



1981

The Significance of the Signature: A Comment on the Obligations Imposed by Civil Rule 11

J. Patrick Browne

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Civil Procedure Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

J. Patrick Browne, *The Significance of the Signature: A Comment on the Obligations Imposed by Civil Rule 11*, 30 Clev. St. L. Rev. 385 (1981)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol30/iss3/6>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

ARTICLE

THE SIGNIFICANCE OF THE SIGNATURE: A COMMENT ON THE OBLIGATIONS IMPOSED BY CIVIL RULE 11

J. PATRICK BROWNE*

I. INTRODUCTION	385
II. THE SIGNIFICANCE OF THE SIGNATURE	389
A. <i>The Signature of the Unrepresented Party</i>	389
B. <i>The Signature of the Trial Attorney</i>	395
1. That the Attorney has Read the Document	396
2. That There is Good Ground to Support the Document	396
a. <i>Investigation</i>	397
b. <i>Evaluation of the Document</i>	399
(1) Evaluation—As to Motivation	399
(2) Evaluation—As to Theory	433
(3) Evaluation—As to Fact	443
3. That the Document is not Interposed for Delay	459
4. The “Estoppel Effect”	466
III. CONCLUSION	479

I. INTRODUCTION

BY AND LARGE, Civil Rule 11¹ has received short shrift from courts and commentators.² Indeed, one Ohio appellate court has described the

* Professor of Law, Cleveland State University, Cleveland-Marshall College of Law; B.S., John Carroll University; M.S.L.S., Case-Western Reserve University; J.D., University of Detroit.

¹ OHIO R. CIV. P. 11. Specific Ohio Civil Rules are hereinafter generally referred to as “Rule.”

² For the views of the principal Ohio commentators, see 4 ANDERSON'S OHIO CIVIL PRACTICE § 151.23, at 336-37 (Harper 1973); 2 S. JACOBY, OHIO CIVIL PRACTICE § CR 11, at 86-88 (1972); 1 W. KNEPPER, OHIO CIVIL PRACTICE § 2.05(B), at 62-63 (1970); J. MCCORMAC, OHIO CIVIL RULES PRACTICE § 5.08, at 101-02 (1970); 3 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE, Form 11.1, n.1, at 11-2 through 11-4 (1981); 11 WEST'S OHIO PRACTICE: CIVIL PROCEDURE FORMS § 7.51, at 123 (Lewis 1973).

See also Browne, *Civil Rule 11: The Signature and Signature Block*, 9 CAP. U.L. REV. 291 (1979); Browne, *Civil Rule 10(B) and the Three Basic Rules of Form Applicable to the Drafting of Documents Used in Civil Litigation*, 8 CAP. U.L. REV. 199, 200 (1978); Browne, *Ohio Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses*, 27 CLEV. ST. L. REV. 329, 354 n.82, 356-57

requirements of Rule 11 as being no more than "formal and technical."³ Such expressions are unfortunate because they tend to denigrate the importance of a rule which imposes grave moral and ethical obligations upon attorneys and which may serve as the basis for holding losing attorneys liable for the costs and expenses of the prevailing party.⁴

nn.90, 91 (1978); Browne, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.L. REV. 363, 381 n.85 (1978); Browne, *The Finality of an Order Granting a Rule 60(B) Motion for Relief from Judgment: Some Footnotes to GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 26 CLEV. ST. L. REV. 13, 119 n.348 (1977); Browne, *Contribution Among Tortfeasors: A Comment on Amended Ohio House Bill 531*, 25 CLEV. ST. L. REV. 151, 208 (1976); Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO BAR 727, 732 (1970); Fuerst, *Municipal Court Practice Under the New Civil Rules*, 39 U. CIN. L. REV. 535, 537 (1970); Garvey, *The Attorney's Affidavit in Litigation Proceedings*, 31 STAN. L. REV. 191, 192 n.5 (1979); Lasher, *The Ohio Rules of Civil Procedure and Their Effect on Real Property Titles*, 4 AKRON L. REV. 47, 89 (1971); Milligan, *Rules of Civil Procedure in Domestic Relations Practice*, 39 U. CIN. L. REV. 524, 529 (1970).

For an exhaustive study of FED. R. CIV. P. 11, see Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976) [hereinafter cited as Risinger].

³ F.O.P. v. Dayton, 35 Ohio App. 2d 196, 301 N.E.2d 269 (2d Dist. 1973). Other Ohio decisions which touch upon Rule 11 are: Westmoreland v. Valley Homes Mut. Hous. Corp., 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975); State ex rel. Millington v. Weir, 60 Ohio App. 2d 348, 397 N.E.2d 770 (10th Dist. 1978); East Ohio Gas Co. v. Walker, 59 Ohio App. 2d 216, 394 N.E.2d 348 (8th Dist. 1978); Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (10th Dist. 1972); Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (8th Dist. 1972); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. Montgomery County 1976); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. Cuyahoga County 1976); State v. Buser, 25 Ohio Misc. 179, 265 N.E.2d 332 (C.P. Wood County 1970); Cotterman v. Fahrig, 28 Ohio Misc. 237, 277 N.E.2d 466 (Kettering Mun. Ct. 1971), *rev'd on other grounds*, 55 Ohio App. 2d 15, 378 N.E.2d 742 (2d Dist. 1972).

⁴ Thus far, the courts have been zealous in protecting the losing attorney from suits by the prevailing party. See, e.g., Karpanty v. Scheer, No. L-79-092 (6th Dist. Ct. App., filed Nov. 30, 1979), as summarized in 53 OHIO BAR 412 (1980); Beacon Journal Publishing Co. v. Zonak, Poulos & Cain, No. 70 AP-123 (10th Dist. Ct. App., filed Sep. 25, 1979), as summarized in 53 OHIO BAR 494 (1980); Norman v. Gibson, No. 79 AP-516 (10th Dist. Ct. App., filed Nov. 30, 1978), as summarized in 52 OHIO BAR 120 (1979); W.D.G., Inc. v. Mutual Manufacturing & Supply Co., 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976); Burkons v. Rogoff, No. 953,503 (C.P. Cuyahoga County, filed Dec. 16, 1976), as summarized in 48 CLEV. B.J. 167 (1977). See also Ready, *Countersuing the Lawyer—The Case of the Sore Winner*, 1 NEGLIGENCE L. NEWSLETTER No. 4 (Ohio St. B.A. April, 1978). But the pressure is building, and when the barriers fall, as they must, the spearpoint of the attack may very well be the ethical and moral obligations enshrined in Civil Rule 11.

United States v. Standard Oil Co. of Cal., 603 F.2d 100 (9th Cir. 1979), presents the overture. The court stated:

Rule 11 of the Federal Rules of Civil Procedure provides no authority for awarding attorney's fees against an unsuccessful litigant. The rule provides that the attorney's signature on a pleading certifies that "to

the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . . For a willful violation of this rule, an attorney may be subjected to appropriate disciplinary action." The rule says nothing about disciplining a party by imposing attorney's fees upon him for any act of his lawyer, even if his lawyer willfully violated Rule 11.

Id. at 103 n.2. But will the rule authorize the imposition of attorney's fees on the lawyer? The affirmative answer that is in the slow process of development is premised on a two-fold theory: (1) the Code of Professional Responsibility establishes an attorney's duty not only to his own client, but also to the public at large and, more particularly, to the client's adversaries; (2) Civil Rule 11 is the vehicle for enforcing that duty through its provision for imposing sanctions on the offending attorney.

The first portion of this theory has found some acceptance. *See, e.g.,* Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 310-14 (1979); *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976). Although this latter case did not find any basis for holding the losing attorneys liable for allegedly frivolous litigation, it did note that

[a]n attorney does have an obligation to the public and to his profession to act honestly, competently, in good faith, and without malice in all of the activities he undertakes. This duty has been set forth in the Code of Professional Responsibility adopted by the Supreme Court of Ohio and is enforceable by disciplinary proceedings against the attorney, including suspension from the practice of law or permanent disbarment.

Id. at 400.

Prior to 1979, however, neither the second portion of the theory nor the theory as a whole had been as successful. In *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978), for example, the barrier held fast and the spearpoint was blunted when the court said: "The court disagrees with this theory. Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client. Though Canon 7 does speak of a duty to the legal system 'to stay within the bounds of the law when representing clients,' it does not create a private cause of action." *Id.* at 1383.

But 1979 saw the barrier pierced at several points. One of the first thrusts came in *Nemeroff v. Abelson*, 469 F. Supp. 630 (S.D.N.Y. 1979), when the court noted:

The law is clear that attorney's fees may be assessed against the losing party when action is instituted in malice and bad faith . . . Only on such a showing is an award of attorneys' fees appropriate under Section 9(e) of the Securities Exchange Act of 1934 . . . That same yardstick applies when the equitable power of the court is invoked.

Rule 11, F.R.Civ.P. requires an attorney who signs a pleading to represent that good ground exists to support the claim. *Peter Kiewit Sons Co. v. Summit Construction Co.*, 422 F.2d 242, 271 (8th Cir. 1969). As Judge Gurfein has indicated, the accountability Rule 11 imposes on counsel merely adds an "ethical responsibility to the conception that a claim that is baseless should not survive." *Levy v. Seaton*, 358 F. Supp. 1, 6 (S.D.N.Y. 1973). The law of this circuit is that relief under Rule 11 is discretionary and requires a showing of a claim not simply lacking in merit, but bordering on frivolity. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1056 (2d Cir. 1969). Accordingly, the yardstick is the same whether Rule 11, the equitable power of the court or Section 9(e) of the Securities Exchange Act of 1934 is relied upon.

Id. at 640. To the same effect, see *North American Foreign Trading Corp. v. Zale*

Rule 11 does have some formal and technical requirements, however, and they may be summarized briefly as an introduction to the subject of this Article. First, with respect to the signature requirement, Rule 11, as applied through Rule 7(B)(3),⁵ in substance mandates the following:

1. A party who is not represented by counsel of record must personally sign each pleading, motion or other paper filed in the course of
 - a. a civil action, or
 - b. a special statutory proceeding to which the Ohio Rules of Civil Procedure are clearly applicable by their nature.⁶
2. If a party is represented by counsel of record, each pleading, motion or other paper filed by that party in the course of
 - a. a civil action, or
 - b. a special statutory proceeding to which the Ohio Rules of Civil Procedure are clearly applicable by their nature, must be signed by a designated trial attorney in that attorney's individual name.⁷

Second, with respect to the signature block, Rule 11, as supplemented by a variety of local rules of court, requires the following information be appended to the signature block:

1. The signature of a party not represented by counsel of record must be followed by a signature block consisting of the party's typed or printed name, and his or her address and telephone number.⁸
2. The signature of a designated trial attorney must be followed by a signature block consisting of:
 - a. the typed or printed name of the attorney;
 - b. the designation "trial attorney," followed by the name and party designation of the person on whose behalf the attorney appears;
 - c. the office address of the attorney;
 - d. the office telephone number of the attorney; and

Corp., 83 F.R.D. 293, 298 (S.D.N.Y. 1979); *Gage v. Wexler*, 82 F.R.D. 717, 720 (N.D. Calif. 1979). Given the number of frivolous cases now flooding the courts, decisions such as these are surely signposts to the future.

⁵ OHIO R. CIV. P. 7(B)(3).

⁶ Browne, *Civil Rule 11: The Signature and Signature Block*, 9 CAP. U.L. REV. 291 (1979). With respect to special statutory proceedings, see, in general, Browne, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.L. REV. 363 (1978); in particular, *State, ex rel. Millington v. Weir*, 60 Ohio App. 2d 348, 397 N.E.2d 770 (10th Dist. 1978).

⁷ See Browne, *Civil Rule 11: The Signature and Signature Block*, 9 CAP. U.L. REV. 291 (1979).

⁸ *Id.*

- e. the name of the firm of which the attorney is a member and/or the names of co-counsel or associate counsel if any.⁹

Why require the signature and signature block? The signature block is intended to provide the information needed for the implementation of Rule 5.¹⁰ That rule requires the service of pleadings, motions or other papers on the attorneys for all parties represented by attorneys, and on the parties personally if they are not so represented. The signature block simply provides information with respect to the place where such service may be made. The signature itself, however, is of greater import, and it is the significance of the signature that we shall discuss in the following pages.

II. THE SIGNIFICANCE OF THE SIGNATURE

A. *The Signature of the Unrepresented Party*

As a general rule, the signature of an unrepresented party has no effect other than to signify that party's assent both to the content of the document on which it appears, and to the filing of that document.¹¹ Unlike the signature of an attorney, the signature of an unrepresented party is in no sense a certification as to the merits of the matter presented in the document, and a party may proceed *pro se* on such a document even if he cannot find an attorney who will sign the document and thereby certify that there is good ground to support it.¹² Further, a party may proceed *pro se* on his own signature even if the attorney who had been representing that party moves for leave to withdraw as counsel on the grounds that the party's position is without merit.¹³ If the

⁹ *Id.*

¹⁰ OHIO R. CIV. P. 5.

¹¹ Thus, in *Huffman v. Nebraska Bureau of Vital Statistics*, 320 F. Supp. 154 (D. Neb. 1970), it was said:

One of the requirements of Rule 11 of the Federal Rules of Civil Procedure is that "A party who is not represented by an attorney shall sign his pleading and state his address." . . . Undoubtedly, one of the justifications for the quoted provision of Rule 11 is to make certain that the persons who are named as parties are actually in assent to the filing of an action on their behalf.

Id. at 156. And again, in *Covington v. Cole*, 528 F.2d 1365 (5th Cir. 1976), it was noted that "[i]n situations in which a party is not represented by an attorney, the Rule 11 signature requirement seems designed mainly to assure the court that the named party is actually in assent to the filing of an action on his behalf." *Id.* at 1369 n.7.

¹² *Chubbs v. City of New York*, 324 F. Supp. 1183 (E.D.N.Y. 1971).

¹³ *Anders v. California*, 386 U.S. 738 (1967). See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (B), which states:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment . . . if: (1) He knows or it is obvious that his client is bringing the legal action, conduct-

attorney's motion to withdraw as counsel is accompanied by a detailed examination of the merits of his client's case, however, and that examination reveals a lack of merit in the client's position, the court may grant the motion to withdraw and deny the client the right to proceed *pro se* on his own signature.¹⁴ But this is a rare case, and as a general rule it may be said that the unrepresented party's signature carries no significance as to the merits of that party's case.¹⁵

As far as the Ohio system is concerned, however, there may be at least one exception to the general rule that an unrepresented party's signature is not a certification as to the truth or merit of the material to which it is appended. Under the Ohio Rules of Civil Procedure service has replaced filing as the event which confers official standing on a document used in civil litigation. As Judge Corrigan puts it:

While Rule 4(B) provides that a copy of the complaint and summons shall be served on the defendant, Rule 5 requires that a copy of all subsequent pleadings, motions, and other important papers be served upon the opposite party. This important change is that service of papers and not the filing of papers is the jural act.¹⁶

To some extent, the same principle has been adopted in the federal system, and has been criticized as being too imprecise; the exact mo-

ing the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

Id. And see ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C), which provides:

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal . . . unless such request . . . is because: (1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

Id.

¹⁴ *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

¹⁵ The theoretical basis for this conclusion is found in the language of Rule 11. While that Rule requires the signature of an unrepresented party, or the signature of at least an attorney of record when a party is represented, it is only the attorney's signature that is said to be "a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Further, it is only the attorney who is subject to "appropriate action" for a "willful violation of this rule." Had the Rule meant the certification procedure to apply to both signatures, it would not have spoken only in terms of "the signature of an attorney," nor would it have limited punishment to the attorney's "willful violation of this rule."

¹⁶ Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO BAR 727, 731 (1970).

ment of filing can be determined by the filing stamp of the clerk of court, but the exact moment of service is left to guess and to God.¹⁷ The draftsmen of Ohio Rules were aware of this criticism and attempted to allay it by requiring a proof of service for every document filed with the court if that document had to be served under the provisions of Rule 5(A).¹⁸ To be minimally sufficient, this proof of service had to state the date and manner of service.¹⁹ This, it was thought, would establish the moment of service with sufficient accuracy and would eliminate the burdensome task of calling or visiting the courthouse to determine when a particular document had been filed.²⁰

To insure compliance with the proof of service requirement, Rule 5(D) mandates that no paper filed with the court shall be considered until a proof of service is endorsed thereon or separately filed,²¹ and to insure the accuracy of the proof of service, the Rule commands that it "shall be signed in accordance with Rule 11."²² But the only provision of Rule 11 that is directed to honesty and accuracy is that provision which stipulates that "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is

¹⁷ See the comments *pro* and *con* as they are summarized in Browne, *The Metaphysics of Motion Practice: When is a Motion "Made" for the Purposes of the Rules of Civil Procedure*, 50 OHIO BAR 925 (1977).

¹⁸ Thus, OHIO R. CIV. P. 5(D) provides:

All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Rule 11.

Id.

¹⁹ *Id.*

²⁰ See Ohio Rules Advisory Committee Staff Note to OHIO R. CIV. P. 5(A), in which it is said:

Rule 5(A), then, enhances fair notice by requiring that all important papers subsequent to the original complaint be *served* on the opposing party or his attorney and relieves the opposing attorney of the time-wasting necessity of checking the file in the clerk's office to determine whether an important paper has been filed.

OHIO R. CIV. P. 5(A), 1971 STAFF NOTE (emphasis added). What is said here of the act of service is equally true with respect to the time of service; the proof of service which must accompany each document filed with the court gives fair notice of the time of service and eliminates the time-wasting necessity of checking the file in the clerk's office to determine *when* an important paper has become an official document in the litigation.

²¹ See text of OHIO R. CIV. P. 5(D) as quoted in note 18, *supra*. See also *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975), in which the rule is applied at least inferentially.

²² OHIO R. CIV. P. 5(D).

not interposed for delay.”²³ In the Rule 5(D) “proof of service” context, however, this provision loses its force if it is read literally and is limited to the attorney’s signature.²⁴ Therefore, if the “signature” requirement of Rule 5(D) is to serve its purpose as a guarantor of the accuracy of the proof of service, the “certificate” provision of Rule 11 which it incorporates by reference must be read as being applicable to the signature of the unrepresented party as well as to the signature of the trial attorney. To put it another way, when Rule 5(D) incorporates the provisions of Rule 11 by reference, it incorporates the spirit and intent of that Rule, and not merely its letter.

The same basic argument can be applied to the “signature requirement” applicable to the use of the general denial. In substance, Rule 8(B) stipulates that a defender may plead a general denial “subject to the obligations set forth in Rule 11.”²⁵ However, the need for extending the letter of Rule 11 to cover the unrepresented party is not as great in the case of a general denial as it is in the case of the proof of service. By the nature of things, the general denial, as a pleading device, is likely to be used—and abused—only by those attorneys who were in practice prior to the effective date of the Ohio Civil Rules;²⁶ as a pleading device, it is

²³ *Id.* R. 11 (emphasis added).

²⁴ That it does apply to the attorney’s signature when the signature is appended to a proof of service is evident from what is said in *East Ohio Gas Co. v. Walker*, 59 Ohio App. 2d 216, 394 N.E.2d 348 (8th Dist. 1978): “In the instant case the record establishes that the appellee was timely served with the appellant’s motion for a new trial. The proof of service attached to the appellant’s motion in compliance with Civ. R. 5(D) and Civ. R. 11 establishes that the appellant’s motion was served upon the appellee within fourteen days after the entry of the judgment.” *Id.* at 223, 394 N.E.2d at 352. In other words, the attorney’s Rule 11 signature on the Rule 5(D) proof of service is the guaranty of its truthfulness, and the proof of service may thus be relied upon to establish the date of service. This same point may be found written between the lines in *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 382 N.E.2d 406 (1975).

²⁵ OHIO R. CIV. P. 8(B). The full text of the applicable portion of the Rule reads as follows:

Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court’s jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Id.

²⁶ The general denial was expressly authorized under the Code of Civil Procedure; as it was said in OHIO REV. CODE ANN. § 2309.13 (Page 1954) (Repealed 1971): “The answer shall contain (A) A general or specific denial of each material allegation of the petition controverted by the defendant” *Id.* See also OHIO R. CIV. P. 8(B), 1971 STAFF NOTE, where it is said: “Rule 8(B) supersedes § 2309.13(A), R.C., which, along with the specific denial, has unqualifiedly permit-

probably unknown to the unrepresented party who has had no legal training, and is therefore not likely to be used by that party. But if it is used by an unrepresented party, one can argue that the party's signature is subject to the "certification" provision of Rule 11 to the same extent as an attorney's signature would be.

Apart from the Rule 5(D) exception (and possibly a rare Rule 8(B) general denial exception), the general rule prevails: The unrepresented party's signature is not an attestation to the truth or merit of the material to which it is appended; it is no more than an indication that the unrepresented party consents to the content of the document and to the filing of the document with the court.²⁷

ted a general denial." *Id.* The general denial, however, was never meant to be taken literally; rather, it was a formulary used to put the plaintiff on notice that the defendant demanded strict proof of each and every element of the plaintiff's case. Under Rules pleading, the formulary function of the general denial has been replaced by the concept of "honesty in pleading," and if the general denial is now used, the presumption is that it is intended to be taken literally. Accordingly, under the Rules, the legitimate occasions for using the general denial are rare indeed. As the aforementioned Staff Note goes on to say:

Rule 8(B) provides that a general denial should not be served unless the pleader intends in good faith to controvert all the averments of the preceding pleading. Therefore, in light of the fact that a defendant is seldom in a position to deny in good faith all allegations in a plaintiff's pleading, defendant under Rule 8(B) should resort to the specific denial to designated averments or paragraphs in a plaintiff's pleading or state as to a specific averment that defendant is without knowledge or information sufficient to form a belief as to the truth of an averment or admit in whole or in part of truth of a specific averment.

Id. Attorneys who were admitted to practice after the effective date of the Civil Rules would probably have had this change in philosophy pointed out to them in law school, but attorneys who were admitted to practice prior to the effective date of the Civil Rules may not be expressly aware of the change, and are quite likely to be still using the general denial in its old formulary role.

In any event, Rule 8(B) invokes the "certification" provisions of Rule 11 in order to emphasize that the "honesty in pleading" philosophy has replaced the formulary philosophy, and that the general denial is now to be used only when the defender can, in good faith, deny *all* of the allegations of the pleading to which his general denial is directed.

²⁷ In addition to the cases cited in note 11, *supra*, see *Ginter v. Southern*, 611 F.2d 1226 (8th Cir. 1979), *cert. denied*, 446 U.S. 967 (1980), where it was said:

Rule 11 of the Federal Rules of Civil Procedure requires that every pleading, including the notice of appeal, be signed by the party filing it, or by that party's attorney. We note that . . . of the six individuals named as pro se plaintiffs-appellants in No. 79-1344, only Leonard G. Ginter, who is not an attorney, signed the complaint, the notice of appeal, and all other pleadings filed in that case. Under similar circumstances, courts have dismissed the appeals of those pro se appellants who failed to sign the notice of appeal. *Scarrella v. Midwest Federal Savings and Loan*, 536 F.2d 1207, 1209 (8th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976); *McKinney v. Debord*, 507 F.2d 501, 503 (9th Cir. 1974). Because of the conclusion we reach in this case, we decline to con-

sider whether such a dismissal is appropriate here. However, we urge the district courts to assure compliance by pro se litigants with the requirements of Rule 11. Only by such compliance may the courts be assured that the parties named as plaintiffs are actually in accord with the pleadings filed on their behalf.

Id. at 1227-28 n.1. This note not only sums up the significance of the unrepresented party's signature but also stipulates the normal penalty for the unrepresented party's noncompliance with Rule 11—dismissal of the action or the appeal of those unrepresented parties who have failed to individually sign the appropriate documents. To the same effect, see *People ex rel. Snead v. Kirkland*, 462 F. Supp. 914 (E.D. Pa. 1978): "One purpose of Rule 11 is to assure that persons who are named as plaintiffs in an action actually assent to the filing of the action on their behalf. Since the present complaint was not signed by either Darryl or Daniel Snead, the Court will strike the complaint as to them." *Id.* at 917-18.

It may be noted here that while an unrepresented party is not normally subject to the "certification" provisions of Rule 11 because he is not bound by the Code of Ethics which governs the conduct of attorneys, he may be made subject to the "verification" provisions of that Rule if he demonstrates a tendency to abuse the judicial process. *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 1003 (S.D. Tex. 1977). Further, a represented party or the represented party's attorney cannot escape the "certification" provisions of Rule 11 by having the represented party serve and file documents *pro se*; when a party is represented by an attorney of record, documents filed *pro se* by that party may be either ignored or stricken from the files. See *Ahmad v. Independent Order of Foresters*, 81 F.R.D. 722 (E.D. Pa. 1979):

Since the plaintiffs are represented by an attorney, their pleadings and other papers must be signed by him, as required by Fed.R.Civ.P. 7 and 11. In order to further the goal of expeditiously resolving this lawsuit, we will order that the defendant need not respond to any papers filed *pro se* by the plaintiffs so long as they continue to be represented by counsel.

Id. at 730. In footnote 6 to this passage the court indicated that it would grant the defendant's motion to strike an affidavit filed *pro se* by one of the plaintiffs.

Finally, it should be noted here that there are ongoing efforts to extend the "certification" provision of Rule 11 to the unrepresented party. See, e.g., PRELIMINARY DRAFT PROPOSED AMENDMENTS FED. R. CIV. P. 26(g) (1981), which provides in part:

Signing of Discovery Requests, Response, and Objections.

Every request for discovery, or response or objection thereto, made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that it is (1) to the best of his knowledge, information, and belief formed after a reasonable inquiry consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) interposed in good faith and not primarily to cause delay or for any other improper purpose; and (3) not unreasonable or unduly burdensome or expensive, given the nature and complexity of the case, the discovery already had in the case, the amount in controversy, and other values at stake in the litigation. If a request, response, or objection is not signed, it shall be deemed ineffective.

Id.

B. *The Signature of the Trial Attorney*

The signature of the trial attorney, on the other hand, is quite different. It has been held that the signature of the attorney is the equivalent of an affidavit of merit,²⁸ and is intended to hold that attorney to strict accountability for the contents of the document upon which his signature appears.²⁹ In short, Rule 11's requirement that the attorney sign the document imposes upon that attorney an ethical and moral obligation not to present documents which contain scandalous or indecent matter, or matters which are false, frivolous or otherwise without merit. The substance of these rules provide, when read *in pari materia*, the attorney's obligation in positive form:

OHIO CIVIL RULES

7(B)(3) & 11:

The signature of an attorney on a

1. pleading,
2. motion, or
3. other paper

constitutes a certificate by him

1. that he has read the document;
2. that to the best of his
 - a. knowledge,
 - b. information, and
 - c. belief
 there is good ground to support it; and
3. that is not interposed for delay

FEDERAL CIVIL RULES

7(b)(2) & 11:

The signature of an attorney on a

1. pleading,
2. motion, or
3. other paper

constitutes a certificate by him

1. that he has read the document;
2. that to the best of his
 - a. knowledge,
 - b. information, and
 - c. belief
 there is good ground to support it; and
3. that is not interposed for delay

²⁸ "When filed, the signature of plaintiff's attorney thereon, pursuant to Rule 11, F.R.C.P., will be the equivalent of an affidavit of merit." *Russo v. Sofia Bros.*, 2 F.R.D. 80, 82 (S.D.N.Y. 1941). The same conclusion may be inferred from *State v. Buser*, 25 Ohio Misc. 179, 265 N.E.2d 332 (C.P. Wood County 1970):

The court has prepared this memorandum of opinion not alone to give notice to the profession of this case but to alert the profession, in the light of the facts of this case, to Rule No. 11 of the Ohio Rules of Civil Procedure (and particularly the fourth sentence thereof) effective July 1, 1970, which reads: ". . . *The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . .*"

If we trial judges firmly insist that every member of the Bar observe and adhere to this requirement in substantial and bona fide compliance, I must suspect it will make a greater contribution to a generally more satisfactory administration of justice in Ohio than the rest of the new rules together.

Id. at 184-85, 205 N.E.2d at 336 (emphasis added by the court).

²⁹ "The purpose of the signature of 'at least one attorney of record in his in-

Local rules of court may supplement these provisions of the rules by importing additional significance to the attorney's signature.³⁰ Rules 7(B)(3) and 11 themselves establish three obligations which are discussed in the following sections of this Article.

1. That the Attorney has Read the Document

The first obligation imposed by Rule 11 is that the attorney read the document upon which his signature appears. This not only prevents an attorney of record from simply adding his name to documents prepared by an attorney not of record, or by a party,³¹ but is also a necessary prerequisite to the remaining two obligations: An attorney cannot certify that there is good ground to support the matters set forth in a document, and that those matters are not interposed for delay, unless he has become familiar with the content of the document through reading it. The word "read," of course, need not be taken literally. The Rule requires that the attorney be thoroughly familiar with the content of the document to which his name is appended. Normally, such familiarity is obtained through reading the document, and the Rule contemplates this normal process. However, if the attorney can, in good faith, say that he is thoroughly and completely familiar with the contents of the document without having actually read it, the spirit of the Rule is satisfied, and the attorney may sign the document without being foresworn.

2. That There is Good Ground to Support the Document

The second obligation requires the attorney to certify, by way of his signature, that to the best of the attorney's knowledge, information and belief there is good ground to support the matter contained in the document on which the attorney's signature appears. Without question, this is the most important of the three obligations, and the very heart of Rule 11. As Judge Hitchcock said: "If we trial judges firmly insist that every member of the Bar observe and adhere to this requirement in substantial and bona fide compliance, I must suspect it will make a

dividual name' is to hold the attorney of record who signs his individual name to strict accountability as is provided in Rule 11" *United States v. American Surety Co. of New York*, 25 F. Supp. 225, 226 (E.D.N.Y. 1938).

³⁰ For example, see Rule 10(A) of the Rules of the Court of Common Pleas, Hamilton County, Ohio, which states: "In addition to the certificate mentioned in Civil Rule 11, the signature of the trial attorney, in actions for partition, foreclosure of mortgages, foreclosure of mechanics' liens, to contest a will, and other such actions, also constitutes a certificate that all persons having a claim, interest or lien on the property involved, or in the subject matter of the action, have been made parties as required by law." HAMILTON COUNTY CT. C.P.R. 10(A).

