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How Do Lawyer Disciplinary Agencies Enforce Rules Against Litigation Misconduct? Or Do They? Results of a Case Study and a National Survey of Disciplinary Counsel

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ARTICLE

HOW DO LAWYER DISCIPLINARY AGENCIES ENFORCE RULES AGAINST LITIGATION MISCONDUCT? OR DO THEY? RESULTS OF A CASE STUDY AND A NATIONAL SURVEY OF DISCIPLINARY COUNSEL

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[1] Professor Emeritus, Department of Criminal Justice and Criminology, Loyola University Chicago; Ph.D., Arizona State University, 1990; J.D., DePaul University, 1975; B.S., University of Illinois, 1972. I want to first thank the pro se litigant identified as PG in the case study described in this article, who in my view suffered a grave injustice at all levels of the court and lawyer disciplinary system. It is my hope that his case will prompt a greater commitment by lawyer discipline agencies to seriously review all lawyer misconduct allegations. In addition, thanks are due to all the state lawyer disciplinary counsel who responded to my survey regarding their practice upon receipt of litigation misconduct complaints. Thanks also to the student editors and staff of the Journal for their expert editing of this manuscript.

I. INTRODUCTION

Lawyers everywhere, beginning with their law school training through the bar admission process, and later in continuing legal education courses, know that they may not make false statements of law or fact in litigation, or conceal material evidence. They are also forbidden from filing and pursuing non-meritorious actions. The professional ethical duties and prohibitions imposed on lawyers in litigation are enumerated under the ABA Model Rules of Professional Conduct ("MRPC") and its state variants. These obligations collectively fall under the general duty to act with "candor towards the tribunal,"[2] and related prohibitions against dishonesty

[2] *See* MODEL RULES OF PRO. RESP. CONDUCT r. 3.3 (AM. BAR ASS'N 2020). Rule 3.3 states:

> (a) A lawyer shall not knowingly:
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> > (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> > (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> > (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Id. Comment 2 of Rule 3.3 states:

and acts prejudicial to the administration of justice.[3] While the phrase, "candor towards the tribunal" has multiple meanings, this and related ethical duties will be referred to in shorthand form as litigation misconduct.

This article examines the relationship between courts and lawyer discipline agencies with respect to sanctions for litigation misconduct. It will focus on the enforcement or non-enforcement of sanctions by lawyer discipline agencies subsequent to court-ordered sanctions in the predicate case. In other words, this article will address what happens when litigation misconduct occurs, but (a) neither the court nor an aggrieved party was aware of it during the litigation; (b) the trial court grants a sanctions request against the offending lawyer; or (c) the sanctions request was considered and denied, thus "exonerating" the lawyer. In these cases, the question is whether lawyer discipline agencies investigate and prosecute subsequent

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

Id. at cmt. 2.

[3] *See id*. at r. 8.4. Rule 8.4 states, in relevant part:

> It is professional misconduct for a lawyer to:
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> > (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so[;] . . .
> > (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
> > (d) engage in conduct that is prejudicial to the administration of justice . . . .

Id. Rule 3.4 states in relevant part:

> A lawyer shall not:
>
> > (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . .
> > (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Id. at r. 3.4.

complaints made against lawyers for litigation misconduct, or whether they defer to the courts on the issue.

Part II presents a review of the literature on the subject, which is scant. Some commentators note the reluctance of disciplinary agencies to prosecute lawyers for litigation misconduct, preferring to refer the matter back to the courts. Professor Peter Joy's empirical study of the relationship between Rule 11 sanctions and state disciplinary referrals is described. While he supports the institutional choice made by lawyer discipline agencies toward non-prosecution, this article takes the opposite view.

Part III begins with a description of the three-stage process for lawyer discipline in Illinois, which is initiated by the Illinois Attorney Registration and Disciplinary Commission ("ARDC"). It reviews recent prosecution data regarding cases of litigation misconduct. This is followed by a review of the state supreme court cases relevant to litigation misconduct, and the purpose and independence of the ARDC.

Part IV reviews the relevant standards that guide professional ethics and disciplinary enforcement for lawyer misconduct. These are contained in two sources: the *Restatement of Law Governing Lawyers* and the ABA's *Guidance on Lawyer Disciplinary Enforcement*. As judged by these standards, it appears that the ARDC failed to meet its responsibility to the general public by refusing to investigate the litigation misconduct described herein.

Part V presents a case study of two lawyers alleged to have made false statements of law and fact, concealed evidence, and filed an unwarranted sanctionable sanctions petition against a pro se litigant in an Illinois small claims court. It then summarizes the reasons given by the ARDC for refusing to investigate the allegations.

Part VI reports the results of a national survey of state lawyer disciplinary counsel regarding their willingness to conduct investigations into litigation misconduct where courts either failed to rule on the misconduct or ordered sanctions against offending lawyers. This part reports survey responses from disciplinary counsel in twenty-nine jurisdictions (twenty-seven states, plus the District of Columbia, and the U.S. Department of Justice).

Part VII discusses the reasons for prohibiting lawyer discipline agencies from making the "institutional choice" to defer to courts in cases involving litigation misconduct. This is followed by my recommendations for disciplinary agencies' review and investigation of litigation misconduct complaints, as well as suggestions for future research. I conclude with the hope that lawyer discipline agencies will maintain their independence from

courts and pursue cases of litigation misconduct to retain public trust and confidence in the justice system.

II. LITERATURE REVIEW

The issues raised in this article are linked to the role of the lawyer as a zealous advocate for his or her client. The Preamble to the Model Rules of Professional Conduct ("MRPC") states: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[4] The role of advocate, however, is often inconsistent with the purported truth-finding function of courts. As Judge Marvin E. Frankel noted in his classic article critical of the adversary system:

> The advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth. The advocate's primary loyalty is to his client, not to truth as such . . . . The business of the advocate, simply stated, is to win if possible without violating the law . . . . His is not the search for truth as such . . . . [T]he truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.[5]

But "[t]he duty to represent a client zealously and vigorously has its limits."[6] The limits, of course, are the applicable state ethics rules that

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[4] *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020) ("[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.")

[5] *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, LAWYERS' ETHICS: CONTEMPORARY DILEMMAS 99, 102-03 (Allan Gerson ed., 1980).

[6] *See* James J. Brosnahan & Carol S. Brosnahan, *The Attorney's Ethical Conduct During Adversary Proceedings*, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 143, 148 (1978). The authors cite former ABA Canon 15 for this proposition:

> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge if its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause . . . .

Id. at 148 (quoting ABA CANONS OF PROFESSIONAL ETHICS, CANON 15); *see also* J.E. Singleton, CONDUCT AT THE BAR AND SOME PROBLEMS OF ADVOCACY 25 (1933) ("[T]he Court is entitled to rely on Counsel to draw the attention of the Court to any case which is contrary to his contention if he knows of that case."). The author also cites to an 1857 authority that states:

are generally based on the MRPC. We know there are limits to zealous advocacy, but do lawyers face disciplinary actions for their litigation misconduct? In Jerome Carlin's 1966 seminal study of lawyer ethics, he notes: "The most frequent charges against lawyers involve wrongdoing against a client, usually misappropriation of client funds. Much less frequent are accusations of offenses against the administration of justice, mainly submission of false or misleading testimony in a court or administrative agency."[7]

The Restatement of Law Governing Lawyers acknowledges that "[m]ost bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement."[8] Professor Deborah Rhode concurs with this observation:

> Lawyers and judges rarely report professional abuses, and little effort has focused on counteracting the obvious economic and psychological barriers to reporting. Many attorneys do not feel sufficiently blameless to cast the first stone unless they are sure of a fellow practitioner's serious misconduct . . . . As a consequence, most ethical violations never reach regulatory agencies . . . . In the unusual cases where judges or lawyers report abuses to bar agencies,

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> The zeal of the advocate may lead him into bye-paths, may tempt him to deviate from that strict truthfulness for which he should ever be distinguished . . . . If . . . there should be two eminent advocates in one Court, the loss of one of them would be a great public evil. Should such a state of things exist as one commanding mind only at the Bar, with a weak Judge upon the bench, the public interest would suffer. And if that one barrister should not withal be strictly scrupulous, the nuisance would be intolerable.

Id. at 26. This is the risk when a self-represented litigant faces a lawyer representing their adversary, an illustration of which is the case study described herein.

[7] *See* JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 152-55 (1966). An early ABA report evaluating disciplinary enforcement included the following two of thirty-six "Problems" observed by the committee that are relevant to this study: "No permanent record of complaints and their processing," and "Processing of complaints involving material allegations that also are the subject of pending civil or criminal proceedings." GEOFFREY C. HAZARD JR. AND DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 425-26 (1985).

[8] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. (b) (AM. L. INST. 2000) (prohibiting "Frivolous Advocacy"). The definition of a "frivolous position" is "one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it[,]" whereas a nonfrivolous argument is one that "includes a good-faith argument for an extension, modification, or reversal of existing law." *Id*. at cmt. (d).

> *these agencies will often refer the case back to the courts for final resolution, leaving the injured party stranded in between*.[9]

Commentators have noted the leniency of lawyer disciplinary agencies in responding to allegations of litigation misconduct in the form of false statements to the court.[10] Professor Peter Joy conducted a relevant study of the relationship between Rule 11 violations and professional discipline for the same misconduct.[11] Rule 11 of the Federal Rules of Civil Procedure authorizes discretionary sanctions on lawyers or parties who engage is various forms of litigation misconduct. It provides that, by signing any paper submitted to the court, "or later advocating it," an attorney or "unrepresented party":

> certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:[12]

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[9] *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 694-95 (1994) (emphasis added); *see also* David L. Hudson, Jr., *Questionable Claims: Election Fraud Cases Highlight Ethics Rule on Baseless Complaints*, ABA JOURNAL (Apr.–May, 2021) 32, 33 (quoting Columbia law professor Leslie Levin: "As a practical matter, discipline authorities almost never get involved in these sorts of matters . . . If the court doesn't sanction the lawyer, disciplinary authorities often conclude that discipline is not warranted. If the courts do sanction the lawyer, disciplinary authorities often feel like lawyers have been punished enough.")

[10] *See* Stephen Gillers, *Lowering The Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 507-10 (2014).

> [A] dishonest lawyer can cause more harm to more people than a lawyer who takes on one matter she is not competent to handle or is tardy in her work. . . . Given the high value of truth, we might expect that lawyers who lie in court matters will face harsh sanctions, especially if those lies are under oath. Indeed, lawyers have often been disciplined for lies, whether to tribunals or third persons, but a review of decisions across more than five years reveals that sanctions are far more lenient in the Second Department than in the First Department—even when the lies are in connection with litigation . . . . Leniency runs deep in Second Department cases that discipline lawyers for dishonesty in court matters. It has imposed public censure even when lawyers have lied directly to the courts.

Id.

[11] *See* Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 785-97 (2004) ("Rule 11 Study").

[12] *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

> 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 reasona-

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[13]

Rule 11 misconduct encompasses the making of, *inter alia*, false statements of law or fact, the obstruction of access to evidence, or equally serious professional misconduct. Such acts, while not given as specific examples under the rule's scope, no doubt fall within the bounds of the Rule 11 when done for an "improper purpose," such as making a claim or defense that is "unwarranted" by existing law or evidence, or false denials of

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> ble 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.

Id.

