undercover operation pursuant to its inherent power to do so.

C. Suits Against Opposing Counsel

Sometimes -- as a hardball tactic, in pursuit of redress for perceived wrongs, or simply out of spite -- attorneys or their clients sue opposing counsel. Most civil claims against opposing counsel, however, are foiled by the “litigation privilege,” a more than 400-year-old doctrine which is more properly characterized as an absolute affirmative defense against such suits. The law provides this protection to litigators because of the nature of the adversarial system, which sometimes requires attorneys to “push the envelope” on behalf of their clients. In one commentator’s view,

[T]he adversary system’s penchant for conflict and drama, coupled with high stakes and behind-the-scenes confidences, seem to put even greater temptations on trial lawyers than on desk lawyers to use questionable tactics to secure victory.

In fact, the ethical rules do require attorneys to advocate zealously for their clients, and zealous advocacy unquestionably spawns suits by unhappy opponents: “The problem is exacerbated by the adversary system which encourages the diligent attorney to capitalize upon advantages and to attack weaknesses of his [or her] opponent,” and “[a]n essential ingredient of zealous representation is the freedom to err in favor of the client.”

As a result, every state but two permits an absolute litigation privilege that bars most claims against opposing counsel as a matter of law, based upon Section 586 of the 2nd Restatement of Torts. Section 586 provides:

41 See generally Joseph, supra note 11, Ch. 4 ("Inherent Power: Bad Faith Litigation Abuse").


43 Id. (providing an overview of the litigation privilege).

44 Id. at 917 (quoting R.J. Gerber, Victory vs. Truth: The Adversary System and Its Ethics, 19 Ariz. St. L.J. 3, 23 (1987)).

45 Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L.J. 387, 388, 390 (1978). American courts have held this view for at least a hundred years. See, e.g., Myers v. Hodges, 44 So. 357, 362 (Fia. 1907) ("Much allowance should be made for the... ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own"), quoted in Anenson supra note 42, at 934.

46 Anenson, supra note 42, at 917.
An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Two states, Georgia and Louisiana, have parted company from the Restatement formulation of the privilege; Georgia law offers attorneys absolute immunity for statements in pleadings but qualified immunity for other conduct, while Louisiana law provides litigators only qualified immunity against suit. Although Section 586 concerns defamation, courts in the majority of jurisdictions have expanded the litigation privilege to other types of claims, in part to avoid attempts by counsel to "creatively plead" around the privilege. No matter how the claims are styled, some courts have been quite vocal in their dislike of suits between opposing counsel. The California appellate court, for example, has derided such suits as "ridiculous catfights." Nevertheless, attorneys continue to file suit against their opponents for defamation, libel, tortious interference and other causes of action.

1. Defamation or Libel

In the vast majority of jurisdictions, trial attorneys are protected by the litigation privilege against defamation and libel suits. One of the primary reasons for this bar against suits is to protect clients, whose interests would be threatened if their litigation attorneys, who must advocate zealously on their behalf, had to fear lawsuits in connection with doing so, particularly because sanctions and disciplinary mechanisms already exist to rein in improper conduct. As the Ohio Supreme Court explained,

The most basic goal of our judicial system is to afford litigants the opportunity to freely and fully discuss various aspects of a case in order to assist the court in determining the truth. While the imposition of an absolute privilege in judicial proceedings may prevent redress of particular scurrilous [actions] that tend to harm the reputation of the person [defamed], a contrary rule, in our view, would unduly stifle attorneys from zealously advancing the interests of their clients in possible violation of the Code of Professional Responsibility, and would

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47 Absolute immunity is decided by courts as a matter of law, such that if the privilege applies, a claim may be dismissed at the pleading stage. Qualified immunity, however, means that most claims cannot be dismissed before the summary judgment stage of the litigation. Anenson, supra note 42, at 918.

48 Anenson, supra note 42, at 915.


50 In most jurisdictions, the privilege arises under the common law, but, in California, the privilege is statutory. Cal. Civ. Code § 47(2).

51 Anenson, supra note 42, at 922, 925; Youmans v. Smith, 153 N.Y. 214, 220 (1897). But see Paul T. Hayden, "Reconsidering the Litigator’s Absolute Privilege to Defame," 54 Ohio St. L.J. 985 (1993) (arguing that the litigation privilege is too broad and that the asserted policies justifications for it are flawed).
clog court dockets with a multitude of lawsuits [based on actions taken] in other judicial proceedings.52

The scope of the litigation privilege against defamation and libel suits is very broad. Most courts, for example, hold that the privilege applies to statements made before litigation, as long as they were part of investigation or preparation for pending or anticipated litigation.53 Furthermore, in addition to court actions, the privilege applies to arbitrations, mediations, administrative hearings, and other types of proceedings that have judicial trappings.54 As the comments to Section 586 of the Restatement (Second) of Torts note, the privilege applies to “all proceedings before an officer or other tribunal exercising a judicial function.”55

The most important factor in determining whether a litigator’s statement or conduct is protected by the litigation privilege is whether it is appropriately connected with, or pertinent to, the underlying litigation. In fact, “[t]he privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer so long as the conduct complained of has some relation to the litigation.”56 Moreover, nearly all states presume that the privilege applies, and resolve doubts in favor of the lawyer.57

In practice, most courts have held that the privilege applies to any statement pertinent to any stage of judicial proceedings; in other words, it is sufficient if the statement has at least “some connection” to the case.58 Although many courts refer to this as a relevance requirement, the “relevance” necessary for the privilege to attach is far less stringent than evidentiary relevance as set out in the rules of evidence. 59 As one court put it, the relevance test is satisfied by anything that may “possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability.”60


53 See 23 A.L.R.4th 932 §§ 3[a] and [b]. Courts may find that statements made before litigation still are not privileged, based on other factors. See, e.g., Green Acres Trust v. London, 688 P.2d 617 (Ariz. 1984) (statements to newspaper reporter not privileged because they were not in furtherance of litigation); Morrison v. Gugle, 755 N.E.2d 404 (Ohio Ct. App. 2001) (statement that other shareholders had embezzled funds was not privileged because embezzlement was not a defense to claims for payment, and litigation was neither pending nor imminent).

54 Anenson, supra note 42, at 931.

55 Restatement (Second) of Torts §586 cmt. d (1977).

56 Anenson, supra note 42 at 918 (citing Fink v. Oshins, 49 P.3d 640, 643 (Nev. 2002)).

57 Id. at 933-34, citations omitted.

58 Id.


In the majority of jurisdictions, the privilege applies even to malicious or knowingly false statements. For nearly a hundred years, courts have justified this rule by pointing to the greater good: “Wrong may at times be done to a defamed party, but it is *damnum absque injuria*. The inconvenience of the individual must yield to a rule for the good of the general public.”

Where an attorney’s conduct is particularly egregious or runs afoul of the policy reasons for the privilege, however, courts are more inclined to determine that it was not relevant to the litigation and therefore not shielded from suit. For example, courts have held that the privilege does not protect attorneys from claims where their conduct attempted to deprive the opposing party of their chosen counsel or to secure a business advantage for their client outside the litigation, or where it involves a personal attack on opposing counsel unrelated to a litigation goal.

Furthermore, attorneys who repeat or distribute their allegations to the press or to others (such as franchisees in the system or suppliers) are not immunized from a defamation action merely because those allegations appear in the complaint or other public filing. Although defamation law recognizes a “fair report privilege” that permits fair and accurate reporting of judicial proceedings under certain circumstances,

A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

And, of course, whether or not a privilege applies, litigators remain subject to the ethical duties imposed by the rules of professional responsibility, which prohibit (albeit without compensation to the injured) much of the conduct that civil suits against opponents seek to redress.

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65 Restatement (Second) of Torts, §611, cmt. d (1977).
2. **Tortious Interference and Other Claims**

The litigation privilege against suits for libel or defamation, as described above, is increasingly applied to other claims, including those for tortious interference.\(^{66}\) For decades, courts have extended this immunity to tortious interference claims, in part because judges have viewed those claims as an attempt to avoid application of the litigation privilege.\(^{67}\)

Courts bar a wide variety of other types of claims by virtue of the litigation privilege as well, including claims for negligence, breach of confidentiality, abuse of process, intentional or negligent infliction of emotional distress, invasion of privacy, civil conspiracy and fraud, depending on their nature.\(^{68}\) Courts, however, typically have not applied absolute immunity to statutory claims, either state or federal.\(^{69}\) The franchise statutes therefore may be fair game, if a viable claim can be crafted.

V. **SUING OFFICERS, DIRECTORS AND OWNERS**

Counsel for disgruntled franchisees may have the opportunity to sue the franchisor’s officers, directors and employees of the franchisor for alleged misconduct by the franchisor. The potential claims are limited only by the imagination of counsel, but some of the most common claims and litigation issues are set forth below and discussed briefly.

A. **Statutory Claims**

1. **Franchisee Protection Statutes**

A number of states have franchise protection statutes that permit a franchisee to make claims against the officers, directors and employees of the franchisor. These states include California, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island and South Dakota.\(^{70}\)

This liability, often referred to as control person liability," is designed to provide the franchisee with additional means of recovery if, for example, the franchisor is a complete sham and the corporate franchisor has no funds to pay the franchisee. Many of the statutes allow the individuals to avoid liability if they can establish that they did not


\(^{68}\) Anenson, *supra* note 42, at 928.

\(^{69}\) *Id.*

materially aid in the violation about which the franchisee is complaining and that they had no knowledge or reason to know that the violation was occurring.

At least one court has held that a franchisee need not sue the actual franchisor in order to sue the control persons under a franchise protection statute.\textsuperscript{71} In addition, a control person’s alleged lack of knowledge is an affirmative defense upon which the defendant bears the burden of proof.\textsuperscript{72}

2. Other Statutes

Every state in the nation has a consumer protection statute of some sort (and sometimes more than one such statute) that is intended to protect “consumers” from fraud and sharp business practices.\textsuperscript{73} These statutes, often referred to as “Little FTC” acts, have been used by franchisees to make claims not only against the franchisor but also against officers, directors, employees and attorneys of the franchisor.

The most well-known case involving claims under a state “Little FTC” act was the short-lived, nearly $600 million victory of a class of muffler franchisees in \textit{Broussard v. Meineke Discount Muffler Shops, Inc (“Meineke”)}.\textsuperscript{74} In \textit{Meineke} the franchisees alleged a variety of claims, including that the franchisor, its officers and its related entities violated the North Carolina Unfair Trade Practices Act (“NCUTPA”) by defrauding franchisees into a franchise relationship and failing to honor promises that were made. Three officers of Meineke were found by the jury to have themselves committed fraud, made negligent misrepresentations, and violated the NCUTPA.