³¹ See Browne, *Civil Rule 11: The Signature and Signature Block*, 9 CAP. U.L. REV. 291, 295-96, 297-99 (1979).

greater contribution to a generally more satisfactory administration of justice in Ohio than the rest of the new rules together."³²

There are two aspects to this second obligation. First, the attorney must possess knowledge and/or information, and second, that knowledge or information must lead the attorney to the belief that there is good ground to support the document.

a. *Investigation*

If the attorney must possess knowledge or information, it follows that the attorney must acquire it. But how is the attorney to acquire it? May he simply rely upon the information furnished by the client, or is some independent investigation required? There is some authority for the proposition that the attorney may rely upon the client alone,³³ but the rule's requirement that the attorney form a personal "belief" that there is "good ground" to support the document belies so simple a solution.³⁴

³² State v. Buser, 25 Ohio Misc. 179, 184-85, 265 N.E.2d 332, 336 (C.P. Wood County 1970). For the balance of the quotation, see note 27 *supra*.

³³ See, e.g., Fuerst, *Municipal Court Practice Under the New Civil Rules*, 39 U. CIN. L. REV. 535 (1970):

The pleadings need not be verified by the party and the signature of the attorney is sufficient. This should prove to be a savings in time to the attorney who can take the information necessary for a claim on the client's first visit, obtain his retainer, and immediately file the claim.

Id. at 537. With all due respect to the author of the above comment, this statement is quite misleading. What Judge Fuerst *appears* to sanction is the very type of practice which Rule 11 seeks to prevent. When read in context, however, what Judge Fuerst is saying is that the new signature procedure of the Civil Rules is an improvement over the old verification procedure of the Code because it requires the client to make only one trip—the first—to the attorney's office; the necessity of a return trip to verify the pleading is no longer required. Judge Fuerst should not be understood as saying that Rule 11 relieves the attorney of the duty of making some independent investigation as to the truth of what the client tells the attorney.

An additional comment from the same time period is more equivocal with respect to relying solely on the client's word. Thus, in Milligan, *Rules of Civil Procedure in Domestic Relations Practice*, 39 U. CIN. L. REV. 524 (1970), we find:

The rule allowing an attorney to sign non-verified complaints constitutes a significant break with past practice. Some attorneys view this change with alarm since the emotional domestic relations client is notoriously unworthy of trust. Others may view the change as a device to save time which will not endanger the attorney since the rule only requires that he plead the facts to the best of his knowledge.

Id. at 529. The second of these two views can be understood as authorizing a signature based solely on the client's information, even if the client "is notoriously unworthy of trust" because of his emotional state. If that is its true import, it is clearly not in harmony with either the letter or spirit of Rule 11, and the attorneys who follow this view may ultimately find that they do so at their peril.

³⁴ Thus, in Helfant v. Louisiana & Southern Life Ins. Co., 82 F.R.D. 53 (E.D.N.Y. 1979):

Under Rule 11, F.R.Civ.P., moreover, an attorney's signature upon

As noted in *Freeman v. Kirby*:³⁵

Plaintiff urges that Rule 11 interdicts the filing of a pleading known to be false, and no more. Such a narrow construction of the rule finds no support either in the rule itself, the Advisory Committee Note, or decisional law. In the language of the rule, "The signature of an attorney constitutes a certificate by him * * * that to the best of his knowledge, information, and belief there is good ground to support [the pleading] * * *." An affirmative obligation is thus cast upon the attorney signatory to a pleading that he be satisfied, in good faith, that there is good ground to support the claim asserted therein.³⁶

Thus, the attorney must take the steps necessary to produce in his mind a bona fide satisfaction that there is good ground for the document which he proposes to sign. If the client's story alone produces that honest satisfaction, all well and good; but if it does not, the attorney is under an affirmative obligation to inquire further. But how much further must the attorney go? Clearly, "good ground" is the key. The attorney must have a good faith belief that there is good ground to support the document; furthermore, that belief must be premised on the attorney's knowledge or information. Therefore, before the attorney can determine what knowledge or information is needed, and the length to which he must go to acquire it, the attorney must know what is meant by "good ground."

The thrust of Rule 11 is obvious; it invokes the ethical responsibility of the attorney as a member of the legal profession.³⁷ Accordingly, the

the complaint is a certificate that to the best of his knowledge, information, and belief there is good ground to support it. This casts upon the attorney an affirmative obligation that he be satisfied in good faith that there is good reason to support the claim, see *Freeman v. Kirby*, 27 F.R.D. 395, 397 (S.D.N.Y. 1961); see also *Crimmons v. American Stock Exchange, Inc.*, 368 F. Supp. 270, 281 (S.D.N.Y. 1973), and thus provides defendants with the attorney's certificate of good faith and a remedy for willful violation of the rule.

Id. at 56-57. See also *Hecht Co. v. Southern Union Co.*, 474 F. Supp. 1022 (D.N.M. 1979), where the court rather caustically notes:

The defendants either misread the plaintiffs' complaint or failed to consider seriously Rule 11 of the Federal Rules of Civil Procedure. Had the defendants looked for "good ground to support" their *Noerr-Pennington* defense, they could have saved a much overburdened file an additional volume.

Id. at 1027. To the same effect, but without notable comment, see *Shapiro v. Miami Oil Producers, Inc.*, 84 F.R.D. 234 (D. Mass. 1979); *Bready v. Geist*, 83 F.R.D. 432 (E.D. Pa. 1979).

³⁵ 27 F.R.D. 395 (S.D.N.Y. 1961).

³⁶ *Id.* at 397.

³⁷ In *Levy v. Seaton*, 358 F. Supp. 1 (S.D.N.Y. 1973), the court stated that Rule 11 requires an attorney who signs a pleading to represent his

meaning of "good ground" is to be found in the principles enunciated in the ABA Code of Professional Responsibility, and more particularly, in the Ethical Considerations and Disciplinary Rules under Canons 2 and 7 which put flesh on those bones of principle. From a review of these Considerations and Rules, it is apparent that the "good ground" necessary to support a document consists of three elements: the motivation behind the document, the legal theory underlying the document, and the factual basis for the document. Before signing a document, the attorney must have a bona fide belief that the motivation is proper, the theory sound, and the factual basis true, and this belief must be premised on the attorney's personal knowledge, or on the best information the attorney can obtain. Thus, to the extent necessary to form a bona fide belief, the attorney must make a personal, tripartite investigation into motivation, theory and fact.

b. *Evaluation of the Document*

(1) Evaluation—As to Motivation

The attorney may not accept employment,³⁸ or must withdraw from

honest belief that there is good ground to support the claims asserted in the pleading. This merely adds an ethical responsibility to the conception that a claim that is baseless should not survive.

Id. at 6. And in *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 5 LITIGATION NEWS, No. 3 (April 1980), the Special Committee for the Study of Discovery Abuse of the Section of Litigation, American Bar Association, made the following point:

Third, the subdivision [*i.e.*, PRELIMINARY DRAFT PROPOSED AMENDMENTS FED. R. CIV. P. 26(g)] which was quoted in part in note 27, *supra*] recognizes, as does Rule 11, that a willful misuse of the discovery process by an attorney is a serious form of professional misconduct and may warrant professional discipline. This is an important safeguard against discovery abuse for it will allow, in appropriate cases of willful, flagrant or repeated abuse of the discovery process, the supplementation of the present judicial remedies with those available to professional disciplinary bodies. *See, e.g.*, Code of Professional Responsibility, DR 1-102(A)(5)-(6); 7-106(A), (C) (7); 7-102(A)(2).

Id. at 12.

Although *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976), does not expressly mention Ohio Civil Rule 11, it aptly summarizes the attorney's responsibility under the Rule:

An attorney does have an obligation to the public and to his profession to act honestly, competently, in good faith, and without malice in all of the activities he undertakes. This duty has been set forth in the Code of Professional Responsibility adopted by the Supreme Court of Ohio and is enforceable by disciplinary proceedings against the attorney, including suspension from the practice of law or permanent disbarment.

Id. at 400.

³⁸ As to the attorney's obligation not to accept employment, see ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30, which states in pertinent part:

Employment should not be accepted by a lawyer . . . when he knows or it

employment,³⁹ if it is obvious to the attorney that the client is motivated

is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another.

Id. See also ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A) (1), which provides:

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to: (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

Id. ABA COMMISSION ON EVALUATION OF PROFESSIONAL CONDUCT, ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT (Jan. 30, 1980) [hereinafter cited as DISCUSSION DRAFT], does not appear to be quite as forceful as the above quoted provisions from the Code of Professional Responsibility. The DISCUSSION DRAFT's closest parallel to EC 2-30 and DR 2-109(A)(1) appears to be its Rule 1.15 (b)(1), which states: "(b) A lawyer shall not decline appointment by a court or other authority to represent a person except for the following reasons or other good cause: (1) representing the client would be likely to result in violation of the rules of professional conduct . . ." *Id.*

³⁹ As to the attorney's obligation to withdraw from employment, see ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10, which provides that "[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.* This Ethical Consideration is implemented by ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) and DR 2-110(B)(1). As DR 7-102(A)(1) puts it:

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

Id. And as it is said in DR 2-110(B) (1):

(B) Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if: (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

Id.

Again, it would appear that the DISCUSSION DRAFT, *supra* note 38, of the ABA MODEL RULES OF PROFESSIONAL CONDUCT provides only a pale imitation of the present Ethical Considerations and Disciplinary Rules. Thus, the DISCUSSION DRAFT counterpart to EC 7-10 appears to be Rules 3.2 and 3.4. Rule 3.2(a) reads: "A lawyer shall be fair to other parties and their counsel, accord them their procedural rights, and fulfill obligations under the procedural law and established practices of the tribunal." *Id.* And Rule 3.4 continues: "(a) In preparing and presenting a case, a lawyer shall respect the interests of third persons, including witnesses, jurors, and persons incidentally concerned with the proceeding. (b) A lawyer shall not: . . . (2) use a procedure having no substantial purpose other than to embarrass, delay, or burden a third person." *Id.* These basic considerations are then implemented by Rules 1.3 and 1.16. As it is said in Rule 1.3:

(a) A lawyer shall accept a client's decisions concerning the objectives of

merely by a desire to harass or maliciously injure another.⁴⁰ On the other hand, the client has a right to seek any lawful objective through legally permissible means and to present for adjudication any lawful claim, issue or defense.⁴¹ Further, every legal action causes harassment

the representation and the means by which they are to be pursued except as stated in paragraphs (b) and (c).

(b) A lawyer shall not pursue a course of action on behalf of a client in violation of law or the rules of professional conduct.

(c) The lawyer may decline to pursue a lawful course of action pursuant to Rule 1.5(B), and, if the client insists upon such course of action, the lawyer may withdraw from representation subject to the provisions of Rule 1.16.

Id. And Rule 1.16 provides:

(a) Except as stated in paragraph (c), a lawyer shall withdraw from representing a client if: (1) continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the rules of professional conduct; . . .

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: . . . (2) the client persists in a course of conduct that is illegal or unjust; . . .

(c) A lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal.

Id.

⁴⁰ Determining motivation is not always easy. In the hard case, the attorney may give the client the benefit of the doubt. Thus, in ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6, we find:

Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action . . . In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

Id. For the DISCUSSION DRAFT equivalent of this Ethical Consideration, see Rule 1.3(a), as quoted in note 39, *supra*.

⁴¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 puts it in the following terms:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

Id. In the DISCUSSION DRAFT of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5(a) appears to be the relevant provision:

A lawyer shall act diligently in representing a client. A lawyer may take any action on behalf of a client that is consistent with law and the rules of professional conduct.

DISCUSSION DRAFT, *supra* note 38, at Rule 1.5(a).

or injury to some extent. Therefore, in construing the applicable Ethical Considerations and Disciplinary Rules, emphasis must be placed on the words "merely" and "maliciously."

If, after investigation, the attorney determines that the client has a lawful objective in mind, the attorney must next determine the client's motivation. If the primary motivation is harassment or injury, and the lawful objective is merely the occasion for furthering the client's desire to harass or injure, the attorney may not represent the client; but if the primary goal of the client is to achieve the lawful objective, and some harassment or injury is merely a by-product of the client's legitimate endeavor, representation is permissible. A simple action for trespass, with nominal damages as the likely award, will illustrate this principle. Neighbors Smith and Jones are feuding. One day, while hurling vituperation at one another, Jones comes upon Smith's property. Smith seizes upon this as an opportunity for "getting" Jones, and seeks to bring an action for trespass against him. Here, the motivation is clearly one of harassing Jones, and an attorney would not be warranted in taking the case.⁴² But suppose Jones consistently cuts across Smith's lot to get to his own house. Smith has repeatedly asked Jones not to do so, but Jones pays no attention. Finally, in exasperation, Smith decides to sue Jones for trespass. To some extent, the action for trespass is harassing in nature, but its primary objective is to put an end to Jones' continuing trespass on Smith's property. Therefore, in the absence of an ongoing feud between Smith and Jones, representation of Smith is clearly permissible.

Adding to the above example the fact that Smith and Jones have been feuding for years, Smith's motivation is not quite so clear. Is Smith suing in the hope of stopping the continuing trespass, or is he bringing suit in order to "get even" with Jones for other reasons arising out of the feud? Here, the attorney must investigate the motive, and he must evaluate the product of that investigation to determine whether Smith's motivation is "merely" to harass or maliciously injure Jones. If, as a result of the investigation and evaluation, the attorney "knows" that Smith's purpose is to "merely" harass or maliciously injure Jones, or if that conclusion should be "obvious" from the circumstances, the attorney may not represent Smith;⁴³ but if the attorney's investigation does not produce

⁴² The Ethical Considerations and Disciplinary Rules quoted in notes 38 and 39 *supra* emphasize that the attorney must *know* that the motive of the client is to harass or maliciously injure, or that harassment or malicious injury is the *obvious* purpose of the client's action. When these Considerations and Rules refer to that which is "obvious," they are implying constructive knowledge which a reasonably prudent person would acquire from the circumstances. But this emphasis on actual or constructive knowledge does not mean that the attorney can close his eyes to the facts; he will be held to have seen that which was there to be seen.

⁴³ See notes 38, 39 and 42 *supra* and accompanying text.

actual knowledge of Smith's purpose, or if that purpose is not obvious from all of the circumstances, the attorney should give Smith the benefit of the doubt and may undertake the representation.⁴⁴

What is true of the whole is equally true of its parts. Although an action may be perfectly proper from the motivational point of view, a particular document filed in that action may be motivated by a desire to harass or injure. If the attorney cannot represent the client in an action motivated merely by the client's desire to harass or maliciously injure, it follows that the attorney cannot lend his signature to any document that is so motivated.⁴⁵ In short, Rule 11 prohibits an attorney from signing, serving and filing any document if that document is to be used maliciously and without probable cause for the purpose of annoying and embarrassing one's opponent, or when it is not calculated to lead to any practical result. Or to put it in terms more familiar to the Ohio practitioner, Rule 11 prohibits an attorney from signing, serving and filing any document that is vexatious in character.⁴⁶

The same prohibition applies to a document that is scurrilous in character because it contains scandalous⁴⁷ or indecent matter. "Scandalous" matter consists of unnecessary⁴⁸ matter of facts criminatory of a

⁴⁴ See note 40 *supra* and accompanying text.

⁴⁵ See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), as quoted in note 39 *supra*; see also ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25 which, in pertinent part, reads as follows:

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules.

Id. And with respect to the above quoted reference to "applicable law and rules," remember that EC-7 states that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes *Disciplinary Rules and enforceable professional regulations.*" *Id.* (emphasis added).

⁴⁶ It was stated in *Brown v. Lamb*, 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960), that "[t]he term 'vexatious' as applied to a pleading imports that it is instituted maliciously and without probable cause for the purpose of annoying and embarrassing one's opponent or when it is not calculated to lead to any practical result. *Black's Law Dictionary*, 4 Ed." *Id.* at 123, 171 N.E.2d at 196. Accordingly, if a document is introduced into the litigation process "merely for the purpose of harassing or maliciously injuring any person" (EC 2-30, DR 2-109(A)(1), DR 2-110(B)(1), and DR 7-102(A)(1)), that document is aptly described as "vexatious" in character.

⁴⁷ As defined in the text and the following notes, "scandalous" is well within the ambit of "scurrilous." See, e.g., *Ex parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1976); *Mahurin v. Moss*, 313 F. Supp. 1263 (E.D. Mo. 1970).

⁴⁸ Almost all of the cases discussing scandalous matter emphasize that the scandalous allegations were not necessary to a statement of claim or defense. On

party referred to in the document;⁴⁹ matter casting an excessively adverse⁵⁰ or derogatory⁵¹ light on the character of an individual or par-

the other hand, allegations which might otherwise be considered scandalous under one test or another may escape that categorization if they are arguably relevant to the statement in the pleading. See, e.g., *Pocono Racing Management Ass'n, Inc. v. Banks*, 434 F. Supp. 507 (M.D. Pa. 1977). But "[e]ven relevant portions of a complaint may be stricken where they are scandalous and are set out in needless detail." *Gleason v. Chain Service Restaurant*, 300 F. Supp. 1241, 1257 (S.D.N.Y. 1969).

⁴⁹ The basic authority for this proposition is *Burke v. Mesta Mach. Co.*, 5 F.R.D. 134 (W.D. Pa. 1946), in which the term "scandalous" is defined as "unnecessary matter or facts criminatory of a party referred to in the pleading." *Id.* at 138. *McLaughlin v. Copeland*, 435 F. Supp. 513, 519 (D. Md. 1977), appears to be the most recent case to accept this definition. Other cases which appear to fall in this category, but which do not expressly make reference to the "criminatory" formula of *Burke*, are the following: *Ex parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1976); *Mahurin v. Moss*, 313 F. Supp. 1263 (E.D. Mo. 1970); *Budget Dress Corp. v. Int'l Ladies' Garment Workers' Union*, 25 F.R.D. 506 (S.D.N.Y. 1959); *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953).

⁵⁰ The "adverse light" formulation appears in *OKC Corp. v. Williams*, 461 F. Supp. 540 (M.D. Tex. 1978): "Scandalous matters are those casting an excessively adverse light on the character of an individual or party." *Id.* at 550. This definition was based on a decision in *Budget Dress Corp. v. Int'l Ladies' Garment Workers' Union*, 25 F.R.D. 506 (S.D.N.Y. 1959), which held scandalous an averment "with gruesome and evidentiary detail, various conspiracies between plaintiff and several elements of the underworld, characterized in these defenses as 'strong arm men' and 'racketeers.'" *Id.* at 508. If it is profitable to attempt a distinction between the various shadings of scandalous matter, *Budget Dress Corp.* is more aptly placed in the "criminatory" category, and *Agran v. Isaacs*, 306 F. Supp. 945 (N.D. Ill. 1969), in which the offending document "set forth libelous accusations and innuendoes disparaging the character and professional ethics of two judges of the United States Court of Appeals for the Seventh Circuit, and a judge of the Appellate Court of Illinois . . ." *id.* at 947, is a better candidate for the "adverse light" category.

⁵¹ The "derogatory light" formula appears to find its origin in 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1382, at 826 (1969): "'Scandalous' matter is that which improperly casts a derogatory light on someone, most typically on a party to the action." *Id.* *Gilbert v. Eli Lilly & Co., Inc.*, 56 F.R.D. 116 (D.P.R. 1972), adopts this definition and contrasts it with that of Professor Moore:

A matter is deemed "scandalous" when it improperly casts a derogatory light on someone, usually a party to the action. *Martin v. Hunt* (D.C. Mass. 1961), 28 F.R.D. 35; *Burke v. Mesta Mach. Co.*, [5 F.R.D. 134 (W.D. Pa. 1946)]. For Professor Moore, scandalous matter consists of "any unnecessary allegation which reflects cruelly upon the moral character of an individual, or states anything in repulsive language which detracts from the dignity of the court." 2A. Moore's *Federal Practice*, Section 12.21, p. 2426, 1968 ed.

Id. at 120 n.7. This "derogatory light" formula is also adopted by *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977).

Also, *Martin v. Hunt*, 28 F.R.D. 35 (D. Mass. 1961), which is cited by both *Gilbert* and C. WRIGHT & A. MILLER, neither uses the term "derogatory light" nor indicates the nature of the allegations it found scandalous. The best one can draw from the *Martin* case is the following: "A substantial portion of [the peti-

ty; or matter that is abusive or vituperative⁵² in nature.⁵³ "Indecent" matter is the more direct equivalent of the pre-rule "scurrilous" matter, and may be defined as matter which imports indecency or abuse. It is synonymous with vile, vulgar, foul or foul-mouthed.⁵⁴ The inclusion of

tion] consists of the prolix and verbose series of allegations which concern alleged conduct of Judges Charles E. Wyzanski, Jr., . . . and of various allegations as to certain actions allegedly taken by other judges of this court. . . ." 28 F.R.D. at 35. We may reasonably assume that these "allegations" to which the decision here makes reference were not entirely flattering. Indeed, from the plethora of cases on point, we may say with some confidence that any unflattering remark touching upon a judge's ability or character will be deemed scandalous. In addition to *Martin*, see *Therault v. Silber*, 574 F.2d 197 (5th Cir. 1978); *Ex parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1976); *Mahurin v. Moss*, 313 F. Supp. 1263 (E.D. Mo. 1970); *Agran v. Isaacs*, 306 F. Supp. 945 (N.D. Ill. 1969); *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953).

⁵² The term "scandalous" embraces both the "abusive" and "vituperative." See *Mottaghi-Iravani v. Int'l Commodities Corp.*, 20 F.R.D. 37 (S.D.N.Y. 1956); *Walle v. Dallett*, 136 F. Supp. 102 (S.D.N.Y. 1955); *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953). To this list might be added *Therault v. Silber*, 574 F.2d 197 (5th Cir. 1978), in which "vile and insulting references to the trial judge" caused the notice of appeal to be stricken as an "abusive document." *Id.* at 197. However, it is not clear from the short opinion whether the court's FED. R. Civ. P. 12(f) order striking the notice of appeal was premised on the theory of impertinent matter or the theory of scandalous matter. The decision makes no reference to "scandalous matter," but it does characterize the content of the notice of appeal as "disrespectful and impertinent." *Id.*

⁵³ There does not appear to be any reported Ohio decision interpreting the word "scandalous" in light of the Civil Rules, but *Cantillon v. City of Cincinnati*, 2 Ohio N.P. (n.s.) 417, 15 Ohio Dec. 387 (Cin. Sup. Ct. 1903), is a pre-rule decision reasonably close to the point. Although *Cantillon* does not provide a definition of "scandalous," it does hold that an allegation of bias and prejudice against a judge is scandalous when it is based on a rumor that all attorneys who did not support that judge for election "were marked for disfavor." As the court put it: "To allege in an affidavit that a judge is biased or prejudiced against an attorney, and at the same time to allege that such allegation is founded upon 'rumor,' is not only impertinent but scandalous." *Id.* at 419, 15 Ohio Dec. at 389.

City of South Euclid v. Novy, 7 Ohio Misc. 181, 214 N.E.2d 711 (So. Euclid Mun. Ct. 1966), adopts the Webster's New Collegiate Dictionary definition of "scandalous" to the effect that it means "1. Giving scandal; scandalizing; also bringing shame or infamy; as, scandalous actions. 2. Defamatory; libelous; . . ." *Id.* at 185 n.4, 214 N.E.2d at 714 n.4. Interpreting the word in the light of an ordinance prohibiting the disturbance of the peace by the use of scandalous language, the court accordingly held that "calling another person a 'liar' is scandalous language; and since 'nigger' is a very derogatory reference to a member of the Negro race, stating that members of a religious faith are worse than 'niggers' also constitutes 'scandalous' language." *Id.* at 185, 214 N.E.2d at 714.

In the final analysis, a precise definition of "scandalous" remains elusive. Perhaps the best that can be said is this: Scandalous matter is that which the courts call scandalous.

⁵⁴ Again, in *Brown v. Lamb*, 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960), we find: "'Scurrilous' imports indecency or abuse and is synonymous with vile, vulgar, foul or foul-mouthed. *United States v. Strong*, 263 F. 789, 796; *United States v. Auld*, 263 F. 800, 810." *Id.* at 123, 117 N.E.2d at 196.

scurrilous matter in a document is almost always motivated by a desire to injure maliciously, and it is manifest that an attorney may not ethically sign a document containing such matter.⁵⁵ However, since allegations contained in pleadings and other filings in a court proceeding pertinent to that proceeding are absolutely privileged,⁵⁶ a party subjected to scurrilous allegations has no recourse outside of the proceeding itself, and if he is to be protected from abuse, the rules must provide some device which may be used in the proceeding. Rules 11 and 12(F)⁵⁷ provide that

⁵⁵ See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10, which states that "[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.* Rule 3.2(a) of the DISCUSSION DRAFT of the ABA MODEL RULES OF PROFESSIONAL CONDUCT puts it this way: "A lawyer shall be fair to other parties and their counsel, accord them their procedural rights, and fulfill obligations under the procedural law and established practices of the tribunal." DISCUSSION DRAFT, *supra* note 38, at Rule 3.2(a). Rule 3.4(b)(2) extends this requirement to persons not parties: "(b) A lawyer shall not: . . . (2) use a procedure having no substantial purpose other than to embarrass, delay, or burden a third person." DISCUSSION DRAFT, *supra* note 38, at Rule 3.4(b)(2).

It speaks well of the profession—and it is worthy of note—that almost all of the decisions dealing with scandalous or indecent matter involve documents filed *pro se* by laypersons. See, e.g., *Therault v. Silber*, 574 F.2d 197 (5th Cir. 1978); *Ex parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1976); *Mahurin v. Moss*, 313 F. Supp. 1263 (E.D. Mo. 1970); *Agran v. Isaacs*, 306 F. Supp. 945 (N.D. Ill. 1969). A notorious exception is *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977), in which the papers in support of plaintiff's motion to compel discovery repeatedly likened the defendant to a notorious medical practitioner whose alleged malpractice had been chronicled in a magazine article and insinuated comparisons between the defendant and the alleged malpractitioner in the article. As Judge Sirica said of these allegations:

By overstepping her limited role, and insinuating comparisons between defendant Howard and a reputed "Rogue Elephant" type of health care provider, plaintiff has gone far towards focusing the Court's attention on matters that are wholly outside the scope of this case. Whether the article about Dr. Nork is accurate or not, it simply has no bearing, in the Court's estimation, on any material issue involved in the present proceeding. Moreover, references to it for the purpose of drawing comparisons with defendant Howard improperly cast him in a derogatory light. *Cf. Wright & Miller*, [FEDERAL PRACTICE AND PROCEDURE] § 1382. It belabors the obvious to say that these references qualify as "indecent" and "scandalous" within the meaning of F.R.Civ.P. 11, and for this reason, they must be stricken.

Id. at 468. Incidentally, this is one of the few reported cases that attempts to give some meaning to the word "indecent" as it appears in the last sentence of FED. R. CIV. P. 11.

⁵⁶ As it is said in *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976), "[p]laintiffs purport to set forth a claim for relief for libel in connection with the judicial proceedings. Since allegations contained in pleadings and other filings in a court proceeding pertinent to that proceeding are absolutely privileged, no action for libel can be maintained." *Id.* at 402.

⁵⁷ OHIO R. CIV. P. 12(F).

device.⁵⁸ Although Rule 11 does not expressly state that the attorney's signature is a certificate by the attorney that the document upon which

⁵⁸ Both Rules are concerned with scandalous matter, but neither is a carbon copy of the other. In substance they provide as follows:

OHIO CIVIL RULE 11:

Similar action may be taken if
1. scandalous, or
2. indecent
matter is inserted.

OHIO CIVIL RULE 12(F):

[T]he court may order stricken
from any pleading any . . .
scandalous matter.

In theory, Rule 11 is somewhat broader than Rule 12(F) because its ambit includes "indecent matter," and "indecent" is not precisely the same as "scandalous." See note 54 *supra* and accompanying text. As originally drafted, however, Rule 12(F) would not have been narrower. The text which the Rules Advisory Committee of the Ohio Judicial Conference submitted to the Ohio Supreme Court read as follows: "[T]he court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, scandalous or otherwise improper matter." See Rules Advisory Committee, *Draft Ohio Rules of Civil Procedure*, 42 OHIO BAR 223, 236 (1969) (emphasis added). The Staff Note which accompanied this text gave this explanation of the language:

At the end of Rule 12(F), the words "or otherwise improper matter" were added to make it clear that the subdivision was not limited to the terms employed in the Federal rule. Thus, for example, language in a pleading anticipating a defense or constituting an argumentative denial would be "otherwise improper matter" and could be stricken under subdivision (F).

OHIO R. CIV. P. 12(F), 1970 STAFF NOTE. While this explanation made no specific reference to "indecent matter," and while it is obvious that the intent of the draftsmen was not to make Rules 11 and 12(F) parallels by the use of the "otherwise improper matter" clause, it is equally clear that "indecent matter" would have been well within the scope of "otherwise improper matter," and the effect of the clause would have been the creation of a parallel between Rule 11 and 12(F) on this particular point.

On October 13, 1969, it was announced that the Supreme Court had approved the above-quoted text of Rule 12(F), and would submit the same to the General Assembly before the January 15, 1970 deadline. See Rules Advisory Committee, *Ohio Rules of Civil Procedure*, 42 OHIO BAR 1243, 1246 (1969). From all that appears in the printed sources, the text proposed by the Rules Advisory Committee and approved by the Supreme Court was submitted to the General Assembly on January 13, 1970. See Report, *Revisions to Ohio Rules of Civil Procedure*, 42 OHIO BAR 163 (1970). That source tells us: "The . . . rules which appear in . . . 42 OHIO BAR No. 39 (Oct. 13, 1969) . . . are essentially correct. They are in the form of the rules filed with the General Assembly and have only minor typographical corrections. Due to space limitations these corrections will not be printed in *The Ohio Bar*." *Id.* Thus, the original text of Rule 12(F) was intact as of February 9, 1970, when the above-quoted remark was published.

However, on April 30, 1970, the Supreme Court submitted to the General Assembly a number of amendments to the proposed Rules. Among these amendments was one which changed the text of Rule 12(F) to the following: "[T]he court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." See Report, *Amendments to the Ohio Rules of Civil Procedure*, 42 OHIO BAR 675, 679 (1970). It was this text which the General Assembly accepted, and it was also this text which became effective on July 1, 1970. For the acceptance by the General Assembly, see Cor-

it appears does not contain any scurrilous matter, it does so by rather clear implication. Thus, the first protective barrier is the attorney-signatory's sense of honor as a member of the Bar. Should the attorney-signatory's sense of honor not be equal to the challenge, Rule 12(F) provides that scurrilous matter may be stricken from a document on a court's own motion, or on the motion of any party,⁵⁹ and Rule 11 provides that an attorney may be subjected to appropriate disciplinary action if scurrilous matter is inserted in a document signed by that attorney.