[13] *See* FED. R. CIV. P. 11(b)(1)-(4). The comparable rule relevant to the case study presented here is Ill. S. Ct. R. 137(a), which states:

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

Ill. S. Ct. R. 137(a). In addition, Ill. S. Ct. R. 375(b), provides for sanctions on appeal:

> If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, . . . an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.
> Ill. S. Ct. R. 375(b).

factual contentions. But does the fact that there is overlap between Rule 11 misconduct and conduct prohibited by ethics norms mean that lawyer discipline agencies should defer such matters to the courts? Is that what they do now?

Professor Joy's Rule 11 Study examined ten years of federal district court (N = 274) and circuit court (N = 437) cases involving Rule 11 sanctions. He coded the cases by court, party sanctioned or exonerated, frequency of sanctions awarded and denied, and frequencies of circuit court affirmances and reversals of sanctions.[14] Data regarding state civil procedural rules modeled on Rule 11 and referrals to disciplinary agencies was not within the scope of this study.[15]

The Rule 11 Study then examined those cases with opinions that included the words "discipline," "ethics," or "refer" (N = 51).[16] Of these, only three specifically involved disciplinary referrals to state lawyer discipline agencies for Rule 11-based misconduct.[17] After an examination of these cases and searching for subsequent state disciplinary agency records and state supreme court case law, the study noted:

> [O]ne cannot say for certain that any of their discipline was based in whole or in part on the same conduct giving rise to their Rule 11 sanctions. It is also important to remember that judges could be making private disciplinary referrals, and such referrals would not appear in current case databases.[18]

The study concludes that there is "little empirical evidence of a relationship between Rule 11 sanctions and subsequent lawyer discipline."[19] Given this lack of correlation, Professor Joy argues that these data show that an implicit and appropriate "institutional choice" was made by federal

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[14] *See* Joy, *supra* note 11, at 788. The study does not report separately the cases of circuit courts imposing their own sanctions. *Id*.

[15] *See* Joy, *supra* note 11, at 767 ("It is beyond the scope of this article to discuss discipline under the state counterparts to Rule 11, or to explore state analogs to other federal laws, rules, and the inherent power of federal courts to regulate lawyers' litigation conduct."). *Id*.

[16] *See id*. at 792-93. "Because only the public discipline cases appear as reported cases, correlating Rule 11 sanctions that include referrals to disciplinary authorities with resulting discipline captures only the public discipline cases, which comprise slightly less than sixty percent of all lawyer discipline cases." *Id*.

[17] *See id*. at 792.

[18] *See id*. at 795. We know lawyer disciplinary agencies may recommend that a lawyer be given a private or public censure or reprimand, but it is unclear what Joy means by judges making "private disciplinary referrals." *Id*.

[19] *See id*. at 797. Frankly, a more accurate statement of the results is that no correlation was found between court sanctions and subsequent disciplinary action. *Id*.

judges and state disciplinary agencies to defer Rule 11-type cases to courts rather than referring the matters to the agencies for possible ethics prosecutions.

> The empirical analysis points to an implicit division of authority concerning the regulation of lawyer litigation conduct in federal courts. In this division of authority, federal district court judges wield primary control over the litigation conduct of lawyers appearing before them. Structural features of both Rule 11 and prevailing ethics rules, both of which do not require either judges or lawyers to report Rule 11 violations to lawyer disciplinary authorities, reinforce this division of authority by virtually guaranteeing that in most instances the Rule 11 sanctions will be the only public sanctions imposed on lawyers for their litigation conduct.[20]

Professor Joy supports his position by citing other commentators' arguments,[21] studies,[22] and a bar journal[23] finding that disciplinary agencies are unwilling to control litigation conduct.[24] He contends that courts are more effective at handling litigation conduct, as reflected in the Rule 11 sanctions cases studied.[25] Lastly, he notes that the standards for imposing discipline for litigation misconduct "disfavor lawyer discipline for litigation conduct,"[26] and that there is a lack of coordination between courts and

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[20] *See id*. at 806 (footnotes omitted).

[21] *See* Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethic—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 630-31, 642 (1982) (arguing that escalating frivolous litigation and the "perceived inability or reluctance by the bar to police its ranks through disciplinary actions" served to "encourage the use of rule 11 as a sanctioning mechanism for deterring groundless litigation").

[22] *See* Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 44 (1993) (arguing that only the most serious litigation misconduct should be referred to lawyer disciplinary agencies and trial judges presiding over cases are better than disciplinary agencies for handling less serious litigation misconduct).

[23] *See* Maridee F. Edwards, *Report of the Office of Chief Disciplinary Counsel for the Year 2002 Together with the Financial Report of the Treasurer of the Advisory Committee Fund for 2002*, 59 J. MO. B. 238, 242 (2003) (discussing complaints filed against Missouri lawyers in 2002).

[24] *See* Joy, *supra* note 11 at 806-08.

[25] *See id*. at 810-11.

[26] *See id*. at 812. For this proposition, Joy argues:

> The [ABA] Model Rules for Disciplinary Enforcement set forth a category described as "lesser misconduct," which is described as "conduct that does not warrant a sanction restricting the respondent's license to practice law." Rather than defining "lesser mis-

disciplinary agencies, supporting the presence of an implicit institutional choice of favoring judges over disciplinary agencies in these matters.[27]

I argue that the institutional choice of deference to courts will effectively immunize many members of the bar from scrutiny for ethics violations arising from their litigation misconduct. That is, miscarriages of justice will result when a lawyer's misconduct is not known until after the litigation is concluded, or where a court exonerates the lawyer under court rules, and the disciplinary agency thereby declines to investigate the matter. Professor Joy noted the absence of data of court referrals to disciplinary agencies, and there is a similar lack of available data regarding cases in which lawyer discipline agencies defer to courts and decline to investigate complaints from non-judicial sources, such as aggrieved litigants, opposing counsel, or non-adversary lawyers who become aware of the misconduct.

III. BACKGROUND TO CASE STUDY

A. Illinois Attorney Registration and Disciplinary Commission

The Illinois Attorney Registration and Disciplinary Commission ("ARDC") is the agency designated by the Illinois Supreme Court to inves-

> conduct," the rules state that conduct may not be viewed as lesser misconduct if the conduct involves the "misappropriation of funds," "results in or is likely to result in substantial prejudice to a client or other person," "involves dishonesty, deceit, fraud, or misrepresentation," is a serious crime, is the same as conduct for which the respondent was disciplined within the past five years, or "is part of a pattern of similar misconduct." Thus, *except in extreme cases of Rule 11 violations, or for lawyers who repeatedly violate Rule 11, the disciplinary enforcement rules permit potential ethics violations based on Rule 11 violations to be treated as lesser misconduct* that would, if pursued by disciplinary authorities, not normally result in sanctions restricting the putative lawyer's right to practice law.

Id. at 812-13 (footnotes omitted) (emphasis added). Also, the ABA Model Standards for Lawyer Sanctions:

> do not usually treat litigation misconduct prohibited by Rule 11 as a serious matter. The standard describing "abuse of the legal process" mentions the possibility of sanctions for "failure to expedite litigation or bring a meritorious claim." Examples of sanctions under this standard focus on knowing violations of a court order or rule to gain an advantage in a matter, or other violations that do not involve violations of Rule 11. Although it is possible that a Rule 11 sanction may fit the definition of the sanction standard for abuse of legal process, the Model Standards fail to illustrate this possibility with an example. *This failure to discuss or illustrate how Rule 11 conduct may lead to discipline appears to suggest that disciplinary sanctions for Rule 11 violations are not a priority under the Model Standards for Lawyer Sanctions*.

Id. at 813 (footnotes omitted) (emphasis added).

[27] *See id*. at 813-14.

tigate and prosecute lawyer discipline cases and make recommendations to it. The supreme court makes the ultimate decision on discipline cases because it "has the exclusive authority to regulate the practice of law" and "has the power to impose sanctions for unprofessional conduct so as to protect the public interest and guard the legal profession against reproach."[28]

The rules of the Illinois Supreme Court dictate that the ARDC be comprised of seven members with oversight authority over the disciplinary process.[29] The Commission appoints an Administrator "to serve as the principal executive officer of the registration and disciplinary system."[30] The Administrator "shall":

> (a) On his own motion, on the recommendation of an Inquiry Board, or at the instance of an aggrieved party, *investigate* conduct allegations of violations of the Rules of Professional Conduct of attorneys licensed in Illinois . . . whose conduct tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute . . . .[31]

Assuming the ARDC staff attorneys decide the complaint has merit, the prosecution process is as follows: an Inquiry Board is convened to "inquire into and investigate matters referred to it by the Administrator. The Board may also initiate investigations on its own motion and may refer matters to the Administrator for investigation."[32] After investigation and consideration, the Board "shall dispose of matters before it by voting to dismiss the charge, to close an investigation, to file a complaint with the Hearing Board, or to institute unauthorized practice of law proceedings."[33] If the Inquiry Board refers the matter to the Hearing Board, that board "shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary disposition. The Hearing Board may order that it will ad-

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[28] *See In re* Nesselson, 390 N.E.2d 857, 858 (Ill. 1979) (citing *In re* Day, 54 N.E. 646, 650 (Ill. 1899)).

[29] *See* Ill. S. Ct. R. 751.

[30] *See id*. at r. 752(a)(1).

[31] *See id*. (emphasis added). Noteworthy is the explicit duty to investigate a complaint brought "at the instance of an aggrieved party." While I was not a directly affected "aggrieved party," my duty as an Illinois attorney to report the misconduct as described herein was clearly established under the *Himmel* case. *Infra* Part V. In addition, PG, the plaintiff in the case study described herein, filed his own ARDC complaint on the heels of my filing, to which the ARDC never responded beyond an initial acknowledgement of receipt. *Infra* Part V.

[32] *See* Ill. S. Ct. R. 753(a)(2).

[33] *See id*. at para. (a)(3).

minister a reprimand to the respondent in lieu of recommending disciplinary action by the court."[34] Thereafter, the Review Board

> may approve the findings of the Hearing Board, may reject or modify such findings as it determines are against the manifest weight of the evidence, may make such additional findings as are established by clear and convincing evidence, may approve, reject or modify the recommendations, may remand the proceeding for further action or may dismiss the proceeding. The Review Board may order that it will administer a reprimand to the respondent in lieu of recommending disciplinary action by the court.[35]

Thus, it appears the Hearing and Review Boards may enter "reprimands" to accused lawyers that never reach the supreme court and are publicly inaccessible.

According to the ARDC's 2020 Annual Report, the bulk of filed complaints ("grievances") are client-centered matters:

> Grievances that stem from a breakdown in the attorney-client relationship (neglect of a client's cause, failure to communicate, billing and fee issues, and failure to provide competent representation) are consistently the top areas of grievance each year and account for 66.4% of all grievances. Neglect of a client's matter was alleged in 32.1% of all grievances in 2020.[36]

In 2020, 3,936 complaints were "investigated."[37] The report shows that, of all the complaints that were "docketed" in 2020, only fifteen cases involved false statements: ten of them concerned bar applications or occurred during disciplinary proceedings, and five concerned false statements about a judge, a judicial candidate, or a public official. None of the complaints docketed involved false statements of law or fact, or concealment of

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[34] *See id*. at para. (c)(3).

[35] *See id*. at para. (d)(3).

[36] *See* MARY F. ANDREONI, *ANNUAL REPORT OF 2020*, ATT'Y REGISTRATION AND DISCIPLINARY COMM'N 5, 36 (2021), https://www.iardc.org/Files/AnnualReports/AnnualReport2020.pdf.