The jury also found that entities related to Meineke and the three individual defendants were also directly liable for aiding and abetting Meineke’s breach of fiduciary duty and for interfering with plaintiffs’ contractual relations with Meineke. The jury awarded plaintiffs $196,956,596 in compensatory damages and a total of $150 million in punitive damages (including $1.2 million against the three Meineke officers). Plaintiffs elected to forego the punitive award in favor of trebling the compensatory award under the UTPA, N.C. Gen. Stat. § 75-16. After trebling, the court entered a $590,869,788 judgment for plaintiffs. The U.S. Court of Appeals for the Fourth Circuit reversed.\textsuperscript{75}

Little FTC acts and similar statutes (if found to be applicable to franchisor/franchisee relationships) can provide an enormous “hammer” for franchisees who may sue not only their franchisor but also the franchisor’s officers, directors and


\textsuperscript{74} 958 F.Supp. 1087 (W.D.N.C. 1998) rev’d 155 F.3d 331 (4th Cir. 1998).

\textsuperscript{75} See 155 F.3d 337.
employees and possibly recover multiple damages and attorneys’ fees. As described below, if these claims cannot be insured against and the individuals’ assets cannot be adequately protected, such claims can provide the officers with significant incentive to settle.

B. Fraud and Misrepresentation

One court has summarized the law regarding the liability of corporate officers and directors for corporate fraud as follows:

As a general rule, a corporate officer or director is not liable for the fraud of other officers or agents merely because of his official character, but he is individually liable for fraudulent acts of his own or in which he participates. (Citations omitted). The mere fact that a person is an officer or director does not per se render him liable for the fraud of the corporation or of other officers or directors. He is liable only if he with knowledge, or recklessly without it, participates or assists in the fraud.76

Under this standard, franchisees or franchisors who want to make an individual claim against an officer or director are generally able to do so if they can prove that the officer or director committed or participated in a fraudulent act or scheme or recklessly turned a blind eye to what others were doing.

Potential fraud claims of this sort also may be bolstered by the Sarbanes-Oxley duties of the officers or directors, addressed more fully in Section VI, infra.

C. Arbitration Issues

A franchisee often signs a franchise agreement in which the franchisee agrees to arbitrate “all claims” against the franchisor and all claims in any way related to or arising out of the franchise relationship. The franchisor may (with some carved-out exceptions) make a similar agreement.

An interesting legal issue arises where the franchisee decides that he or she also would like to make a claim against the officers, directors and employees of the franchisor. Under existing law, these control persons can decide whether these claims will be litigated or arbitrated. If the franchisee adds the control persons to the arbitration demand, these respondents may argue that they are not subject to the arbitration provision of the franchise agreement because they did not sign the agreement. This is a winning argument.77 Remarkably, if the franchise decides to sue the control persons in court, the control persons can come in and successfully argue that the franchisee has to arbitrate all of its claims, including all claims against the control persons.78

78 See, e.g. CD Partners, LLC v. Grizzle, 424 F.3d 795, 800 (8th Cir. 2005).
This bizarre situation results in the franchisee being wrong either way. Imagine a situation in which one officer wishes to arbitrate and another wishes to litigate. Does the franchisee lose both the argument that he may arbitrate and the argument that he may litigate? Under existing precedent, it is altogether possible.

D. Insurance Issues

Officers and directors are often covered by errors and omissions insurance that will assist them if they are required to defend themselves against a franchisee action. However, passage of the Sarbanes-Oxley Act in 2002, according to at least one commentator, has made it more difficult to obtain insurance and to protect assets from claims made against the officers and directors:

There were no shortages of securities class-action lawsuits even prior to Sarbanes-Oxley, but after its passage, litigation became much more personal, especially for outside directors. To settle their liability on the accounting fraud claims alone, ten outside directors of WorldCom agreed to pay $18 million from their personal assets, which represented an estimated 20% of their net worth. Another $36 million was paid from their D&O insurance. Similarly, ten former Enron directors agreed to personally pay $13 million as part of a $168 million settlement for fraudulent accounting practices.

Stung by large claims against the D&O policies issued to these unfortunate directors, the insurance carriers have tightened up their policies and expanded their exclusions. Future corporate officers and directors who are caught up in similar circumstances may have to litigate with their own insurance carriers to provide defense and coverage. Also, a sustained series of financial collapses, such as the savings & loans crisis of the 1980’s, might challenge the solvency of a particular insurance carrier and its ability to timely pay claims.79

If, in fact, insurers are reducing the scope of errors and omissions insurance (and there is reason to believe that they are, given the magnitude of potential claims), claims against officers and directors may sting a great deal more and put more pressure on the officers to settle favorably with the plaintiffs bringing the claims.

E. Personal Jurisdiction and Fiduciary Shield Issues

The Fiduciary Shield Doctrine is a state-law doctrine, adopted only in certain states,80 which holds that an agent may not be subject to personal jurisdiction in a state


80 See, e.g., Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 522 N.E.2d 40 (1988)(doctrine does not apply in New York where minimum contacts are present).
merely because his or her corporate employer is subject to jurisdiction there or because the agent performed certain acts in the state on behalf of the corporation.81

In recent years, the Fiduciary Shield Doctrine has been eroded by the federal courts and, even where the doctrine is still recognized, the federal courts have found the rule to be subject to a slew of exceptions. A few of the exceptions were described in a recent decision as follows:

Defendants contend that this Court should decline to exercise jurisdiction over Pettigrew and White on the basis of the fiduciary shield doctrine. This doctrine is exclusively a creation of state law, and numerous federal courts have declined to consider its applicability when the state's long-arm statute is coterminous with the full reach of due process. (citations and quotations omitted).

While certainly an individual's contact with a forum exclusively as a corporate officer or agent cannot, standing alone, give rise to jurisdiction over that person in an individual capacity, see Ark. Rice Growers v. Alchemy Indus., Inc., 797 F.2d 565, 574 (8th Cir.1986), Supreme Court jurisprudence has made clear that this means only that the contacts of each defendant must be assessed individually, not that one's corporate status automatically places that person beyond the court's jurisdiction. (citations omitted) Moreover, where, as here, the corporation is nothing more than the alter ego of the individually named defendants, “courts attribute a corporation's contacts with the forum state to an individual defendant for jurisdictional purposes.” (Citations omitted).

On these principles, the Court concludes that Pettigrew's and White's status as corporate agents of their closely-held corporation, Triune, cannot shield them from the exercise of personal jurisdiction, where the facts support a conclusion that such jurisdiction complies with the requirements of due process.82

Given the federal courts' trend toward allowing the exceptions of the Fiduciary Shield Doctrine to swallow the rule, the sole remnant of the rule may be that an employee who does little or nothing in a state except ministerial corporate duties will not be subject to jurisdiction in that state.

The doctrine appears to be faring no better in the state courts.83 Even if an officer or director could find a friendly line of state court precedent, the officer or director

81 Id.


would be faced with a difficult decision if the state court might be a less friendly forum for the substantive claims. If the officer or director moves to dismiss the state court proceeding on jurisdictional grounds, the time for removal of the case to federal court almost certainly would run.

VI. THE IMPACT OF SARBANES-OXLEY

The Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745, also known as the Public Company Accounting Reform and Investor Protection Act of 2002) is a United States federal law passed in the summer of 2002 in response to a number of major corporate and accounting scandals involving prominent companies in the United States. These scandals resulted in a decline of public trust in accounting and reporting practices. The legislation is wide ranging and establishes new or enhanced standards for all U.S. public company Boards, Management, and public accounting firms. The Act contains eleven titles, or sections, ranging from additional Corporate Board responsibilities to criminal penalties, and requires the Securities and Exchange Commission (SEC) to implement rulings on requirements to comply with the law.84

The Sarbanes-Oxley Act's major provisions include:

1. Certification of financial reports by chief executive officers and chief financial officers
2. Ban on personal loans to any Executive Officer and Director
3. Accelerated reporting of trades by insiders
4. Prohibition on insider trades during pension fund blackout periods
5. Public reporting of CEO and CFO compensation and profits
6. Auditor independence, including outright bans on certain types of work and pre-certification by the company's Audit Committee of all other non-audit work
7. Criminal and civil penalties for violations of securities law
8. Significantly longer jail sentences and larger fines for corporate executives who knowingly and willfully misstate financial statements.
9. Prohibition on audit firms providing extra "value-added" services to their clients including actuarial services, legal and extra services (such as consulting) unrelated to their audit work.
10. A requirement that publicly traded companies furnish independent annual audit reports on the existence and condition (i.e., reliability) of internal controls as they relate to financial reporting.

84 This general description is taken from www.wikipedia.com/wiki/Sarbanes-Oxley.
Certain commentators have taken the position that the Sarbanes-Oxley Act really does not impose upon corporate officers any greater substantive obligations than they already had before 2002:

It is important to recognize that, while Sarbanes-Oxley imposes greater and longer prison terms for corporate wrongdoing, it does not criminalize behavior that was ever considered lawful. Committing securities fraud, obstructing justice, intentionally destroying evidence and filing false financial statements were all illegal before Sarbanes-Oxley was adopted. Sarbanes-Oxley does not create new bases for civil lawsuits.\(^{85}\)

The true impact of Sarbanes-Oxley on future civil claims against officers and directors may be indirect. First, it may be more difficult for officers and directors with Sarbanes-Oxley obligations to take the stand and claim complete ignorance regarding how their corporation is run. Second, courts are probably going to be more likely to consider claims against officers and directors as presumptively proper in light of the civil and criminal penalties imposed upon individuals such as Jeffrey Skilling and Kenneth Lay, formerly of Enron.

In *Andropolis v. Snyder*,\(^{86}\) shareholders of the franchisor of the Red Robin system recently brought a derivative action against the franchisor and certain officers and directors asserting that the franchisor’s executives usurped a corporate opportunity by sending development opportunities to a franchisee that the officers 37% controlled. The shareholders requested, among other things, that the officers be required under Section 304 of Sarbanes-Oxley to disgorge all bonuses that they had received. Although the plaintiff’s case was dismissed for failure to meet the requirements of a derivative action, the case demonstrates that at least one plaintiff’s attorney unhappy with action taken by a franchisor and its officers has tried to punish those officers by making them forfeit compensation under the disgorgement language of Section 304 of Sarbanes-Oxley. This is an issue worth watching, in part because enterprising franchisee lawyers might urge their clients to buy stock in the franchisor to obtain standing to pursue the franchisor’s executives in this fashion.