This reference to Rules 11 and 12(F) raises interesting questions with respect to the function and application of each rule. First of all, does Rule 12(F) reach any document other than a pleading? The rule provides that "the court may order stricken from *any pleading* any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter."⁶⁰ A "pleading" is a device mentioned in Rule 7(A),⁶¹ and by its nature, is either assertive or responsive. An assertive pleading is one which states a claim for relief; a responsive pleading is one which contains a defense to a claim for relief.⁶² The assertive and responsive pleadings allowed by Rule 7(A) may be listed as follows:

rigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO BAR 727, 738 (1970), and Report, *Ohio Rules of Civil Procedure*, 43 OHIO BAR SPECIAL RULES ISSUE 19 (June 22, 1970); for the effective date, see OHIO R. CIV. P. 86(A). Unfortunately, none of the printed sources tell us why the phrase "or otherwise improper" was dropped. We may speculate that the deletion was motivated by a desire to more closely conform the Ohio Rule to its Federal counterpart, but we do not know. In any event, the effect of the deletion is a narrowing of the scope of OHIO R. CIV. P. 12(F).

⁵⁹ As illustrated in note 58 *supra*, "scandalous" matter is expressly within the embrace of OHIO R. CIV. P. 12(F). Whether "indecent" matter is also within that embrace is more doubtful. There is little doubt, however, that if a court were pressed for a remedy it would construe "indecent" matter as "immaterial" matter, and strike it under that aspect of Rule 12(F). Because that is so, it is fair to use "scurrilous" as a bridge-word between Rules 11 and 12(F) to link and illustrate their common area of concern, since the term "scurrilous" clearly embraces both scandalous matter and indecent matter.

It has also been suggested that the entire document may be stricken from the files under the provisions of Civil Rule 11 if it contains scandalous or indecent matter. *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977). But there is some question whether this is a correct interpretation of Civil Rule 11.

⁶⁰ OHIO R. CIV. P. 12(F) (emphasis added).

⁶¹ *Jones v. Laughlin Steel Corp.*, 40 Ohio St. 2d 61, 320 N.E.2d 658 (1975). See also OHIO R. CIV. P. 7(A), 1971 STAFF NOTE, which states in pertinent part: "Rule 7(A) names the pleadings which are permitted under the rules." *Id.*

⁶² The court-ordered reply to an answer or reply to a third-party answer is an exception to this general rule. By their nature, either the reply to an answer or the reply to a third-party answer asserts a defense to a defense.

<u>ASSERTIVE PLEADING:</u>	<u>RESPONSIVE PLEADING:</u>	<u>RESPONSIVE PLEADING:</u>
1. Complaint	1. Answer	1. Reply ⁶⁷
2. Counterclaim ⁶³	2. Reply ⁶⁵	
3. Cross-Claim ⁶⁴	3. Answer to Cross- Claim ⁶⁶	
4. Third-Party Complaint	4. Third-Party Answer	2. Reply ⁶⁸

⁶³ Although the "counterclaim" and "cross-claim" are both technically pleadings because they assert claims for relief, they are not separate pleadings in the sense that they appear in their own unique document; rather, they physically appear in the document which contains the responsive pleading to some other assertive pleading. For example, a counterclaim or cross-claim asserted by a defendant will normally appear in the document containing the answer to the complaint. All of this is deduced from OHIO R. CIV. P. 7(A) and 12(A)(2), which speak in the following terms: "an answer to a cross-claim, if the *answer* [to the complaint] contains a cross-claim. . . ." OHIO R. CIV. P. 7(A) (emphasis added). "The plaintiff shall serve his reply to a counterclaim *in the answer* [to the complaint] within twenty-eight days after service of the *answer* [to the complaint] . . ." OHIO R. CIV. P. 12(A)(2) (emphasis added).

⁶⁴ See note 63 *supra*.

⁶⁵ OHIO R. CIV. P. 8(C) tells us: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation." *Id.* From this we may deduce that there are occasions when it will be difficult to determine whether a particular set of averments in a responsive pleading is an affirmative defense or a counterclaim. To prevent unintended defaults resulting from the failure to reply to such a set of averments, OHIO R. CIV. P. 7(A) stipulates that a reply to a counterclaim is required only when the counterclaim is "denominated as such;" that is, when the set of averments in question bears the label "counterclaim." In any event, when a responsive pleading is required, that responsive pleading is properly designated a "reply."

⁶⁶ OHIO R. CIV. P. 7(A) lists the various responsive pleadings as "an answer," "a reply," "an answer to a cross-claim," and "a third-party answer." It then concludes with the following sentence: "No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." *Id.* This choice of words presents a rather interesting problem: Is the word "answer" as used in the last sentence of OHIO R. CIV. P. 7(A) limited to the answer to the complaint, or does it also include the answer to a cross-claim?

If "answer" includes "answer to a cross-claim," then Rule 7(A) authorizes four replies: (1) a reply to the answer to the complaint; (2) a reply to a counterclaim denominated as such; (3) a reply to the answer to a cross-claim; and (4) a reply to a third-party answer. Some support for this reading can be found in OHIO R. CIV. P. 7(A), 1971 STAFF NOTE:

In certain special circumstances Rule 7(A) provides for a reply. Thus, if defendant files a counterclaim (and denominates it as such), then Rule 7(A) provides that plaintiff must file a "reply" to the counterclaim. And in rare instances, most certainly not the ordinary case, Rule 7(A) provides that in order to clarify the status of the pleadings the court may in its discretion order a reply to an answer and a third-party answer.

Id. But there are two additional problems with this extract: First, if it is read to

Obviously, if scurrilous material appears in any of these devices, it may be stricken either on a party's motion or on the court's own motion.⁶⁹

support the proposition that "answer" also means "answer to a cross-claim," then it ignores the vital distinction between a reply to a counterclaim and a reply to an answer by putting them on the same level and giving them the same status. (A reply to a counterclaim serves the same function as an answer to a complaint. For the function of a court-ordered reply to an answer to the complaint, or to a third-party answer, see note 67 *infra*.) It is inconceivable that the Rules Advisory Committee would have made such a fundamental error. Second, it perpetuates (if it does not exacerbate) the original puzzle by substituting the phrase "answer and a third-party answer" for Rule 7(A)'s "answer or a third-party answer."

On the other hand, if "answer" does not include "answer to a cross-claim," then the court may authorize a reply to an answer to the complaint or a reply to a third-party answer, but it may not authorize a reply to an answer to a cross-claim or a reply to a counterclaim. Why two responsive pleadings should be so favored, and two not, is equally puzzling.

Yet again, if an "answer to a cross-claim" is subsumed under the word "answer," then the reply to a counterclaim is the only responsive pleading to which no reply may be directed, and a mystery remains.

Whatever may be the correct solution, the internal evidence strongly suggests that the draftsmen of the Rule did intend a distinction between the answer to the complaint and a third-party answer on the one-hand, and a reply to a counterclaim and an answer to a cross-claim on the other. Accordingly, it may be concluded, as I have concluded in the text, that the last sentence of Rule 7(A) authorizes a court-ordered reply to an answer and a third-party answer, but not to a reply to a counterclaim or an answer to a cross-claim.

⁶⁷ See note 66 *supra*. The court-ordered reply authorized by the last sentence of OHIO R. CIV. P. 7(A) is the lineal descendant of OHIO REV. CODE ANN. § 2309.24 (Page 1954) (repealed 1971), which read: "When an answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter." *Id.* Thus, under the Code, the function of the reply was to put in issue an affirmative defense in the answer either by denying the allegations upon which it was premised (a negative defense to the affirmative defense), or by asserting new matter which avoided the affirmative defense or abated its assertion (an affirmative defense to the affirmative defense). Under the Rules, both functions are presumed. As OHIO R. CIV. P. 8(D) puts it: "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." *Id.* Or as the Ohio Rules Advisory Committee Staff Note to Civil Rule 7(A) states, "Rule 7(A) does not 'require' a reply; hence the combination of Rule 7(A) and Rule 8(D) dispenses with the reply, and the affirmative defense of defendant is taken as denied or avoided." OHIO R. CIV. P. 7(A), 1971 STAFF NOTE. Accordingly, under the Rules, the reply serves no useful function other than to clarify the issues when the claimant wishes to state on the record his affirmative defense to the defender's affirmative defense. Again, in the language of OHIO R. CIV. P. 7(A), 1971 STAFF NOTE: "And in rare instances, most certainly not the ordinary case, Rule 7(A) provides that in order to clarify the status of the pleadings the court may in its discretion order a reply to an answer and a third-party answer." *Id.*

⁶⁸ See notes 67-68 *supra*.

⁶⁹ OHIO R. CIV. P. 12(F) provides that:

Upon motion made by a party before responding to a pleading or, if no

But what if such material appears in a motion or in an "other paper"⁷⁰ such as an affidavit? A literal reading of Rule 12(F) would leave the scurrilous matter in motions or other papers invulnerable to a motion to strike it.

There are, however, three arguments which subject motions and other papers to the Rule 12(F) motion to strike. The first is based on a concept of necessity, and is well stated in *McLaughlin v. Copeland*:⁷¹

Federal Rule of Civil Procedure 12(f) relates to matters to be stricken from pleadings. Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike because the Federal Rules provide no other means to contest their sufficiency. . . . If portions of an affidavit are inadmissible, the whole affidavit need not be stricken but only those portions which are deficient.⁷²

The second argument is based on the distinction between form and substance. Scurrilous matter in a pleading, motion or other paper is a formal defect, not a substantive one. Ohio Civil Rule 7(B)(3) states: "The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules."⁷³ Since that portion of Rule 12(F) which deals with the striking of redundant, immaterial, impertinent or scandalous matter is a rule applicable to other matters of form, Rule 12(F) is made applicable to motions and other papers through the operation of Rule 7(B)(3).

The third argument is based on a combination of inherent power and analogy. It may be conceded, for sake of argument, that Rule 12(F) applies only to pleadings.⁷⁴ Nevertheless, it does provide a basic procedure

responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

Id.

⁷⁰ See OHIO R. CIV. P. 7(B)(3), which divides all documents used in litigation into three mutually exclusive categories: (1) pleadings; (2) motions; and (3) other papers.

⁷¹ 435 F. Supp. 513 (D. Md. 1977).

⁷² *Id.* at 519. See also *Monroe v. Board of Educ.*, 65 F.R.D. 641 (D. Conn. 1975). But see *Ernest Seidelman Corp. v. Mollison*, 10 F.R.D. 426 (S.D. Ohio 1950), which rejects the authority of FED. R. CIV. P. 12(f), and relies upon the inherent power of a court to strike documents, in whole or in part, if they do not comply with Rule requirements.

⁷³ OHIO R. CIV. P. 7(B)(3). See also FED. R. CIV. P. 7(b)(2), which is the corresponding federal rule.

⁷⁴ As is so often the case with the interpretation of the Federal Rules of Civil Procedure, there are as many, if not more, authorities for this proposition as there are for the proposition that it also applies to motions and other papers. See,

for striking portions of a document. Quite apart from any express authority in the rules, courts have inherent power to strike a document in whole or in part if that document does not comply with the Civil Rules.⁷⁵ When the courts exercise this inherent authority to strike out part of a document, they should do so in a manner that is as consistent with the rules' procedure as the circumstances will admit. Therefore, when the courts strike scurrilous material from a motion or other paper, they should, to the extent possible, follow the rules' procedure for striking scurrilous matter from a pleading; that is, they should apply Civil Rule 12(F) by analogy. But if the courts are to follow Rule 12(F) procedure, is it not sensible to say that a motion to strike scurrilous material from a motion or other paper is made under the aegis of Rule 12(F)?⁷⁶

In sum, then, the first question is answered in the affirmative. Rule 12(F), or at least that portion of it dealing with the striking of redundant, immaterial, impertinent or scandalous matter, is applicable to documents other than pleadings either through analogy, by necessity, or through the operation of Rule 7(B)(3).

In the context of scurrilous matter, the second question is this: Does

e.g., *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977):

[T]he rule is limited in its application to "pleadings". Rule 12(f), F.R.Civ.P. "Pleadings" within the meaning of the Federal Rules of Civil Procedure are those matters set forth in Rule 7(a). The plaintiff in this instance seeks to strike an affidavit and therefore invokes a procedure not within the literal meaning of the Rules.

Id. at 368. *See also* *Wimberly v. Clark Controller Co.*, 364 F.2d 225 (6th Cir. 1966); *Superior Beverage Co. v. Ohio*, 324 F. Supp. 564 (N.D. Ohio 1971); *Ernst Seidelman Corp. v. Mollison*, 10 F.R.D. 426 (S.D. Ohio 1950).

⁷⁵ *Ernst Seidelman Corp. v. Mollison*, 10 F.R.D. 426 (S.D. Ohio 1950).

⁷⁶ This argument is suggested in *Monroe v. Board of Educ.*, 65 F.R.D. 641 (D. Conn. 1975):

A motion to strike asks the court to remove "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). A rule 12(f) motion to strike is not strictly proper in this instance, for the record of the school board's hearing is not a "pleading." The federal rules designate as "pleadings" those filings as set forth in rule 7(a): a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and a reply to an answer or a third-party answer if ordered by the court. Fed.R.Civ.P. 7(a)

It is, nevertheless, necessary to determine what material may be used in ruling on the pending motion for partial summary judgment, and a motion to strike has sometimes been used to call to courts' attention questions about the admissibility of proffered material in similar circumstances Thus the court accepts the motion as an invitation by the plaintiff to consider whether the record of Monroe's hearing as submitted by the defendant may properly be relied upon.

Id. at 645.

Civil Rule 12(F) authorize the striking of the entire document from the files if it contains scurrilous matter, or does it authorize only the striking of the scurrilous matter from the document? The Rule states in pertinent part that "the court may order stricken *from* any pleading . . ."⁷⁷ Accordingly, a literal reading of the Rule would favor the latter interpretation over the former. But there is ample federal authority for the proposition that Federal Civil Rule 12(f) may be used to strike the entire document if it is replete with scurrilous material.⁷⁸ Therefore, if one were to rely upon what the federal courts have done rather than upon what the federal rule says they may do, one could conclude that an entire document can be stricken from the files under the authority of Ohio Civil Rule 12(F).

Pre-rule Ohio practice recognized two motions to strike. The first was a motion to strike *from* a pleading, and was authorized in the following terms: "If redundant, irrelevant, or scurrilous matter is inserted in a pleading, it may be stricken out on motion of the party prejudiced thereby. Obscene words may be stricken from a pleading on the motion of a party or by the court of its own motion."⁷⁹ The second was a motion to strike an entire document *from the files*: "Motions to strike pleadings and papers from the files may be made with or without notice, as the court directs."⁸⁰ Unlike the former authority governing the motion to strike from a pleading, this latter authority does not prescribe when the motion to strike from the files may be used, but the customary usages of the motion to strike from the files are outlined in *Brown v. Lamb*:⁸¹

[T]his remedy is ordinarily employed to strike pleadings for failure to comply with previous orders of the court . . . This office of a motion to strike a pleading from the files is to test the regularity connected with the filing, as when filed after time; to its form with respect to verification; or for failure to comply with previous orders of the court. Its office is not to inquire into the merits of the case . . . The motion may also be employed to strike sham or frivolous pleadings.⁸²

The motion to strike from the files was also to be used if an action failed of commencement. In such a case, the action could not be dismissed,

⁷⁷ OHIO R. CIV. P. 12(F) (emphasis added).

⁷⁸ See, e.g., *Therault v. Silber*, 574 F.2d 197 (5th Cir. 1978); *Ex parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1976); *Argran v. Isaacs*, 306 F. Supp. 945 (N.D. Ill. 1969); *Martin v. Hunt*, 29 F.R.D. 35 (D. Mass. 1961); *Mottaghi-Iravani v. Int'l Commodities Corp.*, 20 F.R.D. 37 (S.D.N.Y. 1956); *Walle v. Dallett*, 136 F. Supp. 102 (S.D.N.Y. 1955); *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953).

⁷⁹ OHIO REV. CODE ANN. § 2309.33 (Page 1954) (repealed 1971).

⁸⁰ OHIO REV. CODE ANN. § 2309.70 (Page 1954) (repealed 1971).

⁸¹ 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960).

⁸² *Id.* at 121, 171 N.E.2d at 194-95.

since it never came into existence, but the petition was to be stricken from the files to signify the failure of commencement and the nonexistence of the action.⁸³

Each motion to strike served its own function, and the two were not interchangeable. If a pleader objected to scurrilous matter in a document, his remedy was the motion to strike *from* the document, and not the motion to strike the document from the files. Even if the document was replete with offensive matter, the former motion was the remedy of choice, and the latter motion did not lie:

Section 2309.33, Revised Code, specifically provides that if redundant, irrelevant or scurrilous matter be inserted in a pleading, it may be stricken *out* on motion of the party prejudiced thereby. . . .

[T]he remedy is by way of motion to strike from the pleading. Defendants' counsel contend that the petition is so replete with evidentiary, redundant and other improper allegations that a motion to strike [from the pleading] would be as lengthy as the petition itself and, if granted, would so emasculate the petition as to leave nothing of substance remaining, and would impose undue hardship upon the court and counsel. Notwithstanding this contention, we are of the opinion that the appropriate remedy is by way of motion to strike [from the pleading] or possibly by motion to make definite and certain.⁸⁴

Ohio's pre-rule motion to strike from the pleading has evolved into Civil Rule 12(F), but the pre-rule motion to strike from the files has no express rule counterpart; rather, its continued existence as a distinct

⁸³ *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954):

Therefore, it cannot be said that an action was ever deemed to be commenced in Lorain county. In other words, notwithstanding the filing of the petition and the issuance of summons, no case ever matured in Lorain county to the point where the court had any jurisdiction over the defendant or had any power to make any order based upon the allegations of the petition so filed. There was no pending case to be "dismissed." Although on the Lorain county court docket there appears the words, "dismissed without prejudice," what that court did was merely to strike the petition from the files. It is common knowledge that after service of summons and even after the filing of an answer a case may be "dismissed" for want of prosecution. Such would be a genuine dismissal because such case would be pending and the court would have jurisdiction over it. It seems axiomatic that a nonexistent case can not be dismissed.

Id. at 383-84, 119 N.E.2d at 288.

⁸⁴ *Brown v. Lamb*, 112 Ohio App. 116, 120-22, 171 N.E.2d 191, 194-95 (6th Dist. 1960) (emphasis in original).

remedy is merely shadowed in such rules as Rule 11⁸⁵ and Rule 12(E).⁸⁶ Thus the teasing question: Since both pre-rule motions to strike have survived into the rules era, will the Ohio courts read Ohio Civil Rule 12(F) literally and follow the pre-rule Ohio tradition of distinguishing between the motions to strike from a document and to strike a document from the files, or will they read Ohio Civil Rule 12(F) loosely and follow the federal practice of treating the Rule 12(F) motion to strike as both a motion to strike from a document and a motion to strike the document from the files?⁸⁷

Although not on point,⁸⁸ *Longstreth Co. v. Charles Vangrov & Son*,

⁸⁵ Compare OHIO R. CIV. P. 11 with *Brown v. Lamb*, 112 Ohio App. 116, 121, 171 N.E.2d 191, 195 (6th Dist. 1960):

Ohio R. Civ. P. 11:

If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

Brown v. Lamb:

The office of the motion to strike a pleading from the files is to test . . . its form with respect to verification; . . . The motion may also be employed to strike sham or frivolous pleadings.

⁸⁶ Compare OHIO R. CIV. P. 12(E) with *Brown v. Lamb*, 116 Ohio App. 116, 121, 171 N.E.2d 191, 194-95 (6th Dist. 1960):

Ohio R. Civ. P. 12(E):

If the motion is granted and the order of the court is not obeyed . . . , the court may strike the pleading to which the motion was directed or make such order as it deems just.

Brown v. Lamb:

[T]his remedy is ordinarily employed to strike pleadings for failure to comply with previous orders of the court, . . . The office of the motion to strike a pleading from the files is to test . . . for failure to comply with previous orders of the court.

⁸⁷ See also FED. R. CIV. P. 11 and 12(e), which suggest the existence of the motion to strike from the files. While there is little doubt that it does exist as a viable method of invoking the court's inherent power to strike matters from the files, the federal courts had no uniform pre-rule history of the motion's use to draw upon, and they have therefore tended to limit its use to the functions suggested in Rule 11 and 12(e). That being so, they have never considered it as an alternative to FED. R. CIV. P. 12(f), and since they saw no Rule-recognized alternative to Rule 12(f), they tended to bend Rule 12(f) to double duty: It became both a motion to strike scurrilous matter from a document and also a motion to strike the document from the files if it were so replete with scurrilous matter that striking from the files seemed a more appropriate disposition. See note 78 *supra* and accompanying text.

⁸⁸ At issue in *Longstreth Co. v. Charles Vangrov & Son, Inc.*, 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970), was the choice of motion to be used in challenging a noncompliance with OHIO R. CIV. P. 10(D), which requires a copy of an account or other written instrument to be attached to a pleading whenever a claim or defense in that pleading is founded on an account or other written instrument. In *Longstreth*, the Dayton Municipal Court concluded that the non-

compliance with Civil Rule 10(D) rendered the complaint substantively insufficient, and opted for the OHIO R. CIV. P. 12(B) (6) motion to dismiss for failure to state a claim upon which relief can be granted as the motion of choice.

The question next arose in *Point Rental Co. v. Posani*, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (10th Dist. 1976). In this case, the Court of Appeals for Franklin County drew a distinction between a noncompliance that rendered the pleading substantively deficient and a noncompliance that left the pleading substantively sufficient on its face. In the latter case, the noncompliance was a mere formal defect, and the court of appeals concluded that the motion of choice for presenting the challenge was an OHIO R. CIV. P. 12(E) motion for a definite statement:

The proper procedure in attacking the failure of a plaintiff to attach a copy of a written instrument or to state a valid reason for his failure to attach same is to serve a motion for a definite statement, pursuant to Civ. R. 12(E). Had that motion been granted, as would have been proper in this case, plaintiff could properly have been required to amend his complaint within 14 days after notice of the order sustaining the motion for a definite statement, and ordered to attach a copy of the written instrument or state a valid reason for the failure to attach same. In the event a party fails to obey the order of the court, the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to CIV. R. 41(B)(1).

Id. at 186, 368 N.E.2d at 1269.

While this may be a workable solution in the *Posani* situation, it smacks of an attempt to artificially force the problem into a Rule-recognized solution, even though the problem does not quite fit the Rule-recognized scheme of things. In short, in its attempt to bring everything under the aegis of the Civil Rules, the court overlooked the fact that there are a number of remedies which are either not expressly mentioned in the Rules, or are mentioned only in passing. In any event, there are at least two solid objections to the use of the motion for a definite statement as the vehicle for challenging noncompliance with Rule 10(D). To begin with, if the statement of claim is substantively sufficient without the attached document, or without a valid explanation for its absence, then it is questionable whether one can honestly say that the absence of the document or an explanation renders the pleading so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. But if the pleading is not so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the motion for a definite statement does not lie. See OHIO R. CIV. P. 12(E). Therefore, if the pleading does not have the requisite vagueness and ambiguity for a proper use of the motion for a definite statement, an attorney who signs, serves and files such a motion solely for the purpose of compelling compliance with Civil Rule 10(D) violates the certification provisions of OHIO R. CIV. P. 11, since he is certifying to a condition—vagueness or ambiguity—which he knows does not exist. Secondly, a motion for a definite statement under the provisions of OHIO R. CIV. P. 12(E) will lie only when the vagueness or ambiguity appears in a pleading to which a responsive pleading is permitted. But an answer to a complaint, a reply to a counterclaim, an answer to a cross-claim, and a third-party answer are pleadings to which no responsive pleading is permitted, except in that rare instance when a court will order a reply to an answer or a third-party answer. See notes 66-67 *supra*. Under the provisions of OHIO R. CIV. P. 12(B), the vast majority of defenses will appear in these pleadings. Nevertheless, OHIO R. CIV. P. 10(D) asserts that whenever a defense is founded on an account or other written instrument, a copy of that document must be attached to the pleading containing the defense, or an explanation for its

Inc.,⁸⁹ appears to be the only reported post-rule opinion to wrestle with the question. From what is said in the decision itself, the court seems to retain the traditional distinction between the two motions:

Unlike the former Ohio Rules (R.C. 2309.70), there is no specific provision in the new rules for a motion to strike from the files. However, a court has an inherent right to strike pleadings from a file in certain instances. Courts often, under the old rules, would order the striking of an entire pleading when the rules of pleading are violated in a gross manner. . . .

Likewise, a motion to strike under Rule 12(F) would not be the proper remedy to attack a claim which is insufficient in the man-

absence must be given in the pleading. Therefore, if there is noncompliance with this aspect of Rule 10(D), the *Posani* remedy will not be available, since the motion for a definite statement cannot be directed to the responsive pleading to which the document is not attached, or from which the explanation is absent. In short, while the Rule 12(E) solution to the Rule 10(D) noncompliance problem may have worked in the *Posani* situation, it is patently inadequate when one considers the full scope of the Rule 10(D) requirement; and even in the *Posani* situation, it may have worked only at the sacrifice of Rule 11, since it is difficult to see how one can say that in the absence of the written document there is enough in the pleading to say that it states a claim upon which relief can be granted, but not enough to permit one to frame a responsive pleading.

The author's solution to the Rule 10(D) noncompliance problem is premised on the theory that the motion to strike from the files is the vehicle of choice for presenting challenges to defects of form whenever the Civil Rules or tradition do not specify some other motion. The initial step is to determine whether the noncompliance with Rule 10(D) leaves the claim or defense substantively insufficient. If a claim is left substantively insufficient, the noncompliance with Rule 10(D) ought to be challenged by a Rule 12 (B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or a Rule 12(F) motion to strike an insufficient claim from the pleading, whichever is more appropriate in the circumstances. For the correct use of the Rule 12(F) motion to strike an insufficient claim from the pleading, see note 90 *infra*; Browne, *The Finality of an Order Granting a Rule 60(B) Motion for Relief From Judgment: Some Footnotes to GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 26 CLEV. ST. L. REV. 13, 120-24 (1977); Browne, *Ohio Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses*, 27 CLEV. ST. L. REV. 329, 369-70 (1978). If a defense is left substantively insufficient, the noncompliance with Rule 10(D) ought to be challenged by an OHIO R. CIV. P. 12(C) motion for judgment on the pleadings, or a Rule 12(F) motion to strike an insufficient defense from the pleading, whichever is the more appropriate in the circumstances. For the correct use of the Rule 12(F) motion to strike an insufficient defense from the pleading, see Browne, *Ohio Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses*, 27 CLEV. ST. L. REV. 329, 367-69 (1978). But if either the claim or the defense remains substantively sufficient, then the noncompliance with Rule 10(D) produces nothing more than an irregularity of form, and since there is no specific motion more prescribed as the vehicle for presenting a challenge to this irregularity of form, the noncompliance with Rule 10(D) ought to be challenged by the motion to strike the pleading from the files.

⁸⁹ 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970).

ner stated by the defendant. . . . Although an insufficient claim may be the subject of a motion to strike, the provisions should not be interpreted as being a substitute for a motion to dismiss for failure to state a claim under which relief can be granted. The [Rule 12(F)] motion to strike should be restricted only to a claim which is completely redundant, immaterial, impertinent or scandalous.⁹⁰

⁹⁰ *Id.* at 16-17, 265 N.E.2d at 844-45. The last two sentences of the material quoted in the text are a paraphrase of the following extract from J. MCCORMAC, OHIO CIV. RULES PRACTICE WITH FORMS § 6.10 (1970):

The Ohio Rules Advisory Committee added the provision that an insufficient claim may be subject to a motion to strike. This provision should not be interpreted as being a substitute for a motion to [dismiss for failure to] state a claim under which relief can be granted or a motion for summary judgment. It should be restricted only to a claim which is completely redundant, immaterial, impertinent or scandalous.

Id. at 132. With all due respect to Judge McCormac, so narrow an interpretation would render the provision all but meaningless. *But cf.* Berisford v. Sells, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975) (an example of a claim that would qualify as one of Judge McCormac's "completely redundant" claims). Rather, the key to the correct interpretation of the "insufficient claim" provision of Ohio Civil Rule 12(F) is to be found in OHIO R. CIV. P. 12(F), 1971 STAFF NOTE:

Rule 12(F) authorizes the court to strike from any pleading "any insufficient claim or defense." The words "claim or" were added to the Ohio rule. This provision explicitly permits an attack on one claim . . . in a pleading containing more than one claim . . . paralleling the Ohio statutes which permit a demurrer to one of several causes of action. . . .

See, §§ 2309.12,

Id. But the OHIO R. CIV. P. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is also a Rules equivalent of the old Code demurrer. *See* Schulman v. City of Cleveland, 30 Ohio St. 2d 196, 283 N.E.2d 175 (1972); *State, ex rel. Brown v. BASF Wyandotte Corp.*, 67 Ohio Op. 2d 239 (C.P. Cuyahoga County 1974); OHIO R. CIV. P. 7(C), 1971 STAFF NOTE, which states in pertinent part: "Rule 7(C) abolishes the demurrer, but the demurrer is substituted for by the motion to dismiss discussed under Rule 12." *Id.* Thus, to the extent that both are substitutes for the demurrer, they must share common characteristics.

Accordingly, it may be said that in substance the Rule 12(F) motion to strike an insufficient claim is identical to the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. That is, both admit for purpose of the motion the truth of all of the facts well-pleaded in the claim challenged; neither can be aided by evidence extrinsic to that claim; and neither can be granted unless it appears beyond doubt from the face of the claim attacked that the claimant can prove no set of facts entitling him to recovery on that claim. In other words, either motion can be granted only if the claim attacked: (1) fails to allege sufficient operative facts to show the existence of a claim for relief; (2) alleges a claim not cognizable under existing law; or (3) alleges operative facts which, on their face, establish a defense which bars recovery on the claim. (This third point is a bastard use of either motion sired by the Ohio Supreme Court in a moment of carelessness. *See* Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974), and the comment thereon in Browne, *Ohio Rule 8(C)*

Unfortunately, the third paragraph of the *Longstreth* syllabus tends to confuse the two motions, and this confusion results in an incorrect statement of the law even under the federal interpretation. As the syllabus provides: "3. A motion to strike a complaint from the files should be restricted only to the claim which is completely redundant, immaterial, impertinent or scandalous."⁹¹

Accordingly, the only post-rule Ohio authority we have on the point is at worst confusing and at best less than definitive. It does, however, suggest that the pre-rule tradition ought to be followed; that is, a distinction must be drawn between the motion to strike from a document and the motion to strike a document from the files. If this is a correct reading, and if it is an accurate signpost to future practice, it may be said that Ohio Civil Rule 12(F) cannot be used to strike an entire document from the files if it contains scurrilous matter. Indeed, under no circumstances will the inclusion of scurrilous matter warrant the striking of the entire document from the files; rather, under the authority of Rule 12(F), the scurrilous matter may be stricken *from* the document.