[37] *See id*. at 20. "1,001 fewer investigations than in 2019; a 20.3% drop from the previous year and the largest single-year decline." *Id*. "The sharp decline in 2020 over 2019 was attributed to the impact of the pandemic[,]" "slowdown of the legal system[,]" the reported five-year decline in the number of new cases filed in Illinois courts, and "a significant rise in the number of consumers with legal matters who are self-represented, the graying of the legal profession, and the continuing decline in the Illinois population." *Id*. (footnotes omitted).

evidence. However, 231 complaints were docketed involving other litigation misconduct such as filing of frivolous or non-meritorious claims or pleadings, and 138 involved charges of conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction (none of the subcategories of which are specified). Interestingly, eleven cases were docketed involving failure to report misconduct of a lawyer or judge.[38]

The report also notes that, in 2020, 4,284 investigations were "concluded," 4,158 of them by the Administrator's staff: "1,222 grievances were closed after initial review of the complainant's concerns and 2,936 were closed after investigation did not reveal sufficiently serious, provable misconduct."[39] That left only 126 cases (or 0.03 percent of all complaints filed that year) that were prosecuted, leaving 4,158 that were dismissed by ARDC staff attorneys. There are no available data on the nature of these complaints or reasons for their dismissal.

The prosecuted complaints require evidence of "serious misconduct" and are referred to the Inquiry Board, the first of the three-stage review process.[40] Of the 37 cases referred to the Hearing Board in 2020 by the Inquiry Board, six involved "misrepresentations to a tribunal," and one involved "assertion of frivolous pleadings."[41] Once the Hearing Board files its report in a case, either party may file a notice of exceptions with the Review Board, which serves as an appellate tribunal.[42] Seven cases were filed with the Review Board in 2020, and eleven were "concluded"; however, the report does not indicate the nature of the cases heard by that board.[43] Ultimately, "In 2020, the [Illinois Supreme] Court entered 81 sanctions against 81 lawyers. The Hearing Board reprimanded one lawyer."[44]

In sum, in 2020 only a handful of litigation misconduct cases of over 4,000 complaints survived the review and investigations conducted by ARDC staff. Only seven cases heard by the Hearing Board involved litigation misconduct. The ARDC does not report the disposition of all those cases which resulted in a mere private reprimand.[45] Given the paucity of

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[38] *See id*. at 48, chart 12.

[39] *See id*. at 21.

[40] *See id*.

[41] *See* ANDREONI, *supra* note 36.

[42] *See id*. at 26.

[43] *See id*. at 56, chart 20E.

[44] *See id*. at 27.

[45] *See* Ill. S. Ct. R. 753(d)(3) ("The Review Board may order that it will administer a reprimand to the respondent in lieu of recommending disciplinary action by the court."); Ill. S. Ct. R. 766(a)(5) ("Proceedings . . . shall be public with the exception of the following matters, which shall be private and confidential: . . . (5) deliberations of the Hearing Board, the Review Board and the court.")

the data, it is unclear whether the ARDC aggressively pursues litigation misconduct complaints.

B. Relevant Illinois Supreme Court Opinions

1. Litigation Misconduct and Ethics

The supreme court imposes discipline on lawyers for a variety of litigation misconduct. The court has considered (but not always imposed) discipline for lawyers accused of filing frivolous actions.[46] This includes filing frivolous suits without factual or legal basis.[47] Filing of frivolous complaints, failure to make a reasonable inquiry before drafting and filing a complaint or other document with a tribunal, and other pleading-related actions can also lead to professional discipline.[48]

The ARDC is a "tribunal" for purposes of Illinois ethics rules, and frivolous filings with the commission are sanctionable.[49] In fact, there are

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[46] *See* Ill. S. Ct. R. 137 (permitting court sanctions for frivolous filings); McCarthy v. Taylor, 155 N.E.3d 359, 363-64, (Ill. 2019) ("Rule 137 authorizes a court to impose sanctions against a party or counsel for filing a motion or pleading that is not well grounded in fact; that is not supported by existing law or lacks a good-faith basis for the modification, reversal, or extension of the law; or that is interposed for any improper purpose. It is settled that '[t]he purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions.'" (quoting Sundance Homes, Inc. v. County of DuPage, 746 N.E. 2d 254, 285-86 (2001)). "[T]he predecessor to Rule 137, was to 'penalize the litigant who pleads frivolous or false matters, or who brings a suit without any basis in the law' []. In other words, the clear purpose of Rule 137 is to prevent the filing of false and frivolous lawsuits." *Id*. (quoting *In re* Estate of Wernick, 535 N.E.2d 876, 883 (Ill. 1989)).

[47] *See In re* Sarelas, 277 N.E.2d 313, 318 (Ill. 1971).

> The respondent here has taken out in litigious storm, not only against the judiciary, but also against fellow lawyers and laymen who have in some manner been connected with prior disputes wherein he was involved. He has charged them with all manner of fraud and corruption and with the purpose of maliciously inflicting harm upon him. To borrow from his own complaints, he has made these charges with scurrilous and defamatory invective. He has demonstrated an unfortunate and insistent propensity to sue other lawyers with whom he has been involved in litigation, as well as members of the judiciary who have rendered judgments against him or his clients. He has consistently exercised this propensity with unprofessional and contemptuous language.

Id.; *see also In re* Jafree, 444 N.E.2d 143, 149 (Ill. 1982) (explaining that respondent instituted numerous defamatory and frivolous lawsuits, appeals and administrative actions).

[48] *See In re* Mitan, 518 N.E.2d 1000, 1008 (Ill. 1987). The test for such misconduct is whether "no objectively reasonable inquiry was made into the pertinent facts and law" before filing the document with a tribunal, in this case, a verified reinstatement petition to the ARDC. *Id*.

[49] *See In re* Smith, 659 N.E.2d 896, 908 (Ill. 1995) ("[P]rior to the hearing, respondent repeatedly filed frivolous requests and meritless motions which appear solely calculated to delay the proceedings." (quoting In re Samuels, 535 N.E.2d 808, 817 (Ill. 1989)).

numerous cases in the supreme court's jurisprudence addressing false statements made to that tribunal as part of the lawyer discipline process. This conduct is a separate ethics violation from breaches of candor-towards-the-tribunal requirements.[50]

The few Illinois Supreme Court cases involving false statements to courts imposed discipline for the filing of factually false documents. Examples include: the filing of a false pauper affidavit;[51] the filing of a false affidavit submitted to another state supreme court that failed to disclose that the lawyer was admitted to practice law in Illinois;[52] the failure to disclose in a *pro hac vice* application to a federal court that the lawyer was previously disciplined by another court;[53] the unauthorized filing of a factually false pauper affidavit in the bankruptcy court;[54] the filing of a false and misleading final account of an estate in probate;[55] and the like.[56] Research discloses no Illinois Supreme Court cases involving discipline of lawyers for making a false statement of *law* to a tribunal, nor the withholding of material evidence.

2. ARDC Independence

In theory, the ARDC maintains its independence from courts to carry out its purpose of determining lawyers' fitness to practice law by applying the state's Rules of Professional Conduct. The Illinois Supreme

[50] *See* Ill. S. Ct. R. 8.1(b) cmt. (1) ("[I]t is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct."); *In re* Timpone, 804 N.E.2d 560, 563 (Ill. 2004); *see also In re* McAuliffe, 506 N.E.2d 1300, 1300 (Ill. 1987).

[51] *See In re* Ingersoll, 710 N.E.2d 390, 392 (Ill. 1999).

> The charges concerned respondent's role in the preparation and filing of a pauper's affidavit Flexner filed in circuit court in connection with the slander suit. The form, entitled 'Application to Sue or Defend as a Poor Person,' sought information on the applicant's financial standing. Question 4, regarding real and personal property, stated, 'Applicant owns (A) no real estate except: (Location and Value),' and was followed by a blank line on which the applicant could provide information regarding his interests in real estate. Flexner's application did not contain any answer for question 4A. Flexner, however, owned a home in Morton, where he lived with his wife and three sons.

Id.

[52] *See In re* Bell, 588 N.E.2d 1093, 1096 (Ill. 1992).

[53] *See In re* Howard, 721 N.E.2d 1126, 1129 (Ill. 1999).

[54] *See In re* Lewis, 562 N.E.2d 198, 206 (Ill. 1990).

[55] *See In re* Gordon, 524 N.E.2d 547, 549-50 (Ill. 1988).

[56] *See In re* Mehta, 413 N.E.2d 1265, 1265-66 (Ill. 1980) (ordering respondent be suspended for three years for filing false statements in connection with immigration cases); *In re* Mitan, 387 N.E.2d 278, 282 (Ill. 1978) (ordering respondent be disbarred for making false statements on application for admission to the bar).

Court has held that trial court rulings are a factor to be considered in the disciplinary process but are not binding on the Hearing Board (where the evidentiary discipline hearing takes place).[57] Criminal court judgments are similarly non-binding in the disciplinary process.[58]

In re Ettinger involved a lawyer charged criminally in federal court with a scheme to bribe a police officer.[59] He was acquitted by a jury, but the ARDC thereafter pursued multiple ethics violations against him.[60] In response to his claim that his acquittal precluded an ARDC prosecution, the court stated:

> Illinois, along with the majority of other States, has adopted the position that an acquittal in a criminal proceeding against an attorney will not act as a bar to subsequent disciplinary proceedings based upon substantially the same conduct . . . . The rationale underlying this rule is the differing purposes of criminal as opposed to disciplinary proceedings. While the purpose of a criminal prosecution is to punish the wrongdoer, the purpose of a disciplinary proceeding is to determine whether an individual is a proper person to be permitted to practice law.[61]

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[57] *See In re* Owens, 581 N.E.2d 633, 636 (Ill. 1991) ("Although a civil judgment may not be the only factor of consideration of a Hearing Board, it nevertheless may be a component in the greater whole of the Board's decision.") ARDC Hearing Boards publish their own opinions and follow this rule. *See In re* Stolfo, No. 2742217, 2018 WL 2123647, at *3 (Ill. Atty. Reg. Disp. Comm. Apr. 16, 2018).

> Findings in related civil proceedings are not binding or dispositive in disciplinary matters, although those findings can be considered, along with the other evidence presented, in determining whether the Administrator has met his burden of proving the misconduct charged. The Hearing Panel may not find misconduct based solely on a decision in a civil case, but may consider the record and rulings in an underlying civil case, as part of the evidence and part of the basis for its decision. We considered the evidence in this case as a whole, mindful of these principles.

Id. (citations omitted).

[58] *See In re* Ettinger, 538 N.E.2d 1152, 1160 (Ill. 1989).

[59] *See id*. at 1153.

[60] *See id*. at 1155. The one-count complaint contained the following alleged rule violations (under a previous ethics code): Rule 1–102(a)(3) (engaging in illegal conduct involving moral turpitude); Rule 1–102(a)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 1–102(a)(5) (engaging in conduct which is prejudicial to the administration of justice); Rule 7–102(a)(5) (knowingly making a false statement of law or fact); Rule 7–102(a)(6) (participating in the creation or preservation of evidence when he knows or when it is obvious that the evidence is false); and Rule 7–102(a)(7) (counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent). *Id*. at 1115.

[61] *See id*. at 1160-61. The court added:

Despite this distinction, the ARDC does not always invoke the independence the state supreme court declares it has.

