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The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct Lead Article

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THE FIRST AMENDMENT PROBLEM WITH THE MOTIVE RESTRICTIONS IN THE RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

The Rules of Professional Conduct governing lawyers once again face a challenge under the First Amendment. This time the problem is not under the Speech Clause, which has confounded rulemakers so often in the last twenty-five years,[1] but instead the Petition Clause. The Petition Clause, the last provision of the First Amendment, is often overlooked:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for redress of grievances.*[2]

The United States Supreme Court has held that the right to petition

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1. The principal area in which state and bar association rulemakers have had to struggle to conform to evolving First Amendment standards is in their regulation of lawyer advertising and solicitation. In 1977, the Supreme Court held that the Speech Clause limited a state's ability to bar lawyer advertising. *See* Bates v. Arizona State Bar, 433 U.S. 350 (1977). The next year, the Court issued two opinions addressing First Amendment contraints on state anti-solicitation rules. *See* Ohralik v. Ohio State Bar, 436 U.S. 477 (1978) (upholding state ban on in-person solicitation of private litigation); *In re* Primus, 436 U.S. 412 (1978) (invalidating Virginia's efforts to ban written solicitation of civil rights litigation). The states and Court have been in a "dance" ever since, as the Court further refines its application of the Speech Clause to such rules and the states rewrite their rules to conform with the new rulings. *Compare* Florida Bar v. Went for It, Inc., (1995) (allowing state to impose a 30-day waiting period for written solicitation of accident victims); ALA. RULES PROF. CONDUCT 7.3 (1996 rule in response to *Went For It* that imposes a number of conditions, including a waiting period, on a lawyer's ability to solicit business by mail).

2. U.S. CONST. amend. 1 (emphasis added).

extends to the third branch of government, the courts, and thus protects a plaintiff's right to file civil claims.[3] Interestingly, the Supreme Court's first hint that the Petition Clause protected court access came in challenges to state regulation of the legal profession.[4] In the ensuing years, however, courts and scholars have tended to ignore the Petition Clause, in favor of the corollary First Amendment freedoms of speech and assembly, when examining state professional regulation. Yet, the Petition Clause right of court access did not stagnate. The Court developed this "new" right in other contexts, such as antitrust and labor. It is now time to revisit lawyer regulation under the Petition Clause.

Although the petition right is related to speech, the Petition Clause places a special value on access,[5] apart from the speech that is in the petition. Therefore, the many limitations that the Court has allowed, under the Speech Clause, on speech in judicial settings do not necessarily apply to the question of initial access.[6] The right of court access under the Petition Clause mandates separate analysis. I take on that challenge in this Article. I examine, under the Petition Clause, the Professional Rules that regulate a lawyer's or his client's motive in civil proceedings.

This Article is part of my continuing study of the right to petition courts. In my first article, I explored the validity and scope of a right of court access under the Petition Clause.[7] I concluded that the clause does

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3. *See* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding that "the right of access to courts is indeed but one aspect of the right of petition").

4. In *NAACP v. Button*, 371 U.S. 415 (1963), the Court held that Virginia could not apply its anti-solicitation laws to bar the NAACP from organizing civil rights litigation: litigation "may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Id.* at 429-30. I discuss *Button infra* at notes 79-80 and 187-89.

5. The court access protected by the Petition Clause is that of the petitioner—to file the initial civil complaint—not that of outsiders, such as the press, to observe the proceedings. Whether the press or other interested persons have a right to observe and report on civil proceedings is an unsettled issue under the Speech and Press Clauses. *See generally* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREE SPEECH, § 25.11 (West 1999).

6. In the litigation setting, the Court has recognized a number of competing interests, including the litigants' right to a fair trial, that justify greater limitations on speech than might otherwise apply. *See* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (acknowledging the power of the state to regulate attorney speech in litigation but invalidating Nevada rule as vague). I further discuss the power of the state to regulate speech in litigation, *infra* at notes 122-23.

7. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause*

protect court access but that the right is narrow.[8] In my second work, I examined the propriety of motive restrictions on court access.[9] This was a general assessment of all such restrictions, which included not only Professional Rules of Conduct but also a wide range of other laws, such as Federal Rule of Civil Procedure 11 and Federal Civil Rights Statutes. I concluded that the Petition Clause overrides motive restrictions to the extent that they limit the ability to file a civil suit based on motive alone and not the merit of the underlying claim. Here, I narrow my focus to the motive restrictions in the Professional Rules of Conduct for lawyers but broaden the analysis in that I look at motive regulation of all phases of civil litigation, not just the filing of a civil complaint.

I begin in Section I of this Article by collecting the various Professional Rules that address the motive of a lawyer or his client in litigation. These include specific prohibitions directed to litigation as well as general proscriptions against an attorney acting for purposes of harassment. In Section II, I set out the Court's development of the right to petition courts over the last thirty years. This began in the 1960s with general references to such a right, in reaction to states' efforts to control organized group litigation through application of their professional rules, and culminated in 1993 with a precise anti-trust immunity for judicial petitions. Finally, in Section III, I analyze the motive rules under the Petition Clause. I conclude that the Professional Rules that impose a motive restriction on a lawyer's ability to file initial civil claims impermissibly infringe on the client's right of court access, but those that regulate motive in other litigation activity do not.

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of the First Amendment: Defining the Right, 60 OHIO ST. L.J. 557 (1999). Other legal scholars and some courts also are beginning to more broadly test and apply the principle. For a general overview of the cases and academic commentary assessing the right to petition courts, see *id.*, Section I(B).

8. I proposed that the right to petition courts is the right of an individual or group only to file winning civil claims that are within the particular court's jurisdiction. *Id.*, at § III.

9. Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO STATE L.J.___ (forthcoming 2000).

II. THE MOTIVE RESTRICTIONS IN THE RULES OF PROFESSIONAL CONDUCT

Lawyers are bound by a wide array of laws. These range from general criminal and civil laws, applicable to all citizens, to rules targeted to lawyers alone. The bulk of this latter category, the specific rules regulating lawyers, are state rules of professional conduct.[10] Most states model their codes of conduct on one of the sets of standards promulgated by the American Bar Association: either its Model Code of Professional Responsibility or its Model Rules of Professional Conduct. Both models contain rules that purport to regulate the motives with which a lawyer may act. In Part A of this Section, I examine the history of motive standards in professional rules, and in Part B, I collect the current motive restrictions, those in the ABA Model Code and Model Rules, that might touch upon civil litigation.