There remains the third question: If a document containing scurrilous matter cannot be stricken from the files under the authority of Rule

and Related Rules: Some Notes on the Pleading of Affirmative Defenses, 27 CLEV. ST. L. REV. 329 (1978).

It is in its employment that the motion to strike an insufficient claim from a pleading differs from a motion to dismiss for failure to state a claim upon which relief can be granted. If a pleading contains a single statement of claim and that statement is legally insufficient, or if a pleading contains a number of statements of claim and *all* such statements are legally insufficient, the proper motion to be used in challenging the sufficiency of the *pleading* is the Rule 12(B)(6) motion to dismiss the action for failure to state a claim upon which relief can be granted. However, if a pleading contains more than one statement of claim and one or more, but less than all, of such statements are legally insufficient, the proper motion to be used in challenging the insufficient *claim or claims* is the Rule 12(F) motion to strike from the pleading. Thus, this motion to strike is a motion to strike a particular claim or claims from a multiclaime pleading on the ground that the challenged claim does not state a claim upon which relief can be granted. For an illustration of this use of the Rule 12(F) motion to strike an insufficient claim, see *Miles v. N.J. Motors*, 32 Ohio App. 2d 350, 291 N.E.2d 758 (6th Dist. 1972).

Of course, as indicated in *Berisford v. Sells*, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975), Rule 12(F) may also be used to strike a "completely redundant" claim from a pleading, but when it is used for this purpose, it is not being used under that provision of the Rule which authorizes the striking of an "insufficient claim"; it is being used under the provision which authorizes the striking of "redundant, immaterial, impertinent, or scandalous matter." These two authorizations are separate and distinct, and ought to be kept so.

⁹¹ 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970) (the report of this decision found at 265 N.E.2d 843 does not reproduce the syllabus that appears at 27 Ohio Misc. 15).

12(F), may it be stricken from the files under the authority of Rule 11? From what little authority there is on the point, one may gather that in the federal system the answer is in the affirmative. *Payne v. Howard*⁹² is the leading case, and it puts the proposition this way:

The authority to strike pleadings stems from provisions of the Federal Rules of Civil Procedure. F.R.Civ.P. 11 confers on the Court the power to order pleadings stricken "if scandalous or indecent matter is inserted." *Id.* Similarly, F.R.Civ.P. 12(F) provides that upon motion by a party "the court may order stricken from any pleading" any material that is "redundant, immaterial, impertinent or scandalous." *Id.* Although rules 11 and 12(f) refer to "pleadings," at least rule 11 affords a basis for striking material other than formal "pleadings." See F.R.Civ.P. 7(b)(2); *Wright & Miller Federal Practice and Procedure* § 1191 (1969); *Moore, Federal Practice* ¶ 11.02 (1975). Whether that authority is to be exercised is a matter committed to the discretion of the Court.⁹³

*Spencer v. Dixon*⁹⁴ is the only other reported decision to cite Rule 11 as authority for striking a document which contains scurrilous matter, but it gives something of a mixed signal because it is not entirely clear whether the court ultimately relied upon Federal Rule 12(f) to strike the

⁹² 75 F.R.D. 465 (D.D.C. 1977).

⁹³ *Id.* at 467-68. The authorities cited for this proposition provide some support for the court's statement of what it perceives to be the rule. Professors Wright and Miller tell us:

Rule 11 provides two sanctions for a failure to sign a pleading or for a signature executed with an "intent to defeat the purpose" of the rule, or "if scandalous or indecent matter is inserted." First, the pleading "may be stricken as sham and false and the action may proceed as though the pleading had not been served." Secondly, a willful violation of Rule 11 may subject an attorney to "appropriate disciplinary action."

5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1334 (1969).

It should be noted that the court cited § 1191 of C. WRIGHT & A. MILLER to support the proposition that Rule 11 is made applicable to motions and other papers through the operation of Rule 7(B)(2), and not for the proposition that Rule 11 authorizes the striking of a document from the files because it contains scurrilous matter.

Professor Moore is somewhat less forceful. He says: "A reputable attorney cannot file sham or frivolous pleadings and motions, or insert scandalous or indecent matter. An attorney who does resort to such tactics should be disciplined; and the pleading or motion which violates the spirit of this rule should be stricken." 2A MOORE'S FEDERAL PRACTICE ¶ 11.02 (2d ed. 1975).

⁹⁴ 290 F. Supp. 531 (W.D. La. 1968).

document, or whether it relied upon Federal Rules 11 and 12(f) in tandem.⁹⁵

One may question the accuracy of this affirmative answer, and suggest that the correct answer is to be found in the last three sentences of Rule 11. Numbered here for easier reference, those sentences read as follows:

- [1] If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.⁹⁶
- [2] For a willful violation of this rule an attorney may be subjected to appropriate [disciplinary] action.⁹⁷
- [3] Similar action may be taken if scandalous or indecent matter is inserted.⁹⁸

The key to proper interpretation of those three sentences lies in the words "similar action," which appear in the third sentence. If these two words refer back to sentence [1], then there is little doubt that Rule 11 authorized the striking of a document because it contains scurrilous matter. The same conclusion may be drawn if these two words refer back to both sentences [1] and [2]. But if "similar action" refers to sentence [2] only, then Rule 11 authorizes the imposition of sanctions on the attorney who includes scurrilous matter in a document, but it does not authorize the striking of the document itself from the files.

⁹⁵ The *Spencer* decision paraphrases the motion to strike in the following terms:

The motion to strike was filed under Rules 11 and 12 of the Federal Rules of Civil Procedure; the grounds of the motion, among others, being that the pleading was filed with the intent to defeat the purposes of Rule 11 and that the pleading is replete with scandalous matter in violation of Rule 11 and with redundant, immaterial, impertinent and scandalous material in violation of Rule 12(f).

290 F. Supp. at 534. The Court did grant the motion to strike the pleading from the files, but in doing so stated:

It is fair to comment that this pleading indeed is permeated with scandalous material reprobated by Rule 11 and with redundant, immaterial, impertinent matter forbidden to be contained in a pleading under Rule 12(f) of the Federal Rules of Civil Procedure. . . . Consequently, it is the opinion of this court that, for these reasons, this Amended Complaint should be stricken, and it is so ordered.

Id. at 535. This can be read as endorsing Rule 11 as the authority for striking the pleading because it contained scandalous matter, and Rule 12(f) as the authority for striking it because it contained redundant, immaterial and impertinent matter.

⁹⁶ FED. R. CIV. P. 11; OHIO R. CIV. P. 11.

⁹⁷ *Id.* (the word "disciplinary" appears in FED. R. CIV. P. 11, but not in OHIO R. CIV. P. 11, but apart from this single difference, the text of the two Rules is the same).

⁹⁸ FED. R. CIV. P. 11; OHIO R. CIV. P. 11.

The historical antecedents of Federal Rule 11 (and thus the grandparents of Ohio Rule 11) provide some support for the reading which has "similar action" refer to the "striking" provision of sentence [1]. As the 1937 Committee Note to Federal Rule 11 indicates, the Rule "is substantially the content of Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified."⁹⁹ Federal Equity Rule 24 provided:

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signature shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.¹⁰⁰

Thus, the insertion of scandalous matter is put on the same level as a groundless pleading, but no provision is made for punishing a violation of the Rule. Here, Federal Equity Rule 21 lends its aid. As that Rule once read: "The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit."¹⁰¹ Accordingly, if scandalous matter is inserted in a document, it may be stricken out on such terms as the court shall think fit.

Based on these two equity rules, it can be argued that the "striking out" provision of Equity Rule 21 has evolved into the "striking from the file" provision of present Rule 11. Further, since the insertion of scandalous matter is an offense of the same magnitude as the assertion of a groundless claim of defense, the provision for striking the latter from the file should apply also to the former, since the former was subject to being stricken under that provision of Equity Rule 21 which has evolved into the "striking" provision of present Rule 11. Therefore, in construing present Rule 11, one must read the words "similar action" as referring to the "striking" provision of sentence [1].

The difficulty with this argument is that the blood of Equity Rule 21 runs more strongly in the veins of present Rule 12(F) than it does in the veins of present Federal Rule 11.¹⁰² Compare:

⁹⁹ For the text of the Committee Note, see 2A MOORE'S FEDERAL PRACTICE ¶11.01[2] (2d ed. 1975).

¹⁰⁰ FED. EQUITY R. 24 (the text is taken from B. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 274 (1925)).

¹⁰¹ FED. EQUITY R. 21 (the text is taken from B. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 273 (1925)).

¹⁰² For the proposition that Equity Rule 21 is the principal parent of Federal Rule 12(f), see 2A MOORE'S FEDERAL PRACTICE ¶¶ 12.01[19], [21], [22] (2d ed. 1968).

EQUITY RULE 21:

[T]he court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court may think fit.¹⁰³

FEDERAL RULE 12(f):

[T]he court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.¹⁰⁴

FEDERAL RULE 11:

If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.¹⁰⁵

It is clear from this comparison that the "striking" provision of Equity Rule 21 descended intact to its progeny, Federal Rule 12(f), and did not evolve into the "striking" provision of Federal Rule 11. At best, Rule 11 resembles a niece or nephew of Equity Rule 21, and if it were not for the fact that the 1937 Committee Note stated that Equity Rule 21 had been mated with Equity Rule 24 to produce present Federal Rule 11, we would not be able to find any trace of Equity Rule 21 in Rule 11.¹⁰⁶

But if Equity Rule 21 did not provide the "striking" provision of Rule 11,¹⁰⁷ where did that "striking" provision come from? From all that ap-

¹⁰³ FED. EQUITY R. 21 (the text is taken from B. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 273 (1925)).

¹⁰⁴ FED. R. CIV. P. 12(f).

¹⁰⁵ FED. R. CIV. P. 11.

¹⁰⁶ Professor Risinger provides an explanation for this strange result: This [1937 Committee] note is virtually unchanged from the note accompanying Rule 11 (then Rule 10) in the first preliminary draft, *see* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE 20-21 (May 1936) . . . and it seems inaccurate as applied to the final draft. In the first preliminary draft of the Federal Rules, there was no provision corresponding to Rule 12(f), which, as originally promulgated in 1938, provided for a motion to strike any "redundant, immaterial, impertinent, or scandalous matter" from a pleading. Fed. R. Civ. P. 12(f), 308 U.S. 679 (1939). In the preliminary draft the only section arguably authorizing a motion to strike for scandal was the "similar action" clause of Rule 11 (then Rule 10): "Similar action may be taken if scandalous or indecent matter . . . [is] inserted." . . . Thus, the allegation that the Rule embodied the content of Equity Rule 21 was arguably justified at least in part, since Equity Rule 21 provided for a motion to strike for scandal or impertinence, a common practice both at law and in equity for generations. . . .

In the final draft of the Federal Rules the precise office of Equity Rule 21 was provided for in Rule 12(f). . . . Thus, despite what the Advisory Committee note says, Equity Rule 21 has nothing to do with Rule 11 as finally promulgated.

Risinger, *supra* note 2, at 8-9 n.20.

¹⁰⁷ "The phrase providing that a pleading 'may be stricken as sham and false'

pears, it evolved from the traditional motion to strike a sham pleading; that is, a pleading "good in form but false in fact and dishonestly pleaded for some unworthy purpose."¹⁰⁸ It is this bit of historical evidence that provides the clue to the correct interpretation of Rule 11.

Again, given our three-sentence universe, it is clear that sentence [1] authorizes the striking of a pleading from the files only if it is found to be sham and false. But in the three sentences, there are only three possible bases for concluding that a pleading is sham and false: (a) the pleading is not signed; (b) the pleading is signed with intent to defeat the purpose of Rule 11; and (c) scurrilous matter is inserted in the pleading. If "sham and false" is a conclusion which may logically be drawn from the existence of each of these premises, then we may conclude that "similar action" refers to the "striking" provision of sentence [1], but if that is not a logical conclusion which may be drawn from premise (c), then we ought to conclude that "similar action" in sentence [3] does not refer to the "striking" provision of sentence [1].

As noted above, an attorney's signature is, in effect, an affidavit that he has read the document, that to the best of his knowledge, information and belief, there is good ground to support that which is said in the document, and that the document is not interposed for the purpose of delay. But if a document is interposed only for delay, that is tantamount to saying that "good ground" to support that document does not exist.¹⁰⁹ Therefore, in substance, the attorney's signature on a document is his affidavit that to the best of his knowledge, information and belief, there is good ground to support the content of the document. If a document is not signed, it is either because the attorney forgot to sign it, or because he could not, in good faith, swear that there are good grounds to sup-

did not come from equity practice, but the Advisory Committee note is silent both as to the antecedents of this phrase, and how it is intended to operate." Risinger, *supra* note 2, at 9 n.20.

¹⁰⁸ Risinger, *supra* note 2, at 18. See also Risinger's history of the motion to strike a sham pleading in Risinger, *supra* note 2, at 17-34.

The pre-rule Ohio tradition is in accord with Risinger's conclusions. See *Brown v. Lamb*, 112 Ohio App. 116, 171 N.E.2d 191 (1960), where the court stated: "The motion [to strike a pleading from the files] may also be employed to strike sham or frivolous pleadings. *White v. Calhoun*, 83 Ohio St., 401, 94 N.E., 743. And the exercise of the power to strike a sham pleading necessarily imports the taking of evidence at the hearing thereon." *Id.* at 121, 171 N.E.2d at 195.

¹⁰⁹ This is basically Professor Risinger's position. As he puts it:

The insertion of the certification that the pleading has not been interposed for delay seems logically redundant, since a pleading interposed *only* for delay could not have "good ground" no matter how that term is ultimately defined, and a pleading with independent "good ground" is not likely to be rendered improper because tactical considerations of delay entered into the ultimate decision of whether or not to file an otherwise honest, meritorious, and proper pleading.

Risinger, *supra* note 2, at 8.

port it. But if the attorney refuses to swear that good grounds for the document exist, then it may be inferred that the document is sham and false. Therefore, the absence of the attorney's signature raises the rebuttable presumption that the document is sham and false because there are not good grounds to support it.¹¹⁰ Accordingly, the conclusion that the document is sham and false follows logically (if somewhat uncertainly) from the existence of premise (a), the absence of the attorney's signature.

An attorney signs a document with the intent to defeat the purpose of Rule 11 if he knows that good ground to support it does not exist, or if he neither knows nor cares whether good ground to support it exists.¹¹¹ If a good ground to support the document does not exist, then the content of the document must be false. But if the content of the document is false, then the document is a sham. Therefore, the conclusion that the document is a sham and false follows logically from the existence of the "knowing" variant of premise (b). On the other hand, if the attorney neither knows nor cares whether good ground for the document exists, he cannot have a bona fide belief that there is good ground to support the document. The absence of the attorney's bona fide belief that good ground exists raises the rebuttable¹¹² presumption that the content of the document is false. But if the content of the document is false, then it

¹¹⁰ Obviously, the presumption is only a rebuttable one, since the failure to sign may be attributable solely to oversight or carelessness. It can be rebutted by the attorney's offer to sign the document when the absence of the signature is drawn to his attention. As Professor Risinger notes: "Every court that has ever faced the issue has luckily had the good sense to find an implied power both to order and to allow the technically offending pleading to be corrected." Risinger, *supra* note 2, at 15 (footnote omitted).

On the other hand, Risinger also points out: "Presumably, a refusal to correct such a technical error would be ground to infer some sort of improper motive and wilfulness in the original error, and perhaps justify 'striking' the pleading, but such a case would obviously be very rare." *Id.* (footnote omitted).

¹¹¹ One might also add that an attorney signs a document with the intent to defeat the purpose of Rule 11 if he interposes the document solely for the purpose of delay. But if we accept Professor Risinger's theory, as set out in note 109 *supra*, "delay" is simply an aspect of the absence of "good ground," and is subsumed under the broader heading. Thus, for brevity's sake we can limit our comment to the absence of good ground.

¹¹² Here we must again acknowledge Professor Risinger's contribution by subscribing to his distinction between honesty and truth. See Risinger, *supra* note 2, at 3-4. An attorney who signs a document without knowing or caring whether there are good grounds to support it is acting dishonestly, but it does not necessarily follow that the document is a sham. The attorney is dishonest and the document is a sham only if the contents of the document are untrue. However, in the absence of the attorney's bona fide belief that good grounds exist, one may reasonably presume that the content of the document is false, and the document may be stricken as sham and false unless the attorney can rebut the presumption by demonstrating the truth of the document's content.

is a sham. Therefore, the conclusion that the document is sham and false also follows logically (if not absolutely) from the existence of the "careless" variant of premise (b).

Obviously, this process of reasoning from premise (b) to the conclusion that the document is sham and false is somewhat artificial. It is hardly likely that the attorney's intent in signing the document would be drawn in question in the absence of a previous finding that the content of the document is sham and false. Thus, in real life, the process would go something like this: The court finds that the content of the document is false; it also finds that the content of the document is so obviously false that no honest, reasonably competent attorney could form a bona fide belief that there was good ground to support the position taken in the document. From these two findings the court concludes that the attorney in question did not have such a bona fide belief, and therefore he must have signed the document with intent to defeat the purpose of Rule 11. Although this reverses the process, and makes premise (b) the conclusion, and "sham and false" the major premise, it demonstrates even more emphatically the logical connection between premise (b) and the conclusion that the document is sham and false.

But no such logical or necessary connection can be drawn when we consider premise (c)—the insertion of scurrilous matter. The demonstrable absence of truth compels the conclusion that a document is sham and false. The refusal to certify that the content of a document is true, or the manifest indifference to the truth or falsity of that content, give rise to the presumption that a document is sham and false. But no such conclusion or presumption follows from the mere existence of scandalous or indecent matter. Indeed, the particular vice of scurrilous matter is that it may be true—true but irrelevant allegations set out in a document with the intent of arousing the passion and prejudice of the reader. Thus, in *Payne v. Howard*,¹¹³ for example, there is little doubt that the material about Dr. Nork, that master of medical malpractice, was true. It was scurrilous, however, because it had no relevance to the allegations made against Dr. Howard, the defendant, and because it was intended to prejudice the court against him by tarring him with the brush of innuendo.

Of course, scurrilous matter may be false. However, falsity is not inherent in scurrility; if it exists at all, it exists as an accident. Therefore, because falsity is not an inherent aspect of scurrility, it does not follow that the mere presence of scurrilous matter renders a document sham and false. But if a document is not sham and false, or is not presumed to be sham and false, it cannot be stricken under the authority of Rule 11. Accordingly, the mere presence of scurrilous matter does not invoke the "striking" provision of Rule 11, and contrary to some of the federal

¹¹³ 75 F.R.D. 465 (D.D.C. 1977).

authority on the point, a document cannot be stricken from the files under the provisions of Rule 11 simply because it is replete with scurrilous matter. In short, since "sham and false" is not a conclusion that may logically be drawn from the mere existence of premise (c), we must conclude that the words "similar action" in sentence [3] of Rule 11 do not refer to the "striking" provision of sentence [1]. Rather, they refer only to sentence [2], which mandates that an attorney may be subjected to appropriate disciplinary action if he is guilty of a willful violation of Rule 11. The insertion of scurrilous matter is not the same as a willful violation of the signature/certification provisions of Rule 11, but it is a separate and independent offense of the same magnitude as the willful violation of those signature/certification provisions, and thereby warrants the imposition of disciplinary sanctions against the scandal-mongering attorney which are similar to the disciplinary sanctions which may be imposed against the attorney who willfully violates the signature/certification provisions of the Rule.

In a word, then, the answer to the third question is in the negative: A document containing scurrilous matter cannot be stricken from the files under the authority of Rule 11.

At first blush, this hair-splitting over the proper scope of Rule 11 may seem to be much ado about nothing. Does it really make a difference if a document containing scurrilous matter is stricken from the file under the provisions of Rule 11 as opposed to the provisions of Rule 12(F)? In a word, yes! Rule 12(F) is remedial in nature; the offender is normally given leave to amend,¹¹⁴ and the action proceeds on the basis of the

¹¹⁴ See, e.g., *Therault v. Silbert*, 574 F.2d 197 (5th Cir. 1978), where the court explained that:

We have examined the notice of appeal and agree that it contains disrespectful and impertinent references to the trial judge. See Rule 12(f), F.R.Civ.P. Such documents are beneath the dignity of this court. Nothing in our liberal pro se practice dictates that this court receive abusive documents. The appellee's motion to strike the notice of appeal and dismiss the appeal are therefore GRANTED. Appellant has ten days from the issuance of this Order to file a proper notice of appeal. If he does so, his appeal and motion to appoint counsel will be reinstated.

Id. Actually, if Rule 12(F) is properly employed, leave to amend is unnecessary. If one compares the provisions of OHIO R. Civ. P. 12(E) with 12(F), one finds the amendment procedure outlined in Rule 12(E) wholly absent from 12(F). The reason for this is quite simple: Rule 12(F) is designed to strike offensive material from the pleading. Thus, when the court journalizes its order granting the 12(F) motion to strike, the offensive material is either deemed to be stricken from the document through the operation of the order, or it may be physically obliterated. In either event, the original document itself remains, and the action proceeds on the basis of that document less the material ordered stricken. No amended document need be served, and therefore there is no express provision made for the service of an amended document.

Technically, obliteration is a form of amendment. For example, certain local rules of court provide that: "Pleadings and motions may be amended as provided

amended document. On the other hand, Rule 11 is punitive in nature. As the Rule puts it: “[The document] may be stricken as sham and false and the action may proceed as though the [document] . . . had not been served.”¹¹⁵ Thus, as a punitive measure, the court may prohibit the service and filing of a substitute for the stricken document. If the court does so prohibit the filing of a substitute, the consequence to the offending party may be fatal. If the stricken document contained a statement of claim, its absence from the file may result either in a failure to commence the action within the meaning of Ohio Civil Rule 3(A),¹¹⁶ or in the dismissal of the action (or the particular claim stated in the stricken document) for failure to state a claim upon which relief can be granted.¹¹⁷ Alternatively, if the stricken document contained a statement of defense, its absence from the file would result in a failure to plead and, under the terms of Ohio Civil Rules 8(D)¹¹⁸ and 55(A),¹¹⁹ this would result in a default judgment against the offending party. Thus, the choice of Rule may be determinative of the action itself.

That brings us to the fourth and last question: Given the presence of scurrilous matter in a document, what is the proper function of Rules 11 and 12(F) in the elimination of that scurrilous matter? To some extent, the answer depends upon whether one chooses to follow the federal decisions cited above, or whether one elects the pre-rule Ohio tradition coupled with a strict reading of the two rules.

As we have seen above, the federal decisions do not limit themselves to a literal interpretation of the two Rules, but have found within their

in Civil Rule 15, but no pleading or motion shall be amended by interlineation or obliteration except upon leave of court first obtained. . . .” CUYAHOGA COUNTY CT. C.P.R. 8(F) and STARK COUNTY CT. C.P.R. 9.04. However, it is a form of amendment which does not require the service of a new document; the offending part of the original document is simply blacked out, and the balance of the original document then stands as written. But if the court prefers, it may grant the motion to strike from the original document, and then require the service and filing of a new document which does not contain the stricken material. This is a somewhat tidier process of striking out offensive material, and if it is employed, the amendment procedure of Rule 12(E) may be applied by analogy.

¹¹⁵ OHIO R. CIV. P. 11.

¹¹⁶ If, for example, a complaint is stricken without leave to substitute an amended complaint, and the court had not acquired jurisdiction over the person of the defendant at the time the complaint is stricken, there is no complaint before the court, and the first requisite of commencement—the filing of a complaint—has not been met. As a consequence, the action must fail for want of commencement.

¹¹⁷ If a complaint is stricken after the action had been commenced, and no substitute permitted, there would be no statement of claim before the court, and the court would have little choice but to dismiss the action for failure to state a claim upon which relief could be granted. Quite obviously, no relief can be granted in the total absence of a statement of claim.

¹¹⁸ OHIO R. CIV. P. 8(D).

¹¹⁹ OHIO R. CIV. P. 55(A).

spirit the authority to strike an entire document from the files if it contains scurrilous matter. If this incorrect interpretation is followed, there must still be some reason for choosing one rule over the other. The motive of the document's author provides a sound basis for choice. If the scurrilous matter is inserted through an excess of zeal, or because the author is caught up in a fit of righteous indignation, the motive is relatively benign, and the document may be stricken under the provisions of Rule 12(F), with leave to serve and file an amended document which is devoid of scurrility. But if the scurrilous matter is inserted with the intent of arousing the passion or prejudice of the reader, the motion is malignant, and the document may be stricken under the provisions of Rule 11, without leave to serve and file an amended document. The difficulty with this latter choice, however, is that the motivation in question is generally that of the *attorney* rather than the client. Thus, if the document is stricken under the provisions of Rule 11 without leave to amend, an innocent client may be punished for the attorney's misfeasance, and this is a result which at least one federal court has eschewed.¹²⁰ Be that as it may, when the federal interpretation of the two rules is followed, Rule 12(F) should be chosen when the court's objective is purely remedial, and Rule 11 when the court intends punitive action because of the improper motive behind the insertion of the scurrilous matter.

On the other hand, the pre-rule Ohio tradition combined with a literal reading of the two Rules produces a procedure which does not punish an innocent client but can punish the attorney who strays beyond the pale. The first step in the procedure is the striking of the scurrilous material *from* the document under the provisions of Rule 12(F). Depending upon the nature and extent of scurrility, this can be accomplished in one of three ways: (1) Since the court's order to strike from the document is self-executing, the court and the parties may simply deem the offensive material to have been excised and may proceed as if it were not in the document. This method is the most convenient when the scurrilous material is not particularly atrocious. (2) After the order to strike from the document has been journalized, the court or the offending attorney can physically obliterate the scurrilous material. This may be done in a number of ways, including cutting the matter out of the document, or blacking it out so that it cannot be read. This method can be used when the scurrilous material is so offensive that it should be physically removed from sight. The drawback, however, is that it destroys the record, and should not be used if any party contemplates a later appeal from the court's order to strike.¹²¹ (3) As part of its order to strike from

¹²⁰ See *United States v. Standard Oil Co. of Cal.*, 603 F.2d 100 (9th Cir. 1979), as quoted in note 4 *supra*.

¹²¹ This is technically an amendment to the document, but it has the advantage

the document, the court may order the offending attorney to serve and file a substitute document which does not contain the scurrilous material. This method is particularly useful when the scurrilous matter is so reprehensible that it should be removed from public view. Contemporaneously with the entry of the court's order to strike the document, the original document may be removed from the files and sealed, or it may be removed from the files and physically destroyed,¹²² as the court may direct. But if any party indicates a possible appeal from the court's grant of the motion to strike the scurrilous material from the document, the removal and physical destruction option should not be employed since it would also destroy the record basis for the appeal.¹²³

of not delaying the action pending the service and filing of a new document. See note 114 *supra* and accompanying text.

¹²² It is a well-settled general rule that an amended version of a document completely supersedes and replaces the original version of that document, and the original is deemed abandoned. As it is said in *Bullen v. DeBretteville*, 239 F.2d 824 (9th Cir. 1956): "It is hornbook law that an amended pleading supersedes the original, the latter being treated thereafter as non-existent." *Id.* at 833. The Ohio authorities to the same effect are collected in 43 O. JUR. 2d *Pleading* § 366 (1973). If, after amendment, the original document is deemed non-existent, it may be physically removed from the files of the court. But certain local rules of court provide that "upon the filing of an amended pleading or motion the original or any prior amendment thereof shall not be withdrawn from the files except upon leave of the court." CUYAHOGA COUNTY CT. C.P.R. 8(E); STARK COUNTY CT. C.P.R. 9.04.

¹²³ In paragraph one of the syllabus of *Fout v. Secrets*, 114 Ohio App. 107, 180 N.E.2d 628 (2d Dist. 1960), it is said: "Where a plaintiff elects to file an amended petition, he thereby abandons the original petition and waives any right to appeal from rulings sustaining motions to strike allegations there from." *Id.* at 107, 180 N.E.2d at 629. If this is still sound law, it must necessarily affect the timing of the removal and destruction of the original document. In effect, *Fout* tells us that the party against whom a motion to strike has been entered must either stand on his original document, or amend. If he stands on the original, an appeal may be taken when a final judgment is entered, but if he amends, the amendment waives any error the court may have made in granting the motion to strike, and the appeal is effectively lost. Accordingly, when granting a motion to strike from the document with leave to serve and file an amended document, the court should not order the physical removal and destruction of the original until after the offending party has made an election to stand or amend, or until after reasonable time for making such an election has passed. If the offending party elects to amend, then under the *Fout* rule, the right to appeal is lost with the service and filing of the amended document, and after those events have occurred, the court may safely order the destruction of the original document.

But the Ohio Supreme Court's recent decision in *Balson v. Dodds*, 62 Ohio St. 2d 287, 405 N.E.2d 293 (1980), casts some doubt on the present validity of the *Fout* rule. In *Balson*, plaintiff moved for summary judgment. After that motion was denied, the case proceeded to trial, and plaintiff ultimately appealed from an adverse judgment following trial. On appeal, she alleged error in the overruling of the motion for summary judgment, but the court of appeals refused to review that decision. In effect, the court of appeals held that she had waived any error in the denial of the motion for summary judgment by not standing on that motion, and by proceeding to trial. See Advocate's Research, *Ohio Courts of Appeals Opi-*

One might well ask whether there is any real difference between striking the entire document from the file (something which the court cannot do under the provisions of Rule 12(F)) and this third method of striking material from the document. There is, and the difference lies in the text of the replacement document. Technically, under this third method of striking from the document the offensive material is removed from the document, and the original document remains in the files. But the extensive deletions required make it impracticable to leave the original document in the files. Therefore, the courts permit a replacement document, and by the use of a legal fiction, treat this document as if it were the original. To carry this off, however, the text of the replacement document must be limited to an exact reproduction of the original, less the offensive material which the court has ordered stricken. Thus, from a textual point of view, the text of the replacement document can-

nion Summaries, 52 OHIO BAR 1978 (1979), where this portion of the appellate court's decision is abstracted: "The syllabus of the court is as follows: '1. Alleged error in the overruling of a motion for summary judgment is waived by the movant by proceeding to trial and is not reviewable on an appeal from a final judgment rendered against the movant pursuant to such trial. . . .'" *Id.* at 1988.