IV. STANDARDS GOVERNING LAWYER DISCIPLINE

A. Restatement Rules and Procedural Guidance

The Restatement of Law Governing Lawyers offers guidance regarding attorney discipline proceedings.[62] It provides that "[A] professional, independent disciplinary counsel is charged with responsibility to prosecute offenses, often following review by a screening body to determine whether probable cause exists warranting formal charges."[63] The standard of proof in most jurisdictions, including the ARDC, is clear and convincing evidence; "that is, evidence establishing the truth of the charged offense beyond a mere preponderance of the evidence but not necessarily beyond a reasonable doubt."[64] Lawyers are subject to discipline for violating any provision of an applicable lawyer code of ethics, as well as "for attempting to commit a violation."[65] Fellow lawyers "who know of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropri-

> Thus, a disciplinary proceeding seeks to protect the public and monitor the legal profession. Additionally, the burden of proof in the two proceedings is different. In a criminal prosecution, charges must be established beyond a reasonable doubt; in a disciplinary proceeding, charges need be proved by clear and convincing evidence. In this respect, evidence deemed insufficient to convict an attorney on criminal charges may be sufficient to show a deviation from required standards of professional conduct, warranting disciplinary action. Respondent's acquittal in the Federal district court has no bearing upon the professional misconduct alleged. . . . More importantly, however, as we have already discussed, respondent's acquittal in a criminal case has little effect upon these proceedings. Disciplinary proceedings serve a different purpose and are governed by different rules. The respondent has been charged with different wrongs. Thus, even if respondent could convince us that he withdrew from the bribery scheme, this would not alleviate the professional errors he engaged in.

Id. (citations omitted); *see also In re* Browning, 179 N.E.2d 14, 17-19 (Ill. 1961); Robert Brazener, Annotation, *Effect of Acquittal or Dismissal in Criminal Prosecution as Barring Disciplinary Action Against Attorney*, 76 A.L.R.3d 1028 § 2[b] (1977) ("[There is] little doubt but that an acquittal of an attorney in a criminal proceeding will not bar disciplinary action against the attorney arising out of the same facts.")

[62] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. L. INST. 2000).

[63] *See id*. § 4.

[64] *See id*.

[65] *See id*. § 5(2).

ate disciplinary authorities."[66] Regarding the accused lawyer's state of mind, "[m]ost disciplinary offenses involve acts that, in themselves, reflect a concern with moral blameworthiness and thus require that the lawyer's conduct be knowing . . . . What a lawyer knows may be inferred from the circumstances. Accordingly, a finding of knowledge does not require that the lawyer confess to or otherwise admit the state of mind required for the offense."[67]

Section 106, Comment [d] notes that "opposing advocates should bear toward each other "a respectful and cooperative attitude marked by civility, consistent with their primary responsibilities to their clients."[68] Comment [d] also prohibits "charges of wrongdoing made recklessly or knowing them to be without foundation," "legally impermissible forms of partisanship," and "misrepresenting the record."[69] Regarding sanctions petitions, the Restatement cites authority for the proposition that the filing of frivolous motions for sanctions against an opponent may itself incur sanctions, and result in discipline under ABA Model Rule 3.1, which has been adopted in Illinois.[70]

Lawyers under the Restatement "may not knowingly: (1) make a false statement of a material proposition of law to the tribunal; or (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed to opposing counsel."[71] Comment [b] to this rule states that the rule also prohibits a lawyer from "making an apparently complete recital of relevant authorities but *omitting an adverse decision* that should be considered by the tribunal for a fair determination of the point."[72] Similarly, Restatement § 118 states that a lawyer "may not falsify documentary or other evidence, and "may not destroy *or obstruct* another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements . . ."[73] The "evidence" includes materials

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[66] *See id*. § 5(3).

[67] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. (d) (AM. L. INST. 2000). The Restatement cites, inter alia, ABA Model Rules of Professional Conduct, Terminology, ¶¶ [1], [5], and [9] (1983) (citing definitions of "belief," "knowingly," and "reasonably should know.") *Id*. Reporter's Note, cmt. (d).

[68] *See id*. § 106 cmt (d).

[69] *See id*. The section does permit a lawyer to make a "vigorous argument and to attack an opposing position on all legal available grounds." *Id*.

[70] *See id*. § 166 Reporter's Note cmt. (d) (citing Hauswald Bakery v. Pantry Pride Enters., Inc., 553 A.2d 1308, 1314, n. 3 (Md. Ct. Spec. App. 1989)).

[71] *See id*. § 111.

[72] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. (b) (AM. L. INST. 2000) (emphasis added).

[73] *See id*. § 118 (1)-(2).

"that a reasonable lawyer would understand may be relevant to an official proceeding."[74] The Restatement also prohibits a lawyer from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."[75] This includes the prohibition against "'backdoor' methods of proof of an inadmissible matter."[76]

As noted earlier, the most apt statement in the Restatement is the acknowledgement that most lawyer disciplinary agencies rely on the courts to deal with litigation abuses.[77]

B. ABA Guidance on Lawyer Disciplinary Enforcement

The ABA publishes the Model Rules for Lawyer Disciplinary Enforcement ("MRDE"), which provide guidance to regulatory bodies for processing lawyer misconduct complaints.[78] The ARDC has its own rules,[79] which will be compared to the ABA procedural rules. MRDE Rule 4 defines the duties of disciplinary counsel. These include the power and duty "[*t]o investigate all information* coming to the attention of the agency which, if true, would be grounds for discipline . . ."[80] Counsel also has the power to "dismiss or recommend probation, informal admonition, a stay, the filing of formal charges" or to transfer a lawyer to inactive status.[81]

Despite the supreme court rule stating that the ARDC Administrator "shall" investigate allegations of lawyer misconduct, the ARDC's Rule 51 states that the Administrator "may" initiate an investigation on his own motion based upon information from any source. ARDC Rule 52 provides, in relevant part, that "the Administrator is not required to investigate any charge which does not meet the requirements of this rule, although in his discretion he may do so." The only "requirements" of that rule are that the

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[74] *See id*. § 118 cmt. (a).

[75] *See id*. § 107(2).

[76] *See id*. § 107 cmt. (c).

[77] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. (b) (AM. L. INST. 2000) (prohibiting "[f]rivolous [a]dvocacy"). The definition of a "frivolous position" is "one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." *Id*. Whereas a nonfrivolous argument is one that "includes a good-faith argument for an extension, modification, or reversal of existing law." *Id*. at cmt. (d).

[78] *See* MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT (AM. BAR. ASS'N 2007).

[79] *See* Ill. R. of the Att'y Registration and Disciplinary Comm'n (2021) ("ARDC Rules"), https://iardc.org/Home/Rules. The previous iteration of the rules, dated December 7, 2011, were not posted on the ARDC website.

[80] *See* MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 4(B)(2) (AM. BAR. ASS'N 2007) (emphasis added).

[81] *See id*. at (B)(3).

charge be in writing, and "shall identify the respondent and the person making the charge, and shall be sufficiently clear to apprise the respondent of the misconduct or unauthorized practice charged." The ARDC initiation-of-investigation rule appears to be narrower than the ABA rule; the latter requires that "all information" regarding lawyer misconduct be investigated, while the former states that the Administrator "may" in his or her discretion investigate complaints received.

MRDE Rule 11 further provides that disciplinary counsel "shall evaluate all information coming to his or her attention by complaint or from other sources alleging misconduct . . ."[82] If the lawyer is subject to the jurisdiction of the court, "and the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel *shall conduct an investigation*."[83] Upon conclusion of an investigation, disciplinary counsel may dismiss the case or recommend formal charges.[84]

ARDC Rule 54 provides that the Administrator "shall close an investigation . . . upon the Administrator's conclusion that there is insufficient evidence to establish that the respondent has engaged in misconduct" or an unauthorized practice violation. The rule further provides that the Administrator's closure decision "shall not bar the Administrator from resuming the investigation if circumstances warrant."

MRDE Rule 11 states that, upon conclusion of an investigation, the complainant "shall be notified of the disposition of a matter following investigation." ARDC Rule 54 also provides that, in the case of closure, "[t]he Administrator shall notify the complaining witness of the decision to close an investigation." Disciplinary counsel's duties under the ABA rules also include the requirement "[t]o notify promptly the complainant and the respondent of the status and the disposition of each matter," and to, *inter alia*, provide "to the complainant" the following: (a) a copy of any notice, motion, or order sent to respondent; (b) a copy of any written communication from the respondent relating to the matter, except privileged material; (c) a concise written statement of the facts and reasons a matter has been dismissed prior to a hearing, and a copy of the relevant guidelines for dismissal, "provided that the complainant shall be given a reasonable opportunity to rebut statements of the respondent before the case is dismissed." No such requirements exist under ARDC rules. There is also no right to rebut the closure rationale.

Interestingly, a complainant under MRDE Rule 11 "may file a written request for review of counsel's dismissal decision within [thirty]

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[82] *See id*. at r. 11(A).

[83] *See id*. (emphasis added).

[84] *See id*. at (A)(1)(a)-(c).

days of receipt of notice of disposition[.]"[85] The request for review of disciplinary counsel's dismissal decision "shall be reviewed by the chair upon the complainant's request for review."[86] There is no parallel provision in the ARDC rules, which deprives complainants of all recourse once a closure decision is made.

The MRDE provides that rules are needed "to determine which matters should be dismissed for failing to allege facts that, if true, would constitute grounds for disciplinary action."[87] The case described below is an example of the need to have very specific dismissal rules. Dismissal rules would place an affirmative burden on the ARDC to make findings even in cases where the alleged acts occurred in courts that chose not to sanction the behavior. Members of the public, according to the MRDE, "who come to the agency seeking its services are entitled to be advised of the disposition of their complaints."[88] This guideline also exists in ARDC Rule 54.

Another interesting provision in the MRDE pertains to situations where a complaint is filed against, *inter alia*, "a member of a hearing committee."[89] In that event, the chair of the board "shall appoint a special hearing committee for the case."[90] No such parallel procedure exists under the ARDC rules. ARDC counsel merely refers the matter involving one of the agency's own Hearing Board members to Special Counsel, who subsequently decides whether to recommend an investigation.

V. THE *HIMMEL* COMPLAINT

Lawyers in Illinois have a duty to report fellow lawyers' misconduct to the ARDC. *In re Himmel*[91] is an Illinois Supreme Court disciplinary case on point.[92] Here, the respondent lawyer was retained to compel

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[85] See MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 11(B)(3) (AM. BAR. ASS'N 2007).

[86] *See id*.

[87] *See id*. at r. 4(B)(7).

[88] *See id*. at r. 4 cmt.

[89] *See id*. at r. 18(K).

[90] *See* MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 18(K)(2) (AM. BAR. ASS'N 2007).

[91] 533 N.E.2d 790 (Ill. 1988).

[92] *See In re* Himmel, 533 N.E.2d 790, 793-94 (Ill. 1988).

> This court has also emphasized the importance of a lawyer's duty to report misconduct . . . . ['A] lawyer has the duty to report the misconduct of other lawyers. Petitioner's belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law.' Thus, if the present respondent's conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated.

another lawyer to pay their mutual client the latter's share of an accident settlement that he never paid.[93] This was because the second lawyer had converted the client's funds.[94] Rather than reporting the misconduct, the respondent lawyer entered into a contract with the offending lawyer, agreeing to a settlement in exchange for his agreement not to report the other lawyer's misconduct to the ARDC, nor file a civil or criminal complaint against him.[95]

The supreme court held that respondent's failure to report the misconduct of the lawyer who converted client funds was itself an ethical violation, rejecting his defense that his acts were not taken for financial gain, but rather for his client's benefit.[96] The applicable disciplinary rule at the time was Rule 1–103(a) of the lawyer ethics code, which stated: "A lawyer possessing unprivileged knowledge of a violation of Rule 1–102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."[97] Rule 1–102 of the code stated:

> (a) A lawyer shall not
>
> (1) violate a disciplinary rule;
> (2) circumvent a disciplinary rule through actions of another;
> (3) engage in illegal conduct involving moral turpitude;
> (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

Id. (citations omitted). This case was "the first reported decision imposing discipline solely for an attorney's failure to report collegial misconduct." DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 853 (1995); *see also* DEBORAH RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 237 (2002) (noting that "Illinois is the only jurisdiction that has made (if sporadic) attempts to enforce reporting requirements," and that *Himmel* "is the first published decision imposing discipline solely for a lawyer's failure to report collegial misconduct.")