VII. IMPACT OF THE BANKRUPTCY REFORM ACT OF 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, the “Bankruptcy Reform Act”)\(^{87}\) got a great deal of attention from the media and consumer rights advocates for stripping away the rights of certain debtors to file Chapter 7 bankruptcy if they were above their state’s median income level and their debts were primarily consumer debts.


However, certain less-advertised changes in the Bankruptcy Code may impact corporate officers and directors faced with business-related claims. The Act also limited the ability of debtors to shelter assets from a large judgment.

The Bankruptcy Reform Act limits the ability of debtors to frustrate creditors by purchasing multi-million dollar homes in states with unlimited homestead exemptions in a number of ways:

1) The debtor must be domiciled in his state of residence for two years pre-bankruptcy to claim a state’s homestead exemption.\(^{88}\)

2) The debtor’s homestead exemption is limited to $125,000 unless the debtor has owned his residence for 1,215 days pre-bankruptcy.\(^{89}\)

3) A debtor may not shelter greater than $125,000 in his homestead no matter how long he has resided at his home if any of the following has occurred:

   a) the debtor is convicted of a felony and the court determines that the bankruptcy filing was an abuse of the Bankruptcy Code;

   b) the debtor owes a debt arising from a violation of federal or state securities laws or regulations;

   c) the debtor owes a debt due to fraud, deceit, or manipulation in a fiduciary capacity in the purchase or sale of a registered security;

   d) the debtor owes a debt arising out of any civil remedy under the federal criminal code;

   e) the debtor owes a debt arising out of a RICO claim; or

   f) the debtor owes a debt due to any criminal act, intentional tort, or other willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.\(^{90}\)

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\(^{89}\) 11 U.S.C. § 522(p).

\(^{90}\) 11 U.S.C. § 522(q).
In addition, the value of the homestead may be reduced by the value of non-exempt property that the debtor sold in the 10-year period before the filing of the petition when the property was sold with the intent to hinder, delay or defraud creditors.\footnote{11 U.S.C. § 522(o).}

Although the Bankruptcy Reform Act defines “federal securities laws,” no statutory provision appears to define “state securities laws.” Are state franchise statutes “state securities laws”?\footnote{The names of some of the state franchise laws, while certainly not dispositive on this issue, include the “Delaware Franchise Security Law,” and “Franchise Investment” laws in California, Hawaii, Michigan, North Dakota, Rhode Island, Washington and Wisconsin.} Are individuals with “control person” liability under these statutes limited to a homestead exemption of $125,000? There is some authority for the proposition that the fraudulent sale of a franchise is a violation of state and federal securities laws.\footnote{“Several courts have held that the sales of franchises fall within the ambit of federal and state securities laws.” \textit{Morgan v. AirBrook Limousine, Inc.}, 510 A.2d 1197, 1205 (N.J. Super. 1986).} If the courts take an expansive view of the term “state securities laws,” franchisor executives of failed systems may be unable to find much protection in bankruptcy court.

\section{VIII. Any Change Under the Proposed New FTC Franchise Rule?}

The proposed new FTC Rule does not, in and of itself, impose any greater individual liability on officers, directors or employees of the franchisor.

It could be argued that the proposed new Rule actually may limit the liability of officers and directors. The new Rule would exempt from the FTC disclosure requirements: 1) “large investment transactions” where the franchisee’s initial investment exceeds $1,000,000 exclusive of real estate; 2) “sophisticated franchisee” transactions where the franchisee has a net worth of at least $5,000,000 and has been in business for at least 5 years; and 3) “insider” transactions where the franchisee recently has been a 25% owner of the franchisor or recently has been an officer, director, general partner or manager of the franchisor.\footnote{See Staff Report on the Proposed Revised FTC Rule (CCH Aug. 25, 2004), David Kauffman Introduction (ninth unnumbered page).}

State Little FTC acts sometimes provide that a violation of federal law is also a violation of the state Little FTC act. The result is that a damaged party is given a private right of action where none exists under federal law. Because the proposed new FTC Rule would exempt certain transactions from federal law, that would also, in turn, nullify the Little FTC act’s incorporation by reference of federal law violations. A franchisor whose disclosures would otherwise violate the FTC Rule could argue successfully, if sued, that the alleged transaction is now exempt from the federal law and, therefore, the alleged disclosure violation cannot violate the state Little FTC act either.
IX. STANDARD FACT PATTERNS FROM WHICH ETHICAL ISSUES MAY ARISE

1. You receive a letter or e-mail sent by opposing counsel and obviously not intended for you.

The answer to this question between 1992 and 1999 was very simple. The attorney who received the letter or e-mail, obviously knowing that s/he received it by mistake, had an obligation not to read it, to notify the lawyer who sent it, and to abide by whatever instructions the producing attorney provided (for example, “throw it away” or “return it to me without making any copies”). Some bar associations considered reading such a document to be a serious violation of the applicable ethical rules.

In 1999, however, the Ethics Committee of the Massachusetts Bar Association refused to follow the ABA position and opined that an attorney bound zealously to represent a client could not return the material, even when a claim of privilege was made. This small rift in the general rule grew larger in 2002 when the ABA added a sub-paragraph (b) to Model Rule 4.4 which stated:

(b) a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably knows that the document was inadvertently sent shall promptly notify the sender.

Since the new Rule 4.4(b) did not require the reader to refrain from reading the document or to send it back, an issue arose as to whether the 1992 ethics opinion still had any life. The answer came on October 1, 2005, when the 1992 ethics opinion was withdrawn and replaced with ABA Formal Opinion 05-437, which re-states the rule as follows:

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.

Therefore, it reasonably can be argued that an attorney who is sent an important but privileged document by mistake arguably has an ethical obligation to the client to read and use the document! The ABA has stated, however, that Rule 4.4(b) is not intended to force an attorney to read the document. Three of the states that have enacted Rule 4.4(b) have added provisions stating that the receiving attorney should

95 ABA Formal Opinion 92-368.
96 Opinion 256 (1995) of the D.C. Bar Legal Ethics Committee stated that reading or using the material violated Rule 8.4(c); Oregon Formal Opinion No. 1988-150 stated that it violated Rule 8.4(d).
97 MBA Opinion 99-4.
98 Model Rules Prof’l Conduct, R. 4.4(b) (2002).
stop reading the document when it becomes obvious that it is not meant for him or her.\textsuperscript{100}

Case law on whether an attorney can use the information he receives is not consistent. In California and Wisconsin, for example, the courts have stated quite clearly that an inadvertently produced document must be sent back and not used against the party producing the document.\textsuperscript{101} By contrast, at least one case indicates that an attorney receiving such a document should be able to retain it and use it to impeach the opposing party at trial.\textsuperscript{102}

The controversy over the rights and obligations of an attorney in this situation appear to be heating up. The proposed amendments to the Federal Rules of Civil Procedure, which are scheduled to go into effect on December 1, 2006, include Proposed Rule 26(b)(5)(b). This Rule would provide that if information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party would be required promptly to return, sequester, or destroy the specified information and any copies it has and would not be able to use or disclose the information until the claim is resolved. A receiving party could promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it would be required to take reasonable steps to retrieve it. The producing party would be required to preserve the information until the claim is resolved.

Of course, the fact that information needs to be returned to and retained by opposing counsel on an interim basis does not mean that the privilege has been maintained. Ultimately it is the state and federal rules of evidence, as interpreted by the courts, that will determine whether inadvertent production has resulted in a waiver of privilege.

2. You receive an inadvertently-disclosed piece of privileged information in discovery.

Very few attorneys actually send opposing counsel privileged documents on purpose. So, the law on “inadvertent disclosure” might more properly be analyzed if the courts would call the attorney’s actions “negligent disclosure.” The attorney was trusted with producing non-privileged documents and, due to some error by the attorney or the law firm, some privileged documents got produced anyway. The legal dispute really comes down to a consideration of two important beliefs: 1) that an attorney must protect

\textsuperscript{100} Arizona, Louisiana and New Jersey are the three states revising Rule 4.4(b).

\textsuperscript{101} Rico v. Mitsubishi Motors Corp., 10 Cal. Rptr. 601 (Cal. App. 2004)(attorney who read and used the document was disqualified as counsel); Harold Sampson Children’s Trust v. The Linda Gale Sampson 1979 Trust, 271 Wis.2d 610, 679 N.W.2d 794 (2004)(Wisconsin requires return of the document even where it was not inadvertently produced).

privileged material or the privilege is waived, or 2) that the attorney-client privilege belongs to the client and should be protected even if an attorney makes a mistake.

Courts that have considered the issue of inadvertent disclosure have applied one of three rules, which one court has described as 1) “strict accountability,” 2) “never waived,” and 3) “middle ground.” As their names might suggest, the first rule finds that the privilege always has been waived by disclosure, the second states that a waiver never may occur and the third rule asks whether finding a waiver would be fair under the circumstances.

The federal courts, at least in cases involving federal claims, almost exclusively follow the “middle ground” rule. The five-factor test employed by most “middle ground” courts examines 1) the reasonableness of precautions taken to prevent disclosure; 2) the amount of time taken to remedy the error; 3) the scope of discovery; 4) the extent of disclosure; and 5) the overriding issue of fairness.

A good general rule of thumb from these “middle ground” cases is that when a very large production has occurred and very few privileged documents have been produced, it is highly unlikely that a waiver will be found. In other words, slightly negligent disclosure probably will not result in a waiver, only grossly negligent disclosure will.

An attorney who receives an inadvertently-disclosed document that is arguably privileged would be well advised to notify opposing counsel of that fact immediately and hold the document until satisfied that return of the document is required under applicable law.

3. Your client wants to pursue a claim clearly barred by the statute of limitations.

The statute of limitations is an affirmative defense and must be pleaded as a defense. If the defense is never raised, a plaintiff may prevail on a time-barred claim. However, exactly when does it become ethically improper to bring such a claim? There is no evidence to suggest that attorneys who prevail on time-barred claims are later sanctioned. Having won, they zealously and successfully represented their clients. However, the cases involving statutes of limitations and Rule 11 make it very clear that bringing a time-barred claim could result in serious sanctions.

105 See, e.g., Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993).
106 Id.
Attorneys who feel that they must raise a time-barred claim do so at their peril, and would be well-advised to abandon the claim immediately upon opposing counsel’s pleading the statute of limitations as a defense or providing the “safe harbor” notice required under Rule 11 of the Federal Rules of Civil Procedure.

4. Your client has valid claims against the officers and directors of a corporation. The corporation clearly can pay the judgment, but the client wants to pursue only the individual defendant.