Before outlining these rules, I must define the term "motive restriction." Motive can play multiple roles in regulating or protecting First Amendment freedoms. Motive can *restrict* exercise of First Amendment rights if it is the sole criterion on which to base liability (e.g., a statute that bars speech, whether true, false or opinion, if spoken with a proscribed motive). A motive or other state of mind element also can *protect* First Amendment values by narrowing the circumstances under which the government may restrict exercise of the right. A statute that punishes speech that is both false and spoken with a proscribed motive is more protective of speech than one that bases liability solely on the falsity of

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10. Lawyers principally are subject to licensing and regulation by the states in which they practice, but the federal government also regulates lawyer conduct in some circumstances. Lawyers must be formally admitted to practice before a particular federal court and must comply with that court's rules of conduct. Most federal courts simply adopt the rules of conduct applicable in the state in which they sit and some use the ABA model standards. For a listing and discussion of the approach of each federal court as of 1995, see Linda Mullinex, *Multiforum Federal Practice: Ethics and* Erie, 9 GEO. J. LEGAL ETHICS 89 (1995). Lawmakers and academics are debating whether to develop one national set of Rules of Professional Conduct for lawyers practicing in federal court, but it has not yet come to pass. *Compare* Fred Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (advocating a national code of conduct for lawyers practicing in all courts) *with* Geoffrey Moulton, *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (criticizing the federalization movement).

the speech.

Moreover, the definition of "motive" itself is somewhat problematic.[11] I use the term here in a broad sense to include intent, purpose or feelings. I do not use motive to mean a state of awareness of a particular set of facts, such as the degree to which a lawyer knows that his claim has legal or factual merit.[12] Nor do I use the term to denote a general belief system. To illustrate these distinctions, take the case of a person who is a racial bigot, who recklessly disregards the factual and legal bases for his lawsuit, but who nevertheless files suit with the intent of getting redress. He does not have an improper motive in bringing his suit, even though his belief is racial bigotry and he would fail an awareness standard. In this article, I focus on the professional rules that arguably *restrict* the conduct of lawyers in civil litigation by regulating their *motive* alone.

A. History of Motive Regulation in Civil Litigation

Regulation of the motive in litigation is a relatively modern phenomenon in this country. Today, a number of procedural rules and statutes purport to govern the motive with which litigants act. The best example is Federal Rule of Civil Procedure 11(b), which requires a litigant to certify that he is not presenting a pleading, motion or other paper in fed-

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11. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 Supreme Court Rev. 1, 5 (1993) (noting that "motive is by no means a unitary concept, and that the First Amendment has very different implications depending on what aspect of an actor's motive is being singled out for punishment, and what is meant by motive").

12. The Court has distinguished degree of awareness from motive in its *New York Times* line of defamation cases. In *The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that the newspaper could not be held liable in tort for false and defamatory words written about a public figure unless the newspaper spoke with actual malice. The Court defined actual malice, however, as being "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* at 285. Although the actual malice standard would seem to suggest ill will, the Court later clarified that this actual malice awareness standard was different than "bad or corrupt motive," "personal spite," or "ill will." Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 & 84 (1967) (per curiam). I further discuss *New York Times* and its actual malice standard, *infra* at notes 155-160.

eral court for "any improper purpose."[13] This provision now appears in most procedural compilations, but all are a product of the twentieth century.[14]

Penalties for litigation "abuse" date back to the early beginnings of the English court system.[15] These penalties evolved so that by the early nineteenth century, the most common form of litigation control was an award of costs. Courts under the English system and early American system regularly imposed costs, and such cost awards typically turned solely on whether the party won or lost the case.[16] If courts considered motive, they used it as an additional factor that limited the punishment; in other words, a losing party would not have to pay the other's costs unless he also acted with ill motive.

Anglo-American courts also used other procedural tools to control litigation.[17] They required litigants or their lawyers to sign pleadings, and courts sometimes struck pleadings.[18] However, until the twentieth century, the signature certified the merit of the suit, not the litigant's motive.[19] Similarly, the power to strike pleadings usually turned on the merits of the pleading (whether it was false or "scandalous") and not the motive with which the party or his lawyer filed the pleading. In the mid-nineteenth century, new pleading codes began to allow a court to strike *defensive* pleas if they were motivated for delay, but the courts typically did not do so unless the pleading also lacked merit.[20]

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13. FED. R. CIV. P. 11(b)(1), *reprinted infra* at note 66.

14. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(B)(1)(c).

15. *See generally* Andrews, *Motive Restrictions*, *supra* note 9, § III(A). Before the Norman conquest, English courts assumed that an unsuccessful suit was a false suit and they made a losing plaintiff pay with the loss of his tongue. The Norman courts substituted payments, to the King and later to the defendant, but they still assumed that the bringing of a losing suit was a wrong. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical* Analysis, 88 YALE L.J. 1218 (1979) (describing history of judicial methods to curb litigation abuse).

16. *See* John Leobsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMPORARY PROB. 9 (1984); Arthur Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

17. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(A).

18. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some Striking Problems With Federal Rule of Civil Procedure*, 61 MINN. L. REV. 1 (1976).

19. The rules applicable to federal courts in equity cases, for example, required "a signature of counsel" affirming that "there is good ground for the suit." FED. EQUITY R. P. 24, 42 U.S. (1 How.) xli-lxx (1842).

20. *See* Risinger, *supra* note 18, at 15-16 & 28 ("*There is not one reported case*

Although procedural codes did not use motive as the sole criterion for litigation behavior until the twentieth century, states sometimes controlled *lawyer* behavior through motive proscriptions. This first appeared in lawyer oaths. Lawyer oaths have an ancient heritage.[21] They were early forms of "ethics codes" in that they often required lawyers to swear to a number of ethical precepts. Many of these early oaths seemed to speak to motive, but their exact meaning and application is open to question and merits further study.[22] For example, a common lawyer oath of

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prior to the adoption of the Federal Rules where a finding of falsity was not required before a plea could be deemed a sham.") (emphasis in original).

21. The oaths took different forms. A particularly interesting oath dates back to 1274 France, in the time of Phillip the Bold (the different provisions, noted by date below, were added as the centuries progressed). Remarkably, it reflects many of the same concerns as modern ethics codes:

> Advocates at the beginning of the year shall swear to the suits that will follow. In causes which will be heard and affect the king, they themselves will advise the court of this. (Date: 1274)
>
> Let them come early in the morning and cause their causes (or associates) to come early in the morning. Let them not propound impertinent facts. They will not withdraw from the court as long as the magistrates will be sitting. (Date: 1274)
>
> They will not knowingly receive the patronage of unjust causes. If they do not see the cause as unjust from the beginning, but rather after the fact, they will dismiss it. (Date: 1274)
>
> They will not propose nor sustain customs which they do not believe to be true. In those they will not seek or enable accusations and malicious subterfuges. (Date: 1274)
>
> They will not speak injurious words against adverse parties or others. (Date: 1344)
>
> They will not be for two parties. (Date: 1536)
>
> They will serve the poor. (Date: 1536)
>
> They will not reveal a secret. (Date: 1816)

Lucien Alexander, Secretary, ABA Committee on the Code of Professional Ethics, Memorandum for Use of ABA's Committee to Draft Canons of Professional Ethics, Section V (1908) [hereinafter Alexander Memorandum] (on file with author) (quoting Edward S. Cox-Sinclair, *Law Magazine & Rev.*, Feb. 1908). The translation of these oaths is rough; the original text is in Latin and French.