But the Ohio Supreme Court did not agree. In pertinent part, it said:

The trial court's denying appellant's motion for summary judgment is not a final appealable order. . . . Immediate review of this order was impossible, therefore, unless appellant elected to forego trial on the merits by standing on her motion, and by permitting the trial court to enter final judgment in the form of an involuntary dismissal for failure to prosecute. Civ. R. 41(B).

If we were to sustain the Court of Appeals' ruling that the above order is non-reviewable on appeal from a subsequent adverse final judgment, appellant would be required to choose *either* trial on the merits without preserving for appellate review the trial court's alleged error on summary judgment, *or* immediate appellate review of the trial court's alleged error on summary judgment without preserving her right to trial on the merits. Thus, the conjunction of the above rules would unfairly present appellant with a Hobson's choice. Moreover, such a scheme would inhibit effective and consistent appellate court scrutiny of trial court compliance with pre-trial procedure. To avoid such difficulties, appellant should be permitted to try her case on the merits and still preserve for appellate review the trial court's alleged error on summary judgment. Thus, we hold that a trial court's denial of a motion for summary judgment is reviewable on appeal by the movant from a subsequent adverse final judgment.

62 Ohio St. 2d at 289, 405 N.E.2d at 295 (emphasis added).

Obviously a motion to strike from a document is not the same as a motion for summary judgment, but neither are they that different. A motion to strike an insufficient claim or defense from a pleading, for example, is, in substance, an unsupported motion for partial summary adjudication with respect to that claim or defense. Thus, what the Supreme Court says here of the motion for summary judgment may be translated into a principle that applies to all "pre-trial procedure." That being so, the *Fout* rule must give way, and a court granting a motion to strike should not order the destruction of the original document unless all parties clearly indicate that no appeal will be taken from the order to strike.

not vary from the text of the original except with respect to the stricken material. On the other hand, when the court exercises its inherent power to strike a document from the files with leave to substitute a new document, the text of the new document is limited only by the scope of the court's order striking the original, or by the provisions of such Civil Rules as Rule 15(C).¹²⁴ If the court's order does not specify the content of the replacement document, and if there are no statutes of limitations or other problems of like nature, the text of the replacement document can differ radically from the text of the original which the court ordered stricken from the files.

The second step in the procedure under discussion is the imposition of sanctions on the *attorney*. The authority for this procedure is found in sentences [2] and [3] of Rule 11. When properly integrated, they read: "Appropriate [disciplinary] action may be taken against an attorney if scandalous or indecent matter is inserted [in a document subject to the signature requirement of Rule 11]."¹²⁵ While it is sometimes said that the attorney who inserts scurrilous matter in a document should be disciplined,¹²⁶ the language of the Rule¹²⁷ makes it clear that the imposition of disciplinary sanctions is discretionary with the court. The exercise of that discretion, however, is not dependent upon a finding that the scurrilous material was inserted intentionally, or with an evil motive; as far as the language of the Rule is concerned, the mere presence of scurrilous material in a document is the occasion for disciplinary action; the motive underlying its insertion is immaterial.¹²⁸

¹²⁴ OHIO R. CIV. P. 15(C) discusses those situations in which an amendment may relate back to the date of the original in order to avoid the bar of the statute of limitations.

¹²⁵ See notes 87-98 *supra* and accompanying text.

¹²⁶ See, e.g., *Lowenschuss v. C.G. Bluhdorn*, 78 F.R.D. 675 (S.D.N.Y. 1978), which quotes Professor Moore to the following effect:

Lowenschuss and Levin contend that the affidavits of Messrs. Dennis Jacobs and Barry Ostrager, which accompanied the motion to disqualify them, contain false and slanderous statements. They further claim that the motion was brought for improper purposes. They therefore move pursuant to FED.R.CIV.P. 11 to strike the motion to disqualify them and request the imposition of disciplinary sanctions upon Ostrager and Jacobs.

"A reputable attorney cannot file sham or frivolous pleadings and motions, or insert scandalous or indecent matter. An attorney who does resort to such tactics should be disciplined; and the pleading or motion which violates the spirit of this rule [11] should be stricken." 2A Moore's Federal Practice ¶ 11.02 at 11-6-7 (2d ed. 1975).

Id. at 678-79.

¹²⁷ OHIO R. CIV. P. 11. Rule 11 provides in pertinent part that "action *may* be taken . . ." *Id.* (emphasis added).

¹²⁸ *Id.* Rule 11 provides in pertinent part that "action may be taken if scandalous or indecent matter is inserted."

Motive, of course, may be considered both with respect to whether disciplinary action will be taken, and if so, the severity of that action. In any event, if disciplinary action is to be taken, it is to be taken against the attorney personally, and not the client.¹²⁹ Thus, the proper use of Rules 11 and 12(F) in tandem will result in the removal of the scurrilous material with a minimum of fuss; the punishment of the offending lawyer (when the court deems punishment in order); and the protection of the rights of the innocent client.

Before we took up the question of scurrilous matter, our inquiry into motive was limited to the motive of the client. Scurrility, however, brings into play the motive of the attorney, since scurrilous matter cannot be inserted in a document without the attorney's consent, connivance or cooperation. Accordingly, the motivation of the client is not the only relevant motivational consideration; the attorney making a Rule 11 investigation must not only inquire into the motivation of the client, but must also subject himself to a continuing examination of conscience. Even when the client's motivation is of the purest, the attorney may not take any action which is motivated by the attorney's desire to harass or injure opposing attorneys or adverse parties.¹³⁰

(2) Evaluation—As to Theory

A client has the right to seek any lawful objective through legally permissible means, and to present for adjudication any lawful claim, issue or defense.¹³¹ But the emphasis is on "lawful;" an attorney may only

¹²⁹ From what has been said above, it is clear that the "similar action" authorized by sentence [3] of Rule 11 refers to the phrase "an attorney may be subjected to appropriate [disciplinary] action," which appears in sentence [2]. See notes 97-98 *supra* and accompanying text. See also *United States v. Standard Oil Co. of Cal.*, 603 F.2d 100, 103 n.2 (9th Cir. 1979), in which the court points out that sanctions are to be imposed on the attorney, and not on the client.

¹³⁰ For example, EC 7-10 provides that: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10. Also, EC 7-37 states: "In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers." *Id.* at EC 7-37. DISCUSSION DRAFT, *supra* note 38, states it this way: "A lawyer shall be fair to other parties and their counsel, accord them their procedural rights, and fulfill obligations under the procedural law and established practices of the tribunal." *Id.* at rule 3.2(a). And in addition: "(a) In preparing and presenting a cause, a lawyer shall respect the interests of third persons, including witnesses, jurors, and persons incidentally concerned with the proceeding. (b) A lawyer shall not: . . . (2) use a procedure having no substantial purpose other than to embarrass, delay, or burden a third person." *Id.* at rule 3.4. See also Annot., 87 A.L.R. 3d 351 (1978), which discusses an attorney's verbal abuse of another attorney as the basis for disciplinary action.

¹³¹ As it is said in ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1:

represent a client within the bounds of the law.¹³² Thus, an attorney may not accept employment if it is obvious, or may withdraw from employment if it becomes obvious, that the client wishes to present, or insists upon presenting, a claim or defense which is not warranted under existing law.¹³³ Likewise, an attorney may not knowingly advance a claim

“In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.” *Id.* A somewhat similar sentiment is found in the comment to rule 1.3 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT:

The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those same limits, a client also has a right to consult on the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.

DISCUSSION DRAFT, *supra* note 38, at comment to rule 1.3.

¹³² Again, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 speaks to the point: “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.” *Id.* Compare rule 1.3(b) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, which states: “A lawyer shall not pursue a course of action on behalf of a client in violation of law or the rules of professional conduct.” DISCUSSION DRAFT, *supra* note 38, at rule 1.3(b).

¹³³ Thus, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109 provides:

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to: . . .

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Id. And ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 states:

(C) Permissive withdrawal.

If DR 2-110(B) [mandatory withdrawal from employment] is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because: (1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law. (b) Personally seeks to pursue an illegal course of conduct. (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

Id. Rule 1.16 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, puts it this way:

(a) Except as stated in paragraph (c), a lawyer shall withdraw from representing a client if: (1) continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the rules of professional conduct; . . . (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: . . . (2) the client per-

or defense that is unwarranted under existing law.¹³⁴ It follows, therefore, that the attorney may not sign a document unless he believes that its contents are in compliance with applicable law and rules.¹³⁵ In other words, an attorney may not sign, serve or file a document that is frivolous in nature.¹³⁶

sists in a course of conduct that is illegal or unjust. . . . (c) A lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal.

DISCUSSION DRAFT, *supra* note 38, at rule 1.16.

¹³⁴ This is, in part, the burden of ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, which states:

(A) In his representation of a client, a lawyer shall not: . . . (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Id. The ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT counterpart to this Disciplinary Rule is found in rule 1.3(b), note 132 *supra* and accompanying text, and in rule 3.1, which reads in pertinent part:

(a) A lawyer shall not: (1) file a complaint, motion, or pleading other than one that puts the prosecution to its proof in a criminal case, unless according to the lawyer's belief there is good ground to support it; . . . (4) make a representation about existing legal authority that the lawyer knows to be inaccurate or so incomplete as to be substantially misleading.

DISCUSSION DRAFT, *supra* note 38, at rule 3.1.

¹³⁵ *See, e.g.*, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25, where it is said:

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules. . . .

¹³⁶ Thus ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 tells us:

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

The comment to rule 3.3 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, states that:

A claim or defense having little or no authority in existing precedent may have great potential for inviting a change in the law. A factually implausible claim or defense may nevertheless be sustainable. It is not improper to assert a claim or defense that can be supported by good faith argument for an extension, modification, or reversal of existing law. Ac-

At the common law, a pleading was deemed "frivolous" if, from the face of the pleading, it was obviously false in fact.¹³⁷ In the Ohio system, however, a "frivolous" pleading is one that is insufficient as a matter of law; a pleading that is false in fact is a "sham" pleading.¹³⁸ Thus, if the position taken in a document is not within the bounds of the well-settled law, or if it is not within those bounds and cannot be supported by a good faith argument for an extension, modification or reversal of the existing law, both the position and the document advocating it are frivolous.¹³⁹

count has to be taken of the potential for the law's development, the exigencies of proof, and other variables that go into the assessment of a cause. Nevertheless, there is a limit beyond which legal inventiveness becomes frivolity, and the propriety of a lawyer's conduct in supporting a cause cannot depend simply on personal good faith. The essential question is whether reasonably competent counsel could conclude in good faith that the claim or defense in question has substantial basis. The same principle applies to issues within a case.

DISCUSSION DRAFT, *supra* note 38, at comment to rule 3.3.

¹³⁷ See Risinger, *supra* note 2, at 18, where he notes: "Frivolous, on the other hand, meant obviously false upon the face of a pleading, as when something was pleaded that conflicted with a judicially noticeable fact or was logically impossible, such as a plea of judgment recovered before the accrual of the cause of action." *Id.*

¹³⁸ Thus, in *White v. Calhoun*, 83 Ohio St. 401, 403, 94 N.E. 743, 744 (1911), the Ohio Supreme Court noted: "A frivolous answer is one that contains no valid defense, one which is insufficient on its face. A sham answer is one good in form, but false in fact and not pleaded in good faith." *Id.* Risinger explains that "[d]uring the 19th century, both in England and America, the term sham meant good in form but false in fact and dishonestly pleaded for some unworthy purpose." Risinger, *supra* note 2, at 17-18.

¹³⁹ This is the essential thrust of the comment to rule 3.1 of the ABA MODEL RULES OF DISCIPLINARY CONDUCT, DISCUSSION DRAFT:

An argument is frivolous if a disinterested legal analyst could say it lacks any basis in existing authority and could not be supported by good faith argument for an extension, modification, or reversal of existing authority. Even an advocate for a criminal defendant, who is obliged to state the best possible argument for the client, is not required to submit a frivolous argument.

DISCUSSION DRAFT, *supra* note 38, at comment to rule 3.1. See also *Delgado v. de Jesus*, 440 F. Supp. 979 (D.P.R. 1976), where the court dismissed a complaint as being frivolous with the following comment:

The federal claim for sanctions arises under Rule 11 of the Federal Rules of Civil Procedure: Lawyers have a responsibility before subscribing their names to complaints, to ascertain that a reasonable basis exists for the allegations for jurisdiction and for relief requested. This suit is frivolous and there was not the slightest basis for its assertion. *Miller v. Schweickart*, 413 F. Supp. 1059 (S.D.N.Y. 1976).

...

ORDERED, that defendant be, and hereby is, awarded attorney's fees in the amount of \$300.00 to be paid by plaintiff.

Id. at 982. It is important to note that the court did not find the complaint to be

The Ethical Considerations and Disciplinary Rules, however, emphasize the attorney's state of mind; they speak of what the attorney "knows," or does "knowingly," what is "obvious," or what he "believes." But these words are swords, not shields; the attorney may not close his eyes to that which may be discovered by diligent research, study and reflection.¹⁴⁰ Within the narrow context of the immediate discussion, before signing any document, the attorney must undertake research sufficient to satisfy himself that the position taken in the document is warranted by existing law, and in accord with all applicable rules of evidence and procedure, Disciplinary Rules and other enforceable professional regulations.¹⁴¹ But the satisfaction produced by this research must be a good faith satisfaction:¹⁴² satisfaction beyond a professional doubt,¹⁴³ and not simply a conscience-soothing gloss. The attorney's

false in fact; rather, it found that there was no legal basis for bringing the complaint. Accordingly, it found that a complaint is frivolous when no reasonable legal basis exists for filing it, and that the filing of such a complaint is punishable under the provisions of Rule 11.

¹⁴⁰ The court declared in *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961), that:

In the language of the rule, "The signature of an attorney constitutes a certificate by him . . . that to the best of his knowledge, information, and belief there is good ground to support [the pleading]. . . ." An affirmative obligation is thus cast upon the attorney signatory to a pleading that to be satisfied, in good faith, that there is good ground to support the claim asserted therein. See *Rosen v. Texas Company*, 161 F. Supp. 55, 57 (S.D.N.Y. 1958).

Id. at 397.

¹⁴¹ See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 and rule 1.3(b) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, quoted in note 132 *supra*; ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25, quoted in note 135 *supra* and accompanying text; and *Delgado v. de Jesus*, 440 F. Supp. 979 (D.P.R. 1976).

¹⁴² See *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961), as quoted in note 140 *supra*.

¹⁴³ Thus, in *Crimmins v. American Stock Exchange*, 368 F. Supp. 270 (S.D.N.Y. 1973), it was said:

We consider it the responsibility of an attorney to bring suits of this nature in the spirit of Rule 11, Federal Rules of Civil Procedure, only if he is convinced beyond professional doubt that his client has been denied the relevant elements of fairness embodied in the noble concept of due process.

Id. at 281.

Also, the comment to rule 3.3 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, states that:

A claim or defense having little or no authority in existing precedent may have great potential for inviting a change in the law. A factually implausible claim or defense may nevertheless be sustainable. It is not improper to assert a claim or defense that can be supported by good faith argument for an extension, modification, or reversal of existing law. Account has to be taken of the potential for the law's development, the exigencies of proof, and other variables that go into the assessment of a

signature constitutes an affidavit that he has acted with professional integrity in looking into the legal merits of the matter presented in the document.¹⁴⁴

cause. Nevertheless, there is a limit beyond which legal inventiveness becomes frivolity, and the propriety of a lawyer's conduct in supporting a cause cannot depend simply on personal good faith. The essential question is whether reasonably competent counsel could conclude in good faith that the claim or defense in question has a substantial basis. The same principle applies to issues within a case.

DISCUSSION DRAFT, *supra* note 38, comment to rule 3.3. See also note 139 *supra* and accompanying text.

¹⁴⁴ That the attorney's signature is an affidavit of merit, see *Russo v. Sofia Bros.*, 2 F.R.D. 80 (S.D.N.Y. 1941), where it is said:

As to the defendant's plea that the plaintiff show a meritorious case as a condition to permitting the amendment, I think that the proposed pleading, as verified, is sufficient. When filed, the signature of plaintiff's attorney thereon, pursuant to Rule 11, F.R.C.P., will be the equivalent of an affidavit of merit.

Id. at 82.

The same conclusion may be garnered from Judge Charles E. Clark's remarks on Rule 11 made at the various Institutes on the Federal Rules of Civil Procedure. At the Institute held in Washington D.C. in 1938, he said:

Rule 11 deals with signing of pleadings. Here we follow the equity rule that the signature of the lawyer, carrying with it certain responsibilities, is much more important and worth while than an oath or verification attached to the complaint. It is really an easy way of evading responsibility to draw a formal sounding document with long legal allegations and then get your client, who, thank God, can't understand them, to swear that they are all true. Then everybody has fulfilled his or her obligation. But after all, it doesn't amount to anything. In general the oath has been more defiled than honored by applying it to a situation of that kind. So here, instead of taking this course, we say that a lawyer is held to these certain obligations when he signs a pleading: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Then certain penalties are stated, including disciplinary action against the attorney for violation of the rule.

ABA, PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., 1938, at 52 (1939). And again, at the 1938 Institute held in Cleveland, Ohio, he said:

Rule 11 deals with the Signing of Pleadings. There, if you read down through it, you will see that, in general, verification, or taking of oath, is not required, but, on the other hand, the signing by the attorney is a certificate of substantially the same effect, perhaps a little stronger than any mere formal oath would be.

We attempted, in Rule 11, to add certain penalties for signing improperly, and whether they are effective or not remains to be seen, but the idea was that the signature of an attorney alone ought to carry with it a certificate that he had read the pleading and to the best of his

Where the bounds of the law are made certain by well-settled rules and precedents, such satisfaction readily occurs, but where those bounds are uncertain because of a lack of precedent, or because of conflicting authority,¹⁴⁵ the outcome is otherwise. In this latter situation the attorney must take the facts as he finds them, and should resolve doubts as to the bounds of the law in favor of the client.¹⁴⁶ The attorney may urge any permissible construction of the law favorable to the client without regard to the attorney's professional opinion as to the likelihood that the construction will ultimately prevail, provided that the position taken is supportable by a good faith argument for an extension or modification of the well-settled law.¹⁴⁷

Does this mean that an attorney may not sign a document which takes a position that is contrary to the well-settled law? As a general rule, the answer is in the affirmative.¹⁴⁸ But there are exceptions. The attorney

knowledge there was good ground to support it, and it was not interposed for delay.

ABA PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT CLEVELAND, OHIO, 1938, at 236-37 (1938).

¹⁴⁵ The ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY clearly recognizes this difficulty. As it is said in Canon 7:

The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-2.

¹⁴⁶ This is the burden of ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3, where it is said:

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. . . . In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. . . . While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.

Id.

¹⁴⁷ See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4, quoted in note 136 *supra* and accompanying text. Rule 3.3(b) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, puts it this way: "Except as stated in paragraph (c), a lawyer shall bring or defend a proceeding, or assert or controvert an issue therein, only when a lawyer acting in good faith would conclude that there is a reasonable basis for doing so." DISCUSSION DRAFT, *supra* note 38, at rule 3.3(b). As to the "good faith" required, see that portion of the comment to rule 3.3 of the DISCUSSION DRAFT, quoted in note 139 *supra* and note 149 *infra* and accompanying text.

¹⁴⁸ See notes 132 and 134 *supra* and note 149 *infra* and accompanying text.

may sign a document if the position taken is supportable by good faith argument for an extension, modification or reversal of the existing law.¹⁴⁹ The Ohio "guest statute"¹⁵⁰ furnishes an apt example. Suppose that prior to *Primes v. Tyler*¹⁵¹ an attorney represented a client who was injured while clearly a guest in another's automobile, and there was absolutely no evidence to support a charge of wilful or wanton misconduct against the driver. Under such circumstances, the well-settled law of Ohio barred any action against the driver. But at the same time the constitutionality of such guest statutes was challenged nationwide, and the supreme courts of a number of states were sustaining such challenges. Given that climate, the attorney for the guest could make a good faith argument that the Ohio guest statute was also unconstitutional, and could ethically sign a complaint in an action against the driver if there is evidence that the guest's injury had been caused by

¹⁴⁹ In addition to ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4, see ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109, which states in pertinent part:

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to: . . . (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Id. And ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110, which gives the second step:

(C) Permissive withdrawal. If DR 2-110(B) [covering the mandatory withdrawal from employment] is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because: (1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

Id. Finally, note ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, where it is said:

(A) In his representation of a client, a lawyer shall not: . . . (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Id.

¹⁵⁰ See OHIO REV. CODE ANN. § 4515.02 (Page 1973), which reads as follows: The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

Id.

¹⁵¹ 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

the driver's negligence. It would not be ethical, however, for the attorney to sign such a complaint if it alleged that the client was a paying passenger, or that the driver was guilty of wilful or wanton misconduct, since the example stipulated that there was no factual basis for such allegations. Neither would it be ethical for an attorney to attempt a change in the law by concealing pertinent facts which, if known, would bring the proceeding within a well-settled doctrine that is adverse to the attorney's position.¹⁵² Although a complaint containing misstatements of fact, or omissions of essential operative fact, might not be "frivolous," it would be a "sham," and as such, it would fall under the ban of Rule 11.¹⁵³ Consequently, an attorney seeking to change the well-settled law must not only have a good faith belief that there is a reasonable basis for his position, but must also act in good faith by being candid with the court.¹⁵⁴ With respect to the legal theory upon

¹⁵² See, e.g., *Toledo Bar Ass'n v. Fell*, 51 Ohio St. 2d 33, 364 N.E.2d 872 (1977), in which the Ohio Supreme Court noted:

The [Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio] found that Fell (a specialist in the field of Workmen's Compensation law), having understood that it had been the long established practice of the Industrial Commission to deny any claim for permanent-total disability benefits upon notice of the death of the claimant, deliberately withheld information concerning his client's death prior to the hearing on the motion concerning the claim. The board concluded that Fell's primary motive in withholding such information was to gain for himself a fee to which he was not entitled, but yet received.

Id. at 34, 364 N.E.2d at 873. After concurring in the Board's findings of fact and conclusion the court found that, among other disciplinary rules, Fell had violated ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3), which reads: "(A) In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal." *Id.*

But see *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975), in which the plaintiff put the need to change the law squarely before the court by pleading a case that was beyond the pale of the well-settled law. As the Ohio Supreme Court noted:

Upon this record, we agree with the determination of the Court of Appeals that plaintiff was a guest transported without payment, and not a "passenger." Plaintiff's allegation of negligence, rather than willful and wanton misconduct, on the part of the defendant, squarely places defendant within the class of persons which the guest statute absolves of liability. Plaintiff may not recover for his injuries unless that statute contravenes the organic law of this state or nation. . . . Therefore, the question presented is whether the guest statute contravenes the constitutions of Ohio or the United States.

Id. at 196, 331 N.E.2d at 725.

¹⁵³ As it is noted in ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25: "[A] lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; . . ." *Id.*

¹⁵⁴ See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3), quoted in note 152 *supra*, as well as the authorities cited in note 155 *infra* and accompanying text.

which an action or proceeding is premised, this duty of candor is three-fold: (1) the attorney may not knowingly misrepresent the applicable law; (2) under some circumstances the attorney may have to disclose applicable law that is contrary to the position which he advocates; and (3) the attorney may not make a frivolous legal argument.¹⁵⁵ The attorney's

¹⁵⁵ The candor which Rule 11 and the Code of Professional Responsibility requires is candor with respect to both the law and the facts. Candor with respect to the law is mandated by ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23, which states:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

Id. Rule 3.1 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, says much the same thing, but in a slightly different way:

A lawyer shall be candid toward a tribunal. . . . (c) If a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the lawyer shall advise the tribunal of that authority.

DISCUSSION DRAFT, *supra* note 38, at rule 3.1. And in the comment supporting this rule, we find:

Legal argument based on misrepresentation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize that the existence of pertinent legal authorities is as much a matter of fact as the existence of evidentiary documents. An assertion about the state of law that an advocate knows to be false is a misrepresentation of fact.

With regard to matters of law, it has long been recognized that an advocate has a duty to disclose to the tribunal important authority of which the advocate is aware but which has not been disclosed by an opposing party. The underlying concept is that legal argument is a discussion among the advocates and the tribunal, seeking to determine the legal premises properly applicable to the case. The extent of disclosure is at times a matter of judgment. An advocate is not required to present the full array of opposing authority. Where the lawyer knows of authority that the court clearly ought to consider, the court should be advised of its existence if the opposing party has not done so.

A legal argument may be so baseless as to amount to a misleading argument. An argument is frivolous if a disinterested legal analyst could say it lacks any basis in existing authority and could not be supported by good faith argument for an extension, modification, or reversal of existing authority.

DISCUSSION DRAFT, *supra* note 38 at comment to rule 3.1. Accordingly, the duty of candor not only prohibits the misrepresentation of the existing law, and the making of frivolous legal arguments, but also mandates the disclosure of applicable

signature under the provisions of Rule 11 is, in effect, his affidavit that the document upon which that signature appears complies with all three branches of this duty of candor.

But what of the case when the attorney for the claimant knows that the defender has a valid defense to the claim which, if asserted, will bar recovery on the claim? May the attorney sign the document asserting such a claim? Risinger takes the position that the attorney may "rely upon the rules regarding the burden of pleading," and may sign such a pleading without violating Rule 11.¹⁵⁶ He also notes, however, that a distinction may be drawn between defenses to a claim which are "extrinsic" (such as the statute of limitations), and defenses which are "intrinsic" to that claim. Risinger explains that:

If such a distinction is accepted, then one could rely on the assignment of burden of pleading in regard to "extrinsic" defenses, but if there were sure knowledge of the existence of fraud or other "intrinsic" defenses, there would not be good ground for a claim, even when there was no actual untruth in the pleading itself.¹⁵⁷

To date, the courts have not given this question the attention which it deserves, and a definitive answer must await further developments.

(3) Evaluation—As to Fact

A "sham" document is one that is false in fact although good in form.¹⁵⁸ An attorney may not ethically sign a document which he knows to be a sham. But Ethical Consideration 7-3 mandates that "in asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them."¹⁵⁹ Therefore, before signing a document, an attorney must make a good faith effort to ascertain the factual basis for the position taken in that document.¹⁶⁰ The Staff Note to Rule 11 provides that "[t]he rule places

law, even if that law is against the position taken by the attorney. Under the provisions of OHIO R. CIV. P. 11, an attorney's signature on a document is, in effect, the attorney's affidavit that he has complied with this three-fold duty of candor with respect to the applicable law.

¹⁵⁶ See Risinger, *supra* note 2, at 59.

¹⁵⁷ *Id.* Of course, this rule would not apply in the *Primes* situation if the attorney believed that he had a good faith argument for an extension, modification, or reversal of the existing law which would invalidate or neutralize the "intrinsic" defense. *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

¹⁵⁸ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3.

¹⁵⁹ See *White v. Calhoun*, 83 Ohio St. 401, 94 N.E. 743 (1911).

¹⁶⁰ See *Miller v. Schweickart*, 413 F. Supp. 1039 (S.D.N.Y. 1976), which states:

Lawyers have a responsibility before subscribing their names to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made upon information

the burden for the truthfulness of the pleadings on the attorney — where the responsibility belongs. In effect, his signature, he being an officer of the court, is the verification."¹⁶¹ And Risinger states:

Rule 11 seeks to obtain honesty in pleadings and other papers by requiring the signature of an attorney, and by requiring that

and belief. That is one of the purposes of Rule 11 of the Federal Rules of Civil Procedure. Unverified hearsay based on rumor is not sufficient upon which to subject one to the burdens of complex litigation and heavy legal costs—at least not in this case. The claim that was advanced against Josephthal not only bordered on the frivolous, but there was not the slightest basis for its assertion.

Id. at 1061-62. This passage has become the authoritative statement of the attorney's minimum responsibility under the provisions of FED. R. CIV. P. 11. *Morgan v. Prudential Group, Inc.*, 81 F.R.D. 418 (S.D.N.Y. 1978); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 142 (E.D. Pa. 1978); *Delgado v. de Jesus*, 440 F. Supp. 979 (D.P.R. 1976). In addition, at least one state court has, in part, relied upon this passage in supporting its disbarment of an attorney who violated the state equivalent of FED. R. CIV. P. 11. *See State v. Phelps*, 226 Kan. 371, 598 P.2d 180 (1979).

As ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 puts it: "(A) In his representation of a client, a lawyer shall not: . . . (5) Knowingly make a false statement of law or fact." *Id.* *See also* rule 3.1 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, to the effect that:

A lawyer shall be candid toward a tribunal.

(a) A lawyer shall not:

(1) file a complaint, motion, or other pleading other than one that puts the prosecution to its proof in a criminal case, unless according to the lawyer's belief there is good ground to support it;

(2) make a knowing misrepresentation of fact; . . .

DISCUSSION DRAFT, *supra* note 38, at rule 3.1. The comment to the above rule expands on the rule itself:

There are several important aspects of the duty of candor. First, a contention in a pleading or other court document should have good ground to support it. *See* Federal Rules of Civil Procedure 11. Second, a representation made by a lawyer should be true according to the lawyer's own knowledge, unless the representation is indicated to be otherwise. Thus, when a lawyer asserts that an event occurred, or did not occur, or that a document does or does not exist, the assertion must be based on such knowledge. . . .

An advocate is responsible for pleadings and other documents prepared for litigation and for statements made to the tribunal. A lawyer is not required to have personal knowledge of the matters asserted, for litigation documents ordinarily purport to be assertions made by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, a lawyer must refrain from making contentions the lawyer knows lack a factual basis.

DISCUSSION DRAFT, *supra* note 38, at comment to rule 3.1.

¹⁶¹ Or, as it is suggested in *United States v. Stevens*, 510 F.2d 1101 (5th Cir. 1975), the attorney's signature on a document is the equivalent of a formal affidavit to the effect that the content of the document is factually true to the best of the attorney's knowledge, information and belief. *See also* note 128 *supra* and accompanying text.

there be good ground to support the document signed. Good ground cannot exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document.¹⁶²

Obviously, the attorney cannot sign a document which asserts a position which the attorney knows to be false.¹⁶³ Thus, if a statement of claim contains some allegations that are known to be true, the attorney representing the defender may not sign a document which asserts a general denial of that statement of claim, since the position taken by the general denial is known to be a false position.¹⁶⁴ As the Civil Rules state:

¹⁶² See *Risinger, supra* note 2, at 61. See also *State v. Phelps*, 226 Kan. 371, 598 P.2d 180 (1979).