93 *See In re Himmel*, 533 N.E.2d at 791.

94 *See id*.

95 *See id*.

96 *See id* at 794.

> Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. In addition, we have held that client approval of an attorney's action does not immunize an attorney from disciplinary action. We have already dealt with, and dismissed, respondent's assertion that his conduct is acceptable because he was acting pursuant to his client's directions.

Id. (citations omitted).

97 *See* 107 Ill.2d r. 1–103(a).

> (5) engage in conduct that is prejudicial to the administration of justice.[98]

Today, Mr. Himmel's acts would constitute a violation of the Illinois Rules of Professional Conduct ("IRPC"), namely, Rule 8.3, Reporting Professional Misconduct: "A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority." The latter paragraphs of IRPC 8.4 prohibit acts that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, and conduct involving dishonesty, fraud, deceit, or misrepresentation.[99] MRPC 8.3 (Reporting Professional Misconduct) contains different language: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

After reading the entire record of the case noted below, I suspected that the two attorneys involved had engaged in professional misconduct. As such, I had an ethical obligation to report it. I did so in a twenty-nine-page complaint.

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[98] *See* 107 Ill.2d r. 1–102.

[99] *See* Ill. R. Prof'l Conduct R. 8.4(b)-(c) (effective Jan. 1, 2010). An article on the ARDC's web site by their senior counsel for ethics education explains the duty to report another lawyer's misconduct, and makes multiple relevant points. Mary Andreoni, Senior Ethics Education Counsel, *Answering the Top 10 Questions About a Lawyer's Duty to Report Misconduct*, https://www.illinoiscourts.gov/News/993/Answering-the-Top-10-Questions-About-a-Lawyers-Duty-to-Report-Misconduct/news-detail/. First, "[r]eporting can be awkward and uncomfortable, but most lawyers recognize that the duty to report fulfills our collective responsibility to maintain the public's confidence in the integrity of the justice system and legal profession." *Id*. Second, "[t]he three elements triggering a required duty to report another lawyer under ILRPC 8.3(a) are: (1) that a lawyer 'knows' of another lawyer's conduct; (2) involving a violation of ILRPC 8.4(b) (criminal acts that reflect adversely on the trustworthiness, honesty or fitness as a lawyer) or ILRPC 8.4(c) (fraudulent or deceitful conduct); and (3) where that knowledge is not otherwise protected by the attorney-client privilege or by law." *Id*. Lastly, "[t]he duty to report is 'absolute' and a lawyer cannot be prevented or excused from discharging this duty by a court, a client (unless the lawyer's knowledge is based on attorney-client privilege), by a report already made by the client or someone else or even if the information about the misconduct has become 'common knowledge.'" *Id*. (first citing *Skolnick v. Altheimer & Gray*, 730 N.Ed.2d 4, 15 (Ill. 2000); and then citing *In re* Daley, M.R. 17023, 98SH2 (IL Nov. 27, 2000)). In *In re* Daley, the "Hearing and Review Boards rejected lawyer's argument that he was relieved of the duty to report because the other lawyer's conduct had been disclosed in a court proceeding, was widely disseminated in the press, and was disclosed to various law enforcement agencies." *Id*. (citing *In re* Daley, M.R. 17023, 98SH2 (IL Nov. 27, 2000)).

A. Allegations

PG filed a complaint for monetary relief in an Illinois small claims court.[100] He filed his pro se complaint in six counts. I read the record in this case and filed the aforementioned *Himmel* complaint against the two lawyers for the defense. In brief, my complaint made the following allegations: (1) the lawyers made a false statement of law when they denied the existence of a relevant statutory section that their pro se adversary relied upon and was detrimental to their case (a conflict which the court failed to resolve through research, accepting the lawyers' misrepresentation as to the law); (2) the lawyers made false statements of fact regarding PG's character, calling him a vexatious pro se litigant whose claims were merely a matter of "personal opinion," and whose case was "baseless" and "frivolous"; (3) the lawyers obstructed the pro se litigant's access to evidence; and (4) the lawyers filed an unwarranted sanctionable sanctions petition against PG.

B. Rationales for Dismissal of Complaint Without Investigation

Along with the *Himmel* complaint, I sent a voluminous package to the ARDC containing the entire record in the aforementioned case, including pleadings, motions, orders, transcripts of motion hearings, the trial, and the sanctions hearings, the appellate decision affirming the trial court and its modified opinion on rehearing, plus briefs filed in the appellate and supreme courts.[101] The ARDC senior counsel acknowledged receipt of my complaint, and advised that, because one of the accused lawyers was a member of the ARDC's Hearing Board (the second of three bodies that review ARDC complaints), the ARDC was referring the matter to special counsel for review and recommendation.

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[100] For confidentiality purposes, I am not providing the full name of the plaintiff, the accused lawyers, the trial judge, the circuit court in which this arose, or the appellate court that affirmed the trial court's decision. All transcripts, pleadings, briefs, court orders, and appellate opinions are on file with the author, and have been provided to and verified by this Journal. The Supreme Court of Illinois moved the case to a "confidential" docket at the request of the ARDC; *see also*, Jona Goldschmidt, *Equal Injustice for All: High Quality Self-Representation Does Not Ensure a Matter is "Fairly Heard,"* 44.2 SEATTLE L. REV. SUPRA 75, 86-88 (2021) (citing this case study and two others in support of the proposition that high-functioning "expert" pro se litigants are still subject to experiencing miscarriages of justice).

[101] For his appeal, PG submitted the entire trial court record, which was Bates stamped. The *Himmel* complaint made references to this record by page number for each allegation of the complaint.

1. Deference to Courts

Senior ARDC counsel's initial response to the *Himmel* complaint raised two interesting issues. She wrote that: "The ARDC does not review and cannot nullify court decisions or orders."[102] She, however, misconstrued the complaint as being one seeking to overturn a judgment or order. My complaint asked the ARDC to "review" the record for ethical misconduct, but not to "nullify," the court proceedings as such.

Counsel's position that the ARDC cannot "review" court proceedings in a disciplinary case appears to state a general policy of deference to courts in litigation misconduct cases. One wonders what circumstances *would* justify the ARDC "reviewing" court records, not for nullification-of-court-order purposes, but for investigation of candor-toward-the-tribunal complaints. The ARDC's position on this point appears to be that their hands are tied; they must respect court rulings. This may sound reasonable in theory, but how would lawyers engaging in breaches of the duty of candor to the tribunal ever be disciplined, particularly in cases in which their side prevails? Or, where a judge has acted unethically, enabling the offending lawyer's misconduct to be overlooked? In such cases the offending lawyers may never be held accountable.

Professor Rhode observes that disciplinary agencies often refer cases involving litigation misconduct back to the courts.[103] Here, the ARDC did not refer the matter back to the courts, and took no steps to bring the matter to the trial, appellate, or supreme court's attention. As such, the agency forfeited its power to investigate a lawyer-filed complaint, which could have led to an opportunity to enforce the Illinois Rules of Professional Conduct and hold lawyers accountable for litigation misconduct.[104]

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[102] Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (March 30, 2017) (on file with author).

[103] *See supra* note 9 and accompanying text.

[104] At the end of my *Himmel* complaint I suggested that, if the complaint were sustained, the attorneys' fees awarded to the lawyers by the trial and appellate courts should be disgorged, since they were the product of a fraud upon the court through misrepresentations of law and fact, and by the lawyers' withholding of, or obstruction to, critical evidence. In response, senior disciplinary counsel wrote: "Additionally, there is no legal authority for making disgorgement of fees and costs paid as court-ordered sanctions part of a lawyer disciplinary sanction."

ARDC counsel apparently interpreted S. Ct. R. 772(b)(5), authorizing "restitution" as one of the possible conditions of disciplinary probation, as having no application to disgorgement of sanctions by a court as a result of their unethical conduct. But, she never explained why a trial or appellate court would object to a Supreme Court-ordered sanctions restitution, recommended by its own lawyer discipline agency, and which was the product of unethical conduct. The specific issue is, however, addressed in disciplinary enforcement guidance.

In her decision letter declining to investigate the complaint, ARDC counsel wrote:

> [I]t is not unusual for parties and representatives to maintain that opposing lawyers in court proceedings have made false claims and statements. This circumstance does not in itself justify a disciplinary investigation into the professional conduct of the opposing lawyers. Issues regarding the truth and validity of factual and legal claims made in court proceedings are appropriately addressed and resolved in the courts rather than through the lawyer disciplinary process."[105]

This statement implies that there are no circumstances under which a false statement of law or fact made to a tribunal during litigation may be examined by the ARDC. This is a startling proposition, and, if true, completely abrogates *de facto* the professional responsibility of candor toward a tribunal. This will allow lawyers who engage in such misconduct to avoid

According to the Restatement, the traditional sanctions imposed upon lawyers found guilty of professional misconduct include impediments to the lawyer's right to practice and other sanctions such as, most relevant here, "ordering restitution." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Title C, Introductory Note (AM. L. INST. 2000). The ABA Model Rules state otherwise. Rule 10 specifically provides that, among the other well-known sanctions of disbarment, suspension, probation, reprimand, or admonition, the supreme court or disciplinary agency may order "restitution to persons financially injured, disgorgement of all or part of the lawyer's or law firm's fee . . ." MODEL RULES OF PRO. RESP. CONDUCT r. 10 (AM. BAR ASS'N 2020). Unlike a financial sanction by way of a fine (opponents of which argue it constitutes punishment and not public protection and where a double jeopardy argument could be made), RHODE & HAZARD, *supra* note 7, at 244-45, restitution to a victim of professional misconduct has multiple purposes: compensation, deterrence, and rehabilitation, all of which further public protection. Interestingly, Rhode and Hazard suggest that with the imposition of fines (which they note lawyer discipline agencies generally do not allow), "more of those victims might report misconduct and feel fairly treated by the disciplinary process." RHODE & HAZARD, *supra* note 7, at 245.

Admittedly, these provisions contemplate a sustained complaint involving improper retention or theft of client funds, rather than being a recipient of unwarranted court-ordered sanctions. Yet, both consist of attorneys' fees improperly and unethically received. Whether fees are unethically retained versus a product of unethical conduct is a distinction without a difference. Comparatively, court-awarded sanctions earned unethically should be considered a much more serious breach of professional responsibility; fees stolen from a client should not be given preference over fees stolen from an adverse party through chicanery in litigation (i.e., through official corruption and betrayal of the public trust).

This again raises the issue of whether court-ordered sanctions that are based on a lawyer's misrepresentation of law or facts can ever be remedied. It brings us to senior counsel's next observation regarding the ARDC's inability to review court proceedings.

[105] Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (August 31, 2017) (on file with author).

sanctions in that category of cases where the court is unaware of the misconduct during the pendency of the case.