22. A 1785 Virginia statute set forth a particularized oath with several admoni-

the nineteenth century required a lawyer to swear that, among other things, he would "not encourage the commencement or continuance of a suit from any motive of passion or interest."[23] Does it speak to the motive of the lawyer, his client or both? Inclusion of the "interest" language would suggest that this is an early form of a conflicts rule and that the oath thus speaks to the lawyer's own passions or interests that might conflict with the client's interest or impede his professional judgment.[24]

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tions, including that the lawyer would "delay no man for lucre or malice." *See* James E. Moliterno, *Lawyer Creeds and Moral Seigmography*, 32 WAKE FOREST L. REV. 781, 786 n.42 (reprinting Virginia statute). Interesting, just seven years later, a 1792 Act in Virginia set forth a much shorter oath, which required lawyers to swear only "that I will honestly demean myself in the practice of law . . . , and will in all respects execute my office, according to the best of my abilities." Statutes At Large of Virginia, vol. 1 (1792-1806) (reprinting Nov. 19, 1792 Act).

23. In 1908, ABA rulemakers surveyed the oaths then in effect in the states and noted that many states used an oath similar or identical to the oath used in the Swiss Canton of Geneva, which (as of 1908) required a lawyer to swear:

> To be faithful to the republic and to the canton of Geneva;
> Never to depart from the respect due to the tribunals and authorities;
> Never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defence of an accused person;
> Never to employ knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
> To abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged;
> Not to encourage either the commencement or the continuance of a suit from any motive or passion or interest;
> Not to reject, for any considerations personal to myself, the cause of the weak, the stranger, or the oppressed.

REPORTS OF THE AMERICAN BAR ASS'N, vol. XXXI, App. B, at 715-16 (1907); Alexander Memorandum, *supra* note 21, at 113 (noting states that used this oath).

24. Likewise, the colonial oath, such as that in Virginia, barring lawyers from delaying a cause "for lucre or malice," probably spoke to the lawyer's ill motives. *See supra* note 22. Colonists distrusted lawyers, as illustrated by a 1645 Virginia statute:

> whereas many troublesome suits are multiplied by the unskilfulness and covetousness of attorneys who have more intended their own profit and their inordinate lucre than the good and benefit of their clients, be it therefore enacted that all mercenary attorneys be wholly expelled from such office.

CHARLES WARREN, A HISTORY OF THE AMERICAN BAR, at 41 (Howard, Fertig 1966) (*reprinting* 1645 Virginia statute). Warren notes that the term "mercenary" likely

By the mid-nineteenth century, some states had statutes listing specific duties of lawyers. These statements of duties seem to be an outgrowth of the particularized oaths. The statutory duties mirrored the provisions of the detailed oaths and typically included the duty not to encourage suits out of any motive of passion or interest.[25] In turn, the oath in these states was general. The lawyer typically swore allegiance to the constitution and other laws and obedience to the statutory statement of his duties.[26]

These early efforts would evolve into formal codes of legal ethics by the dawn of the twentieth century. Much of this reform can be attributed to two highly influential essays on legal ethics in the mid-nineteenth century. These essays advocated that lawyers should do justice and act as a screen for improper client actions. This advocacy led to the formation of detailed ethics codes. Those ethics codes in turn seemed to have been an essential step in the widespread adoption of bans on litigants going to court with ill motives.

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referred to any lawyer who collected a fee and did not reflect "the opprobrious definition later given to the word." *Id.* n.1.

25. For example, the 1852 Alabama Code stated that the duties of lawyers were:

> 1. To support the Constitution and Laws of this State and the United States.
>
> 2. To maintain the respect due to courts of justice and judicial officers.
>
> 3. To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice or false statement of the law.
>
> 4. To maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients.
>
> 5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor reputation of a party or a witness, unless required by the justice of the cause with which they are charged.
>
> 6. To encourage neither the commencement nor continuance of an action or proceeding, from any motive of passion or interest.
>
> 7. Never to reject for any consideration personal to themselves the cause of the defenseless or oppressed.

ALA. CODE, Title 9, ch. 10 § 73? (1852). *See also* Alexander Memorandum, *supra* note 21, at § V (surveying lawyer oaths as of 1908).

26. The 1852 Alabama Code provided:

> Every attorney, before commencing practice, must take an oath to support the constitution of this state, and of the United States, and not to violate the duties enjoined on him by law.

ALA. CODE, Title 9, ch. 10 § 735 (1852).

The movement began in 1836, with David Hoffman, a lecturer at the University of Maryland. His widely read essay on "legal deportment" urged that lawyers should be filters for their client's actions[27] and that they should refrain from taking even legally meritorious positions, if the lawyer believed them to be unjust.[28] As to motive, Hoffman suggested that lawyers should not take civil cases to further either the client's, or his own, ill purposes. His tenth resolution clearly applied to the intentions of the client:

> Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into a unjust compromise, or with any other motive, he shall have the option to select other counsel.[29]

Hoffman's second resolution stated that "I will espouse no man's cause out of envy, hatred or malice toward his antagonist."[30] Like the typical lawyer oath of the day,[31] this provision is ambiguous as to whose motive is at issue, but when juxtaposed against the tenth resolution, it seemingly addresses lawyer motive.

Judge George Sharswood picked up the campaign in 1854. While a law professor at the University of Pennsylvania, Sharswood instructed law students that "truth, simplicity and candor" are the "cardinal virtues" of lawyers and that lawyers should avoid practices, such as being "hired to abuse the opposite party," that would impugn the lawyer's character.[32]

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27. Professor Susan Carle describes Hoffman's views as "steeped in religious conviction" and based on the notion that the lawyer should "do justice" and function as a "gatekeeper." Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC'Y INQUIRY 1, 10-12 (1999).

28. DAVID HOFFMAN, FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT (1836), *reprinted in* REPORTS OF THE AM. BAR ASS'N, vol. XXXI, App. H (1907). Perhaps most striking was his admonition that a lawyer should not present the defense of statute of limitations if he believes that the plaintiff's claim is otherwise good. *Id.* (Resolution No. 12) ("I will never plead the Statute of Limitations when based on the mere flux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.").

29. *Id.*

30. *Id.*

31. *See supra* notes 22-24.

32. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, 118 & 169, *reprinted in* REPORTS OF THE AM. BAR ASS'N, Vol. XXXII (1907). Judge Sharswood left the academy to join the Supreme Court of Pennsylvania in 1868 and later be-

This admonition applied even if the law otherwise would allow the conduct. For example, Sharswood warned that "[c]ounsel . . . are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right" and that it would be "immoral" for a lawyer to assist a client who is "aiming to perpetuate a wrong through the means of some advantage the law may have afforded him."[33]

Inspired by the teachings of Hoffman and Sharswood, the Alabama State Bar Association enacted a formal code of legal ethics in 1887.[34] It was the first state to do so. The preamble to the Alabama Code quoted Sharswood: "[t]here is perhaps no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than of law."[35] The Alabama Code warned that "whatever may be the ill-feeling existing between the clients, it is unprofessional for attorneys to partake of it in the conduct and demeanor to each other, or to suitors in the case" and that a client "cannot demand that his attorney abuse the opposing party.[36]

Most important for this discussion was the demand that "[a]n attorney must decline in a civil cause to conduct a prosecution, when satisfied

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came its Chief Justice. *Id.*

33. *Id.* at 96. Sharswood also instructed that a lawyer "may and even ought to refuse to act under instructions from a client to defeat what he believes to be a just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading." *Id.* at 99. Sharswood, however, was somewhat inconsistent in that he also allowed that "counsel may take all means for [purpose of delay], which do not involve artifice or falsehood in himself or the party." *Id.* at 116. He also stated that a lawyer "is not morally responsible for the act of the party in maintaining an unjust cause." *Id.* at 83. This inconsistency has prompted some academic debate as to whether Sharswood departed from Hoffman's view that a lawyer should "do justice" and act as a screen for client conduct. *See, e.g.,* Carle, *Duty to Do Justice, supra* note 27, at n.23 (noting debate and concluding that "Sharswood comes down unequivocally in favor of recognizing a duty to do justice"); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics for the Alabama State Bar Association*, 49 ALA. L. REV. 471, 495 (1998) (arguing that Sharwood differed from Hoffman and advocated that the moral responsibility of lawyers was not to society but to the client).

34. The man who drafted the Alabama Code, Judge Thomas Jones, relied heavily on the Hoffman and Sharswood essays. *See generally* Marston, *Guiding the Profession, supra* note 33.

35. CODE OF ETHICS ALABAMA STATE BAR ASSOCIATION, Preamble (Dec. 14 1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 352-63, App. F (1953).

36. *Id.*, at notes 27 & 28.

that the *purpose* is merely to harass or injure the opposite party, or to work oppression and wrong."[37] This provision is significant in that it clearly speaks to "purpose" and seemingly means the client's purpose. The clause "when satisfied that" suggests a test for determining another's purpose. A lawyer would not need to be "satisfied" of his own purpose. Moreover, the rule apparently applies even to meritorious claims. To be sure, it has an important "merely" limitation, but if the sole purpose of the client were to harass the opponent, the rule would bar a lawyer from filing even a meritorious civil case.

Another significant feature of the Alabama rule is its strict terms. Although the Alabama Code was often aspirational in nature, this rule was a mandate.[38] Indeed, the Alabama State Bar rejected proposals that would have given the lawyer more leeway. The provision, as originally drafted provided that the lawyer "may" decline the case, but the bar convention eliminated this discretion and made the decline mandatory by changing "may" to "must decline."[39] By contrast, the lawyer oaths tended to be aspirational; a similar oath admonished the lawyer merely to not "encourage" suits out of passion.[40]

The true importance of the Alabama Code may be that it prompted a national movement to codify and particularize legal ethics. Other states soon began to form bar associations and enact their own codes, modeled on the Alabama Code.[41] By 1908, eleven states had legal ethics codes containing a prohibition against taking a civil case for malicious purposes.[42] A few states had separate statutory enactments, but most of these were brief and mirrored the statements of duties or oaths of office.[43]

In 1908, the American Bar Association developed a national model

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37. *Id.*, at note 14 (emphasis added).

38. *See* Moliterno, *Lawyer Creeds*, *supra* note 22, at 787-94 (discussing the move from the aspirational notions of Hoffman and Sharswood to mandatory rules and the Alabama Code's role in that process).

39. PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION, 19 (Montgomery, Brown Publishing Co. 1887) (The bar also deleted other language that had required a lawyer who took a case, to avail himself of all lawful advantages.).

40. *See supra* note 23.

41. *See* REPORTS OF THE AMERICAN BAR ASSOCIATION, Vol. XXXI, App. B, at 695 (1907).

42. *Id.*

43. *Id.* at 676-78.

ethics code.[44] The ABA relied upon the Alabama Code and continued at least in part the theme of lawyers acting only with the highest motives.[45] The preamble to the 1908 American Bar Association's Canons of Professional Ethics pronounced that the future of the republic depended upon "pure and unsullied" justice and that justice "cannot be so maintained unless the conduct and the motives of members of our profession are such as to merit the approval of all just men."[46] Canon 30 closely tracked the Alabama rule against taking civil cases for improper motives and required a lawyer to "decline to conduct a civil cause or to make a defense when convinced that it is *intended* merely to harass or to injure the opposite party or to work oppression or wrong."[47] Like the Alabama provision, this Canon seemingly spoke to the intention of the client and would bar a lawyer from filing any civil case if his client had the requisite motive.

The widespread dissemination of the 1908 Canons, including Canon 30, may have been the catalyst for inclusion of motive barriers in the procedural rules. In 1912, the Federal Rules of Equity Procedure included for the first time a modest motive restriction on filing a complaint.[48]

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44. For the committee reports and ABA proceedings concerning adoption of the 1908 Canons, *see* notes 21 and 41.

45. Professor Carle traces the history of the ABA Committee and the personal background of its members and argues that the Committee engaged in an intellectual and jurisprudential dispute as to whether lawyers had a higher calling to serve justice, above their duty to clients, and that this conflict resulted in an uncertain compromise in the Canons:

> [A] clash of perspectives between these men – traceable in part to their backgrounds but also to their unpredictable perspectives allegiances to conflicting trends in legal thought at the turn of the century – prevented the committee from reaching a satisfactory resolution on the duty-to-do-justice issue. The committee members instead adopted ineffectual compromise language in the Canons, leaving us with a legacy of concealed ambivalence on the question of lawyers' 'duty to do justice' in civil cases.

Carle, *Duty to Do Justice supra* note 27, at 1; *see also id.* at 29-31 (reporting on the final compromise language of the committee).

46. ABA, CANONS OF ETHICS, Preamble (*reprinted in* REPORTS OF THE AMERICAN BAR ASSOCIATION, Vol. XXXIII, at 575 (1908)).

47. *Id.*, at Canon 30. Canon 17 continued the admonition against getting involved in the ill will between clients, and Canon 18 added that a lawyer should "never minister to malevolence or prejudices of his client in the trial or conduct of a cause." *Id.*, Canons 17 & 18.

48. Rule 24 of the 1912 rules was a successor to the earlier signature rule. *See*

That limited ban spoke only to the motive of delay, but this equity rule also evolved over time. Its modern counterpart is Federal Rule of Procedure 11(b)(1), which bars a litigant from filing any civil paper for "any improper purpose."[49]

The 1908 Canons and the old state oaths and codes are now primarily historical footnotes. They have been replaced by increasingly more detailed statements of ethical standards. In 1970, the ABA replaced the Canons with a new Model Code of Professional Responsibility.[50] In 1983, the ABA devised a new format, called the Model Rules of Professional Conduct.[51] The majority of states today follow the Model Rules approach, but some states continue to use the Model Code format and a few have their own unique ethics codes.[52] In yet another effort at reform, the ABA is again looking at the Model Rules, in a project called Ethics 2000.[53] This effort is not complete, and as of the publication date of this article, the ABA had not yet proposed any changes that might impact the motive with which a lawyer may act in litigation.[54] I explore in the next part, those rules in the current ABA Model Standards–the Model Code and Model Rules–that potentially control the motive of lawyers, or their clients, in civil litigation

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supra note 19 Under the 1912 rule, the signature certified not only that the paper had "good ground to support it" but also that the paper was "not interposed for delay." FED. EQUITY R. P. 24, 226 U.S. 629 (1912). This delay element appeared in some predecessor codes, but such provisions applied only to defensive papers, not claims for relief and usually applied only where the paper also lacked merit. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(A).