¹⁶³ *Id.* See also *American Automobile Ass'n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952), where the court stated:

One of the obvious purposes of Rule 11 is to keep out of a case issues that are known to be false by the attorney who signs a given pleading, and the violation of the Rule in this case is clear and unmistakable; this opinion should be filed separately in the office of the Clerk of this Court, and indexed against the name of the defendant's attorney, so that, in the event that his professional conduct in any other connection shall become a subject of inquiry, this case and this record can be referred to for such instruction as it may yield.

Id. at 656.

¹⁶⁴ See, e.g., *Tiktin v. Brown*, 17 Ohio Op. 3d 284 (Clev. Hts. Mun. Ct. 1980):

This matter comes on for decision on defendants' motion to reinstate their amended answer and counterclaim. By a previous order dated April 28, 1980, this Court denied defendants leave to serve and file their amended answer because it was apparent from the fact [sic] of the record that the amended answer was sham and false, and signed in violation of Civ. R. 11, at least to the extent that it contained a general denial. . . . [A] pleader may use a general denial only when he or she believes in good faith that all of the allegations in the preceding pleading are false, and he or she intends to deny all of them.

It is impossible for this Court to believe that defendants' amended answer is made in good faith when it denies that the plaintiff was a tenant of theirs in property located at 2588 Mayfield Road, Cleveland Heights, Ohio, and it is equally impossible for this Court to believe that defendants' attorney is in compliance with the certification provisions of Civ. R. 11 when he denies on the one hand that the address of the premises owned by the defendants is 2588 Mayfield Road, Cleveland Heights, Ohio, and on the other, avers that defendants own an apartment building at [that same address].

A closer scrutiny of the pleadings will no doubt reveal other averments which cannot be denied in good faith, but from what has been said above, it is patent from the face of the record that the general denial in defendants' tendered amended answer is sham and false, and that the pleading was signed with the intent to defeat the purpose of

OHIO CIVIL RULE 8(B):

[If] the pleader intends in good faith to controvert all the averments of the preceding pleading, . . . including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

FEDERAL CIVIL RULE 8(b):

[If] the pleader intends in good faith to controvert all the averments of the preceding pleading, . . . including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Since statements of claim are seldom wholly false, it may be said as a practical matter that "general denials or the equivalent are no longer permitted under the Federal Rules of Civil Procedure."¹⁶⁵ Because the Ohio Rule is identical to the Federal Rule, the same practical result obtains in the Ohio system.¹⁶⁶

Civ. R. 8(B) and 11. For these reasons the Court must overrule defendants' motion to reinstate the amended answer.

Id. at 285-86. Or, as Professor Risinger provides: "Good ground cannot exist as to any alleged proposition known to be false, including a denial; . . ." Risinger, *supra* note 2, at 61.

¹⁶⁵ *Gulf Oil Corp. v. Bill's Farm Center, Inc.*, 52 F.R.D. 114, 118-19 (W.D. Mo. 1970). But this is true only as a general rule; there may be rare cases in which a general denial will lie. As it is noted in *United States v. Long*, 10 F.R.D. 443 (D. Neb. 1950):

It can not be said that Rule 8(b) forbids, in all circumstances, the employment of a general denial in the making of an answer. Quite the contrary, the rule expressly permits such a denial, but it also prescribes the sole condition under which it may be tendered. That condition is present when, but only when, the pleader intends in good faith to controvert "all the averments of the preceding pleading."

Id. at 444-45. However, in a subsequent paragraph on page 445 of the report, the Long court also notes that when an attorney does file a general denial, his signature on that pleading is an assurance to the court that "upon his honor as a member of the bar of this court" his client intends to controvert every allegation in the preceding pleading.

¹⁶⁶ In addition to *Tiktin v. Brown*, 17 Ohio Op. 3d 284 (Clev. Hts. Mun. Ct. 1980), see OHIO R. CIV. P. 8(B), 1971 STAFF NOTE, where it is said: "[A] defendant is seldom in a position to deny in good faith all allegations in a plaintiff's pleading." *Id.*

Under pre-rule Ohio practice, the general denial was not taken literally; it was simply a pleading fiction—like the plea of "not guilty" in a criminal action—which had the effect of requiring the claimant to assume the full burden of proof with respect to each allegation in the statement of claim. Under rules practice, this function of the general denial has been abolished:

In this court a defendant has no right categorically to deny an allegation which he knows or believes to be true, solely to the end that he may

An attorney, however, may not sign a document controverting a position taken by another party solely on the ground that he does not know that position to be true.¹⁶⁷ With respect to each and every allegation of

compel his adversary to bear the burden and cost of its proof. One objective of the quoted portions of [Rules 8(b) and 11] is the elimination of that discreditable anachronism in pleading.

United States v. Long, 10 F.R.D. 443, 445 (D. Neb. 1950). See also Risinger, *supra* note 2 at 2:

[A] civil defendant has no constitutional right to put a plaintiff to his proof. Therefore, it can quite properly be demanded of a defending party, and his attorney, that all allegations and denials be honest, even if this means admitting liability in some cases.

Id. Thus, according to *Long*, the general denial must now be made—and taken—literally, on the attorney-signatory's honor as a member of the bar that he intends to controvert *all* the averments to which the general denial is directed.

But as *Tiktin* indicates, the general denial dies hard, even after ten years of practice under the Rules. A computer search of the Ohio decisions reported since the effective date of the OHIO R. Civ. P. reveals at least fourteen cases in which a general denial has been asserted in a responsive pleading. One may speculate that the general denial has been used at least ten times as often in the unreported cases. It is difficult to believe that there was a good faith intent to controvert all of the averments of the complaint in every one of these cases. Indeed, as *Tiktin* would suggest by the defendant's attempt to reinstate the amended answer after it had been rejected by the court on the ground that it contained a general denial, the practicing bar is not conscious of any wrongdoing in the use of the general denial; the practicing bar still adheres to the prerule practice of using it as a device to "put the plaintiff to his proof."

¹⁶⁷ As it is said in *Gulf Oil Corp. v. Bill's Farm Center, Inc.*, 52 F.R.D. 114 (W.D. Mo. 1970):

As shown by the answers to the complaints, the purported answers of defendants to written interrogatories, the transcripts of pretrial conferences and the transcripts of hearings, the counsel for defendants refused to make discovery of much factual information available to defendants and persistently took the position in respect to many items of account that no admission of receipt of goods or of liability therefor would be made in the absence of unilateral conclusive proof by plaintiff. This conduct of defendants violates the rules of discovery and pleading under the Federal Rules of Civil Procedure designed to narrow the issues and eliminate proof of allegations of facts not controverted in good faith. Rule 11, F.R.Civ.P. See *Freeman v. Kirby* (S.D. N.Y. [1961]) 27 F.R.D. 395. General denials or the equivalent are no longer permitted under the Federal Rules of Civil Procedure. Rule 11, *supra*; *Freeman v. Kirby*, *supra*. Parties are under the obligation under the Federal Rules of Civil Procedure to discover the information available to them. See *Criterion Music Corp. v. Tucker* (D. Ga. [1968]) 45 F.R.D. 534.

Id. at 118-19.

In pertinent part, *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961) states:

Plaintiff urges that Rule 11 interdicts the filing of a pleading known to be false, and no more. Such narrow construction of the rule finds no support either in the rule itself, The Advisory Committee Note, or decisional law. . . . An affirmative obligation is thus cast upon the attorney

the opponent's position, the attorney must make such investigation as to satisfy himself that it is either false, true or so clearly immaterial that the attorney can safely fail to deny it and thus admit it to be true.¹⁶⁸ Likewise, an attorney may not sign a document which asserts a position solely on the ground that he does not know that position to be false; the attorney is under the affirmative obligation of conducting an investigation sufficient to produce a good faith satisfaction that the position taken is true.¹⁶⁹ In sum, an attorney may not premise his signature on an absence of certain knowledge or information; rather, the attorney has an affirmative duty to seek out the knowledge or information necessary to the formation of a good faith belief in the merits of the position

signatory to a pleading that he be satisfied, in good faith, that there is good ground to support the claim asserted therein.

Id. at 397. *See also* Criterion Music Corp. v. Tucker, 45 F.R.D. 534 (S.D. Ga. 1968), which notes: "A good faith effort to ascertain the existence of the fact or genuineness of the document is required on a litigant's part where sources of corroboration are at hand." *Id.* at 536. Although this latter point is made with respect to answers to requests for admissions, *Gulf Oil Corp.* makes it equally applicable to pleadings, motions, and other papers. In sum, the rule is that an attorney-signatory cannot hide behind personal ignorance if the means of corroboration are at hand.

¹⁶⁸ *Rosen v. Texas Co.*, 161 F. Supp. 55 (S.D.N.Y. 1958):

Under the Federal Rules of Civil Procedure however, denials are not perfunctory. Rule 11 requires that a pleading must be signed by counsel and counsel's signature constitutes a certificate "that to the best of his knowledge, information, and belief there is good ground to support it". Thus an answering pleader must satisfy himself as to every allegation that is either false, true or so clearly immaterial that he can safely fail to deny it and thus admit it.

Id. at 58.

¹⁶⁹ *See* notes 160 and 167 *supra* and accompanying text. *See also* Neveroff v. Abelson, 620 F.2d 339 (2d Cir. 1980), where it is said: "Rule 11 speaks in plainly subjective terms: the attorney's certification of a pleading is an assertion that 'to the best of his knowledge, information, and belief there is a good ground to support it. . . .' The standard under Rule 11, therefore is bad faith." *Id.* at 350. The court further declared:

Finally, there is the exceptional power to shift [the payment of attorney's fees] where an action has been commenced or conducted "in bad faith, vexatiously, wantonly or for oppressive reasons." . . . *Browning Debenture Holders' [Committee v. DASA Corp.]*, 560 F.2d 1078 (2d Cir. 1977) clarified the requirements for a finding of bad faith in this Circuit. We held that there must be "clear evidence" that the claims are entirely without color and made for reasons of harassment or delay or for other improper purposes. 560 F.2d at 1088 (emphasis added). . . .

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

Id. at 348 (emphasis in original).

asserted in the document. Before an attorney may sign a document, he must have probable cause to believe that the position taken in that document is a meritorious one.¹⁷⁰

¹⁷⁰ As to probable cause, see *Burkons v. Rogoff*, No. 953,503 (Ohio Ct. C.P. Cuyahoga County, filed Dec. 16, 1976), reprinted in 48 CLEV. B.J. 167 (1977), where it is said:

Probable cause to institute the action is certainly not equivalent to an ability to prove the case on its merits; otherwise an action for malicious prosecution would be available for every criminal case where the accused was ultimately found not guilty.

In civil cases, particularly civil cases with the complexity of professional liability actions, the ultimate merits of the claim may not be understood until a lengthy discovery program has been completed, long after suit is filed. And the final merits of the claim may only be determined by a trial or equivalent procedure.

A probable cause to institute an action of this nature is often shown where there is reasonable basis to believe that a very unusual medical result has occurred and reasonable basis to believe that the named defendant was involved in the care which lead to that very unusual medical result.

A more restrictive definition of probable cause for this type litigation, which demanded a higher degree of assurance as to the ultimate result on the merits of the claim would force a claimant to make an unreasonable choice. He would often be forced to risk liability for malicious prosecution because there are real doubts as to his ultimate success, or to risk losing substantively [sic] meritorious rights because he failed to name the defendant ultimately found to be responsible. Since Ohio has the shortest statute of limitations in the nation for malpractice cases, he may well be forced to make that choice when totally inadequate information is available for a good decision. Having commenced an action with reasonable cause, a plaintiff might still be liable in a later malicious prosecution suit (or equivalent) if he pursues that action after learning that there is no longer any reasonable basis to believe that the named defendant is liable for any damages. As the discovery process progresses the knowledge of the parties increases. And probable cause to continue proceedings can dissipate with that increased knowledge.

Id. at 167-68. *But see* *Dakters v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978). In an earlier action, a complaint prepared by attorney Shane alleged that Valerie Jean Hime underwent surgery on March 5, 1973, and that due to the negligence of Dr. Dakters and others, Valerie received bodily injury while on the operating table. It would appear, however, that Dr. Dakters had not been present in the operating room when the surgery was performed, and Valerie Jean Hime had not been his patient on the date of the surgery; rather, as a specialist in neurosurgery, Dr. Dakters had been called by Valerie's surgeon to examine Valerie on a consultant basis after the surgery had been performed. Dr. Dakters did examine Valerie, but did not otherwise treat her at any time.

After he had been dismissed from the malpractice action, Dr. Dakters brought suit against the plaintiffs and their attorney, Shane. The claim against Shane alleged that he was guilty of professional malpractice in failing to properly examine the hospital records to determine the nature and extent of the professional services rendered by Dr. Dakters to Valerie Jean Hime. Shane prevailed on a motion for summary judgment, and Dr. Dakters appealed, presenting the following single question on appeal:

The next problem lies in Rule 8(E)(2). In substance that rule provides:

OHIO CIVIL RULE 8(E)(2):

A party

1. may set forth two or more statements of a
 - a. claim, or
 - b. defense
 either
 - a. alternately, or
 - b. hypothetically; and
2. may also state as many separate
 - a. claims, or
 - b. defenses
 as he has regardless of consistency and whether based on

FEDERAL CIVIL RULE 8(e)(2):

A party

1. may set forth two or more statements of a
 - a. claim, or
 - b. defense
 either
 - a. alternately, or
 - b. hypothetically; and
2. may also state as many separate
 - a. claims, or
 - b. defenses
 as he has regardless of consistency and whether based on

Can an attorney and his client be liable for the malicious institution of civil proceedings when they bring suit on the theory of negligence and medical malpractice against a doctor who had nothing to do with the operation and which fact was readily discovered upon proper investigation?

Id. at 197, 412 N.E.2d at 400.

Although the court of appeals assumed *arguendo* that the action filed by the Himes and attorney Shane against Dr. Dakters was instituted maliciously, it affirmed the summary judgment in Shane's favor because Dr. Dakters had suffered neither attachment of his property nor the restraint of his person.

Since an appellate decision seldom gives all the facts in a particular case it is impossible to know what information was available to attorney Shane at the time he drafted the complaint against Dr. Dakters. Therefore, it is equally impossible to comment fairly upon this particular case. But if we place a hypothetical plaintiff's attorney in the limited fact pattern outlined by *Dakters*, and if we assume the truth of Dr. Dakters' allegations with respect to the contents of the medical records and their availability to the plaintiff's attorney before he drafted the complaint, then we could fairly conclude that the plaintiff's attorney did not have probable cause to bring an action against Dr. Dakters for negligence in the course of the operation. But if a reasonable attorney would not have probable cause to bring such an action, then we must also conclude that the action was brought in bad faith, and that the complaint was signed by the hypothetical attorney "with the intent to defeat the purpose" of Rule 11. Accordingly, a defendant in the position of Dr. Dakters might at least have recovered his expenses and attorneys fees had he rested his case on a violation of Rule 11, and moved to strike the complaint "as sham and false." It must be conceded, however, that this is speculation since a violation of Rule 11 as the basis for recovery in this type of case does not appear to have been tried in this state. See Kent, *The Retaliatory Lawsuit*, 52 CLEV. B.J. 92 (1981).

OHIO CIVIL RULE 8(E)(2):

- a. legal, or
- b. equitable

grounds.

All statements shall be made subject to the obligations set forth in Rule 11.

FEDERAL CIVIL RULE8(e)(2):

- a. legal,
- b. equitable, or
- c. maritime

grounds.

All statements shall be made subject to the obligations set forth in Rule 11.

If a pleading contains alternative hypothetical or inconsistent claims or defenses, how can the requirement of Rule 11 be met? How can an attorney certify that he believes there is good factual ground to support such statements? Inconsistent statements of a claim are an example. By definition, they are "inconsistent" statements because both cannot be factually true; of necessity, one or the other must be false.¹⁷¹ How, then, can the pleader certify that he has probable cause for urging them both?

Note that Rule 11 provides that the signature is a certificate that the signatory has good ground *to support* the pleading; it does not amount to a certification that he has good ground *to prove* the position taken in the document.¹⁷² Probable cause is neither the equivalent of certainty nor the equivalent of an ability to prove the position taken on the merits; it is simply a reasonable basis for believing that the position

¹⁷¹ Thus, in commenting on the pre-rule practice with respect to the pleading of inconsistent claims, the Ohio Supreme Court has said:

A plaintiff may, under our system of pleading, allege as many causes of action as he may have within the scope of the applicable statute. Section 2309.05, Revised Code. However, this statutory authority is subject to the condition, implied from the requirement in regard to verification, that such causes shall not be so repugnant that, if one be true, the other must be false. The pleading before us appears to be incapable of overcoming this condition. If the second cause of action is true, the third is false, and vice versa. The two are mutually destructive. Any attempt to prove one would disprove the other.

In *Pavey v. Pavey*, 30 Ohio St. 600, the syllabus states that "a defendant can be required to elect between which of several defenses he will proceed to trial, only where the facts stated therein are so inconsistent that, if the truth of one defense be admitted, it will necessarily disprove another." . . .

Although pleadings are ordinarily construed liberally in favor of the pleader as against demurrer, it is likewise fundamental that a pleading containing inconsistent allegations or causes of action must be construed against the pleader. 43 Ohio Jurisprudence 2d 64, Section 58.

Fuller v. Drenberg, 3 Ohio St. 2d 109, 114, 209 N.E.2d 417, 421 (1965).

¹⁷² See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), discussed in note 169 *supra* and accompanying text.

taken in a document is meritorious.¹⁷³ The ultimate merits of a position may not be known or understood until a lengthy discovery program has been completed,¹⁷⁴ and discovery is generally not available to an attorney until after suit has been commenced.¹⁷⁵ Thus, an attorney may not be certain of the merits of his position until long after that position has been asserted, and in some cases, will not be certain until the final merits have been determined by a trial or equivalent procedure.¹⁷⁶ At the pleading stage of an action, an attorney may have sufficient knowledge or information to warrant a bona fide belief that he has a good claim or defense under one or more consistent or inconsistent legal theories, but not enough knowledge or information to warrant making an irrevocable choice between those legal theories. The attorney may have to obtain further information by way of discovery, or he may simply have to wait and see how the evidence "goes in" at the trial before he will be in a position to say that it is this particular legal theory on which he will prevail, as opposed to some other legal theory. Civil Rules 8(E)(2) and 11 recognize that at the pleading stage of an action there may well be such a paucity of reliable information that an attorney cannot make an irrevocable choice of the legal theory upon which he is to proceed. Accordingly, that attorney may state his claim or defense alternatively, hypothetically or even inconsistently; all that is required is that the attorney have a reasonable basis (a bona fide belief) that at the trial he will be able to prove enough facts to establish the claim or defense under one or the other of his statements. In other words, inconsistency at the pleading stage does not run afoul of the signature requirement of Rule 11 if the attorney has an honest belief, from the knowledge or information then available,¹⁷⁷ that the facts will develop in such a way that

¹⁷³ See *Burkons v. Rogoff*, No. 953,503 (Ohio Ct. C.P. Cuyahoga County, filed Dec. 16, 1976), reprinted in 48 CLEV. B.J. 167 (1967), discussed in note 170 *supra* and accompanying text.

¹⁷⁴ *Id.* But see note 176 *infra* and accompanying text.

¹⁷⁵ Prior to the commencement of an action, the opportunities for discovery are extremely limited. Essentially, there are only two proceedings which permit such discovery: the OHIO R. CIV. P. 27(A) proceeding for the perpetuation of testimony, and the statutory proceeding for discovery of fact outlined in OHIO REV. CODE ANN. § 2317.48 (Page 1981).

¹⁷⁶ *Burkons v. Rogoff*, No. 953,503 (Ohio Ct. C.P. Cuyahoga County, filed Dec. 16, 1976). But as *Burkons* cautions:

Having commenced an action with reasonable cause, a plaintiff might still be liable in a later malicious prosecution suit (or equivalent) if he pursues that action after learning that there is no longer any reasonable basis to believe that the named defendant is liable for any damage. As the discovery process progresses the knowledge of the parties increases. And probable cause to continue proceedings can dissipate with that increased knowledge.

48 CLEV. B.J. 167, 168 (1977).

¹⁷⁷ See note 167 *supra* and accompanying text, with respect to the attorney's

he will be able to prove at least one of the alternative, hypothetical or inconsistent statements on some legal theory.

The attorney, however, does not have *carte blanche* in the use of these alternative pleading devices. They may only be used when there is paucity of established fact; they may not be used when the attorney has knowledge or information sufficient to permit the selection of a specific claim or defense. If, at the pleading stage, the attorney clearly knows that all of the facts he will be able to prove will support only a single claim or defense, the attorney would not be warranted in pleading two or more claims or defenses alternatively, hypothetically or inconsistently, since he knows that he does not have good ground to support the alternative, hypothetical or inconsistent claim or defense.¹⁷⁸

Likewise, while these pleading devices may be used when there is a lack of complete information, they cannot be used when there is a total absence of all knowledge or information which would support a claim or defense;¹⁷⁹ they cannot be based on the mere hope that something will turn up by the time of trial to sustain the claim or defense pleaded.¹⁸⁰ When an attorney pleads alternative or inconsistent claims or defenses, he must have knowledge or information sufficient to lead to the good faith belief that he can prove one or the other, but not enough knowledge or information to warrant a committed choice between the

obligation to seek out as much knowledge and information as is reasonably available.

¹⁷⁸ Just as the verification of pleadings requirement prohibited this form of pleading in pre-rule practice, so too does the Rule 11 signature requirement prohibit it in Rules practice when the attorney's knowledge or information is equal to the occasion. *Compare* Fuller v. Drenberg, 3 Ohio St. 2d 109, 209 N.E.2d 417 (1965) with note 144 *supra* and accompanying text.

¹⁷⁹ This may be inferred from what is said in *Giannone v. United States Steel Corp.*, 238 F.2d 544 (3d Cir. 1956):

Rule 8(e)(2) of the Federal Rules of Civil Procedure . . . allows inconsistent, alternative and hypothetical pleading. The rules encourage parties to plead not only what they know is factually true, but also any fact if they believe "there is good ground to support it."

Id. at 548.

¹⁸⁰ In *Vocke v. Dayton*, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973), it is said:

If the present plaintiff were to prevail in her contention, any claimant could, within the period of limitation, file a petition [sic] without designation or description of any defendant, and without service upon anyone, in the mere hope that within a year thereafter he might discover a missing party to designate.

Id. at 143, 303 N.E.2d at 895.

This comment with respect to the application of OHIO R. CIV. P. 15(D) applies equally well to the assertion of claims or defenses under OHIO R. CIV. P. 8; an attorney may not assert a claim or defense on the "mere hope" that he will thereafter discover facts to support it.

two;¹⁸¹ and when an attorney pleads hypothetically, he must have sufficient knowledge or information to warrant a good faith belief in the existence of the contingency upon which the hypothetical is premised.¹⁸²

The ability to plead alternatively, hypothetically and inconsistently, therefore, is not a substitute for a factual investigation of the client's claims or defenses; rather, these devices may be used only when a factual investigation fails to produce a reasonable basis for a more specific election of claims or defenses, but does produce probable cause to believe that one or the other alternative or inconsistent claim or defense exists, or probable cause to believe in the existence of the contingency upon which the hypothetical claim or defense is based.

But what is the scope of the factual investigation which the attorney must make before signing? Where must the attorney's investigation begin and end? Obviously, the answer to these questions is controlled by the time, means and circumstances of a particular case. If an attorney is approached late in the day, the statute of limitations may impose severe time limitations on the investigation which may be made prior to the commencement of the action, just as the court's reluctance to grant extensions of time in which to move or plead may curtail the investigation which a defense attorney can make prior to answer. But subject to the constraints of time, means and circumstances uniquely applicable to each case, there are some general guidelines which may be followed.

¹⁸¹ As it is said in *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969):

Federal Rule of Civil Procedure 8(e)(2) clearly permits setting forth two or more statements of a claim alternately or hypothetically and stating as many separate claims as may exist regardless of consistency, subject of course to the qualification that the plaintiff's attorney must sign the complaint, his signature constituting a certificate that he has read the pleading and to the best of his knowledge, information and belief there is good ground to support it and it is not interposed for delay. Fed.R.Civ.P. 8(e)(2), 11, 18(a). . . .

Id. at 271.

¹⁸² See, e.g., *Rosen v. Texas Company*, 161 F. Supp. 55 (S.D.N.Y. 1958), where it is said:

Defendant complains of the omission of any allegation as to the time when the acts complained of occurred. . . . [I]t is said that defendant needs to know the dates on which the wrongs are claimed to have been committed in order to decide whether to plead the statute of limitations. It will do no harm to have pleaded the statute of limitations even if it turns out that the claimed wrongs were committed within the unaffected period. No ethical problem will be presented by the requirement of counsel's signing the answer since counsel can avail himself of the hypothetical allegations permitted by the Rules. See Rule 8(e)(2). The lack of dates does not prejudice defendant.

Id. at 58-59. In other words, if defense counsel had a good faith belief that all or part of plaintiff's claim was, or might be, barred by the statute of limitations defense even though he could not be certain that it applied because the dates of the underlying occurrences were not given in the complaint.

The attorney's search for the facts begins with the client's story, but as Milligan notes, clients can be notoriously unworthy of trust,¹⁸³ and the

¹⁸³ Milligan, *Rules of Civil Procedure in Domestic Relations Practice*, 39 U. CIN. L. REV. 524 (1970):

The rule allowing an attorney to sign nonverified complaints constitutes a significant break with the past practice. Some attorneys may view this change with alarm since the emotional domestic relations client is notoriously unworthy of trust. Others may view the change as a device to save time which will not endanger the attorney since the rule only requires that he plead the facts to the best of his knowledge.

Id. at 529. Milligan's comment should not be limited to domestic relations clients, nor should the last sentence of this quote be read as exonerating the attorney from the duty of independently investigating the client's story.

This duty to independently investigate was best stated by the Supreme Court of Kansas in *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980):

We further reject the statement in *Maechtle v. Clapp*, 121 Kan. 777, 250 P. 303 (1926)] that an attorney may act on the assumption that the facts related by his client are honestly given and are substantially correct and that it is not his duty to go elsewhere for information respecting the honesty of the claim or the good faith of his client. Such a rule is degrading to the legal profession and not acceptable in these times. This court in the Code of Professional Responsibility . . . has established general standards of behavior required of the Kansas legal profession. Canon 7 of the Code requires a lawyer to represent his client zealously within the bounds of the law. DR 7-102 specifically states that in his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another. Under DR 6-101, a lawyer is required to represent a client competently and is directed to not handle a legal matter without preparation adequate in the circumstances. As noted above, the rule is well established in Kansas that the advice of counsel as to the institution of a civil action, acted upon in good faith, will absolve the client from liability for malicious prosecution only where the facts known to the informant and *all which can be found by a diligent effort to acquire information*, have been presented to the attorney. *Carnegie v. Cage Furniture, Inc.*, 217 Kan. at 569, 538 P.2d 659. In most cases, the clients of attorneys are not knowledgeable in the law, nor do they know how or where further information about the case may be acquired. It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise, the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client. In determining probable cause in a malicious prosecution action brought against an attorney, a jury may properly consider not only those facts disclosed to counsel by the client but also those facts which could have been learned by a diligent effort on the attorney's part. In determining the purpose of the attorney in filing a civil action, a jury may properly consider as evidence of good faith or absence of malice the fact that the attorney, before filing an action, made a demand upon his client's adversary and extended to him the opportunity to respond with his version of the facts. This should be the standard procedure unless an

search may seldom stop with the information supplied by the client.¹⁸⁴ This is especially so when the client simply believes that a certain fact exists; if the client cannot supply a factual basis for that belief, then it is equally probable that the fact does not exist,¹⁸⁵ and the client's belief is tantamount to hearsay or rumor. Unverified hearsay or rumor is not a sufficient basis upon which to subject others to the burden of litigation and heavy legal costs, and the attorney has the responsibility of ascertaining that a reasonable basis exists for the client's belief before the attorney may subscribe his signature to a document based on that belief.¹⁸⁶

If a reasonably prudent attorney, cognizant of the obligation imposed by Rule 11, would be satisfied with the information provided by the client, then that client's actual attorney need go no further in his investigation; but if that reasonably prudent attorney would be put on notice that further investigation is required, then the actual attorney must also conduct a further investigation. That investigation must be more than perfunctory; it must be conducted with diligence, and must be reasonable in scope. At the very least, the attorney conducting the investigation must discover matters of public record,¹⁸⁷ as well as mat-

immediate filing of an action is required by the imminent running of the statute of limitations or some other good reason.

Id. at 284, 607 P.2d at 448-49 (emphasis in original). *See also* Board of Educ. v. Marting, 88 Ohio L. Abs. 475, 185 N.E.2d 597 (Fayette Cty. C.P. 1962). *But see* Dakers v. Shane, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978) (with respect to the availability of a malicious prosecution action in Ohio).

¹⁸⁴ *But see* Fuerst, *Municipal Court Practice Under the New Civil Rules*, 39 U. CIN. L. REV. 535 (1970):

The pleadings need not be verified by the party and the signature of the attorney is sufficient. This should prove to be a savings in time to the attorney who can take the information necessary for a claim on the client's first visit, obtain his retainer, and immediately file the claim.

Id. at 537. It must be assumed that Fuerst is speaking of the ideal situation, and not the average situation.

¹⁸⁵ *See* Levy v. Seaton, 358 F. Supp. 1 (S.D.N.Y. 1973), where it is said:

The admission that the plaintiff has no information "as to the truth" of the defendant's statement implies as well that she has no information as to its falsity. In short she has no information sufficient to form a belief that Seaton actually had "inside information" at the time of the transaction.

Rule 11 requires an attorney who signs a pleading to represent his honest belief that there is good ground to support the claims asserted in the pleading. This merely adds an ethical responsibility to the conception that a claim that is baseless should not survive.

Id. at 6.

¹⁸⁶ *Miller v. Schweickart*, 413 F. Supp. 1059 (S.D.N.Y. 1976); *see also* note 160 *supra* and accompanying text.