A franchisee may sue an individual defendant without suing the franchisor.108 However, if the franchisor is solvent and can pay, is it ethical to sue the franchisor’s current or former control persons just to make life more difficult for them? The answer is that a client may choose to sue whomever he or she wants:

Tortfeasors facing joint and several liability are not parties who must be joined in a single lawsuit. Because each tortfeasor is jointly and severally liable, the plaintiff can pick and choose whom to sue and if the plaintiff elects to sue less than all of them, those sued cannot compel joinder of the other tortfeasors. Rule 19 does not require the joinder of joint tortfeasors.109

Therefore, clients have every right to pick and choose whom they should sue, even if it is a bad idea. The attorney, however, may have an issue with representing such a spiteful client competently, diligently and consistent with the ethical rules.110 If the client is endangering valid claims he or she may have in order to try to bankrupt an individual defendant, that may not be a proper purpose for bringing a legal action. For example, the California Rules of Professional Conduct prohibit an attorney from acting as follows:

A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person…111

While this language would appear to give the attorney some room to argue that a case could be brought for the purposes of harassment if there were “probable cause” to bring it, the ethical and sanctions rules seem to caution an attorney not to pursue matters for improper reasons, even if the claims are valid.

5. Opposing counsel has failed to cite controlling authority of which you know he is aware.

108 Courtney, supra note 71.


110 See Model Rules of Prof'l Conduct 1.1, 1.2(d), 1.3, and 1.16 all requiring the attorney to act in a proper manner and not represent a client who requires representation inconsistent with the lawyer's obligations.

111 California Rule of Professional Conduct 3-200.
The law is quite clear that counsel must cite controlling authority adverse to its position:

Time and time again, courts have approved disciplinary action against attorneys who knowingly fail to disclose controlling authority. See, e.g., Southern Pacific Transp. Co. v. Public Utilities Comm'n. of State of Cal., 716 F.2d 1285, 1291 (9th Cir.1983) (characterizing an attorney's failure to acknowledge controlling precedent as "a dereliction of [its] duty to the court ..."); United States v. Stringfellow, 911 F.2d 225, 226 (9th Cir.1990) (where counsel fails to cite controlling case law that renders its position frivolous, he or she "should not be able to proceed with impunity in real or feigned ignorance of them, and sanctions should be upheld."); Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133, 1138 (9th Cir.1984) (sanctioning party sua sponte under 28 U.S.C. § 1927 for deliberately misquoting statute); Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir.1987) (awarding sanctions in part because argument on appeal ignored controlling Supreme Court authority); McEnery v. Merit Sys. Protection Bd., 963 F.2d 1512, 1516-17 (Fed.Cir.1992) (awarding sanctions on appeal for failing to reference or discuss controlling precedent); DeSisto College, Inc. v. Line, 888 F.2d 755, 766 (11th Cir.1989) (noting that counsel must acknowledge the binding precedent of the circuit). These cases recognize that while courts should encourage attorneys to assert novel legal theories, attorneys must nonetheless acknowledge controlling authority directly adverse to his position.112

An attorney faced with a sanctions motion often will argue that he or she did not know of the negative authority. It is true that a negligent attorney does not violate the ethical rule against failing to cite controlling authority.113 An attorney may not, however, cite to favorable portions of cases while omitting references to controlling authority within the cited cases.114 Counsel who “crop” a quotation in order to avoid a reference to negative authority may be sanctioned, because the cropping demonstrates that the attorney is fully aware of the negative authority yet intentionally chose not to provide it to the court.115

The clear and unambiguous line of authority holds that an attorney who fails to cite adverse controlling authority should be sanctioned. A lawyer who violates this rule obstructs the proper operation of justice. Therefore, if such an act occurs, it would appear that the opposing counsel has an obligation under Rule 8.3(a) of the Model Rules to report the unprofessional conduct. Counsel are loathe to “tattle to the PR

114 Id.
115 Id. at 1356-57.
Board.” But if the misconduct is clear and egregious, it may be an ethical violation for the victimized attorney not to report the violation.

X. CONCLUSION AND SUGGESTIONS

There are numerous opportunities to bring legal actions against opposing counsel and the officers, directors and employees of the other party. When the claims are legitimate and necessary to protect your client’s rights, they should be brought. When the claims are frivolous or designed to harm or harass an individual (with no real resulting benefit to your client), they should not be brought. A more difficult issue arises when the claims fall somewhere in the middle – they are marginally beneficial to your client, but are more designed to bring about hardship to the individual defendant than they are designed to put money in your client’s pocket.

It is our opinion that the zealous representation of an attorney’s client does not require the attorney to harass or bankrupt an individual merely because the attorney can avoid sanction by the Professional Responsibility Board. We suggest that an attorney ask the following questions before pursuing a claim against an attorney, officer, director, employee or similar entity: 1) Is my client likely to prevail? 2) Even if my client might prevail, am I really bringing the claim for a purpose that falls within the “improper purposes” listed in Rule 11 or violates other sanctions rules? 3) Can I achieve the same result through less “hardball” means or by providing notice of a potential claim? 4) If I bring the claim, will I continue to pursue relief from or against the individual even if I can obtain fair relief from the corporate defendant? 5) Do I expose myself or my firm to significant liability if I do not bring the claim? After careful analysis of these factors and rules for attorney conduct, each attorney has to make his or her own decision of how to proceed.

While each state sets the floor on what ethical standards its attorneys must abide by, we would hope that attorneys would remember the words of Alexander Solzenitsyn, who stated: “Even the most rational approach to ethics is defenseless if there isn’t the will to do it right.”
APPENDIX A

Particular State Deviations from
the Model Rules Applicable to Zealous Advocacy

I. Aspirations for zealousness of representation
   A. Arizona: Preamble urges lawyers to act “honorably” rather than “zealously”
   B. Indiana: No references to zealous advocacy. “Lawyers should conduct themselves honorably”
   C. Oregon: No preamble, and thus no references to zealous advocacy

II. Merit of claims
   A. Georgia: may not advance a claim that is unwarranted under current law, unless good faith basis to extend (essentially same as Rules, but uses Code language)
   B. Montana: requires diligent investigation before asserting a claim or defense

III. Delay
   A. Nebraska: no duty to expedite litigation
   B. Oregon: Rule 3.2 (expediting litigation) not enacted, but Rule 3.1 amended to forbid lawyer from knowingly delaying a trial
   C. Texas: may not take positions that unreasonably increase costs or delays
   D. Virginia: Rule 3.2 was not enacted (expediting litigation)

IV. Harassment/Threats of prosecution (criminal only)
   A. Colorado: may not threaten criminal prosecution in order to obtain advantage in a civil proceeding
   B. Idaho: may not threaten or press criminal charges to gain a civil advantage
   C. New Jersey: may not present or threaten criminal charges to obtain improper advantage in a civil matter
   D. Tennessee: may not threaten or offer to refrain from filing criminal charges to obtain an advantage in a civil matter

V. Harassment/Threats of prosecution (criminal, civil, and/or disciplinary)
A. Alabama: may not take any action merely to harass or maliciously injure another

B. Georgia: may not take action merely to harass or maliciously injure another

C. Kentucky: may not present or threaten criminal or disciplinary charges solely to gain advantage in a civil or criminal matter

D. Louisiana: may not threaten criminal or disciplinary charges solely to gain advantage in a civil matter

E. Montana: may not make a claim or defense “for the purpose of harassment, advancement of a nonmeritorious claim, or solely to gain leverage”

F. Nebraska: may not take action when lawyer knows or it is obvious that the action would serve merely to harass or maliciously injure another

G. South Carolina: may not threaten criminal or disciplinary charges solely to gain advantage in a civil matter

H. Texas: may not threaten criminal or disciplinary charges to gain advantage in civil matters

I. Virginia: may not present or threaten criminal or disciplinary charges solely to gain a civil advantage. May not present claims or defense designed merely to harass or maliciously injure

VI. Evidentiary value of breach of the rules

A. Indiana: may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client (essentially same effect as Model Rules, but different wording)

B. Pennsylvania: “Scope” section does not contain Model Rules statement that lawyer’s violation may be evidence of a breach of applicable standard of conduct

VII. Reporting duties

A. Alabama: any misconduct, as defined in Rule 8.4. Alabama’s Rule 8.4 includes “other conduct that adversely reflects on [a lawyer’s] fitness to practice law.” This is possibly the broadest reporting duty of any state.

B. Colorado: must report misconduct unless protected by Rule 1.6 (privilege) if lawyer has no substantial doubt that misconduct occurred

C. Illinois: criminal acts that reflect adversely on honesty, trustworthiness, or fitness as a lawyer, as well as any conduct involving dishonesty, fraud, deceit, or misrepresentation
D. Iowa: not limited to violations that raise a substantial question as to another lawyer’s honesty, trustworthiness, or fitness to practice

E. Kentucky: no duty to report

F. Massachusetts: not a duty – lawyer “should” report
## APPENDIX B

### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
<th>Rule Number</th>
<th>Refers to State Rules</th>
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<th>Refers to ABA Model Code</th>
<th>Refers to ABA Canons</th>
<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.D.C.</td>
<td>DC</td>
<td>83.15(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Violations of the Rules of Professional Conduct (as adopted by the D.C. Court of Appeals except as otherwise provided by specific rule of this Court) by attorneys subject to these Rules shall be grounds for discipline. (District adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Mass.</td>
<td>1</td>
<td>83.6(4)(B)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Canons and rules adopted by the Supreme Judicial Court, embodied in rules 3:05, 3:07, &amp; 3:08, as they may be amended from time to time by said court, except as otherwise provided by specific rule of this Court after consideration of comments by representatives of MA Bar Associations. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Me.</td>
<td>1</td>
<td>83.3(d)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Code as adopted by the Supreme Judicial Court of ME as amended from time to time by that Court. (State adopted a version of the Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>D.N.H.</td>
<td>1`</td>
<td>83.5 (DR-1)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Rules of Professional Conduct as adopted by the NH Supreme Court, as the same may from time to time be amended by that court, &amp; any standards of conduct set forth in these rules. Attorneys prosecuting criminal cases are also held to the standards of conduct established by law for prosecutors. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D.P.R.</td>
<td>1</td>
<td>83.5(a)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Court adopted the Model Rules of Professional Conduct as adopted by the ABA “as amended”.</td>
</tr>
<tr>
<td>D.R.I.</td>
<td>1</td>
<td>4(d)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Court adopted the rules of Professional Conduct as adopted by RI Supreme Court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Conn.</td>
<td>2</td>
<td>83.2(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Recognizes the authority of the “Rules of Professional Conduct,”</td>
</tr>
</tbody>
</table>

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**RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS**