49. *See infra* note 66 (reprinting Rule 11(b)(1)).

50. The Model Code retained many of the ethical concepts of the Canons, but reformatted the system and set forth black letter rules, the violation of which could subject a lawyer to professional discipline. *See generally* Charles A. Wolfram, MODERN LEGAL ETHICS, § 2.6.3 (West 1986) (describing Model Code and its adoption).

51. *Id.* at § 2-6-4 (describing Model Rules and their adoption). This new set of rules was the product of a six-year "comprehensive rethinking of the ethical premises and problems of the legal profession." ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Preface vii (3d ed. 1996).

52. About 40 jurisdictions have adopted the Model Rules format, but even these states have substantial variations on the ABA model rules. STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS, 3-4 (Aspen 1999). *See generally id.* (collecting significant state variations); *see also infra* note 60 (noting state variations).

53. The ABA maintains a website that reports on the activities of its Ethics 2000 Commission: www.abanet.org/cpr/ethics2k.

54. *Id.* (status as of May, 2000).

B. The Current Motive Restrictions in the ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct

Four ABA Model Rules arguably regulate the motive with which a lawyer may take action in civil cases: DR 7-102(A) of the Model Code and Model Rules 3.1, 3.2 and 4.4. Interestingly, the presence of motive restrictions in these rules is counter to the trend in regulation of lawyers. The ABA and state bar association have tried over the years to make ethical mandates more realistic and concrete. This effort has included departure from some of the broadly stated lawyer-screening ideals of the nineteenth century, including motive standards.

As I explain in more detail below, the literal language of the black letter rules could be read to avoid use of the client's motive as the sole criterion for litigation behavior. The rules seem to speak to effect or to set objective standards. Yet, the rules, or in some cases their official comments, leave open the possibility that they regulate litigation conduct by motive or purpose alone. Whether that motive is that of the client or of the lawyer is another source of uncertainty. We have little guidance. Courts and disciplinary authorities rarely have invoked these particular rules in any context, let alone to punish motive alone.[55] But the absence of disciplinary cases does not mean that the rules are free from any problem. The rules are supposed to guide the lawyer's conduct in the first instance.[56] Assuming a perfect world of ethical lawyers, none would have transgressed the rules but many may have modified their litigation behavior to conform to the rules, including the rules' arguable regulation of motive.

Disciplinary Rule 7-102(A) of the Model Code provides that "[i]n

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55. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BRIGHAM YOUNG U. L. REV. 959, 974 (1991) (noting that courts and scholars have "paid scant attention" to the provisions of the Model Code and Model Rules, such as Model Rule 3.1, that parallel Rule 11 of the Federal Rules of Civil Procedure).

56. Indeed, the Model Rules state that they are intended in the first instance to act as a guide and influence on lawyer behavior: "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peers and public opinion, and finaflly, when necessary, upon enforcement through disciplinary proceedings." MODEL RULES OF PROFESSIONAL CONDUCT, Scope ¶ 2. *See also* Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997) (discussing policy and practice implications, as opposed to disciplinary results, of Model Rule 5.2(b)).

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.[57]

This standard closely tracks Canon 30 of the 1908 Canons, but unlike Canon 30, DR 7-102(A) does not use "intent" language. Its terms—"serve merely to harass"—suggest an effect test. Yet, the rule seemingly could bar any action intended to harass or injure. If the client's sole aim were to harass the opponent, it seemingly would be "obvious" to the attorney that the filing "would serve merely to harass." To this extent, DR 7-102(A) is broader than Canon 30. Under this reading, the Model Code would bar a client from acting with the sole intent to harass his opponent even if the paper were non-frivolous (as would Canon 30), but it also would prohibit a lawyer from filing a frivolous paper if the effect of that paper would be merely to harass, regardless of the actual intent of his client.

Even assuming that DR 7-102(A) applies to intent, other ambiguities remain. First, must the intent to harass be the only purpose of the suit? Like the Alabama Code and ABA Canon 30, this rule qualifies its prohibition with the term "merely." Thus, to the extent that DR 7-102(A) applies to the intent to harass, that intent likely must be the primary, if not sole, motive of the pleader.[58] Otherwise, the paper would not serve "merely" to harass another. Another ambiguity is whether the relevant purpose is that of the client, the lawyer or both. The rule's references to what a lawyer "knows" and what is "obvious" suggest a test for determining the client's purposes, and not those of the lawyer alone. If the client has good intentions and the paper is not frivolous, it would not serve merely to harass, regardless of the lawyer's motive. In sum, although the rule is open to a number of interpretations, a reasonable lawyer might read DR 7-102(A) as forbidding him from filing even a meritorious motion or pleading where his client's aim is to harass the opponent.

In 1983, when the ABA issued the Model Rules of Professional Conduct, it changed the standard for filing civil papers. New Model Rule

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57. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 7-102(A)(1) (1970).

58. Rules such as Federal Rule 11 do not have such a limitation. They bar a litigant from filing a pleading for "*any* improper purpose." *See* FED. R. CIV. P. 11(b)(1), *reprinted infra* at note 66.

3.1, entitled "Meritorious Claims and Contentions," adopted a seemingly objective "frivolous"standard:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[59]

Most states now use this frivolous standard of Rule 3.1, but some states, even those using the Model Rule format generally, still use the malicious injury-harassment standard of DR 7-102(A).[60]

Despite the change in the black letter rules, some confusion surrounds whether Model Rule 3.1 is a solely objective "frivolous" standard or whether is also retains a subjective element. The principal source of such confusion is the official comments to Model Rule 3.1, which broadly defines "frivolous" as including improper motive:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's cause ultimately will not prevail. *The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or* if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.[61]

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59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1999).

60. New York and Virginia, for example, still generally follow the Model Code approach and retain their version of Model Code Disciplinary Rule 7-102(A)(1). *See* N.Y.C.R.R. tit. 22, Part 1200.33(a)(1); VA. CODE OF PROFESSIONAL CONDUCT Disciplinary Rule 7-102(A)(1). *See generally* STEPHEN GILLERS & ROY SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS xix & 3 (1999) (reporting that as of 1999, "about forty jurisdictions have adopted substantial portions of the Model Rules" and that "several states, including California, New York, Oregon, and Vermont, have rejected the Model Rules" though some have included isolated portions of the Model Rules). In addition, some states that have adopted the Model Rules format rejected Model Rule 3.1 and retained DR 7-102(A)(1), or some variation on it, for filing claims. Alabama is an example; the only difference is that Alabama has made the rule's language gender neutral. ALABAMA RULES OF PROFESSIONAL CONDUCT, Rule 3.1(a).