¹⁸⁷ Thus, in *Porto Transport, Inc. v. Consolidated Diesel Electric Corp.*, 20 F.R.D. 1 (S.D.N.Y. 1956), it is said:

Paragraph 1 of the amended answer insofar as it denies knowledge or information sufficient to form a belief with respect to plaintiff's allegation in paragraph 2 of the complaint that "plaintiff was a common carrier

ters of general public notice.¹⁸⁸ But these are minimal; it is more accurate to say that the attorney will be held to have that information and

by motor vehicle engaged in the transportation of property for hire under authority of Interstate Commerce Commission Docket No. MC-74120" is stricken. A defendant may not assert lack of knowledge or information as to matters of public record since an inspection of the record would reveal whether or not plaintiff was a qualified interstate carrier by motor vehicle. 2 Moore's Federal Practice § 8.22, P. 1677. Defendant shall serve an amended answer in which the aforesaid allegation is either denied or admitted.

Id. at 6.

In *Nieman v. Bethlehem Nat. Bank*, 32 F. Supp. 436 (E.D. Pa. 1939), we find:

[T]he defendant has apparently been rather careful not to draw his denials exactly in accordance with the requirements of Rule 8(b). . . . That rule provides that if the pleader is "without knowledge or information sufficient to form a belief as to the truth of an averment," he shall so state and this has the effect of a denial. The denials in the answer now before the Court simply aver that the defendant has no knowledge and therefore deny the averment, and, if material, demand proof. The defendant can say, with perhaps a semblance of truth, that he has no knowledge, meaning no direct, first hand knowledge, but he certainly could not say as to these matters of public record that he is without information sufficient to form a belief as to the truth of the averment relating to them. It may seem like a fine distinction, but it just enables the defendant and his attorney to avoid filing a patently false answer, and hence the propriety of a strict application of the rule. The answers are held to be sufficient denials. If they were substantially in compliance with Rule 8(b), which they are not, I should be compelled to say that they contained palpably untrue statements and were not filed in good faith, and the ruling would still be that the answer is not effective to raise any genuine issue of fact. See *Nieman v. Long*, D.C., 31 F. Supp. 30.

Id. at 436-37.

¹⁸⁸ See *Squire v. Levan*, 32 F. Supp. 437 (E.D. Pa. 1940), where it is noted:

The affidavit of defense consists of a number of sham denials. If attorneys were more mindful of their obligation to the court in respect of honesty in pleading, a situation of this kind would not arise. To draw and file a pleading which states that a reasonable investigation was made without being able to obtain knowledge whether the plaintiff, who sues as Superintendent of Banks of The State of Ohio, is in fact the Superintendent as averred, is plainly in total disregard of this obligation. The same may be said of a similar denial by a stockholder of a bank of such matters of public record and general knowledge as the facts that the bank was a corporation organized under the banking laws of the State of Ohio, and had its principal place of business in Cleveland, Ohio, and that the Superintendent of Banks took possession of the bank after the closing of the bank and has been liquidating it.

On the whole I feel fully justified in applying the strict letter of the rules against a party who has seen fit to take the position which this defendant has. . . .

The averments of the affidavit of defense are therefore all held to be insufficient denials of the facts stated in the statement of claim, and those facts, for the purpose of this motion, are taken as admitted.

Id. at 438.

knowledge which a reasonable and diligent investigation would have produced.

Subject to the constraints of time, means and circumstances, a "reasonable and diligent investigation" contemplates the use of all discovery devices then available to the attorney, including the pre-commencement discovery of fact from the adverse party provided for in section 2317.48 of the Ohio Revised Code.¹⁸⁹ The prompt and proper use of this latter discovery device may assist the plaintiff's attorney in identifying the proper defendant, and may prevent the assertion of a baseless claim against an innocent person.¹⁹⁰

In summary, then, an attorney may properly sign a document if his reasonable and diligent investigation produces a good faith belief that the position taken in the document is properly motivated, supported by known facts or reasonable inferences which may be drawn from known facts, and either within the bounds of the well-settled law or supported by a good faith argument for an extension, modification or reversal of the well-settled law. Or in the more familiar pre-rule language, an attorney may not sign a document which he knows to be vexatious, frivolous and/or a sham. In forming this belief, the attorney must take the facts as he finds them, but reasonable doubts with respect to the client's intent, motive or desires, or with respect to the bounds of the law, should be resolved in favor of the client. But the attorney's acquisition of knowledge or information is a continuing process, and concomitantly, the attorney's obligation under Civil Rule 11 is a continuing obligation. If, subsequent to the service and filing of a document to which his signature is appended, the attorney discovers that there is no good ground to support the position taken in that document, he must take prompt action to withdraw the document or otherwise mitigate its effect. A failure to do so will subject the attorney to the same sanctions

¹⁸⁹ OHIO REV. CODE ANN. § 2317.48 (Page 1981), reads as follows:

When a person claiming to have cause of action or a defense to an action commenced against him, without a discovery of the fact from the adverse party, is unable to file his petition or answer, he may bring an action for discovery, setting forth in his petition the necessity therefor and the grounds thereof, with such interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought. If such petition is not demurred to, it must be fully and directly answered under oath by the defendant. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable.

Id.

¹⁹⁰ See, e.g., *Daktors v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (1978); *Burkons v. Rogoff*, No. 953,503 (Ohio Ct. C.P. Cuyahoga Cty., filed Dec. 16, 1976), reprinted in 48 CLEV. B.J. 167 (1977). See note 170 *supra* and accompanying text; see also Kent, *The Retaliatory Lawsuit*, 52 CLEV. B.J. 92 (1981).

Bell v. Coen, 48 Ohio App. 2d 325, 357 N.E.2d 392 (1st Dist. 1975), is another example of the untoward result which might be prevented by the use of this pre-commencement discovery device.

that could be imposed if the document had been without support in the first instance.¹⁹¹

3. That the Document is not Interposed for Delay

The third and last obligation imposed on the attorney by Rule 11 is that the document not be interposed for the purpose of delay; the attorney's signature on a document is in substance an affidavit to the effect that the document "is not interposed for delay."¹⁹²

¹⁹¹ See quote from *Burkons v. Rogoff*, No. 953,503 (Ohio Ct. C.P. Cuyahoga Cty., filed Dec. 16, 1976), at note 176 *supra*. See also *American Automobile Ass'n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952), where it is said:

The second objection has to do with the counterclaim according to the terms of which the defendant asserted the existence of a written contract between the plaintiff and herself which it was thought her lawyer knew was not in existence.

As a result of the statements made at the hearing, there can be no doubt that from and after August 6, 1951, the defendant's attorney knew that there was no such contract. . . .

The counterclaim was not withdrawn and it was sought to be upheld on the motion for summary judgment, both orally and in the defendant's brief.

The result is that the counterclaim was allowed to stand and the Court was called upon to adjudicate the issue, although the defendant's attorney knew that there was no good ground to support it.

One of the obvious purposes of Rule 11 is to keep out of a case issues that are known to be false by the attorney who signs a given pleading, and the violation of the Rule in this case is clear and unmistakable; this opinion should be filed separately in the office of the Clerk of Court, and indexed against the name of the defendant's attorney, so that, in the event that his professional conduct in any other connection shall become a subject of inquiry, this case and this record can be referred to for such instruction as it may yield.

The foregoing has been submitted to the other Judges of this Court, and they have approved of it.

Id. at 656.

¹⁹² As it is said in *Overmeyer v. Fidelity & Deposit Co. of Maryland*, 554 F.2d 539 (2d Cir. 1977):

It has not escaped our attention that appellants were assisted by counsel before both the district court and this court in bringing this sham suit and appeal. We have warned counsel in immigration matters about abusing the process in this court to gain delays in deportation. *Hibbert v. I.N.S.*, 554 F.2d 17, at 19 n.1 (2d Cir. 1977); *Acevedo v. I.N.S.*, 538 F.2d 918 (2d Cir. 1976). The use of this court solely as a dilatory tactic to avoid paying a judgment is a serious breach of professional ethics. Cf. *Hibbert v. I.N.S.*, *supra*, at 19 n.1; *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973). See also Edelstein, the Ethics of Dilatory Motion Practice: Time for Change, 44 *Fordham L. Rev.* 1069 (1976). We remind the Bar that under Fed.R.Civ.P. 11 the signature of an attorney on a pleading "constitutes a certificate by him . . . that it is not interposed for delay." We will not countenance attempts to pervert the federal judicial process into a Dickensian court where lawsuits never end.

Among other things, this third obligation is a specific implementation of those Disciplinary Rules which prohibit an attorney from asserting a position which delays the trial of a case;¹⁹³ a reaffirmation of Ohio Civil Rule 1(B) which mandates an application of the Civil Rules which eliminates delay, unnecessary expense and all other impediments to the expeditious administration of justice;¹⁹⁴ the premise underlying those provisions of Ohio Civil Rule 37 which authorize the award of expenses and attorney's fees against the attorney who needlessly invokes the court's jurisdiction in discovery matters;¹⁹⁵ and the basis for those local

¹⁹³ Thus, in ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 it is said:

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

Id. Rule 3.3(a) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT, DISCUSSION DRAFT, is somewhat more specific. It provides:

A lawyer shall make every effort consistent with the legitimate interests of the client to expedite litigation. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client. A lawyer shall not engage in any procedure or tactic having no substantial purpose other than delay or increasing the cost of litigation to another party.

DISCUSSION DRAFT, *supra* note 38, at rule 3.3(a). And in the comment to that rule it is said:

A lawyer has a duty not merely to avoid frivolous or dilatory proceedings but also to expedite the progress of litigation. The critical problem is to define the standard by which to appraise a lawyer's failure to keep litigation moving forward. The standard must require more than nominal observance, for otherwise all but the most flagrant abuses of procedure can become commonplace. . . .

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged for the convenience of the advocates, nor for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not enough that a lawyer's procedural act, or refusal to act, is in personal good faith, or that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the act or refusal to act as having some substantial purpose other than delay.

DISCUSSION DRAFT, *supra* note 38, at comment to rule 3.3(a). Accordingly, there is ample Canonical authority for the Second Circuit Court of Appeals' conclusion that dilatory tactics are a serious breach of professional ethics. *See Overmeyer v. Fidelity & Deposit Co. of Maryland*, 554 F.2d 539 (2d Cir. 1977).

¹⁹⁴ OHIO R. CIV. P. 1(B) provides: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." *Id.*

¹⁹⁵ As OHIO R. CIV. P. 37(A)(4) provides:

Award of expenses of motion. If the motion [to compel discovery] is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable

rules of court which stipulate that "[t]he presentation to the court of unnecessary motions, and the unwarranted opposition of motions, which in either case unduly delay the course of an action through the courts, subject an offender to appropriate discipline including the imposition of costs."¹⁹⁶

As a general rule, it may be said that a document is interposed for delay if it is either frivolous or a sham; that is, there is neither good legal nor factual ground to support the position taken in the document. As Risinger describes:

The insertion of the certification that the pleading has not been interposed for delay seems logically redundant, since a pleading interposed *only* for delay could not have "good ground" no matter how that term is ultimately defined, and a pleading with independent "good ground" is not likely to be rendered improper

expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Id. The substance of this Rule is repeated, or incorporated by reference, in OHIO R. CIV. P. 26(C), 37(B)(2) and 37(D).

This same basic philosophy is expressed in a slightly different context in OHIO R. CIV. P. 37(C):

If a party, after being served with a request for admission under Rule 36, fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

Id.

These Rules are not so much grants of power to the trial court as they are specific implementations of the general power granted the trial court under that provision of OHIO R. CIV. P. 11 which states: "For a willful violation of this rule an attorney may be subjected to appropriate action." *Id.* In other words, the trial court is obliged to punish vexatious, frivolous or sham discovery proceedings. See text accompanying note 252 *infra*.

¹⁹⁶ See Rule 11(G) of the CUY. COUNTY CT. C.P.R. and Rule 10.05 of the STARK COUNTY CT. C.P.R.

because tactical considerations of delay entered into the ultimate decision of whether or not to file an otherwise honest, meritorious, and proper pleading.¹⁹⁷

The relevant Ohio authorities are in basic accord with this position.¹⁹⁸

But the concepts of "frivolous" and "sham" do not exhaust the applicable criteria in testing for delay. It may be said that "delay" is a specification under the general charge of "vexatiousness," and a document is "vexatious" when its interposition "is not calculated to lead to any practical result."¹⁹⁹ Or, as it appears in the comment to rule 3.3 of the Discussion Draft of the ABA Model Rules of Professional Conduct:

No precise definition can be given of a dilatory or baseless proceeding. . . . [T]he propriety of a lawyer's conduct in supporting a cause cannot depend simply on personal good faith. The essential question is whether reasonably competent counsel could conclude in good faith that the claim or defense in question has a substantial basis. The same principle applies to issues within a case. . . . The question is whether a competent lawyer acting in good faith would regard the act or refusal to act as having some substantial purpose other than delay.²⁰⁰

Thus, a document which is neither frivolous nor a sham may be vexatious—and thus interposed for delay—if the position taken in that document, though sound in law and fact, would not objectively achieve any meaningful result or would not have some substantial purpose other than delay.²⁰¹ Suppose, for example, that one's opponent serves and files

¹⁹⁷ Risinger, *supra* note 2, at 8.

¹⁹⁸ See, e.g., *Black v. Goodman*, 12 Ohio C.C. (n.s.) 287 (1909), where it is said:

If the answer and cross-petition is frivolous and was filed for the purpose of delay merely, as stated in the motion [to strike it from the files], and all this appears from the pleading itself, the motion was properly sustained; but if the answer contains a good defense, or the cross-petition of a good cause of action, it is immaterial whether filed in good faith or for purposes of delay only, and the motion should have been overruled.

Id. at 288.

¹⁹⁹ See *Brown v. Lamb*, 112 Ohio App. 116, 171 N.E.2d 191 (1st Dist. 1960).

²⁰⁰ DISCUSSION DRAFT, *supra* note 38, at comment to rule 3.3.

²⁰¹ This was not always the rule in this state. In addition to *Black v. Goodman*, 12 Ohio C.C. (n.s.) 287 (1909), see *Hamilton Glendale & Cincinnati Traction Co. v. Parish*, 67 Ohio St. 181, 65 N.E. 1011 (1902), where it is said:

The contention in the pleadings and finding of facts as to whether Mr. Parish brought and prosecuted the action in good faith, is of no importance, because if he had a legal right which he sought to protect by an action in a court of justice, the motive which induced him to bring the action cannot be inquired into. To sustain his action, if brought in good faith, and defeat it if brought in bad faith, would be to control his morals by means of a law suit. That cannot be done. Unless restrained by statute, a man may direct his moral conduct as he pleases.

a perfectly comprehensible and otherwise proper document in which the paragraphs are not numbered as required by Ohio Civil Rule 10(B). It is well-settled that such a document may be challenged by a motion to state and number separately.²⁰² If the failure to number the paragraphs was the only defect in the document, however, such a motion would not achieve any meaningful result other than harassment and delay (a result which is not in itself legitimate),²⁰³ and the making of such a motion would be vexatious. Obviously, the attorney signing and making such a motion in these circumstances would violate Rule 11.²⁰⁴

But what happens when a document which must inevitably produce delay also has a chance, albeit slim, of producing a useful result? A motion to quash on the grounds of insufficiency of process or insufficiency of service of process, for example, may have only a slim chance of producing a useful result since the plaintiff has a year in which to perfect service,²⁰⁵ and defects in the summons or the service of summons are almost always readily correctible by amendment²⁰⁶ or by the service of

litigant should not determine the decision in an otherwise meritorious case, the motive of the litigant does have a bearing on whether or not an attorney should undertake to represent the litigant in that case. See notes 38 and 39 *supra* and accompanying text. These authorities—the Ethical Considerations and Disciplinary Rules that are essential elements of the Code of Professional Responsibility—are the equivalent of a “statute” which “restrains” the moral conduct of the litigant.

²⁰² Browne, *Civil Rule 10(B) and the Three Basic Rules of Form Applicable to the Drafting of Documents Used in Civil Litigation*, 8 CAP. U.L. REV. 199, 204-05 (1978) [hereinafter cited as *Drafting of Documents*].

²⁰³ DISCUSSION DRAFT, *supra* note 38, at rule 3.3(a).

²⁰⁴ See *Drafting of Documents*, *supra* note 202, which states in pertinent part:

Obviously, very few documents will meet the “vague or ambiguous” standard simply because the author has failed to paragraph them, and it will be a rare case in which a motion to separately state and number will be justified. If the motion is made without proper justification, or if the movant does not meet the requirements stated above with respect to the content of the motion, the court may treat the motion as a delaying tactic, and impose sanctions on the movant.

Id. at 205. See also Rule 11(G) of the Rules of the Court of Common Pleas, CUY. COUNTY CT. C.P.R. and Rule 10.05 of the Rules of the STARK COUNTY CT. C.P.R. quoted in pertinent part at note 196 *supra*.

²⁰⁵ See, e.g., *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975), and *Hayden v. Ours*, 44 Ohio Misc. 62, 337 N.E.2d 183 (C.P. Paulding County 1975), both of which interpret the following language in OHIO R. CIV. P. 3(A): “A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing.” *Id.* It must be noted, however, that the principal holding in *Hayden v. Ours* has been substantively overruled by *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), but the subsidiary holding—that a plaintiff has a year in which to perfect service—has been affirmed by the *Barnhart* opinion. *Id.*

²⁰⁶ OHIO R. CIV. P. 4.6(B): “The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof, unless the amendment would cause material prejudice to the substantial rights of the party against whom the process was issued.” *Id.*

an alias summons.²⁰⁷ Such a motion must delay the case, and at best, there is only a small possibility that the plaintiff's attorney will fail to take the necessary corrective action. But since that possibility exists, a possibility which may, in the right circumstances, result in a complete victory for the defense,²⁰⁸ the motion cannot be judged on its delay producing qualities alone.²⁰⁹ Rather, such a motion must be judged by the principle of the two-fold effect. If the primary and intended result of the motion is the possible defeat of the adverse party, and if the delay produced by the motion is a secondary and unintended result—that is, the delay is not a result desired for its own sake—the motion is proper; but if the delay is the primary result intended, or if the delay is as much desired as the possible victory over the adverse party, the motion is at least suspect, and may fall afoul of the third obligation imposed by Rule 11.²¹⁰

²⁰⁷ OHIO R. CIV. P. 4(A): "Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant." *Id.*

²⁰⁸ If the challenges to the summons or the service of summons are sustained, and valid and effective service is not obtained within a year following the filing of the complaint, no action will have been commenced. *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977). A failure for want of commencement is not a "failure otherwise than on the merits" for the purpose of the Savings Statute, OHIO REV. CODE ANN. § 2305.19 (Page 1981). *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966). Therefore, if the statute of limitations has expired subsequent to the filing of the complaint, and the action fails of commencement because proper service was not obtained within a year of that filing, the plaintiff's claim will be time-barred, and a new action cannot be commenced within a year after the failure of the original action.

²⁰⁹ It is interesting to contrast the motion to transfer for improper venue with the motions to quash discussed in the text. The motion to transfer for improper venue must inevitably produce a delay. Yet, if the motion is well-taken, and the case transferred from an improper venue to a proper venue, it is the party against whom the motion was made, and not the movant, who must bear the consequences. OHIO R. CIV. P. 3(C)(2) directs: "When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in subdivision (B) of this rule." *Id.* With this in mind, note should be taken of OHIO R. CIV. P. 4.6(E), which states:

The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Rules 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.

Id. Perhaps this provision would provide the underlying basis for the payment of the movant's expenses and attorney's fees whenever a motion to quash or a motion to dismiss for lack of jurisdiction over the person is granted. One could argue that the basic philosophy expressed in OHIO R. CIV. P. 3(C)(2) should apply by analogy to proceedings challenging service or process.

²¹⁰ It does not follow, however, that the defenses of insufficiency of process or insufficiency of service of process need be sacrificed because a motion raising them would be suspect or improper under the principle of the two-fold effect;

But such a motion is not necessarily improper if the primary object of the motion is delay, or if the delay produced by the motion is as much desired as any other product. The production of delay is not solely a violation of Rule 11; it is the intent behind the delay which controls.²¹¹ To state it somewhat simplistically, there are good delays and there are bad delays. A Rule 6(B) motion for an extension of time, for example, deliberately seeks a delay, and is interposed for that very purpose. But if that delay is sought for the purpose of more adequately preparing the client's case, or for some other good cause, it is a good delay, and the attorney may properly sign such a motion. On the other hand, if the delay is sought to harass the adverse party or the opposing attorney, or to put economic pressure on the adverse party in the hope of forcing a more favorable settlement of the case,²¹² it is a bad delay, and the attorney

they may be included in any other proper motion served prior to the service of the responsive pleading, or if no other such motion lies or is made, they may be included in the responsive pleading, if one is required, or asserted at the time of trial if no responsive pleading is required. OHIO R. CIV. P. 12(B).

²¹¹ *Black v. Goodman*, 12 Ohio C.C. (n.s.) 287 (1909), appears to take a contrary position. In substance, it holds that if a document is not sham, frivolous or vexatious on its face, it is immaterial whether or not it was filed in good faith or for the purpose of delay only. See note 198 *supra* and accompanying text. If that were once the law, it is the law no longer. OHIO R. CIV. P. 11 clearly makes the intent of the signatory a material factor. Not only does it speak of a document "signed with intent to defeat the purpose of this rule," but also stipulates that "for a willful violation of this rule an attorney may be subject to appropriate sanctions." See note 201 *supra* and accompanying text.

²¹² See DISCUSSION DRAFT, *supra* note 38, at rule 3.3(a) and comment thereto.

Marino v. Morenz, 18 Ohio Op. 3d 205 (Clev. Hts. Mun. Ct. 1980), suggests how a proper procedure might be used to produce a delay that puts economic pressure on the adverse party. In that case, plaintiff sued for forcible entry and detainer and for damages in the total amount of \$297 for unpaid rent and yardwork. Defendant counterclaimed for trespass and constructive eviction. Total damages in the amount of \$33,000 was demanded in this two-count counterclaim. After the counterclaim was at issue, defendant moved to certify the action to the common pleas court pursuant to OHIO R. CIV. P. 13(J). The municipal court ordered the parties to submit briefs on the motion. The plaintiff's brief in opposition to the motion was improperly supported by documentary evidence in testimonial form. The defendant's brief in support of the motion was not supported by evidence. The court held that the plaintiff's evidence, taken alone, satisfied the court that there was no basis in fact for the counterclaim. It further held, however, that it could not properly consider that evidence and, since the counterclaim was otherwise proper on its face, it had to certify the entire action to the common pleas court. Since the court did not have the defendant's evidence before it, we cannot say that the counterclaim was sham or frivolous. But if we suppose that it was, for example, that the plaintiff's evidence was conclusive as to the merits of the counterclaim, then we must conclude that the counterclaim was interposed for the purpose of delay. Such a delay would produce two unwarranted results: (1) it would unduly delay plaintiff's recovery on his \$297 claim; and (2) it would make pursuit of that claim in the common pleas court more expensive than the recovery would warrant.

On the other hand, the defendant did not support her brief in support of the

could not properly sign the motion. In summary, it is the attorney-signatory's motivation and intent which control, and since these are interior matters, the principle of the two-fold effect, or other tests for propriety, cannot be applied by an exterior source except in the most blatant of cases.²¹³ But motivation and intent are principally a burden of conscience which must be borne by the attorney signing the document, and even in a case which has the appearance of a blatant violation of Rule 11, an exterior source such as the court may feel compelled to accept the assurance of the attorney-signatory that such is not the case.²¹⁴

In sum, then, the third obligation of Rule 11 prohibits an attorney from signing a document if the interposition of the document is intended to produce a bad delay; that is, a delay for which there is no sound legal, moral or ethical warrant or justification.

4. The "Estoppel Effect"

Thus far the ethical and moral significance of the attorney's signature has been considered, but an examination of the effect of that signature

motion to certify with documentary evidence because the Rules do not provide for such a procedure. Thus, the court had only the plaintiff's evidence before it, and that was improperly before it. Accordingly, if the defendant would have had a proper opportunity to present her evidence, and if that evidence would have suggested a meritorious counterclaim, then the counterclaim would have been proper even though it produced the two results outlined above.

But, as a caveat, note that even a meritorious counterclaim might become improper if the amount demanded as judgment was exaggerated solely for the purpose of requiring the certification of the entire action to the common pleas courts.

²¹³ See, e.g., *American Automobile Ass'n, Inc. v. Rothman*, 104 F. Supp 655 (E.D.N.Y. 1953).

²¹⁴ An excellent illustration of this point is found in *United States v. Long*, 10 F.R.D. 443 (D. Neb. 1950). The question arose on the plaintiff's motion to strike the defendant's answer which consisted of a one sentence general denial. The court noted:

When one examines that complaint he encounters difficulty in supposing that a general denial in good faith of its averments under the admonitions of Rule 8(b) and Rule 11 and the latter's sanctions, is reasonably possible unless the defendant actually intends to deny that he had any relation whatsoever to the plaintiff's designated agency in the matter declared upon. The improbability of such a supposition is at once apparent.

However, upon his honor as a member of the bar of this court and in the face of the quoted language of Rule 11, counsel for the defendant, by signing and filing the answer—and now by the express statement of his brief—assures this court that his client intends to controvert "every allegation of the plaintiff's complaint", to borrow his own language. The court is compelled to accept those assurances as being tendered in good faith. And in that situation the motion must be and is being denied and overruled. The integrity of the answer will be made to appear, or be repelled, by the events of the trial.

Id. at 445.

cannot stop with those considerations alone since the signature may produce other effects as well. For want of a better term one of the most recently developed of these effects may be described as the "estoppel effect" of the attorney's signature when that signature is subscribed to a document pursuant to the requirements of Rule 11. This effect may be illustrated by *Brown v. Anderson*.²¹⁵ In substance, plaintiffs brought an action against the United States alleging that they were injured by the negligence of Anderson in operating a Postal Service mail truck while in the course and scope of his employment for the United States Postal Service. At the same time, the plaintiffs brought an action against Anderson individually. In this second action, the United States Attorney representing Anderson moved to dismiss on the ground that the court did not have subject matter jurisdiction because of the provisions of 28 U.S.C. § 2679(b),²¹⁶ which made an action against the United States the exclusive remedy in such cases. This motion was supported by an affidavit in which the United States Attorney stated that to the best of his knowledge and belief Anderson was acting in the scope of his employment at the time of the accident in question. In their response to this motion the plaintiffs took the position that the question of scope of employment was a fact question which could not be determined on the basis of an affidavit. The court held:

Considering [plaintiffs'] position in light of the fact that the same Attorney represents Plaintiffs in both actions, and that pur-

²¹⁵ 430 F. Supp. 337 (W.D. Okla. 1976).

²¹⁶ 28 U.S.C. § 2679(b) (1976) provides as follows:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Id. Compare OHIO REV. CODE ANN. § 2743.02(A)(1) (Page Supp. 1980), which reads in pertinent part as follows:

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Id. Effective December 31, 1985, the second sentence of the above quote will read as follows unless prior to that date the General Assembly reenacts the above language: "The waiver shall be void if the court determines that the act or omission was not within the scope of the officer's or employee's office or employment." OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1980) (effective Dec. 31, 1985).

suant to Rule 11, Fed. Rules Civ. Proc. the affirmation made in [*Brown v. United States*] that Defendant Anderson was acting in the scope of his employment with the United States Postal Service constitutes a certificate by counsel that to the best of his knowledge and belief there are good grounds to support such affirmation, the Court finds for the purposes of this Motion that Defendant Anderson was acting in the scope of his employment with the United States Postal Service at the time of the accident giving rise to this litigation.²¹⁷

In other words, the plaintiffs were estopped from questioning that which their attorney had, by his signature, certified to be true in a separate, albeit closely related, action.²¹⁸

In effect, the court is saying that an assertion made under the obligation of Civil Rule 11 is a conclusive judicial admission. This concept of judicial admission is not new; it has long been held that the unqualified assertion of a material and competent *fact* in a pleading constitutes a conclusive judicial admission of that fact *in that particular case*.²¹⁹ What

²¹⁷ *Brown v. Anderson*, 430 F. Supp. 337, 338 (W.D. Okla. 1976).

²¹⁸ *But see* OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1980); *compare* *Smith v. Stempel*, 65 Ohio App. 2d 36, 414 N.E.2d 445 (10th Dist. 1979).

²¹⁹ 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1064 (Chadbourn rev. 1972). *See also* *Gerrick v. Gorsuch*, 172 Ohio St. 417, 178 N.E.2d 40 (1961); *Faxon Hills Constr. Co. v. United Brotherhood of Carpenters & Joiners of America*, 168 Ohio St. 8, 151 N.E.2d 12 (1958); *Peckham Iron Co. v. Harper*, 41 Ohio St. 100 (1884). The Ohio Supreme Court, however, may have abandoned the concept of conclusiveness. In its somewhat ambiguous opinion in *Jones & Laughlin Steel v. Bd. of Revision*, 40 Ohio St. 2d 61, 320 N.E.2d 658 (1974), it said:

[T]he Court of Appeals "deemed" the taxpayer's complaint to the board a "pleading in the case," and stated further that "any admission of fact against interest in a pleading is conclusive upon the pleader and he is bound by such admission, and the Court of Appeals is bound to accept as true such admissions in the pleadings." Although we need not question the validity of this conclusion, we can not concur in the court's premise that the "complaint" herein, filed with an administrative body prior to the institution of this judicial proceeding, is a pleading. *See* Civ. R. 7(A).

Finally, even if the "complaint" were a pleading, the averments contained therein would lack conclusive effect. . . . Civ. R. 15 allows amendments to pleadings when justice requires or when necessary to conform to the evidence. . . . No objection was made that such evidence was not in conformity with the pleadings, and, had an objection been entered, Civ. R. 15(B) provides for amendment at that time.

Id. at 63-64, 320 N.E.2d at 660. In other words, at the trial the court may permit the introduction of evidence that is inconsistent with a prior admission made in the pleadings, and the party introducing that inconsistent evidence may then amend his pleadings to conform to that evidence. The court also implies that an ordinary amendment made under the provisions of OHIO R. CIV. P. 15(A) may withdraw a judicial admission made in the original pleading. This seems to be a departure from the generally accepted rule that any admission against interest made in the original pleading may later be used against the amending party.

is new is the extension of the judicial admission concept to cover conclusions of law or mixed assertions of law and fact,²²⁰ and the use of judicial admissions in a different action. As a general rule, judicial admissions were deemed conclusive only in the action in which they were made, and could not be used as *conclusive* admissions in another action.²²¹ Here, the court not only permits the use of the judicial admission in the second action, but also gives it the same conclusive effect that it would have in the first action. Further, from all that appears in the case, the court did so by taking judicial notice of the complaint filed in the first action, since there is no indication that that complaint was put in evidence in the second action.²²²

Most of the courts considering this aspect of Rule 11 would not go so far. Most courts would probably agree that an unqualified assertion of fact made under the obligation of Rule 11 is to be treated as a conclusive judicial admission in the action in which it is made if it is not subsequently qualified, amended or withdrawn before trial,²²³ but as for its use in another action involving the same party asserting it, it is no more than a nonbinding admission which may be introduced into evidence against a party.²²⁴

²²⁰ In other words, Anderson was acting within the course and scope of his employment. *Cf. Faxon Hills Constr. Co. v. United Brotherhood of Carpenters & Joiners of America*, 168 Ohio St. 8, 151 N.E.2d 12 (1958)(the assertion that the defendant's labor practices affect interstate commerce is a conclusion of law rather than an assertion of fact, and thus not within the concept of judicial admission).