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
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<th>No Local Rule</th>
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</tr>
</thead>
<tbody>
<tr>
<td>E.D.N.Y.</td>
<td>2</td>
<td>1.5(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Grounds for Discipline or Other Relief: (1) convicted of a felony or misdemeanor, (2) disciplined by any court, (3) resigned from the bar of any court while an investigation into allegations of misconduct of the attorney was pending, (4) has an infirmity that prevents the attorney from practicing law, (5) conduct violative of the NY State Lawyer’s Code of Professional Responsibility as adopted from time to time by the Appellate Division of the State of NY, and as interpreted and applied except by the state courts, or (6) has appeared at the bar of this court without permission to do so. (State adopted a version of the Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>N.D.N.Y.</td>
<td>2</td>
<td>83.4(j)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>“The Court shall enforce the N.Y.S. Lawyer’s Code of Professional Responsibilities as adopted from time to time by the Appellate Division of the</td>
</tr>
</tbody>
</table>

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Any changes made by the judges of the CT Superior Court to the Rules of Professional Conduct shall not be binding on the District Court unless the changes are expressly adopted by order of the District Judges. CT state interpretations of the Rules of Professional Conduct are not binding on this Court. Rules 3.6 and 3.7(b) of the Rules of Professional Conduct are not adopted as rules governing professional conduct on the District of CT. The ethical standards governing public statements by counsel in a criminal case are set forth in Local Criminal Rule 57. The ethical standards governing participation as counsel in a case where either the attorney or another attorney in his or her firm may be a witness for both civil and criminal cases are set forth in Local Civil Rule 83.13. (State adopted a version of the Rules of Professional Conduct.)
<table>
<thead>
<tr>
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<th>Circuit</th>
<th>Rule Number</th>
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<th>Refers to ABA Canons</th>
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</tr>
</thead>
<tbody>
<tr>
<td>S.D.N.Y.</td>
<td>2</td>
<td>1.5(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>State of New York and as interpreted and applied by the United States Court of Appeals for the Second Circuit.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Grounds for Discipline or Other Relief: (1) convicted of a felony or misdemeanor, (2) disciplined by any court, (3) resigned from the bar of any court while an investigation into allegations of misconduct of the attorney was pending, (4) has an infirmity that prevents the attorney from practicing law, (5) conduct violative of the NY State Lawyer’s Code of Professional Responsibility as adopted from time to time by the Appellate Division of the State of NY, and as interpreted and applied except by the state courts, or (6) has appeared at the bar of this court without permission to do so. (State adopted a version of the Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>W.D.N.Y.</td>
<td>2</td>
<td>83.1(b)(5)(G)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The New York State Lawyer’s Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York, and as interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and this court. (State adopted a version of the Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>D. Vt.</td>
<td>2</td>
<td>83.2(d)(4)(B)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of Bar Associations within the state and other interested parties. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
</tbody>
</table>
## RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
<th>Rule Number</th>
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<th>Refers to ABA Canons</th>
<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. Del.</td>
<td>3</td>
<td>83.6(d)(2)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ABA Model Rules of Professional Conduct, subject to such modifications as may be required or permitted by Federal statute, court rule or decision of law.</td>
</tr>
<tr>
<td>D.N.J.</td>
<td>3</td>
<td>103.1(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>ABA Model Rules of Professional Conduct as revised by the NJ Supreme Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Md.</td>
<td>4</td>
<td>704</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Rules as adopted by the Md. Ct. of Appeals.</td>
</tr>
<tr>
<td>E.D.N.C</td>
<td>4</td>
<td>83.1(j)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Revised Rules of Professional Conduct (of the N.C. State Bar), now in force and as hereafter modified by Supreme Court of N.C., except as may be otherwise provided by specific rule of this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D.N.C.</td>
<td>4</td>
<td>LR83.11(e)(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Code of Professional Responsibility adopted by the Supreme Court of NC, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D.N.C.</td>
<td>4</td>
<td>LR83.1(A)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Adopts Canons of Professional Ethics of N.C. State Bar and the ABA.</td>
</tr>
<tr>
<td>E.D. Pa.</td>
<td>3</td>
<td>83.6</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state, except that prior court approval as a condition to the issuance of</td>
</tr>
</tbody>
</table>
## RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

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<tr>
<th>District</th>
<th>Circuit</th>
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<th>No Local Rule</th>
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</thead>
<tbody>
<tr>
<td>M.D.</td>
<td>3</td>
<td>83.23.2</td>
<td>X (with specific difference)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>a subpoena addressed to an attorney in any criminal proceeding, including a grand jury, shall not be required. The propriety of such a subpoena may be considered on a motion to quash.</td>
</tr>
<tr>
<td>W.D.</td>
<td>3</td>
<td>83.3.1</td>
<td>X (except Rule 3.10)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Acts or omissions by an attorney admitted to practice before this court, individually or in concert with any other person or persons, which violate the rules of Professional Conduct adopted by this court, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Rules of Professional Conduct adopted by this court are: (1) the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, except Rule 3.10, as amended from time to time by that court, unless specifically excepted in this court's rules; and (2) the Code of Professional Conduct enacted in the Middle District of Pennsylvania's Civil Justice Reform Act Plan.</td>
</tr>
<tr>
<td>D.V.I.</td>
<td>3</td>
<td>83.2(a)(1)</td>
<td>X (only)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>“The Rules of Professional Conduct of the American Bar Association shall govern the conduct of the members of the bar admitted to practice in this court, subject to such modifications as may be required or permitted by federal statute, regulation, court rule or decision of law.”</td>
</tr>
<tr>
<td>D.S.C.</td>
<td>4</td>
<td>83.1.08</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>S.C. Rules of Professional Conduct (Rule 407 of the S.C. )</td>
</tr>
<tr>
<td>District</td>
<td>Circuit</td>
<td>Rule Number</td>
<td>Refers to State Rules</td>
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<td>-----------------------------------------------</td>
</tr>
<tr>
<td>E.D. Va.</td>
<td>4</td>
<td>83.1(1)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Appellate Court Rules adopted by the Supreme Court of South Carolina as amended from time to time by that state court, except as may be otherwise provided by specific Rule of this Court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Va.</td>
<td>4</td>
<td>LR Gen P</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with another person or persons, which violate the disciplinary rules adopted by this Court shall constitute misconduct and be grounds for discipline, whether or not the act or omissions occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by the Virginia Supreme Court, as amended from time to time by that court shall be the disciplinary rules of this Court, except as otherwise provided by specific Rule of the Court after specific consideration of comments by representatives of bar associations within the state.</td>
</tr>
<tr>
<td>N.D. W. Va.</td>
<td>4</td>
<td>LR Gen P</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct, as adopted by the Supreme Court of Appeals of W.V., provide the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this Court (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>S.D. W.Va.</td>
<td>4</td>
<td>LR Gen P</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>(Explicit)</td>
<td>ABA Rules of Professional Conduct, the Model Federal Rules of Disciplinary Enforcement as adopted by this Court, &amp; the Rule of Professional Conduct as adopted by the Supreme Court of Appeals of</td>
</tr>
</tbody>
</table>
## RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
<thead>
<tr>
<th>District Circuit</th>
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<th>Refers to ABA Model Rules</th>
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<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>E.D. La.</td>
<td>5 83.2.4E</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>W.V. provide the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this Court. In all appearances, actions and proceedings within the jurisdiction of this Court, attorneys shall conduct themselves in accordance with the Model Federal Rules of Disciplinary Enforcement and the Rules of Professional Conduct, and shall be subject to the statutes, rules and orders applicable to the procedures and practice of law in this Court. These codes, rules and orders provide minimal standards for the conduct of attorneys, and the Court encourages attorneys to conform their conduct to the highest of ethical standards. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D. La.</td>
<td>5 83.2.4M</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Rules of Professional Conduct of La. State Bar Association, as hereinafter amended from time to time by La. Supreme Court except as otherwise provided by specific rule or general order of a court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. La.</td>
<td>5 83.2.4W</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Rules of Professional Conduct of La. State Bar Association, as hereinafter amended from time to time by La. Supreme Court except as otherwise provided by specific rule or general order of a court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Miss.</td>
<td>5 83.1(c)(1)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Court may after 30 days' notice and an opportunity to show cause to the contrary, and after hearing, if requested, censure or reprimand any</td>
</tr>
</tbody>
</table>