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2 (1999). Furthermore, the section of the comments that compares Rule 3.1 to DR 7-102 states:

The italicized portion of this comment tracks the language of the Model Code, but, unlike DR 7-102(A), this comment clearly applies to the motive or purpose of harassment (as opposed to effect) and broadens the proscription from "merely" to "primarily." The comment also clarifies that the motive at issue is that of the *client*. If the action has objective merit and the client has good intentions, the lawyer, under this rule, seemingly can file the suit even if his own motives are not pure.[62] He may not do so if his client has ill motives.

Comments to the Model Rules are not binding authority,[63] but this comment to Model Rule 3.1 at a minimum suggests that a reasonable lawyer could read Model Rule 3.1 as imposing a motive barrier. The history of the rule offers little to refute this interpretation of Model Rule 3.1. The stated aim of the ABA rulemakers in 1983, when they adopted the frivolous standard, was to track contemporaneous changes in the rules of civil procedure. Professor Geoffrey Hazard, the reporter of the ABA Rules Commission, explained the purpose of the change: "A 'not frivolous' standard was adopted rather than one based on the concepts 'harass' or 'maliciously injure' to track the standard generally used and

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> . . . Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be "reasonable basis for" the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer 'knows or when it is obvious' that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case . . .

Id., Rule 3.1, Model Code Comparison. This description of the change could be read as retaining the subjective element of the code. Under this view, the "first" change expanded the definition of prohibited claims to include all frivolous claims, but it also included those brought to harass or injure. The "second" change substituted a "should have known" standard for the former standard of actual knowledge or reckless lack of knowledge (i.e., the "obvious" clause).

62. The general conflicts rules, however, would bar the lawyer from taking the case if his own motives were such that they materially limited his representation of the client. *See* MODEL RULE OF PROFESSIONAL RESPONSIBILITY Rule 1.7(b) (1999).

63. The "Scope" section of the Model Rules of Professional Conduct explains that the comments "are intended as guides to interpretation, but the text of each Rule is authoritative." *Id.* Scope ¶ 9.

defined in the law of procedure."[64] This statement of purpose is not particularly enlightening for the simple reason that the procedural rules to which Professor Hazard refers have both subjective and objective components.

During this century, the procedural codes have experimented with both objective and subjective components in their attempts to control litigation abuse by parties and their lawyers.[65] The primary tool has been Rule 11 of the Federal Rules of Civil Procedure.[66] The original version of Rule 11 had only subjective components, including a ban on a lawyer filing civil papers "for delay."[67] In 1983, federal rulemakers revised the

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64. ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 119 (1987) (February 1983 statement of Professor Geoffrey Hazard, reporter for the Commission on Evaluation of Professional Standards, before the ABA House of Delegates).

65. *See generally* Andrews, *Motive Restrictions*, *supra* note 9, at § II(A)(1).

66. The heart of Rule 11 is its certification provision, now set out in Rule 11(b)(1):

> (b) *Representations to Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

67. The 1938 version of Rule 11 provided in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

FED. R. CIV. P. 11, 308 U.S. 645, 676 (1938). *See generally* 5A Charles A. Wright

rule to include an objective reasonableness standard for the merit of the filing.[68] They also enlarged the delay provision so that under Rule 11, a signature now acts as a certification that the complaint is not presented for "any improper purpose."[69] Almost every state in turn has adopted the new version of Rule 11, including its broad motive prohibition.[70]

To be sure, the portion of the 1983 revision to Rule 11that drew the most attention was the addition of an objective standard for the merit of the pleading. But such change was *in addition* to the broadening of the improper purpose clause. Although this dual effort has caused considerable confusion as to whether Rule 11 is objective or subjective, the literal terms of the rule state both as independent tests.[71] Thus, to the extent that Model Rule 3.1 standard was meant to track the procedural law, it also could have a subjective "improper purpose" component.

The ABA in 1983 also promulgated other new rules that arguably regulate the lawyer's or his client's purpose. First, ABA rulemakers isolated the delay element of DR 7-102(A)(1) and created a new rule on delay.[72] Model Rule 3.2, entitled "expediting litigation," provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[73] The official comments clarify that this rule bars a lawyer from acting for the *purpose* of delay, even if his act does not in fact have such effect:

> Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the

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& Arthur K. Miller, FEDERAL PRACTICE AND PROCEDURE § 1331 (2d ed. 1990) (discussing judicial interpretation of the 1938 rule as imposing only a subjective standard). Rule 11 is a successor to Rule 24 of the 1912 Federal Equity Rules, which stated that the signature of counsel on a pleading certified, among other things, that he did not interpose the pleading for delay, *see supra* note 48.

68. FED. R. CIV. P. 11, 97 F.R.D. 165, 167-68 (1983 amendments) (requiring "reasonable inquiry" and that the pleading be "well grounded in fact" and "warranted by existing law or a good faith argument" for change).

69. FED. R. CIV. P. 11(b). The current version of Rule 11(b) is reproduced *supra* at note 66.

70. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(B)(1)(c).

71. *See id* at § III(B)(1)(b).

72. DR 7-102(A)(1) instructed that an attorney may not "delay a trial" when such action would serve merely to harass. . . . " *See supra* note 57. In addition, DR 7-101(A)(1) had provided that a lawyer "may be punctual in fulfilling all professional commitments." ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-101(A)(1) (1970).

73. *Id.*, at Rule 3.2.

> advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct often is tolerated by the bench and bar. *The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.* Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.[74]

The comment to Model Rule 3.2 seems to impose an objective standard for determining whether the purpose of the action was delay: would a competent (reasonable) lawyer view the pleading or motion as having this purpose?[75] Yet, it is the purpose of the pleader, not the merit of the action or its effect, that is "the question" under Model Rule 3.2. The rule just looks to outside evidence in determining whether such a purpose existed. The comment also suggests that the purpose applies to both lawyer and client. Although the italicized language seems to speak to the lawyer's purpose, the next sentence refers to the interests of the client and seemingly brings the client into the analysis. Thus, Model Rule 3.2 arguably imposes a motive restriction on a lawyer in civil litigation (based on his own or the client's purpose), albeit a narrow one limited to the intent of delay alone.

The ABA also adopted in 1983 a Model Rule that demands respect for third persons. This "respect" turns in part on the motives with which a lawyer deals with persons. Model Rule 4.4 now provides:

> In representing a client, a lawyer shall not use means that have no substantial *purpose* other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.[76]

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74. *Id.*, Rule 3.2, cmt (emphasis added).

75. Some observers argue that an objective test likewise should govern whether a litigant has violated the improper purpose element of Federal Rule of Civil Procedure 11(b)(1). For example, William Schwarzer, a leading expert on federal procedure, wrote an influential article concerning the 1983 version of Rule 11, in which he argued for an objective test for purpose:

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The . . . surrounding circumstances should afford an adequate basis for determining whether particular papers of proceedings . . . lacked any apparent legitimate purpose.

William Schwarzer, *Sanctions Under the New Federal Rule 11: A Closer Look*, 104 F.R.D. 181, 195-96 (1985).

76. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1999) ("Respect for

Although this rule is not directed specifically to litigation,[77] Model Rule 4.4 would apply to any action taken in a civil case that has as its principal purpose, the harassment of non-parties. Again, as with Rule 3.2 the rule is ambiguous as to whose motive is at issue and seems to include the ill aims of either client or lawyer.[78] Obvious opportunities for such harassment is in civil discovery and trial examination of witnesses.

In sum, the ABA, and hence the states, have a variety of rules that arguably regulate the motive of lawyers or their clients in civil litigation. To be sure, bad motive alone does not appear to be the primary target of these rules. The rules seemingly try to regulate litigation conduct in terms of its effect. Yet, the terms of the rules are sufficiently broad that they reach motive alone, regardless of the merit or the effect of the activity.

That the rules regulate motive of course does not by itself invalidate the rules. Many laws turn on motive or state of mind. The questions instead are first, whether any of the activity that these rules purport to regulate–filing a civil complaint or other paper, other conduct of litigation, or treatment of third parties–is protected by the First Amendment right to petition courts, and, second, whether motive is a permissible basis on which to regulate that First Amendment right. Analysis of these questions requires an understanding of the right to petition courts.

Rights of Third Persons") (emphasis added). The ABA's Ethics 2000 Commission has proposed additional paragraphs to Model Rule 4.4. *See* ABA website: www.abanet.org/cpr/ethics2k. The proposed additions principally deal with privilege and do not affect the application of the rule to potentially regulate the motive with which a lawyer may act in litigation with regard to third parties.

77. The rule is part of Section 4 of the Model Rules format, which part is entitled "Transactions with Persons Other Than Clients." By contrast, Section 3, which contains both Model Rules 3.1 and 3.2 is entitled simply "Advocate." *See* MODEL RULES OF PROFESSIONAL CONDUCT, Table of Contents.

78. That the rule has potential application to litigation is illustrated by the official "Model Code Comparison" that ABA included as part of the commentary to Model Rule 4.4. That section cites as a source of Model Rule 4.4 sections of the Model Code addressing litigation, including DR 7-102(A). MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.4 (Model Code Comparison). The concern about the impact of litigation on third persons dates back to the lawyer oaths and statements of duties under which a lawyer was not to prejudice the honor or reputation of a witness except as necessary to do justice to the client's cause. *See* 1852 Alabama Code, *supra* note 25. Indeed, the Ancient French Oath included such a provision in 1344. *See supra* note 21.

III. THE RIGHT TO PETITION COURTS

The Supreme Court first recognized that the Petition Clause protects access to court in a line of cases involving state regulation of lawyers, beginning in 1963 with *NAACP v. Button*.[79] In *Button*, the NAACP had urged black persons to use NAACP lawyers to bring desegregation suits against Virginia. Virginia claimed that this activity violated its statutes against solicitation of legal business. The Court held that the NAACP's litigation activities were protected by the First Amendment. The Court emphasized the rights of association and expression, but it also suggested that the right to petition protected litigation:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, *litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*[80]

In 1964, the Court applied *Button* to private, personal injury litigation. In *Brotherhood of Railroad Trainmen v. Virginia*,[81] the union ad-

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79. 371 U.S. 415 (1963).

80. *Id.* at 429-30 (emphasis added). The Court further explained the relationship between litigation and more traditional views of First Amendment freedoms:

> We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. . . .
>
> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of the members of the American Negro community, at the same time and perhaps more important, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id. at 430-31.

81. 377 U.S. 1 (1964).

vised its injured members to consult with union-approved lawyers before settling claims for work-related injuries, primarily claims under the Federal Employer's Liability Act.[82] Virginia charged that the Union's service constituted unlawful solicitation and unauthorized practice of law. The Court held that the service was protected First Amendment activity, primarily association but also petition and court access:

> The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped.*[83]

Thus, the First Amendment right was not limited to political litigation.[84] Indeed, within the next seven years, the Court twice again applied the right to personal injury litigation, in *United Mine Workers of America, District 12 v. Illinois State Bar Association*[85] and in *United Transporta-*

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82. *Id.* at 1-5.

83. *Id.* at 7 (emphasis added).

84. The dissent in *Railroad Trainmen* argued for a political limitation:

> [In *Button*] the vital fact was that the claimed privilege was a 'form of political expression to secure, through court action, constitutionally protected civil rights. Personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damages claims. No guaranteed civil right is involved.

Id. at 10 (Clark, J., dissenting). The Court, however, had rejected a political limitation on First Amendment freedoms, including the right to petition, almost thirty years earlier, in *Thomas v. Collins*:

> This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. . . . Great secular causes, with small ones, are guarded. *The grievance for redress of which the right of petition was insured, and with the right of assembly, are not solely religious or political ones.* And the rights of free speech and a free press are not confined to any field of human interest

323 U.S. 516, 530-531 (1945) (citations omitted) (emphasis added).

85. 389 U.S. 217 (1967). Illinois tried to stop the UMW from hiring lawyers to assist its members in FELA claims. The Court held that the First Amendment protects personal injury litigation:

> We think that both the *Button* and *Trainmen* cases are controlling here. The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was in-

tion Union v. State Bar of Michigan.[86]

Despite their broader view of the right, the group litigation cases did not prompt widespread recognition or application of the right to petition courts. Legal analysts, and even the Court itself, continued to suggest that this new doctrine applied only where other First Amendment rights were implicated, particularly the freedom to assemble.[87] This narrow reading of the right of court access is consistent with the Court's contemporaneous treatment of court access under *due process.*[88] In a series of cases

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> sured, and with the right of assembly, are not solely religious or political ones.' . . . [*Thomas*]. And of course in *Trainmen,* where the litigation was as here, solely designed to compensate victims of industrial accidents, we rejected the contention made in dissent, that the principles announced in *Button* were applicable only to litigation for political purposes.

Id. at 223.

86. 401 U.S. 576 (1971). Here, the union program required counsel to limit his fees to 25% of all FELA recovery in exchange for the union recommending his services to its members. The Court invalidated Michigan's efforts to enjoin this union program:

> The common threat [sic] running through our decisions in *Button, Trainmen* and *United Mine Workers,* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation . . . The injunction cannot stand.

Id. at 585-86.

87. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985) (noting a "conceptual difficulty" in applying the union litigation cases to an individual claim because "the First Amendment interest at stake [in the union cases] was primarily the right to associate collectively"). I discuss *Walters* in more detail *infra* at notes 172-83. *See also* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment,* 17 HARV. J. L. & PUB. POL'Y 293, 386 n.447 (1994) (suggesting that *Button* addressed only pre-filing group organization and planning of litigation); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth,* 21 HASTINGS CONST. LAW. Q. 43-49 (1993) (interpreting the group litigation cases as requiring the presence of a First Amendment freedom other than petitioning).

88. Also at the same time the Court was developing a separate right of court access for prisoners, not applicable to ordinary citizens. The Court has suggested that this unique right of court access rests upon both the Habeas Clause and equal protection, but it now bases this right on due process. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of court access to the courts, upon which [prisoner

beginning in 1971, the Court held that due process rarely protects a plaintiff's right to court access.