²²¹ 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1066 (Chadbourn rev. 1972). *But see* paragraph 1 of the syllabus of *Broadrup v. Woodman*, 27 Ohio St. 553 (1875), where it is said: "The answer of W. in a former suit, relating to the same land and deed in controversy in this case, signed by him, is admissible to prove that the deed was a deed of trust." *Id.*

²²² The traditional Ohio rule would not permit the taking of judicial notice in this instance. *See Gerardot v. Parrish*, 44 Ohio App. 2d 293, 298, 338 N.E.2d 531, 536 (3d Dist. 1975), where it is said: "A court may not take judicial notice of the record of a case in another court and ordinarily may not even take judicial notice of the record of another case in the same court." *Id. Compare Holly v. Dayton View Terrace Improvement Corp.*, 25 Ohio Misc. 57, 263 N.E.2d 337 (Montgomery County C.P. 1970).

²²³ *See, e.g., Jones & Laughlin Steel v. Bd. of Revision*, 40 Ohio St. 2d 61, 320 N.E.2d 658 (1974).

²²⁴ *Parkinson v. California Co.*, 233 F.2d 432 (10th Cir. 1956); *Frank R. Jelleff, Inc. v. Braden*, 233 F.2d 671 (D.C. Cir. 1956); *Yaskin v. Allston*, 179 F. Supp. 757 (E.D. Pa. 1959), *aff'd*, 277 F.2d 926 (3d Cir. 1960). *But see Giannone v. United States Steel Corp.*, 238 F.2d 544 (3d Cir. 1956), which notes the general rule, but questions the soundness of it:

Most of the authorities considering admissions as evidence conclude that pleadings today are supposed to be factual rather than fictional and therefore should be regarded as probative and admissible. . . . Authorities rarely articulate what we believe to be a conflict between

Whether treated as a conclusive judicial admission or a non-binding evidentiary admission, the unqualified assertion of fact made under the obligation of Civil Rule 11 may have its principal thrust in malpractice actions against the attorney-signatory. To date there does not appear to have been any attempt to use such assertions as admissions against the interest of the attorney signing them.²²⁵ Perhaps this is because of the traditional rule which prohibits such use. As stated by Wigmore: "A statement by a person as *counsel in another's cause* may of course *not* be treated as his own admission usable against him personally."²²⁶ But the cases cited for this rule were decided long before the advent of Rule 11, and they obviously do not take into consideration the fact that the attorney's signature under that rule is his personal certification that the facts stated without qualification in the document bearing that attorney's signature are true to the best of his knowledge, information and belief.²²⁷ Thus, there is no reason in principle why the client-plaintiff

the admissions through pleading rule and rule 8(e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., which allows inconsistent, alternative and hypothetical pleading. The rules encourage parties to plead not only what they know is factually true, but also any fact if they believe "there is good ground to support it." See Fed.R.Civ.P. 11. This soundly based policy—see Clark, Code Pleading §§ 41, 42, 99 (2d ed. 1947)—would tend to be defeated if allegations in the pleadings are admissible as evidence. Parties will hesitate to make notice-giving allegations at the risk of their being used as evidence, especially considering Fed.R.Civ.P. 15 liberalizing amendments.

Id. at 547-48.

Because of these objections it is said that pleadings which are couched in the alternative, hypothetical or inconsistent mode do not rise to the status of conclusive judicial admissions in the action in which they are filed and may not generally be introduced as evidentiary admissions against interest in another action. See MCCORMICK'S EVIDENCE HANDBOOK § 265 (E. Cleary 2d ed. 1972). Accordingly, the text emphasizes that the rule we are here discussing applies to *unqualified* assertions in the pleadings.

There does not appear to be any post-rule Ohio decision on point, but the ancient case of *Broadrup v. Woodman*, 27 Ohio St. 553 (1875), subscribes to the general rule stated in the text. Indeed, it can be read as going further than the general rule; it can be read as importing a conclusive effect to assertions verified by the pleader. It must be noted, however, that the pleading involved in *Broadrup* was an answer filed in a chancery case (the first action), and it has always been held that an answer in chancery could be used in another action as the admission of the party answering. 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1065 (Chadbourn rev. 1972).

²²⁵ R. MALLIN & V. LEVIT, LEGAL MALPRACTICE §§ 181, 421 (1977).

²²⁶ 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1066, at 80 (Chadbourn rev. 1972).

²²⁷ Ironically, many of the cases which do not permit the introduction of the pleadings as evidentiary admissions against the interest of the party justify the prohibition on the ground that the pleadings were signed by the attorney rather than the party and are therefore the statements of the attorney. See *Giannone v. United States Steel Corp.*, 238 F.2d 544 (3d Cir. 1956). As McCormick puts it:

in a malpractice action against the attorney cannot use the attorney-defendant's signed pleadings or other documents to establish the merits of the action which would have been tried were it not for the attorney-defendant's malpractice, or the amount of damages suffered because of that malpractice.²²⁸ They are, after all, that attorney's certified statements with respect to the merit and value of the client's cause, and to that extent are admissions by the attorney that his erstwhile client had a meritorious cause of a stated value. While they may not be conclusive judicial admissions on these points they are at least evidentiary admissions which may be considered by the trier of fact in the malpractice action.

Somewhat akin to the malpractice situation described above are those actions in which a successful defendant seeks to recover damages from the attorney for the unsuccessful plaintiff. The theories of recovery vary from case to case, and include malicious prosecution, libel and defamation, abuse of process and related torts, invasion of privacy, negligence, battery, prima facie tort²²⁹ and breach of the Code of Professional Responsibility.²³⁰ Although some of the decisions have noted that the attorney-defendant knew or should have known that the original action was baseless,²³¹ the plaintiffs have, for the most part, been unsuccess-

More often, however, the pleading is prepared and signed by counsel, and the older view holds that it is not sufficient to show that the pleading was filed or signed by the party's attorney of record, and that the statements therein will be presumed to be merely "suggestions of counsel" unless other evidence is produced that they were actually sanctioned by the client.

MCCORMICK'S EVIDENCE HANDBOOK § 265, at 636 (Cleary 2d ed. 1972).

²²⁸ If the client-plaintiff's original action was not tried because of the alleged malpractice of the attorney-defendant, the client-plaintiff must ordinarily prove that had the original action gone forward he would have been successful on the merits and would have recovered damages or whatever other relief he sought. In other words, in this type of malpractice action, the client-plaintiff has the burden of proving the case within the case. See R. MALLIN & V. LEVIT, *supra* note 225, at §§ 411, 416 (1977).

²²⁹ Prima facie tort as a basis for recovery was attempted in *Drago v. Buonagurio*, 89 Misc. 2d 171, 391 N.Y.S.2d 61 (Sup. Ct. 1977), but was rejected for want of an allegation of actual or special damages. For the status of prima facie tort in Ohio, see *Bajpayee v. Rothermich*, 53 Ohio App. 2d 117, 372 N.E.2d 817 (10th Dist. 1977).

²³⁰ For a concise summary of most of the cases and the various theories of recovery, as well as other relevant authorities, see R. MALLIN & V. LEVIT, *supra* note 225, at §§ 41-60; Kent, *The Retaliatory Lawsuit*, 52 CLEV. B.J. 92 (1981); Readey, *Countersuing the Lawyer—The Case of the Sore Winner*, 1 NEGLIGENCE L. NEWSLETTER No. 4 (April 1978), published by the Negligence Law Committee of the Ohio State Bar Association.

²³¹ See, e.g., *Dakters v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978), where it is said: "We shall assume, *arguendo*, that the action filed by the Himes and attorney Shane against Dr. Dakters was instituted maliciously." *Id.* at 197, 412 N.E.2d at 401.

cessful in the use of any of these theories;²³² and in Ohio they have rarely been successful.²³³

It is against this background that *Bickel v. Mackie*²³⁴ becomes noteworthy because, in that action, the liability of the attorney-defendant was premised on a violation of Federal Civil Rule 11. Unfortunately, the allegation alleging violation of Rule 11 was coupled with an allegation that the attorney-defendant breached the Code of Professional Responsibility,²³⁵ and the court treated it as part and parcel of the latter allegation rather than as a basis for recovery in its own right:

²³² See note 230 *supra* and accompanying text.

²³³ *Dacters v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978); *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976); *Meyers v. Seinsheimer*, 5 Ohio N.P. 281 (1898), *Nader v. McBride*, No. 39641 (Cuyahoga County App., filed June 19, 1980), *reprinted in Kent, The Retaliatory Lawsuit*, 52 CLEV. B.J. 92 (1981); *Burkons v. Rogoff*, No. 953,503 (Cuyahoga County C.P., filed Aug. 16, 1977); *Marvin v. Cory*, No. 77-CV-05-2169 (Franklin County C.P., filed Mar. 7, 1978); *Shook v. Stollings*, No. 74-305 (Richland County C.P. [no filing date available]); *Strong v. Roberts*, No. 74-2476 (Lucas County C.P., filed March, 1976), *reprinted in* 19 A.T.L.A. NEWSLETTER 171-72 (1976) ("Jury verdict for defendant-attorney. Jury found that defendant-attorney had inadequate probable cause to bring suit, and that his action caused some damage to plaintiff, but failed to find that defendant-attorney had acted with malice in bringing suit."); *Van Dervort v. Cihla*, No. 79905-75 (Lorain County C.P., filed 1976)(exact filing date unavailable); *Westphal v. Chastang*, No. 76-CV-06-2265 (Franklin County C.P., filed Nov. 16, 1976).

But see Board of Educ. v. Marting, 88 Ohio L. Abs. 475, 185 N.E.2d 597 (Fayette County C.P. 1962), where it is said:

The [demurring] defendants, Griffith and Malone, raise the additional question whether a malicious prosecution action can or cannot be maintained against an attorney at law based upon his capacity as such in a previous action. This Court concludes that an attorney has a responsibility to his client to advise his client as to the merits of his cause. This Court recognizes that "to err is human" but an attorney, due to his background and education, is in much better position to minimize error. An attorney is in good position "to know that the client is activated by malice, and also knows that there is no cause for the prosecution; the dictates of common honesty require that he also should be made accountable."

Id. at 480, 185 N.E.2d at 600. See also *Timson v. Weiner*, 395 F. Supp. 1344 (S.D. Ohio 1975), which notes that an attorney may be held to respond in damages under 42 U.S.C. § 1983 (1976) for invoking the subpoena power of the state if it is shown that the purpose of the subpoena was not to require the presence of a potential witness but to exclude the subpoenaed person from being present at a public function or to harass or punish the person. *Id.*

²³⁴ 447 F. Supp. 1376 (N.D. Iowa), *aff'd without opinion*, 590 F.2d 341 (8th Cir. 1978).

²³⁵ The court summarized the allegations of the complaint as follows:

Count four of Division II complains that defendant Hibbits owed a duty to plaintiff Bickel to comply with the rules of civil procedure relating to certifying that a suit is brought in good faith (FRCP 11) and the Code of Professional Responsibility for Lawyers prescribing adequate prepara-

Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client. Though Canon 7 does speak of a duty "to the legal system" to stay within the bounds of the law when representing clients, it does not create a private cause of action. Plaintiff cites no cases to support his claim that it does create such a cause. There are several cases from other jurisdictions which state that it does not. *San Drago v. Buonagurio* [89 Misc. 2d 171, 391 N.Y.S.2d 61 (Sup. Ct. 1977)]; *Spencer v. Burglass* [337 So.2d 596 (La. 1976)]; *Lyddon v. Shaw* [56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685 (1978)]; Cf. *Commonwealth v. Pfaff*, 233 Pa. Super. 153, 335 A.2d 751, 755 (1975). And even if it did establish a minimal standard of conduct below which lies negligence per se, it has already been noted that no action for negligence exists in the case at bar.²³⁶

tion and proscribing participation in suits to harass or maliciously injure another. Plaintiff analogizes the rules and code to drivers rules of the road which if violated constitute negligence per se.

Id. at 1383.

²³⁶ *Id.* "No action for negligence exists" because:

The attorney owes his primary and paramount duty to his client. The very nature of the adversary process precludes reliance by opposing parties. While it is true that the attorney owes a general duty to the judicial system, it is not the type of duty which translates into liability for negligence to an opposing party on the attorney's conduct.

447 F. Supp. at 1381. *Accord*, *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980); *Ayyildiz v. Kidd*, 266 S.E.2d 108 (Va. 1980).

It is not entirely clear why it is not foreseeable that the original defendant—the attorney's intended adversary—would not rely upon the attorney's compliance with the Rules of Civil Procedure and the Code of Professional Responsibility especially in light of *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969), which the federal court recognized as controlling and quoted as follows:

Thus, it was felt the test to be adopted is whether the third party to whom the accountant owes a duty of care is actually foreseen and a member of a limited class of persons contemplated. We agree, and in so doing, recognize that the same rule may be applicable in other recognized professions, such as abstractors and attorneys. . . .

Id. at 402. *But see* *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978), in which the Supreme Court of Iowa refused to extend the *Ryan* rule to the situation here discussed. As the court put it:

It is clear, however, that the third party, in order to proceed successfully in a legal malpractice action, must be a direct and intended beneficiary of the lawyer's services. . . . Where this special relationship between the lawyer and the third party is lacking, courts refuse to impose liability based on legal malpractice.

Id.

It must be noted, however, that many of the courts which have rejected the negligence theory do so because of the availability of an action for malicious pro-

Thus, in the one case in which Rule 11 was ventured as the basis for imposing liability on an attorney who ignored its mandatory provisions, it did not receive the independent consideration which it deserved.

It is questionable whether Rule 11 as a basis for liability would fare any better in Ohio.²³⁷ The Court of Appeals for Franklin County has suggested that the only remedy for an attorney's breach of the Code of Professional Responsibility is "disciplinary proceedings against the attorney, including suspension from the practice of law or permanent disbarment."²³⁸ Since Ohio Civil Rule 11 incorporates the relevant Ethical Considerations and Disciplinary Rules prescribed under Canon 7 of that code, the court would likely take the same position if liability were premised on a violation of Ohio Civil Rule 11. However, the Court of Common Pleas of Cuyahoga County has recognized that a party plaintiff might be liable for malicious prosecution or its equivalent if he pursues an action "after learning that there is no longer any reasonable basis to believe that the named defendant is liable for any damage."²³⁹ Whether such a rule would also apply to the plaintiff's attorney who institutes an action without any basis to believe that the named defendant is liable for any damage is uncertain.²⁴⁰ Given Ohio's adherence to the requirement of privity in such matters, the answer is probably in the negative.²⁴¹

secution. As it is said in *Weaver v. Steward*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979):

We note further that appellate courts in other jurisdictions have recently rejected the proposed extension of the duty as advanced by Dr. Steward and the California Medical Association [Citations omitted.] Each of those decisions viewed the public policy of freedom of access to the courts as clearly outweighing any argument favoring creation of a duty of care owed by attorneys to adverse third parties in litigation. Moreover, each decision recognized as an adequate remedy, the right of the adverse third party to sue the attorney for malicious prosecution. We view those cases as analytically sound and clearly supportive of the position we have taken with reference to what we see to be the California law on the issue.

Id. at 182-83, 156 Cal. Rptr. at 754.

²³⁷ *Daktors v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978), would have been a perfect test case for the Rule 11 theory of recovery, but it does not appear that Rule 11 was argued in that case.

²³⁸ *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397, 400 (10th Dist. Ct. App. 1976).

²³⁹ *Burkons v. Rogoff*, No. 953, 503 (Cuyahoga County C.P., filed Dec. 16, 1976), reprinted in 48 CLEV. B.J. 167 (1977).

²⁴⁰ It might in those states which do not require the attachment of the plaintiff's property or the restraint of his or her person as integral elements of a cause of action for malicious prosecution. See explanation of the attorney's duty to investigate as detailed in *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980).

²⁴¹ See *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (10th Dist. Ct. App. 1976), where it said: "As a general rule, an attorney is immune from

Nevertheless, it has been recognized that the victim of a sham, frivolous or vexatious lawsuit should have some remedy against the attorney who institutes that suit,²⁴² especially in light of Article I, Section 16 of the Ohio Constitution, which provides that every person shall have remedy by due course of law, and shall have justice administered without denial or delay, for any injury suffered in his land, goods, person or reputation.²⁴³ Illinois, which has a similar constitutional

liability to third persons arising from the performance of the attorney's professional activities as an attorney on behalf of, and with the knowledge of his client, unless such third person is in privity with the client." *Id.* at 400.

²⁴² "In a society in which litigation has become a national pastime it may seem obvious that there should be a remedy for the victim of frivolous litigation where that defendant was neither seized, had his property seized or sustained special injuries." *Bickel v. Mackie*, 447 F. Supp. 1376, 1380 (N.D. Iowa 1978). See also *Ready, Countersuing the Lawyer—The Case of the Sore Winner*, 1 NEGLIGENCE L. NEWSLETTER No. 4, at 1, 4 (April, 1978), where it is said:

Because of Ohio's requirement of proof of arrest of the person or seizure or [sic] property in order to maintain a malicious prosecution suit, in addition to the other burdens of proof discussed earlier, the future of countersuits in Ohio is extremely doubtful. It nevertheless must be recognized, without judging those countersuits already reported, that there is a point—short of arrest of the person or seizure of property—where an attorney's conduct may cross the boundaries of propriety and where he may do harm to a defendant totally without justification. The threat of disciplinary action by the bar association does nothing to compensate the hapless victim of an attorney's intentional malice or reckless abandon. No other profession enjoys a blanket immunity—nor should ours.

The Ohio Constitution provides that "(a)ll courts shall be open and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The Ohio courts should respond to the need for a remedy to the victim where a lawyer clearly and outrageously abused his privileges in practicing law, as long as the consequences of his behavior are foreseeable.

One way to provide that needed remedy is to modify Ohio's malicious prosecution law to drop the necessity of proving arrest of the person or seizure of property, which would only bring Ohio law into line with a majority of jurisdictions in the United States. The majority's experience tells us that the success of countersuits based upon the theory of malicious prosecution would still be rare—as it should be—and reserved for only extreme cases of attorney abuse. No profession uses balancing tests more skillfully than ours, and there is no reason to believe that the courts cannot find the proper balance between compensating those who deserve it on the one hand and protecting the freedom of the attorney to prosecute his client's case diligently, zealously, and effectively on the other hand.

Id. But see *Kent, The Retaliatory Lawsuit*, 52 CLEV. B.J. 92 (1981); *Dakters v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (9th Dist. 1978). The Reporter's Note to the decision indicates that the Ohio Supreme Court overruled a motion to certify the record on September 7, 1978, thereby passing up an opportunity to consider the proposals made by Mr. Ready. *Id.*

²⁴³ See *Ready, Countersuing the Lawyer—The Case of the Sore Winner*, 1

NEGLIGENCE L. NEWSLETTER NO. 4 (April 1978), as quoted in note 242 *supra*.

provision,²⁴⁴ has found that remedy in its code of civil procedure. Thus, in *Lyddon v. Shaw*²⁴⁵ the court noted:

Finally, we reject the suggestion that the result which this court has reached today deprives Dr. Lyddon of his right under article 1, section 12 of the Illinois Constitution, to "a certain remedy in the laws for all injuries and wrongs. . . ." This court has held that this section "does not mandate a specific form of remedy be provided plaintiff but only expresses the philosophy that some remedy be provided". (*Steffa v. Stanley* (1976), 39 Ill. App. 3d 915, 918, 350 N.E.2d 886, 888.) Here, apart from the availability of an action for malicious prosecution or abuse of process, a party who is put to the defense of a groundless lawsuit has available the remedy of a motion in the original action for an award of attorney fees under section 41 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 41) and in an appropriate case may be instrumental in the institution of disciplinary proceedings against the offending attorney.²⁴⁶

Section 41 of the Civil Practice Act, to which the court makes reference, states:

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.²⁴⁷

Although neither the Ohio nor the Federal Rules of Civil Procedure have a general provision similar to section 41 of the Illinois Civil Practice Act, it has been said that such a provision is inherent in that portion of Civil Rule 11 which stipulates that "[f]or a willful violation of this rule an attorney may be subjected to appropriate action."²⁴⁸ Thus, while a violation of Civil Rule 11 may not provide the basis for an independent civil action against the offending attorney,²⁴⁹ it will provide the basis for

²⁴⁴ ILLINOIS CONST. art. 1, § 12, provides in material part that every person shall have "a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. . . ." *Id.*

²⁴⁵ 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

²⁴⁶ *Id.* at 822-23, 372 N.E.2d at 690-91.

²⁴⁷ ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Supp. 1980).

²⁴⁸ Risinger, *supra* note 2, at 42-52.

²⁴⁹ But even this is not all that certain. As Risinger notes: "Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then ac-

a summary application for expenses and attorney's fees against that attorney.²⁵⁰

The rules contain ample warrant for such a use of Rule 11. As Risinger has noted, the Federal Rules of Civil Procedure provide several specific instances in which the court may punish a party or the party's attorney for bringing a sham, frivolous or vexatious proceeding by awarding the opposing party his expenses and attorney fees incurred in resisting that proceeding.²⁵¹ The Ohio Rules include a more thorough

cepted as theoretically tenable (though not the law), then accepted as the law." Risinger, *supra* note 2, at 57.

²⁵⁰ As Risinger remarks:

[This] general approach for handling Rule 11 violations . . . fastens upon the offending attorney the obligation to fully compensate those who have been put out of pocket by his misconduct. At the same time, it creates no windfalls and eliminates the risk of penalizing an innocent client by striking the complaint when the misconduct is solely the attorney's. Further, the penalty or deterrent value of such action is significant, whether taken just after pleadings are filed, or after dismissal, summary judgment, or trial. Therefore, this procedure could be used even though inquiry into the question of pleading honesty is put off, as it should be, until after the normal determination of falsity has been made, or at least until it is certain that a normal determination of truth or falsity will not be made. Finally and perhaps most importantly, this approach ensures that no person will suffer financial loss because of demonstrable attorney misconduct in the courts.

Risinger, *supra* note 2, at 43.

A "summary application," of course, is nothing more than a motion. OHIO R. CIV. P. 7(B)(1). In the context of this discussion, the motion to be used is the OHIO R. CIV. P. 11 motion to strike the offending document from the files as sham and false. This motion should also contain a request for the imposition of sanctions in the form of expenses and attorneys fees incurred by the movant in opposing the offending document. This motion should be accompanied by an affidavit from the movant's attorney which contains: (1) an itemized list of the legal services rendered, the time expended in rendering the services, and the attorney's charge for each separate service rendered; and (2) an itemized list of expenses incurred. Sworn or certified statements or receipts in support of every item of expense should be attached to the affidavit. If expenses were paid directly by the client, the motion should be supported by the client's affidavit as well, and this affidavit should also have attached to it sworn or certified copies of all pertinent statements or receipts.

²⁵¹ As Risinger states:

[The award of expenses and attorneys fees] affirms a general proposition that when any person under the authority of the court takes a position dishonestly or frivolously and expenses arise from that action, that person should pay full compensation.

This, moreover, is basically the position adopted in several other federal rules: Fed. R. Civ. P. 56(g), relating to cost resulting from bad faith affidavits in connection with summary judgment; Fed. R. Civ. P. 37(a)(4), relating to costs resulting from failure to make discovery; Fed. R. Civ. P. 37(d), relating, *inter alia* to costs of failure to attend one's own deposition. It should be noted that under both Fed. R. Civ. P. 37(b)(4) and

documentation.²⁵² These specific rules providing for the award of expenses and attorney fees are not limitations on the court's power to use

37(d) an *attorney* can be made personally liable for such costs, including attorney's fees, in order to fully compensate the party aggrieved by the failure. Apropos of this, I find it difficult to believe that less could be intended by way of awards of attorney's fees in compensation for expenses incurred under Rule 11 than under Rule 37(c).

Risinger, *supra* note 2, at 51-52 (emphasis in original).

²⁵² See OHIO R. CIV. P. 3(C)(2):

When [because of improper venue] action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in subdivision (B) of this rule.

Id. OHIO R. CIV. P. 30(D):

Motion to terminate or limit examinations. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(C). . . . The provisions of Rule 37 apply to the award of expenses incurred in relation to the motion.

Id. (For the applicable provisions of Rule 37, see OHIO R. CIV. P. 37(A)(4), as quoted in note 195 *supra*.)

OHIO R. CIV. P. 30 (G):

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Id.

OHIO R. CIV. P. 36(A):

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. . . . [T]he provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

Id. (For the text of OHIO R. CIV. P. 37(A)(4), see note 195 *supra*.)

OHIO R. CIV. P. 41(D):

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defen-

this monetary penalty as a sanction; rather, they are explicit illustrations of the court's general power to sanction offending parties and attorneys who engage in sham, frivolous or vexatious proceedings. Accordingly, since the general must necessarily include the specific, the general power to sanction granted by Rule 11 must include the specific power to award the prevailing party his expenses and attorney fees when he has been aggrieved by a sham, frivolous or vexatious proceeding. That this general power to sanction includes the power to assess monetary penalties against an offending attorney is made manifest not only by the express language of Rule 11—" [f]or a willful violation of this rule an attorney may be subjected to appropriate action"—but also by the specific language of those rules which provide explicit illustrations of the court's general power to sanction.²⁵³ Therefore, one may conclude with some confidence that Ohio's Civil Rule 11 makes available to an aggrieved party the same remedy that is expressly set forth in section 41 of the Illinois Civil Practice Act; the language of the two may differ but their purpose and application are identical.

III. CONCLUSION

Except with respect to an unrepresented party's signature on a proof of service required by Ohio Civil Rule 5(B), and, possibly, except with respect to an unrepresented party's signature on a responsive pleading containing a general denial, an unrepresented party's signature is not an attestation to the truth or merit of the material to which it is appended; it is no more than an indication that the unrepresented party consents

dant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Id. OHIO R. CIV. P. 56(G):

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Id. OHIO R. APP. P. 23:

If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs.

Id. For cases interpreting this latter Rule, see *Williamson v. Cook*, No. 79 AP-184 (Ohio Ct. App. 10th Dist., filed June 5, 1979), reprinted in 53 OHIO BAR 23 (1980); *Masheter v. Millis*, No. E-78-56 (Ohio Ct. App. Erie County, filed May 11, 1979), reprinted in 52 OHIO BAR 1403, 1404 (1979); and *Kelly v. Kelly*, No. 78 AP-247 (Ohio Ct. App. 10th Dist., filed Aug. 7, 1978), reprinted in 51 OHIO BAR 1384 (1978).

²⁵³ See OHIO R. CIV. P. 37(A)(4).

to the content of the document on which his signature appears, and to the filing of the document with the court.

On the other hand, an attorney's signature on a document is the attorney's affidavit of merit. It imports, as a minimum, that the attorney has read the document, or is otherwise fully conversant with its contents; that he has made a reasonably diligent investigation of the facts underlying the document and has evaluated the content and purpose of the document; and that as a result of this investigation and evaluation, the attorney certifies that the document is neither vexatious, frivolous nor a sham. That is, the attorney's signature is the equivalent of the attorney's affidavit that to the best of his knowledge, information and belief: (1) the proffer of the document is not motivated merely by a desire to harass or maliciously injure another; (2) the document does not contain scandalous or indecent matter; (3) the position taken in the document is either within the bounds of well-settled law or can be supported by a good faith argument for an extension, modification or reversal of the existing law; and (4) the position taken in the document is supported by the known facts or reasonable inferences which may be drawn from known facts; that is, there is probable cause to believe that the position taken in the document is factually true. Finally, the attorney's signature imports that the document is offered for the purpose of achieving some objectively meaningful result and its proffer to the court has some substantial purpose other than delay.

If the attorney's signature is knowingly false in any one of these respects, that is, if the attorney willfully violates the provisions of Ohio Civil Rule 11, he may be subjected to appropriate disciplinary action which includes, but is not limited to, the payment of the aggrieved party's expenses and attorney fees incurred in resisting a vexatious, frivolous or sham document.

APPENDIX

Proposed FED. R. CIV. P. 11. Signing of Pleadings; Sanctions*

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief ~~there is a good ground to support it; and that it is not interposed for delay~~ 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 primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a pleading is not signed, it shall not be accepted for filing. ~~or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ If a pleading is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

ADVISORY COMMITTEE NOTE

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Experience has shown the inefficacy of the rule's language in serving this function. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969). See also the amend-

* Proposed Rule 11 was promulgated after this Article was written. It is set forth herein for the reader's convenience.

ment to Rule 7, which the revision of Rule 11 parallels, and the Advisory Committee Note to Rule 7(b)(3), much of which is repeated below.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express Inc. v. Piper*, ___ U.S. ___, 100 S.Ct. 2455 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

Because the former Rule 11 requirement that a pleading not be interposed for delay has been interpreted to mean *solely* for delay, its application was restricted. See Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 Fordham L.Rev. 1069 (1979). The new language changes that standard. There is a violation of Rule 11 when the *primary* motivation for the submission of any pleading is unjustifiable delay. Thus, the rule applies even when there is some other objective for the pleading, even a legitimate one.

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is much more focused. The Rule 11 formulation is phrased somewhat differently from that in Rule 7 to reflect the different factors that are relevant to pleading and making a motion.

The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

However, 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 was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading; whether the pleading was based on a plausible view of the law;

or whether he depended on forwarding counsel or another member of the bar.

Amended Rule 11 continues to apply to anyone who signs the pleadings. Although the standard is the same for unrepresented parties, who are obliged to sign the pleadings themselves, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11*, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleading. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focuses the court's attention on the need to impose sanctions for pleading abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor.

The court's authority to impose sanctions on its own motion has been explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. See the Advisory Committee Note to Rule 7(b)(3).

If the duty imposed by the rule is violated, the court should have

discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore *Federal Practice* ¶ 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' v. DASA Corp.*, supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that the sanctions issue under Rule 11 normally will be determined at the end of the litigation. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regime will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must limit the scope of sanction proceedings. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.