2. Mere "Argumentation, Characterization, or Conclusion"

In her decision letter, ARDC counsel stated: "We observe that *many* of the statements you allege constituted misrepresentations by [the lawyers] were in the nature of *argument, characterizations or conclusions*."[106] Here, it appears she is arguing that one should expect such conduct in litigation given its rough-and-tumble nature. Additionally, ARDC counsel failed to identify which statements were in the nature of argument, characterizations, or conclusions. One would assume that any lawyer who submits a complaint against a non-adversary lawyer based on alleged false statements of law and fact is entitled to know the basis for the ARDC's prosecutorial decision regarding each allegation.

Second, although ARDC's counsel claimed that some of the alleged misrepresentations were part of the lawyers' arguments, characterizations, and conclusions, they rested upon alleged falsehoods about the law and the facts of the case. Here, again, the implication of the ARDC's position is that when attorneys make arguments, characterizations, or conclusions, it will not scrutinize the facts or law on which they base those statements. This position taken by the ARDC runs counter to the stated principles of both the MRPC and the IRPC, which forbid the making of false statements of law or fact to a tribunal.

3. Likelihood of Meeting Clear and Convincing Burden

ARDC counsel also wrote:

> We would not be able to prove that such statements constituted factual misrepresentations. We have concluded that any effort to bring formal disciplinary charges against [the lawyers] based on your allegations would not be successful and would not result in the imposition of disciplinary sanctions. Accordingly, the ARDC will take no further action with respect to your request.[107]

[106] *See id*. (emphasis added).
[107] *See id*.

Nothing in the first sentence quoted speaks to the false statement of law; it only refers to false statements of fact, despite the complaint raising both issues.[108]

In a later letter, ARDC counsel wrote:

> Our decisions regarding whether to pursue disciplinary charges against lawyers based on alleged rule violations are made on a case-by-case basis and are generally the product of a confluence of factors, including our interpretation of applicable rules of professional conduct, our analysis of available information and evidence, our assessment of potential harm to the public and to the administration of justice, or *policies relating to non-interference with the judicial process and respect for court decisions*, and our judgment on the appropriate use of our limited resources.[109]

The ARDC's refusal to investigate the complaint did not indicate any differences in rule interpretation; my complaint did not cite to any specific rules on the assumption that it is the province of the ARDC to make its own judgments regarding which, if any, ethics rules were violated. It appears that the "analysis of available information and evidence" was not even conducted. Nor does it appear that an "assessment of potential harm to the public or the administration of justice" was conducted. Most telling is ARDC counsel's adherence to its inexplicable hands-off policy regarding review of court records to determine whether professional responsibility rule violations occurred, as reflected in the italicized language in the quotation above.

Subsequently, I requested that the Illinois Supreme Court order the ARDC to investigate my complaint. I did this first through two attempted amicus curiae filings during the pendency of PG's petition for leave to appeal to the state supreme court, wherein I attempted to bring to the alleged miscarriage of justice to the court's attention. Both amicus filings were rejected because the supreme court only allows amicus brief filings when a petition for leave to appeal has been granted (and PG's was not). In addition, I asked the same court to enter a supervisory order directing the ARDC to investigate the complaint, but this too was denied without opin-

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[108] As to whether the ARDC could prove its case, the pleadings and transcripts to which reference was made in the *Himmel* complaint (by document or transcript page numbers) for each and every allegation of misconduct, clearly evidenced the misstatements of law and fact. Here, too, one wonders what else the ARDC needs to prove its case under these circumstances.

[109] *See* Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (September 8, 2017) (on file with author).

ion after the matter was moved to the "Confidential Docket" of the court on the ARDC's motion.

VI. NATIONAL SURVEY OF LAWYER DISCIPLINE AGENCIES

A. Method

The case study described above led me to inquire of all states', the District of Columbia, and the U.S. Department of Justice's ("DOJ") policies for handling complaints received regarding litigation misconduct. The survey letter asked disciplinary counsel for their response to the following hypothetical:

> It is the hypothetical case of a lawyer who intentionally makes a false statement of fact or law in litigation and is not sanctioned by the court. The failure to sanction could be because the matter was undetected by the adverse party, or the court considered the matter but determined that the lawyer had not violated the relevant statute or court rule (or was found not to be in contempt). But the adverse party—believing the lawyer acted unethically—thereafter files a disciplinary complaint against the lawyer.
>
> Does your agency have a general policy to (a) decline to investigate such allegations because the court did not rule on it, or because of the court's ruling exonerated the lawyer? or (b) does your agency nevertheless investigate the allegation in the context of professional ethics norms?

After excluding the responses from several agencies indicating that they do not respond to hypotheticals, I received valid responses from twenty-nine disciplinary counsel.

B. Results

The hypothetical posed three scenarios: (1) the court failed to address the alleged misconduct; (2) the court addressed the alleged misconduct and imposed sanctions; and (3) the court denied sanctions against ("exonerated") the lawyer after considering the sanctions request. In analyzing the responses, the following issues arose.

1. Policies Regarding Investigations

The responses of disciplinary counsel were grouped into the categories of "Yes – would investigate," "No - wouldn't investigate," and "Other." Nineteen counsels' responses fell into the "Yes – would investigate" category; none fell into the "No – wouldn't investigate" category; and ten fell into the "Other" category. Counsel sorted into the "Other" category all stated their concern about the likelihood of a successful prosecution where a court exonerates the accused lawyer, given the agencies' "clear and convincing" burden of proof. Arguably, these ten cases could be included in the "Yes – would investigate" category because these respondents stated they would nevertheless independently review or investigate the complaint.

Viewed in this light, the responses appear unanimous. Counsel all indicated that they did not have a prosecution policy for the scenarios presented. As one respondent succinctly put it, Florida "does not have a general policy wherein we decline to investigate allegations because there is no court order or because the court did not sanction an attorney."[110] The agencies universally consider each complaint on a case-by-case basis. As counsel noted: "the Disciplinary Commission would look at these allegations on a case-by-case basis to determine whether reasonable cause exists to pursue formal disciplinary action"[111]

Therefore, without exception, but with some qualifications noted below, these twenty-nine disciplinary counsel would not be deterred from pursuing an investigation under any of the scenarios presented.

2. Defining "Investigation"

Another interesting issue arising from the survey is counsels' distinction between a "review" and an "investigation" of litigation misconduct cases. Counsel, of course, must possess evidence establishing a reasonable likelihood or probable cause of an ethics violation before sending the case to the first hearing stage of the process. As one counsel put it, "Ultimately, what matters is whether the State Bar can sustain the facts that establish the violation."[112]

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[110] *See* E-mail from Allison C. Sackett, Div. Legal Div. Dir., The Fla. Bar, to author (March 26, 2021, 04:05 CST) (on file with author).

[111] *See* Letter from Charles M. Kidd, Deputy Exec. Dir., Disciplinary Comm'n, Ind. Sup. Ct. Off. Of Jud. Admin., to author (May 13, 2021) (on file with author).

[112] *See* E-mail from James S. Lewis, Assistant Gen. Couns., State Bar of Ga., to author (July 13, 2021, 11:58 CST) (on file with author); *see also* Letter from Alan D. Pratzel, Chief Disciplinary Couns., Off. Of Disciplinary Couns., Sup. Ct. of Mo., to author (July 8, 2021) (on file with

Before a formal complaint is lodged and the first formal evidentiary "reasonable cause" hearing takes place, however, counsel must necessarily review the incoming complaint and supporting materials and decide whether to elevate the matter to an "investigation" stage, however defined. Counsels' survey responses distinguish between an informal and formal "investigation," so it is difficult to determine the extent to which these matters are in fact investigated beyond a reading of the complaint by a staff attorney. Will counsel limit their review to the four corners of the complaint, or will they request the accused lawyer's response? Will they check court records to substantiate the allegations, or call the complainant or witnesses for their statements? There appears to be no consistency across jurisdictions with respect to the elements and parameters of a "review" versus an "investigation," whether formal or informal.

3. Statutory or Rule Requirements

Several respondents indicated that their agency operated under procedural rules that address the specific situation of a pending civil or criminal matter. These agencies' rules either mandate that the agency not be deterred from initiating a prosecution,[113] or expressly permit a prosecution in that situation.[114] In contrast, one agency's rules explicitly defer complaints of litigation misconduct in federal court to those courts (with no similar reference requirement to state courts).[115]

author). Counsel in Missouri stated his office "makes determinations as to whether or not to open investigative files based on complaints and/or reports made to the office. Each complaint or report received is reviewed based on the factual allegations contained therein." Pratzel, *supra* note 112.

[113] *See* Haw R. Sup. Ct. 2.10 ("Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.")

[114] *See* Ala. St. R. Disc. P. 14 ("Disciplinary proceedings shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation involving the respondent, unless authorized by the Disciplinary Board, in its discretion, for good cause shown.")

[115] *See* Neb. S. Ct. R. § 3-309(A)(2). Section 3-309 of the Supreme Court Rules of Nebraska states, in relevant part:

> Upon receipt of a grievance against a member arising out of conduct in a pending or closed federal case, including civil, criminal, bankruptcy, grand jury, or federal proceeding in which the lawyer may be a witness, Counsel for Discipline shall disclose and refer such grievance to the federal judge assigned to the case for consideration of discipline under the federal attorney discipline rules. Any investigation of such grievance by Counsel for Discipline shall be held in abeyance until the federal court resolves the matter, provided, however, that if the federal court fails to resolve the grievance in a timely manner, Counsel for Discipline may take further action without regard to the referral to the federal court. Discipline by the federal court under its disciplinary

What if a state supreme court finds that a prosecutor's statements were not prejudicial and do not require reversal? Will that same court later find the prosecutor sanctionable for litigation misconduct if the lawyer discipline agency finds his or her statements were false? One respondent cited this specific problem, noting that, while his agency would not be deterred from investigating the matter despite a court's exoneration, these circumstances may negate the possibility that the same court would find the non-reversible conduct to be unprofessional.[116]

4. Exoneration Cases

Disciplinary counsel generally expressed concerns regarding (1) the likelihood of meeting their clear and convincing burden in such cases; and (2) noted that these cases are the most problematic. One respondent wrote that his office "typically" does not seek additional sanctions if court sanctions were imposed; but he added that "our rules do allow us to prosecute cases regardless of what a judge may do in any given situation concerning unethical conduct. There are instances where we have continued to prosecute cases even when a judge acts."[117]

One counsel responded forthrightly to this hypothetical: "The fact that a lawyer was found not to be in contempt of court would certainly not be determinative because the State Bar is limited to addressing whether a lawyer violated the Rules of Professional Conduct, which could certainly have occurred notwithstanding a court determination that the lawyer was not in contempt of court."[118] Even more direct was counsel who stated "[i]f someone submits a complaint that an attorney intentionally made a misrepresentation to a court, that alleged rule violation would trigger the opening

rules does not preclude discipline under these rules pursuant to the Nebraska Rules of Professional Conduct.

[116] *See* E-mail from Mark A. Weber, Counsel for Discipline & the Unauthorized Practice of Law, Neb. Sup. Ct., Admin. Off. of the Ct. and Prob., to author (March 16, 2021, 9:14 CST) (on file with author).

[117] *See* Letter from Roman A Shaul, Gen. Couns., Off. of Gen. Couns., Ala. Bar Assoc., to author (April 15, 2021) (on file with author); *see also* Ala. St. R. Disc. P. 14 (stating rule to which counsel was referring).