*District Circuit Rule Number Refers to State Rules Refers to ABA Model Rules Refers to ABA Model Code Refers to ABA Canons No Local Rule Summary of Local Rule Governing Attorney Conduct
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<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. Miss.</td>
<td>5</td>
<td>83.1(c)(1)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Court may after 30 days’ notice and an opportunity to show cause to the contrary, and after hearing, if requested, censure or reprimand any attorney who practices before it for conduct unbecoming a member of the bar or failure to comply with these rules, the Miss. Rules of Professional Conduct, or any other rule of the Court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>E.D. Tex.</td>
<td>5</td>
<td>AT-2(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The standards of professional conduct adopted as part of the Rules Governing the State Bar of TX shall serve as a guide governing the obligations and responsibilities of all attorneys appearing in this Court. It is recognized, however, that no set of rules may be framed which will particularize all the duties of the attorney in the varying phases of litigation or in all the relations of professional life. Therefore, the attorney practicing in this Court should be familiar with the duties and obligations imposed upon members of this Bar by the TX Disciplinary Rules of Professional Conduct, court decisions, statutes, and the usages customs and practices of this Bar. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Tex.</td>
<td>5</td>
<td>83.8(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Grounds for Disciplinary Action: (1) conduct unbecoming member of the bar; (2) failure to comply with rule or order of this court; (3) unethical behavior; (4) inability to conduct litigation properly; (5) conviction by any court of a felony or crime involving dishonesty or false</td>
</tr>
<tr>
<td>District</td>
<td>Circuit</td>
<td>Rule Number</td>
<td>Refers to State Rules</td>
<td>Refers to ABA Model Rules</td>
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<tr>
<td>S.D.</td>
<td>Tex.</td>
<td>83.1(L)</td>
<td>X</td>
<td>X</td>
<td></td>
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<td></td>
<td>Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the TX Disciplinary Rules of Professional Conduct. Violation of the Disciplinary Rules of Professional Conduct shall be grounds for disciplinary action, but the court is not limited by that code. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D.</td>
<td>Tex.</td>
<td>Sec. 3 Rule AT-4</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td></td>
<td>Every member of the bar of this Court and any attorney permitted to practice in this Court . . . shall familiarize oneself with and comply with the standards of professional conduct required by members of the State Bar of TX and contained in the TX Disciplinary Rules of Professional Conduct (VTCA Government Code Title 2, subtitle G, Appendix) &amp; the decisions of any Court applicable thereto, which are hereby adopted as standards of conduct of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standard of professional conduct. In that connection, the ABA Code of Professional Responsibility shall be noted. No attorney shall engage in any conduct which degrades or impugns the integrity of the Court or interferes in the administration of justice therein. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
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<td>District</td>
<td>Circuit</td>
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<tr>
<td>E.D. Ky.</td>
<td>6</td>
<td>83.3(c)</td>
<td>X</td>
<td>X</td>
<td></td>
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<td></td>
<td>If it appears to the Court that an attorney practicing before the Court has violated the rules of the KY Supreme Court governing professional conduct or is guilty of conduct unbecoming an officer of the Court, any judge may order an attorney to show cause—within a specific time—why the Court should not discipline the attorney. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Ky.</td>
<td>6</td>
<td>83.3(c)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>If it appears to the Court that an attorney practicing before the Court has violated the rules of the KY Supreme Court governing professional conduct or is guilty of conduct unbecoming an officer of the Court, any judge may order an attorney to show cause why the Court should not discipline the attorney. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>E.D. Mich.</td>
<td>6</td>
<td>83.22(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct adopted by the MI Supreme Court, as amended from time to time, apply to members of the bar of this court and attorneys who practice in this court . . . . (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Mich.</td>
<td>6</td>
<td>83.1(j)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>“An attorney . . . is subject to the Rules of Professional Conduct adopted by the Michigan Supreme Court, except those rules a majority of the judges of this Court exclude by administrative order, and consents to the jurisdiction of this Court and the Michigan Attorney Grievance Commission and Michigan Attorney Discipline Board for purposes of disciplinary proceedings . . .”</td>
</tr>
<tr>
<td>N.D. Ohio</td>
<td>6</td>
<td>Rule 83.3(f): Mod. Fed. R. Disc. Enf. Rule IV.B.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>All attorneys admitted to practice in this Court shall be “bound by the ethical standards of the Code of Professional Responsibility adopted by the Supreme Court of OH, so far as they are not inconsistent with</td>
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<table>
<thead>
<tr>
<th>District</th>
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<tbody>
<tr>
<td>S.D. Ohio</td>
<td>6</td>
<td>Rule 83.3(f); Mod. Fed. R. Disc. Enf., Rule IV.B.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>“Acts or omissions by an attorney . . . which violate the Code of Professional Responsibility adopted by the Court shall constitute misconduct and be grounds for discipline, whether or not the act or omissions occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.”</td>
</tr>
<tr>
<td>E.D. Tenn.</td>
<td>6</td>
<td>83.7(a)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Court may impose discipline on any member of its bar who has violated the Code of Professional Conduct as adopted by the Tenn. Supreme Court, or has engaged in unethical conduct tending to bring court or the bar into disrepute. The Court may also discipline any member who has been suspended or disbarred by the state in which he or she is a member, or by any court of record. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D. Tenn.</td>
<td>6</td>
<td>83.1(e)(4)</td>
<td>X</td>
<td></td>
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<td></td>
<td>The standard of professional conduct of the members of the bar of this Court shall include the current Tennessee Code of Professional Responsibility, Tenn. Sup. Ct. R. 8. A violation of any of the disciplinary rules contained in the Code in connection with any matter pending before this Court shall subject the offending attorney to appropriate disciplinary action. In this regard, this Court may from time to time appoint</td>
</tr>
<tr>
<td>District</td>
<td>Circuit</td>
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</tr>
<tr>
<td>W.D. Tenn.</td>
<td>6</td>
<td>83.1(e)</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td>grievance committees to investigate any complaints made to it alleging improper professional conduct of any member of the bar in any way connected with his practice in this Court. In such a case the committee appointed shall operate under the directions of the Court and shall take such actions as directed by the Court in the order appointing it. In the alternative, such complaints may be forwarded by the Court to the appropriate disciplinary authority of the state courts. This Rule shall not apply to Disciplinary Rule 7-107, which is superseded as a Rule of this District by Rule 3 of these Rules. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>C.D. Ill.</td>
<td>7</td>
<td>83.6(D)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>All attorneys practicing before the United States District Court for the Western District of Tenn. shall comply with the Code of Professional Responsibility as then currently promulgated and amended by the Supreme Court of Tenn., except that prior court approval as a condition to the issuance of a subpoena addressed to an attorney shall not be required, as specified in Tenn. S. Ct. R. 8, DR 7-103,(c) and with the Guidelines for Professional Courtesy and Conduct as adopted by this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Ill.</td>
<td>7</td>
<td>83.50.1</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>Rules of Professional Conduct adopted by the Supreme Court of Ill., as amended from time to time by that court, except as otherwise provided by specific rule of this court, after consideration of comments by representatives of bar associations within the state. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
</tbody>
</table>

Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or...
### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
<th>Rule Number</th>
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<th>Refers to ABA Canons</th>
<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. Ill.</td>
<td>7</td>
<td>83.4(d)(2)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Ill., as amended from time to time, except as otherwise provided by specific Rule of this Court. (State adopted a version of the Rules of Professional Conduct that also draws heavily from the ABA Model Code.)</td>
</tr>
<tr>
<td>N.D. Ind.</td>
<td>7</td>
<td>83.5(f) &amp; App. B</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct, adopted by the Ind. Supreme Court, and the Standards for Professional Conduct, as adopted by the Seventh Circuit, shall provide the standards of conduct for those practicing in this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>S.D. Ind.</td>
<td>7</td>
<td>83.5(f)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct, as adopted by the Ind. Supreme Court, shall provide standards of conduct for those practicing in this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>E.D. Wisc.</td>
<td>7</td>
<td>83.10(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The standards of conduct of the member of the bar of this court, of government attorneys, and of non-resident attorneys admitted to practice before this court shall be those proscribed by the Rules of Professional Conduct for Attorneys, as such may be adopted from time to time by the Supreme Court of Wis. and except as such may be modified by this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D.</td>
<td>7</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Case-by-case basis, judges have complete discretion.</td>
</tr>
</tbody>
</table>

persons, that violate the Rules of Professional Conduct for the Northern District of Ill. shall constitute misconduct and be grounds for discipline. (State adopted a version of the Rules of Professional Conduct that also draws heavily from the ABA Model Code.)
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<th>District</th>
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<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wis.</td>
<td></td>
<td>83.5(e); App. Rule IV.B.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>However, will consider state bar and ABA. (Clerk’s Office 1995.)</td>
</tr>
<tr>
<td>E.D. Ark.</td>
<td></td>
<td>83.5(e); App. Rule IV(B)</td>
<td>X</td>
<td>X</td>
<td></td>
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<td></td>
<td>The Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court is the Code of Professional Responsibility or the Rules of Professional Conduct adopted by highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of state bar associations within the state. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Ark.</td>
<td></td>
<td>83.2(g)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The rule reads, in part: “The rules of conduct applicable to lawyers admitted to practice before the state courts of Iowa govern all members of the bar of this court and, to the extent provided in subsection (d)(2) of this rule, those admitted pro hac vice . . . .”</td>
</tr>
<tr>
<td>N.D. Iowa</td>
<td></td>
<td>83.2(g)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The rule reads, in part: “The rules of conduct applicable to lawyers admitted to practice before the state courts of Iowa govern all members of the bar of this court and, to the extent provided in subsection (d)(2) of this rule, those admitted pro hac vice . . . .”</td>
</tr>
<tr>
<td>S.D. Iowa</td>
<td></td>
<td>83.2(g)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The rule reads, in part: “The rules of conduct applicable to lawyers admitted to practice before the state courts of Iowa govern all members of the bar of this court and, to the extent provided in subsection (d)(2) of this rule, those admitted pro hac vice . . . .”</td>
</tr>
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<td>District</td>
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<td>Rule Number</td>
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</tr>
<tr>
<td>D. Minn</td>
<td>8</td>
<td>83.6(d)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The MN Rules of Professional Conduct adopted by the Supreme Court of MN, as amended from time to time by that Court, are adopted by this Court except as otherwise provided by the specific rules of this Court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>E.D. Mo.</td>
<td>8</td>
<td>83-12.02</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Mo., as amended from time to time by that Court, except as may otherwise be provided by this Court’s Rules of Disciplinary Enforcement. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Mo.</td>
<td>8</td>
<td>83.5(c)(2)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D.N.D.</td>
<td>8</td>
<td></td>
<td>X</td>
<td></td>
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<td></td>
<td>Primarily address to the court or send to State Bar Council. (Clerk’s Office 1995.)</td>
</tr>
<tr>
<td>D. Neb.</td>
<td>8</td>
<td>1.7(b)</td>
<td>X</td>
<td></td>
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<td></td>
<td>The standards of conduct of the members of the bar of this court shall be those prescribed by the Code of Professional Responsibility adopted by the Nebraska Supreme Court and any amendments thereto or any standards set out in the local rules of the United States District Court for the District of Nebraska (State adopted a version of Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>District</td>
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<td>Rule Number</td>
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<tr>
<td>D.S.D.</td>
<td>8</td>
<td></td>
<td>X</td>
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<td></td>
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<td>X</td>
<td>Follow State Bar of SD. (Clerk’s Office 1995.)</td>
</tr>
<tr>
<td>D. Alaska</td>
<td>9</td>
<td>83.1(i)</td>
<td>X</td>
<td>X</td>
<td></td>
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<td></td>
<td>Every member of the bar of this court and any attorney admitted to practice in this court . . . must be familiar with and comply with the Standards of Professional Conduct required of members of the State Bar of Alaska and contained in the Alaska Rules of Professional Conduct and decisions of any court applicable thereto, except insofar as such rules and decisions shall be otherwise inconsistent with federal law; maintain the respect due to courts of justice and judicial officers; and perform with the honesty, care, and decorum required for the fair and efficient administration of justice. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Ariz.</td>
<td>9</td>
<td>83.2(d)</td>
<td>X</td>
<td>X</td>
<td></td>
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<td></td>
<td>The “Rules of Professional Conduct,” in the the Rules of the Supreme Court of the State of Ariz., shall apply to attorneys admitted to practice before [this Court]. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>C.D. Cal.</td>
<td>9</td>
<td>Chap. VII</td>
<td>X</td>
<td>X</td>
<td></td>
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<td>Rule 83.3.1.2 of Chapter VII reads in full: “In order to maintain the effective administration of justice and the integrity of the court, each attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. These statutes, rules and decisions are hereby adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline. The Model Rules of Professional Conduct of the American Bar Association may be considered as guidance.”</td>
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<td></td>
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<td>Rule 1.2</td>
<td>(Explicit)</td>
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<tr>
<td>District</td>
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</tr>
<tr>
<td>E.D. Cal.</td>
<td>9</td>
<td>83-180(e)</td>
<td>X</td>
<td>X</td>
<td>(Explicit)</td>
<td></td>
<td>Every member of the Bar of this Court, and any attorney admitted to practice in this court . . . shall become familiar with and comply with the Standards of Professional Conduct required of members of the State Bar of CA, and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of CA and decisions of any Court applicable thereto. In the absence of an applicable standard therein, the ABA Model Code of Professional Responsibility may be considered for guidance. No attorney admitted to practice before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice. (State adopted CA Rules of Professional Conduct augmented with a version of the Code of Professional Responsibility.)</td>
<td></td>
</tr>
<tr>
<td>N.D. Cal.</td>
<td>9</td>
<td>11-4(a)(1)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Every member of the Bar of this court and any attorney permitted to practice in this court . . . must: (1) be familiar with and comply with the standards of professional conduct required of members of the State Bar of Cal.; (2) comply with the local rules of the N.D. Cal.; (3) maintain the respect due courts of justice and judicial officers; (4) practice with the honesty, care, and decorum required for the fair and efficient administration of justice; (5) discharge the obligations owed to his or her clients and to the court; &amp; (6) assist those in need of counsel when requested by this court. (State adopted CA Rules of Professional Conduct augmented with a version of the Code of Professional Responsibility.)</td>
<td></td>
</tr>
<tr>
<td>S.D. Cal.</td>
<td>9</td>
<td>83.4(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Every member of the Bar of this court and any attorney permitted to practice in this court shall be familiar with and comply with the standards of professional conduct required of members of</td>
<td></td>
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</table>