[118] *See* E-mail from Katherine Jean, Couns., N.C. State Bar, to author (March 18, 2021, 2:06 CST) (on file with author); *see also* Email from Anne Taylor, Chief Disciplinary Couns., The Disciplinary Bd. of the N.M. Sup. Ct., to author (May 4, 2021, 10:46 CST) (on file with author) ("This office independently investigates alleged violations of the Rules of Professional Conduct, regardless of whether the attorney has been sanctioned by a court."); E-mail from Kara J. Erickson, Disciplinary Couns., Disciplinary Bd. of the Sup. Ct. of N.D. Sup. Ct., to author (March 24-2021, 1:38 CST) (on file with author) ("In response to your inquiry, we would prosecute regardless. In fact, I have a few of those matters pending currently.")

of a disciplinary complaint requiring the attorney to provide a response."[119] Another responding counsel stated that "this office routinely investigates cases of alleged intentional false statements made by a lawyer to a tribunal, regardless of whether the tribunal addressed such conduct."[120]

Regarding these cases, some counsel responses reflected dissonance about an investigation decision in exoneration cases: "We would generally open such an investigation, though if the Court considered the statement and made a substantive ruling, we might defer to the Court's determination and not investigate, or if we do investigate, not find misconduct."[121] Similarly, another noted: "Decisions by a trial court in an underlying matter, although potentially of assistance, may or may not impact this Office's investigation and docketing of a matter."[122]

Other counsel noted the difficulty in such cases: "Where a judge has evaluated the alleged falsity of a statement and the evidence available to the court is the same as that available to [the agency], it is likely to be difficult or impossible to get a special master to substitute a different finding."[123] Another agreed, stating that she would not decline to investigate simply due to the fact of exoneration, but would like to have "other corroborating evidence."[124] One disciplinary counsel stated that his agency would

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[119] *See* Letter from Kelly Reilly Travers, Chief Disciplinary Counsel, Disciplinary Board, R.I. Sup. Ct., to author (July 12, 2021) (on file with author); *see also* Email from John S. Nichols, Disciplinary Couns., Sup. Ct. of S.C., to author (July 8, 2021, 6:38 CST) (on file with author):

> If the information, if true, would be misconduct, then we open a case and investigate the information. . . . Our burden of proof is clear and convincing evidence, and proving misconduct under that standard is not foreclosed by the trial court's ruling since the court likely exercised discretion under our version of Civil Procedure Rule 11 not to find contempt or enter sanctions. . . . [T]he trial court's ruling cannot "exonerate" the lawyer even if the trial court decides not to act. We would vigorously pursue a case against the lawyer before our Commission on Lawyer Conduct and then the Supreme Court. Assuming no disciplinary history, the lawyer would face a suspension of at least 9 months up to disbarment, depending upon aggravating or mitigating circumstances.

Email from Nichols, *supra* note 119; *see also* Letter from Keith L. Sellen, Dir., Off. of Lawyer Regul., Sup. Ct. of Wis., to author (March 19, 2021) (on file with author) ("Upon a court sanction or lack thereof, we would nevertheless investigate . . . . We receive allegations and investigate them in the context of professional ethics norms.")

[120] *See* E-mail from Mark W. Gifford, Off. of Bar Couns., Wyo. State Bar, to author (July 15, 2021, 9:54 CST) (on file with author).

[121] *See* E-mail from Tara M. van Brederode, Dir. of Att'y Discipline & Admin., Att'y Disciplinary Bd., Iowa Sup. Ct. Off. of Pro. Regul., Iowa Jud. Branch, to author (July 12, 2021, 10:43, CST) (on file with author).

[122] *See* Letter from Brian R. Moushegian, Gen. Couns., Att'y Discipline Off., N.H. Sup. Ct. to author (July 12, 2021) (on file with author).

[123] *See* E-mail from James S. Lewis, *supra* note 112.

[124] *See* E-mail from Seana Willing, Chief Disciplinary Couns., State Bar of Tex., to author (March 22, 2021, 3:06 CST) (on file with author).

consider the court's reasoning in making its decision to pursue a prosecution: "We would investigate the allegation notwithstanding the court's determination that the lawyer had not violated the relevant statute of court rule. Of course, we would analyze the court's reasoning in making our own determination whether there was a violation of the RPCs."[125]

> D.C. disciplinary counsel gave the following thoughtful response:
>
> If the court before which the representations were made found that the lawyer should not be sanctioned, that would be a formidable, but perhaps not dispositive barrier. Again, the facts would govern. It could be, for example, that under the court rules only intentional, as opposed to reckless, misstatements are sanctionable, whereas under our different rules, reckless statements were sanctionable. Also, many judges will make findings that statements of law or fact are unsupported, but are reluctant to impose sanctions, just because judges don't like to do that. If the judge makes an affirmative finding that the statements are not false, we would be hard pressed to proceed, however. We have to prove our cases by clear and convincing evidence, and if the judge to whom the statements were directed does not find that she had been misled, it would be almost impossible to prove there is sufficient evidence of a violation.[126]
>
> The DOJ would also review a complaint despite exoneration:
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> Our office would nonetheless review the allegation, even if the court made an affirmative ruling that no such statement was made. As you point out, defense attorneys may later raise such an issue even though it was not brought to the court's attention. We would review those allegations as well. Whether we would conduct a full investigation regarding the allegations would be based on a review of all available information and a preliminary determination

[125] *See* E-mail from Charles Centinaro, Dir., Off. Of Att'y Ethics, Sup. Ct. of N.J., to author (July 20, 202, 9:02 CST) (on file with author).

[126] *See* Email from Phil Fox, Disciplinary Couns., D.C. Bd. of Pro. Resp., to author (March 25, 2021, 10:24 CST) (on file with author).

> based on that review that additional investigation could result in a finding of professional misconduct.[127]

Other counsel responded variously that exoneration would be "a factor" in their decision to investigate, but would "not be determinative";[128] that they would take a court decision "into consideration when deciding whether to proceed with a formal charge or dismiss the matter";[129] that exoneration would be "relevant in the overall assessment of a report of misconduct";[130] or that it would "impact" their decision to investigate but not prevent it, noting that "other or additional allegations" would make it more likely that an investigation would be conducted.[131]

5. Relative Severity of False Statements of Law and Fact

An interesting point was raised by discipline counsel for South Carolina. He wrote:

> [A] false statement of law violates a different rule and is generally not as egregious as a false statement of fact (i.e., a lie). The adversary or the judge are certainly capable of verifying the holding of a cited case, the provisions in a statute, the terms of a regulation or other authority so as to not rely on a false statement of the law. But a false statement of fact is not easily uncovered and may lead the decision-maker to rule based upon the lie, which strikes at the

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[127] *See* E-mail, from Jeffrey R. Ragsdale, Chief Couns., Dep't of Just. Off. Of Pro. Resp., to author (April 2 2021, 7:30 CST) (on file with author).

[128] *See* Letter from Douglas J. Ende, Chief Disciplinary Couns., Off. of Disciplinary Couns., Wash. State Bar Assoc. to author (April 1, 2021) (on file with author). Counsel wrote:

> The Office of Disciplinary Counsel (ODC) has no general policy to decline to investigate such allegations. ODC would review a grievance alleging such misconduct and make a decision about whether to further investigate based on the totality of the circumstances presented. If the court had reviewed the allegations and made a decision to 'exonerate' the lawyer, that could be a factor in determining whether further investigation or action would be warranted.

Id.

[129] *See* Email from Joseph M. Caligiuri, Disciplinary Couns., Off. of Disciplinary Couns., Sup. Ct. of Ohio, to author (July 23, 2021, 9:06 CST) (on file with author).

[130] *See* Letter from Kate F. Baird, Deputy Disciplinary Admin., Off. of the Kan.Disciplinary Admin., to author (March 22, 2021) (on file with author).

[131] *See* Email from Pamela D. Bucy, Chief Disciplinary Couns., Off. of Disciplinary Couns., Mont. Sup. Ct., to author (March 15, 2021, 2:05 CST) (on file with author).

> heart of the system of justice (that's why perjury is so detrimental and so serious an offense).[132]

This would be true in an ideal world. Unfortunately, some judges are not so conscientious and do not conduct their own research to ascertain the correct statement of the law. Where opposing counsel is not present to contradict the alleged false statement of law, there are judges who will simply rely on a sole lawyer's representations regarding the law when the opponent is a pro se litigant. It is true that judges need not conduct legal research for a pro se litigant; but neither should they ignore the pro se's disadvantages when arguing against a lawyer about what the law is. While affirmative legal research assistance may not be required, a judge should conduct independent research where a pro se litigant's statement of law is in direct conflict with that of opposing counsel.

VII. DISCUSSION

A. The Institutional Choice Question

Professor Joy's aforementioned position is that an appropriate institutional choice (or, implicit agreement) has been made by and between federal courts and state lawyer discipline agencies that the latter will defer to the courts for disposition of litigation misconduct complains; this was based on data showing little or no disciplinary enforcement of such complaints. While this conclusion appears sound, it should be noted that there are numerous possible causes for a lack of enforcement, such as: the reluctance of lawyers to report each other's misconduct; clients' lack of knowledge that misconduct occurred; the misconduct was not known to the court, or it was assumed not to have occurred because the offending lawyer prevailed in his or her client's case; and other possibilities. A separate issue is whether leaving litigation to the courts is a good idea.

Joy argues for deference to courts because judges have "both the historical role of the judiciary and . . . play a key role in regulating lawyers' behavior in bringing and defending cases."[133] He cites the lack of recidivism in Rule 11 offenders as support of his contention that "judicially imposed sanctions are working."[134]

Professor Joy's position fails to recognize that lawyer discipline agencies do not enforce court rules, though the ethical norms they enforce

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[132] *See* Email from Nichols, *supra* note 119.

[133] *See* Joy, *supra* note 11, at 811.

[134] *See* Joy, *supra* note 11, at 812.

prohibit similar acts. The agencies determine fitness to practice law, whereas courts are instead focused on instances of misconduct defined by a single court rule in a single case. Courts themselves may be unwilling to address misconduct for a variety of reasons, including possible bias in favor of the offending lawyer, not wanting to hurt a lawyer's career, not wanting to get tangled up in possible future disciplinary hearings, etc. There are many possible reasons not to impose sanctions on a lawyer, and a lack of reporting to the discipline agency—or an agency's unwillingness to prosecute such a case—allows lawyers who engage in unprofessional litigation misconduct to remain unaccountable.

Professor Joy is also incorrect in his view that the ABA Model Rules of Disciplinary Enforcement do not consider Rule 11-type complaints as falling into the "serious misconduct" category, warranting severe sanctions. Litigation misconduct, he argues, (a) does not involve misappropriation of funds; (b) does not result in or is not likely to result in prejudice to a client or other person; and (c) does not involve dishonest, deceit, fraud or misrepresentation.[135] "Thus, except in extreme cases of Rule 11 violations, or for lawyers who repeatedly violate Rule 11, the disciplinary enforcement rules permit potential ethics violations based on Rule 11 violations to be treated as lesser misconduct that would, if pursued by disciplinary authorities, not normally result in sanctions restricting the putative lawyer's right to practice law."[136]

The deficiency in his argument is obvious. Litigation misconduct often involves dishonesty and misrepresentation; that is the essence of false statements of law or fact, concealment of material evidence, and other serious ethics rule violations. Such misconduct can result in prejudice to a client, not to mention the public trust, when the outcome of litigation is a product of the misconduct. Clarification of the matter by the ABA standards committee would be useful.

Professor Joy's last reason in support of his position that deference to courts is preferable is that the legal profession has failed to coordinate with state disciplinary agencies following imposition of Rule 11 sanctions. This, he argues, is "a wise choice, one that enables judges to control lawyers' litigation conduct directly, to fashion appropriate remedies, and to also impose remedies close in time to the offense."[137]

I submit that the facts of the case study described above establish the real possibility that serious litigation misconduct can be overlooked by

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[135] *See* Joy, supra note 11, at 813.

[136] *See* Joy, *supra* note 11, at 812-13 (citing MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. (9)(B) (AM. BAR. ASS'N 2007)).

[137] *See* Joy, *supra* note 11, at 814.

courts and disciplinary agencies. The results of the survey of disciplinary counsel reflect unanimity among them that their agencies will not be deterred from conducting a review of such allegations despite a court ruling on the matter, or lack thereof. Moreover, the weakness of the arguments favoring deference to courts for lawyer discipline—illustrated by the ARDC's rationales for refusing to investigate in this case study—establishes that leaving litigation misconduct to judges will not adequately address such misconduct.

B. Recommendations

The making of false statements to a tribunal or engaging in other litigation misconduct has been prohibited in the practice of law for centuries.[138] The ABA's model lawyer discipline enforcement rules state that "[p]roviding a regulatory system to deter unethical behavior should remain the highest priority of the judicial branch."[139]

Do the justifications cited by the ARDC for its refusal to investigate the case (i.e., that deference must be given to court orders and that complaints of misrepresentation of law and fact made in litigation are merely "arguments, characterizations, or conclusions") have any merit? I suggest not. The agency failed in its duty to ensure that the public is protected from unethical lawyers, in court or out of court. Its "institutional choice" to defer to courts is not easily understood by those who file litigation misconduct complaints, especially those complaints in which a lawyer is inappropriately exonerated by the court. Nor does the ARDC uphold its duty to the legal profession in disciplining unethical lawyers who misrepresent the law and the facts and take advantage of pro se litigants.[140] While,

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[138] *See* HON. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 72 (1884) (quoting Gilbert Burnet, LIFE OF SIR MATHEW HALE 72 (5th ed. 1681). "It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no deceit, imposition, or evasion—to make no statements of facts which he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper-books intentionally garbled . . . [such as] 'quoting precedents of books falsely.'" *See id*.

[139] *See* MODEL RULES OF PRO. RESP. CONDUCT r. 2 cmt. (AM. BAR ASS'N 2020). ("Public confidence in the discipline and disability process will be increased as the profession acknowledges the existence of lawyer misconduct, and shows the public what the agency is doing about it.")

[140] *See* MODEL CODE OF PRO. CONDUCT §7.2-2 (FED'N. OF LAW SOC'Y OF CAN. 2004). Under Canadian legal ethics rules, the kind of chicanery engaged in by the lawyers in this case, including the sanctions sought against their pro se adversary, is referred to as "sharp practice." *Id*. "A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights." *Id*. Additional provisions in the Canadian Code in-

as lawyers, we are proud to say that ours is a self-regulated profession, the case described herein raises serious questions as to the viability of that position.[141]

The data reported here shows minimal enforcement of litigation misconduct in Illinois, which, admittedly, could be attributable to the issuance of private reprimands that are undetectable in ARDC records and reports. This is consistent with the literature and data from other jurisdictions.[142] In contrast, discipline counsel responding to the survey uniformly noted that they would consider litigation misconduct complaints independently of court sanctions imposed, or lack thereof. The contradiction between the weak enforcement data and responding disciplinary counsels' willingness to pursue complaints of litigation misconduct needs further study.

There appears to be a gaping hole in lawyer ethics enforcement with respect to litigation misconduct. It requires the promulgation of rules to prevent the *de facto* immunity of litigators who are given a pass by trial courts, wittingly or unwittingly, whose misconduct is never referred to a disciplinary agency, or whose misconduct is not investigated by a disciplinary agency. I propose the following measures to address this problem:

- Establish a disciplinary rule mandating that all litigation conduct complaints filed by lawyers be investigated (not just "reviewed"); and include a definition of "investigation."

clude knowingly attempting to deceive the tribunal, knowingly misstating information, deliberately refraining from "informing the tribunal" and placing the lawyer's credibility at issue. *Id*. r. 5.1-2(e) (stating rule that prohibits "knowingly attempt[ing] to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct"); *id*. r. 5.1-2(f) (prohibiting "knowingly misstating the contents of a document"); *id*. r. 5.1-2(i) (stating rule that prohibits "deliberately refrain[ing] from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent"); *id*. r. 5.2-1 cmt. (noting "[t]he lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue").

[141] *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 21 (1986). "[A]s in other areas in which occupations and professions are licensed and credentialed, it seems clear that the claim of the legal profession for special and total exemption from external, nonlawyer control faces a skeptical public and uncertain future." *Id*. The case described is a good example of the reason for public skepticism of the claim that self-regulation is preferred over public regulation.

[142] *See* Joy, *supra* note 11, at 807-08 (citing ABA survey results confirming that the overwhelming number of disciplinary complaints generally are dismissed, and citing Missouri opened-complaint data showing "not a single complaint involved filing frivolous lawsuits.")

- An initial investigation should include the requesting of a response from the accused and examining the records submitted by the complainant and any relevant court records in the case.
- Discipline agencies should follow Restatement and ABA guidelines for disciplinary enforcement, including, *inter alia*: (1) the opportunity of a complainant to receive and reply to an accused lawyer's response to a complaint; and (2) notice of closure of a complaint and an opportunity for the complainant to request a review of the closure decision.
- *All* reprimands or other disciplinary sanctions regarding *litigation* misconduct (as distinguished from client-centered complaints) should be publicly accessible so potential clients, lawyer adversaries, and judges will know whether a lawyer has been sanctioned for such conduct in the past.
- Eliminate the "institutional choice" policy made by some disciplinary agencies to defer litigation conduct complaints to courts, or defer them to courts in specific cases, by adopting a rule expressly permitting the agencies to pursue such complaints despite a closed or pending civil or criminal case.
- Do not consider a court's refusal to impose sanctions on a lawyer dispositive of the discipline question; rather consider the order and its reasoning as one factor to be considered in making a separate disciplinary finding based on the record, other corroborating evidence, the requirements imposed by the rules of professional responsibility, and the legal obligations of the lawyer discipline agency.
- Clarify and elevate the characterization of litigation misconduct complaints to "serious misconduct" under the ABA's Model Rules for Disciplinary Enforcement and Model Standards for Lawyer Sanctions.

C. Counter Argument

Some will disagree with my position and argue that prosecutions by lawyer disciplinary agencies should not be conducted based on the same conduct considered by a court before it imposed or refused to impose sanctions. They would argue that disciplinary prosecutions resulting from court referrals or party complaints under these circumstances would be a form of double jeopardy.

The double jeopardy clause appears in the Fifth Amendment, which states individual rights in criminal prosecutions.[143] The Clause

[143] *See* U.S. CONST. amend. V. ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .")

> protects only against the imposition of multiple *criminal* punishments for the same offense, . . . , and then only when such occurs in successive proceedings, . . .[144]

The Supreme Court has long held that "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign. Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."[145] The Double Jeopardy Clause only applies to criminal prosecutions and is not violated by successive prosecutions by different sovereigns. Thus, it cannot apply to the case of a state court sanctions decision that is followed by the same state's disciplinary enforcement proceedings.

But, objectors would argue, the general concept should apply. Why should a lawyer be sanctioned twice for the same misconduct? Or sanctioned at all for unprofessional conduct when the court just didn't—or refused—to impose sanctions? I suggest several reasons justifying subsequent disciplinary agency review and potential additional sanctions.

First, sanctions may have been considered, but inappropriately denied, such as by a judge biased in favor of the accused lawyer. The propriety of later disciplinary action in that case is unquestionable. Alternatively, the court may have imposed sanctions, but limited them to the actual attorneys' fees incurred by the opposing party as a product of the misconduct. Such an award might not be proportional to the severity of the misconduct.

It's also possible that, if court sanctions were imposed, they were only assessed for particular acts within the scope of a pleading misconduct rule (e.g., Fed. R. Civ. P. 11). Related acts of misconduct may not be included in the court's award. Similarly, the court awarding sanctions may not be aware of prior similar acts when imposing sanctions, assuming the conduct is a "one–off" situation. A discipline agency would have that information and could impose a more appropriate sanction.

If sanctions are imposed, courts are limited to attorneys' fees awards and orders barring a lawyer from making future filings; but a discipline agency, whose purpose is to protect the public from unethical lawyers, can recommend a wide range of sanctions from public and private reprimands, restitution, attorneys' fees, orders to attend drug treatment, anger management training, or continuing legal education classes, license

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[144] *See* Hudson v. United States, 522 U.S. 93, 99 (1997) (citations omitted) (first quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938); and then Breed v. Jones, 421 U.S. 519, 528 (1975)).

[145] *See* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (rejecting a challenge to the dual-sovereignty rule).

suspension, and disbarment. These are sufficient reasons to ensure the independence of lawyer disciplinary agencies from the courts in matters involving alleged litigation misconduct that also constitutes potential professional misconduct.

D. Future Research

There are many issues that require empirical study in the realm of lawyer discipline. Confidentiality rules in every state prevent access to case data reflecting complaints against lawyers that were dismissed by disciplinary counsel (or resulted in a private censure or reprimand). These data from state discipline agencies would be useful in ascertaining the source, frequency, and nature of alleged litigation misconduct. To know the reasons for declining to investigate such claims would also be useful with respect to the issue of public protection. What level of severity of a breach of the duty of candor towards the tribunal is sufficient to invoke the disciplinary process? Legislation or court rules are needed to provide scholars access to aggregate data of this type, which will help us answer the last question while maintaining the need for lawyer confidentiality before initiation of a formal complaint.

More importantly, such data would be useful in determining whether disciplinary counsel's strong sense of independence from courts translates to actual prosecutions for litigation misconduct. Limited disciplinary data from Illinois and other states show very little activity in this regard, despite this state supreme court's pronouncements in a handful of cases that litigation misconduct is not tolerated. Studies should be undertaken of more state disciplinary agencies' prosecution practices for litigation misconduct cases to the extent data are made available.

VIII. CONCLUSION

We return to the original issue of whether the lawyer disciplinary process can be viewed as an example of legal profession protectionism, as is often alleged in the case of unauthorized practice of law prohibitions. Thankfully, the encouraging results of the data collected from the national survey of disciplinary counsel reflect their firm belief in disciplinary agencies' independence from courts. They unanimously believe their agency has a duty to hold lawyers accountable for violating ethics norms notwithstanding the imposition (or non–imposition) of court sanctions. This appears to stand in stark contrast to the view of commentators that lawyer discipline agencies have a hands-off policy with respect to litigation mis-

conduct complaints, as well as the decision of the Illinois ARDC to refuse to investigate the complaint described herein. One would hope that the agency's decision does not reflect a general policy of deference to courts which, in light of the survey responses, would make it a pariah among the majority of state disciplinary agencies. The ARDC should come into conformity with the independence standard enunciated by disciplinary counsel in twenty-seven states, the District of Columbia, and the DOJ.

In addition to making more data available regarding rejected complaints or private reprimands of litigation misconduct, implementation of the aforementioned recommendations, and requiring that discipline agencies evaluate lawyer litigation misconduct independently from courts, will ensure that the public is protected from lawyers who engage in such conduct. That is the institutional choice that should be made by courts and regulatory bodies. By not deferring to courts, a robust lawyer disciplinary process justifies the legal profession's right of self-governance, evidences a lack of protectionism, and maintains the public's trust and confidence in the justice system.