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### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
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<td></td>
<td></td>
<td>State Rules</td>
<td>ABA Model Rules</td>
<td>ABA Model Code</td>
<td>ABA Canons</td>
<td>Governing Attorney Conduct</td>
</tr>
<tr>
<td>D. Guam</td>
<td>9</td>
<td>G.R. 22.3(b)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Every attorney admitted to practice before this court shall familiarize himself or herself with and comply with the standards of professional conduct required of members of the Bar of Guam and contained in the ABA Model Rules of Professional Conduct as adopted on 8/2/83, and thereafter amended or judicially construed.</td>
</tr>
<tr>
<td>D. Haw.</td>
<td>9</td>
<td>83.3</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Every member of the bar of this court and any attorney permitted to practice in this court . . . shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Haw. state bar. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>District</td>
<td>Circuit</td>
<td>Rule Number</td>
<td>Refers to ABA Model Rules</td>
<td>Refers to ABA Model Code</td>
<td>Refers to ABA Canons</td>
<td>No Local Rule</td>
<td>Summary of Local Rule Governing Attorney Conduct</td>
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</tr>
<tr>
<td>D. Idaho</td>
<td>9</td>
<td>83.5</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>All members of the bar of this court and all attorneys permitted to practice in this court shall familiarize themselves with and comply with the standards of professional conduct required of members of the ID State Bar and decisions of any court applicable thereto which are hereby adopted as standards of professional conduct of this court. These provisions shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the ID Rules of Professional Conduct for the ID State Bar should be noted. No attorney permitted to practice before this court shall engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice therein. (State adopted Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D.N. Mar. I</td>
<td>9</td>
<td>1.5</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Any acts or omissions by an attorney which violate the ABA Rules of Professional Conduct as adopted in 1983 and thereafter amended or judicially construed, together with Court’s own “Standards of Professional Conduct.”</td>
</tr>
<tr>
<td>D. Mont.</td>
<td>9</td>
<td>83.13</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The standards of professional conduct of attorneys practicing in this Court shall include the ABA Model Rules of Professional Conduct and the Montana Rules of Professional Conduct.</td>
</tr>
<tr>
<td>D. Nev.</td>
<td>9</td>
<td>IA 10-7(a)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>An attorney admitted to practice . . . shall adhere to the standards of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from time to time by the supreme Court of NV, except as may be modified by this court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Or.</td>
<td>9</td>
<td>83.7</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Every attorney admitted to general or special practice and every law student . . . must: (a)</td>
</tr>
</tbody>
</table>
RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
<th>Rule Number</th>
<th>Refers to State Rules</th>
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<th>Refers to ABA Model Code</th>
<th>Refers to ABA Canons</th>
<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>E.D. Wash.</td>
<td>9</td>
<td>83.3(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>This court may impose discipline on any attorney practicing before this Court, whether or not a member of the bar of this Court, who engages in conduct violating applicable Rules of Professional Conduct of the Washington State Bar, or who fails to comply with rules or orders of this Court. (State adopted a version of the Code of Professional Responsibility.)</td>
</tr>
<tr>
<td>W.D. Wash.</td>
<td>9</td>
<td>G.R. 2(e)(1)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Washington Rules of Professional Conduct, as promulgated, amended and interpreted by the Washington State Supreme Court, and the decisions of any court applicable thereto. In applying and construing these Materials, this Court may also consider the published decisions and formal and informal ethics opinions of the Washington State Bar Association, the Model Rules of Professional Conduct of the American Bar Association and Ethics Opinions issued pursuant to those Model Rules, and the decisional law of the state and federal courts. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Colo.</td>
<td>10</td>
<td>83.6</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional conduct, as adopted by the Colo. Supreme Court, are adopted as standards of professional responsibility applicable in this court. (State adopted a version of the Rules</td>
</tr>
</tbody>
</table>
## RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
<thead>
<tr>
<th>District</th>
<th>Circuit</th>
<th>Rule Number</th>
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<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. Kan.</td>
<td>10</td>
<td>83.6.1(a)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Certain exceptions for state standards noted on June 30, 1999 by Administrative Order 1999-6. See § 803.20[2][c].</td>
</tr>
<tr>
<td>D. N.M.</td>
<td>10</td>
<td>83.9</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Kansas Rules of Professional Conduct as adopted by the Supreme Court of Kan., and as amended by that court from time to time, except as otherwise provided by specific rule of this court, are adopted by this court as the applicable Standards of Professional Conduct.” (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>E.D. Okla.</td>
<td>10</td>
<td>83.3(K)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Code of Professional Responsibility of the Okla. Bar Association, as amended from time to time, is adopted as the standard of conduct for applicants and members of the bar of this Court. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Okla.</td>
<td>10</td>
<td>83.2(A)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Attorneys practicing in this court are expected to conduct themselves in accordance with the Okla. Rules of Professional Conduct, as adopted by the Okla. Supreme Court, as the standard of conduct of all members of the OK Bar Association. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>W.D. Okla.</td>
<td>10</td>
<td>83.6(b)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Court adopts the Okla. Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Okla. as the standard</td>
</tr>
</tbody>
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### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

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<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
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<tr>
<td>D. Utah</td>
<td>10</td>
<td>83-1.1(h)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>‘All attorneys practicing before this court, . . . , are governed by and must comply with the rules of practice adopted by this Court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court.’ (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>D. Wyo.</td>
<td>10</td>
<td>83.12.7(b); see also 83.12.1(a)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time-to-time by that state court, except as otherwise provided by specific rule of this Court after consideration of comments by representatives of bar association within the state, together with court's own &quot;Standards of Litigation Conduct.&quot; (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D. Ala.</td>
<td>11</td>
<td>83.1(f)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Attorneys admitted to practice before this Court shall adhere to this Court's Local Rules, the Ala. Rules of Professional Conduct, the Ala. Standards for Imposing Lawyer Discipline, and to the extent not inconsistent with the preceding, the ABA Model Rules of Professional Conduct. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Ala.</td>
<td>11</td>
<td>83.1(f)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>(Explicit)</td>
<td>Each attorney who is admitted to the bar of this court . . . is required to be familiar with, and shall be governed by, the Local Rules of this court and, to the extent not inconsistent with the preceding, the Ala. Rules of Professional Conduct adopted by the Ala. Supreme Court and, to the extent not inconsistent with the preceding, the ABA</td>
</tr>
</tbody>
</table>

* *
# RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

<table>
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<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. Ala.</td>
<td>11</td>
<td>83.5(f)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>An attorney who is admitted to the Bar of this Court . . . shall agree to read and abide by the Local Rules of this Court, the ethical limitations and requirements governing the behavior of members of the Ala. State Bar, and, to the extent not inconsistent with the preceding, the ABA Model Rules of Professional Conduct. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D. Fla.</td>
<td>11</td>
<td>2.04(d)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The professional conduct of all members of this Court, . . . , shall be governed by the ABA Model Rules of Professional Conduct as modified and adopted by the Supreme Court of Fla. to govern the professional behavior of the FL Bar. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>N.D. Fla.</td>
<td>11</td>
<td>11.1(E)(1)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Except where an act of Congress, federal rule of procedure, Judicial Conference Resolution or rule of court provides otherwise, the professional conduct of all members of the bar of this district shall be governed by the Rules of Professional Conduct of the Rules Regulating the FL Bar. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>S.D. Fla.</td>
<td>11</td>
<td>11.1(C)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The standards of professional conduct of the members of the Bar of this Court shall include the current Rules Regulating the Fla. Bar. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>M.D. Ga.</td>
<td>11</td>
<td>83.2.1(A)</td>
<td>(Explicit)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Attorneys practicing before this Court shall be governed by this Court's Local Rules, by the Rules of Professional Conduct adopted by highest court of the</td>
</tr>
</tbody>
</table>
### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL DISTRICT COURTS*

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<tr>
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<th>Circuit</th>
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<th>Refers to State Rules</th>
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<th>Refers to ABA Model Code</th>
<th>Refers to ABA Canons</th>
<th>No Local Rule</th>
<th>Summary of Local Rule Governing Attorney Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>N.D. Ga.</td>
<td>11</td>
<td>83.1(C)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>All lawyers practicing before this court shall be governed by and shall comply with specific rules of practice adopted by this court and, unless otherwise provided, with the specific rules of practice adopted by this court and, unless otherwise provided, with the Ga. Rules of Professional Conduct contained in the Rules and Regulations of the State Bar of Ga. and with decisions of this court interpreting these rules and standards. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
<tr>
<td>S.D. Ga.</td>
<td>11</td>
<td>LR 83.5(d)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>The standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association’s Model Rules of Professional Conduct. When a conflict arises, the Ga. Bar Rules of Professional Conduct shall control. (State adopted a version of the Rules of Professional Conduct.)</td>
</tr>
</tbody>
</table>

*State in which this Court sits, as amended from time to time by that state court, and, to extent not inconsistent with the preceding, the ABA Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court. (State adopted a version of the Rules of Professional Conduct.)
### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL CIRCUIT COURTS

<table>
<thead>
<tr>
<th>Cir.</th>
<th>Refers to State Rules</th>
<th>Refers to ABA Model Rules</th>
<th>Refers to ABA Model Code</th>
<th>Refers to Other</th>
<th>No Local Rule</th>
<th>Local Rule: Refers Neither to State Rules nor an ABA Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.C.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>LOCAL RULE: Refers Neither to State Rules nor an ABA Model</td>
</tr>
<tr>
<td></td>
<td>&quot;Acts or omissions by an attorney . . . which violate any Code of Professional Responsibility or other officially-adopted body of disciplinary rules applicable to the conduct of the attorney constitute misconduct. The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the District of Columbia Court of Appeals, as amended from time to time by that court, except as otherwise provided by specific Rule of this Court.&quot; This Rule is set out in full at § 803.11[1]</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>1st. Cir.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>RULE IV(B) of the Rules of Disciplinary Enforcement</td>
</tr>
<tr>
<td></td>
<td>&quot;The Court of Appeals for the First Circuit Rules of Disciplinary Enforcement are on file in the clerk’s office. A copy may be obtained upon request addressed to the clerk of this court.&quot;</td>
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<td></td>
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</tr>
<tr>
<td></td>
<td>Local Rule 46(c) reads:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>RULE IV(B) of the Rules of Disciplinary Enforcement</td>
</tr>
</tbody>
</table>
|      | "Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility, either of the state in which the attorney is acting at the time of the alleged misconduct or of the state in which the attorney maintains his principal office, shall constitute misconduct and shall be grounds for discipline, whether or nor the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility
RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL CIRCUIT COURTS

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<thead>
<tr>
<th>Cir.</th>
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<th>Refers to ABA Model Code</th>
<th>Refers to Other</th>
<th>No Local Rule</th>
<th>Local Rule: Refers Neither to State Rules nor an ABA Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>2nd Cir. Local Rule 46(h)(2)</td>
<td>X</td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Local Rule 46(h)(2) reads, in relevant part: “The court may refer to the Committee any accusation . . . in respect to any professional matter before this court that allegedly violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction where the attorney maintains his or her principal office . . . .”

This Rule is set out in full at § 803.11[3].

3d Local Rules “Appendix IV”

“Appendix IV” Rule 2:

(d) An act or omission by an attorney that violates the Federal Rules of Appellate Procedure, the Federal Circuit Rules, these rules, or orders or instructions of the court, other than an act or omission contemplated by Rule 3(d) of these rules, may be the basis for discipline. A failure to notify the court in compliance with Rule 6(a) may itself be the basis for discipline.

(e) Any conduct before the court unbecoming a member of the bar may be the basis for discipline.”

means that code adopted by the highest court of the state, or commonwealth, as amended from time to time by that court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state or commonwealth.” The First Circuit Rules are set out at § 803.11[3].
### RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL CIRCUIT COURTS

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<th>Cir.</th>
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<th>Refers to ABA Model Code</th>
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<th>No Local Rule</th>
<th>Local Rule: Refers Neither to State Rules nor an ABA Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>4th Local Rule 46(g)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td><em>(a) Conviction . . . of any felony or of any lesser crime involving . . . (b) Imposition off discipline by any other court . . . (c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court: or (d) Any other conduct unbecoming a member of the bar of this Court.</em></td>
</tr>
<tr>
<td>5th Local Rule 46.2. No Local Rule on Exact Standards Beyond F.R.App.P. 46(6)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>No Local Rule on Exact Standards: *&quot;It is longstanding court practice to look to and follow the ethical rules adopted by the highest court in the state of the atty’s domicile, while always being mindful of the ABA Model Rules&quot; (clerk’s office) Local Rule 46.2. reads: <em>&quot;In addition to Fed.R.App.P. 46(b), attorneys may be suspended or removed from the roll of attorneys permitted to practice before this court if the appropriate law licensing authority withdraws or suspends the attorney’s license to practice law, or the license to practice lapses.&quot;</em></td>
</tr>
<tr>
<td>6th Local Rule 46(b)(2)</td>
<td>X* *</td>
<td>X ‘Canons’*</td>
<td>‘Canons’*</td>
<td></td>
<td></td>
<td>“Local Rule 46(b)(2) (set out in full at § 803.11[5]) reads, in relevant part: “This Court may impose discipline on any member who engages in conduct violating the Canons of Ethics or the Model Rules of Professional Conduct, whichever applies, or who fails to comply with the rules or orders of this Court.””</td>
</tr>
<tr>
<td>7th Circuit Standards For Professional Conduct</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>The Standards for Professional Conduct Within the Seventh Federal</td>
</tr>
</tbody>
</table>

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RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL CIRCUIT COURTS

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<tr>
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<th>Refers to ABA Model Code</th>
<th>Refers to Other</th>
<th>No Local Rule</th>
<th>Local Rule: Refers Neither to State Rules nor an ABA Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within the Seventh Federal Judicial Circuit</td>
<td>Judicial Circuit reads, in the Preamble, in part: The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service . . . . These standards shall not be used as for a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined. These “standards” do not follow any state or ABA Model. See 143 F.R.D 441, 448 (1992) (“Final report on Civility of the Seventh Federal District Circuit”).</td>
<td></td>
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</tr>
<tr>
<td>8th IOP ILD</td>
<td></td>
<td></td>
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<td></td>
<td>Internal Operating Procedure, Not Local Rule. IOP II.D. reads, in part: “A member of the bar is subject to suspension or disbarment for improper conduct and may be disciplined for failure to comply with the Federal</td>
<td></td>
</tr>
</tbody>
</table>
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</thead>
<tbody>
<tr>
<td>9th</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>rules of Appellate Procedure or Eighth Circuit Rules . . .. Clerk’s office stated that issues are sent to a panel of 8th Cir. judges; determination made on an case-by-case basis</td>
</tr>
<tr>
<td>10th</td>
<td>X</td>
<td>Addendum III, the Plan for Attorney Disciplinary Enforcement, reads, in Section 2. Grounds for Discipline: “An attorney may be disciplined by this court as a result of: 2.1 conviction in another court of a serious crime; 2.2 disbarment or suspension or reprimand by another court, with or without the attorney’s consent, or the resignation from the bar of another court while an investigation into allegations of misconduct is pending. 2.3 any act or omission which violates the federal laws or federal statutes or federal Rules of Appellate Procedure, the rules of this court, orders or other instruction of this court, or the Code of Professional Responsibility adopted by the highest court of any state to which the attorney is admitted to practice.” In addition, under Local Rules 46.6 there are special sanctions for increasing the cost of litigation (46.6(A)), court appointed counsel’s failure to comply F.R.App.P or</td>
<td></td>
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<td>10th Circuit Local Rules (46.6(B)), and inadequate representation (46.6(I)). See the rule set out in full at § 803.11[6].</td>
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<td>11th Local Rule 46.1(e) Add. 8 Rule 1. A.</td>
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<td>Addendum 8, Rule 1.A., reads, in part: “an act or omission of an attorney admitted to practice before the Court . . . that violates the Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court, shall constitute misconduct and shall be grounds for discipline . . . . Except as otherwise provided by a specific rule of the Court, attorneys practicing before the Court shall be governed by the Federal Rules of Appellate Procedure, the court’s local rules, the American Bar Association Model Rules of Professional Conduct, and the rules of professional conduct adopted by the highest court of the state(s) in which the attorney is admitted to practice to the extent that those state rules are not inconsistent with the American Bar Association Model Rules of Professional Conduct, in which case the model rules shall govern.”</td>
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<td>Federal Circuit Discipline Rule 2(e)</td>
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<td>“Any conduct before the Court unbecoming a member of the bar may be the basis for discipline.” See Rules 1-5 set out in full at § 803.11[2].</td>
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Jeffery S. Haff is the sole shareholder of Jeffery S. Haff & Associates, P.A. Jeff concentrates his practice on the representation of current and prospective franchisees, dealers and distributors in connection with litigation and non-litigation matters. Jeff has represented clients in a variety of industries.


Jeff is a graduate of the State University of New York at Buffalo (B.A., Communication, summa cum laude, Phi Beta Kappa, 1986) and the Duke University School of Law (J.D., with honors 1989). Jeff is admitted to practice before the state and federal courts of Minnesota, a variety of federal district courts, and the Fifth Circuit and Eighth Circuit.
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Robin M. Spencer is a partner in Schiff Hardin’s Litigation and Intellectual Property groups. She concentrates her practice in the arbitration and litigation of complex commercial litigation, including franchise, distribution and antitrust matters involving manufacturers, suppliers, distributors and dealers, as well as franchisors and franchisees in a variety of service, hotel and food systems. In addition to her litigation practice, Ms. Spencer advises suppliers, manufacturers and franchisors with respect to their supply/distribution arrangements, programs and plans. Significant matters in which Ms. Spencer has been involved include the prosecution and defense of trademark and trade secret cases, antitrust tying, price discrimination, price-fixing, and attempted monopolization claims, as well as issues arising under the franchise and dealership laws.

Ms. Spencer is a member of the editorial board of the American Bar Association Franchise Law Journal and also has served on the Steering Committee of the Litigation and Dispute Resolution Division of the American Bar Association Forum on Franchising and on the Franchising Forum’s Publications Committee and Technology Committee. She is a frequent speaker and writer on franchise and distribution issues. Her recent presentations and publications include “Franchising and Distribution Currents,” co-author, Franchise Law Journal, Summer 2006 and Summer 2005 issues; “Arbitrating Antitrust Claims in Franchise and Dealership Disputes,” ABA Antitrust Section panel, May 2004; “Is Your Business a Franchise? It Might Be,” The Corporate Lawyer, March 2004; “The One Who Knew Too Much: Litigation of Trade Secret and Espionage Claims,” ABA Forum on Franchising, October 2003; “The Road Warriors: Effective Direct and Cross Examinations in Franchise and Distribution Disputes,” ABA Forum on Franchising, October 2003; “Essentials of Franchising,” ABA Annual Meeting, August 2001; and “Franchisor’s Guide to Web Site Content – Practical Legal Considerations,” 2000 Annual International Franchise Association Roundtable, as well as articles on intellectual property and franchise issues for a number of publications. Ms. Spencer also serves as a faculty member for the National Institute for Trial Advocacy, and has been selected as a Leading Lawyer in Franchise and Dealership Law.

Ms. Spencer received her undergraduate degree (B.A., Political Science, International Relations Certification, magna cum laude, Phi Beta Kappa, 1990) from the University of Utah, and her law degree (J.D., 1994) from the University of Virginia School of Law, where she served as Articles Editor of the Virginia Journal of International Law. She is admitted to practice in Illinois and Minnesota, as well as before the United States District Courts for the Northern, Central and Southern Districts of Illinois and the Northern District of Indiana, and has represented clients in state and federal courts pro hac vice throughout the country.