Beginning with *Boddie v. Connecticut*,[89] indigent individuals challenged the requirement that they pay filing fees in order to file a civil complaint. The Court held that a plaintiff has no due process right of initial court access except in extraordinary circumstances, where courts are the only means to resolve the dispute and the matter is one of fundamental importance.[90] Thus, due process requires that an indigent divorce petitioner have free access to court because marriage is a fundamental right and because judicial decree is the only means by which to obtain a legal divorce,[91] but does not extend any right of court access to a bankruptcy petitioner[92] and a person challenging an adverse welfare determination.[93]

The Court broke away from this trend in another line of cases, interpreting the antitrust laws, and started to develop a broader right of court access under the Petition Clause.[94] In 1961, in *Eastern Railroad Pres-*

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access cases were premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"). *But see* Bounds v. Smith, 430 U.S. 817, 838-40 (1977) (Rehnquist, J., dissenting) (arguing that the Court's declaration of a "fundamental right of access to the courts [for prisoners] . . . is found nowhere in the Constitution").

89. 401 U.S. 371 (1971).

90. *Id.* at 375-76 & 382-83 (stating that due process typically does not protect "persons seeking access to the judicial process in the first instance . . . because . . . resort to courts is not usually the only available, legitimate means of resolving private disputes" and that judicial access may be "placed beyond the reach of any individual" unless resort to courts "is the exclusive precondition to the adjustment of a fundamental human relationship").

91. *Id.* at 376, 383 (holding that "marriage involves interests of basic importance in our society" and that "a State may not consistent with the . . . Due Process Clause . . . pre-empt the right to resolve this legal relationship without affording all citizens access to the means it has prescribed for doing so").

92. United States v. Kras, 409 U.S. 434, 444-45 (1973) (noting that an alleged bankrupt's interest "does not rise to the same constitutional level" as the "associational" interest in dissolving a marriage and that "a debtor, . . . in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors").

93. Ortwein v. Schwartz, 410 U.S. 565 (1973) (per curiam) (noting that the interest in welfare payments "has far less constitutional significance" than divorce and that the welfare administration hearing process was an alternate form of dispute resolution, thus rendering access to courts non-essential).

94. The Court discussed and developed the various doctrines of court access

idents Conference v. Noerr Motor Freight, Inc.,[95] a group of truckers brought antitrust claims against railroads that had lobbied the governor of Pennsylvania to veto legislation that benefitted truckers.[96] The railroads allegedly lobbied the governor in order to "destroy" the truckers.[97] The Court limited the Sherman Act so that it did not outlaw such lobbying activity, and in doing so, the Court cited the Petition Clause: the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[98]

In 1972, the Court in *California Motor Transport v. Trucking Unlimited*[99] extended *Noerr* antitrust immunity to the courts:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of the government. Certainly, the right to petition extends to all departments of the government. *The right of access to the courts is indeed but one aspect of the right of petition.*[100]

The Court did not explain its bases for extending the petition right to the courts. As I explain in detail in my first article, the record is "thin" on this issue, but the Court probably was correct. The history, policies and text of the Petition Clause all support, in varying degrees, application of the petition right to the courts.[101] In addition, the Court has since "strengthened" the right by recognizing and applying it in other contexts.

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almost in isolation. The Court rarely mentioned the competing theories of court access. For further discussion of this anomaly, *see* Andrews, *A Right of Court Access*, *supra* note 7, at § I(B).

95. 365 U.S. 127 (1961).

96. *Id* at 129. The Sherman Act reaches lobbying activity if the petitioner intended to monopolize trade or acted collectively with others to restrain competition through the lobbying and caused harm to competition. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(C)(1).

97. 365 U.S. at 139.

98. 365 U.S. at 138. The Court also noted that political activity is essentially different from the commercial activity that the Sherman Act was meant to regulate. *Id.* at 137-38. *See also* McGowan & Lemeley, *supra* note 87.

99. 404 U.S. 508 (1972).

100. *Id.* at 510 (emphasis added). The *California Motor Transport* pronouncement was a dictum in that the Court ultimately held that the defendants' adjudication efforts were "sham" (i.e., baseless claims) and therefore not protected petitioning. *Id.* at 510 & 513. *See infra* notes 129-33 and 137-40 (discussing the Court's "sham" exception to petitioning immunity).

101. *See* Andrews, *A Right of Court Access*, *supra* note 7, at § II.

Of particular importance is a 1983 case in which the Court applied petitioning immunity to the federal labor laws—*Bill Johnson's Restaurants v. NLRB*.[102] There, an employer sued picketing employees for defamation in state court. The National Labor Relations Board found that the employer had brought the claim in retaliation for the workers' picketing and enjoined the employer's suit as an unfair labor practice, in violation of the National Labor Relations Act.[103] A unanimous Court reversed. As in *Noerr*, it construed the NLRA so that it would not run afoul of the Petition Clause:

> In *California Motor Transport* . . . we recognized that the right of access to the courts is an aspect of the First Amendment right to petition . . . The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right [under the NLRA].[104]

The NLRB could not interfere with the employer's right of access to court if its suit met the requisite standard of merit.[105]

The Court's most recent statement of the right came in 1993, in another antitrust case.[106] In *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*,[107] the Court clarified its holding in *California Motor Transport* that certain "sham" litigation is not protected by

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102. 461 U.S. 731 (1983).

103. The NLRA, like the Sherman Act, is broad enough to attach to civil court filings if done with the requisite intent and resultant harm. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III(C)(2).

104. 461 U.S. at 741. *See also id.* at 742-43 ("considering the First Amendment right of access to the courts and the state interests . . . we conclude [that] [t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiffs desire to retaliate"); *Id.* at 751-52 (J. Brennan, concurring) (acknowledging that the Petition Clause extended to the courts and that the narrow interpretation of the NLRA has "constitutional resonances). I discuss *Bill Johnson's Restaurants* in more detail, *infra* at notes 130-32 and 139-40.

105. I discuss the merit standard in detail, *infra* at notes 130-35 and 140.

106. In two other cases since *Bill Johnsons' Restaurants*, the Court has in dicta recognized the right to petition courts. *See* Sure-Tan v. NLRB, 467 U.S. 883 (1984) ("The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs.'"); McDonald v. Smith, 472 U.S. 479 (1985) ("Filing of a complaint is a from of petitioning activity.").

107. 508 U.S. 49 (1993).

Noerr petitioning immunity.[108] The Court in *Professional Real Estate Investors* held that, in order to constitute a "sham," and thus fall outside of *Noerr* petitioning immunity, litigation must be both objectively unreasonable and made in subjective bad faith.[109] If the claim is objectively reasonable, motive is irrelevant, the claim is not sham and its filing is immune from antitrust liability.[110]

This clear definition of the *Noerr* antitrust immunity as applied to litigation prompted wider recognition of the right to petition courts outside of antitrust and labor suits. Many courts and commentators now take *Professional Real Estate Investors* as a constitutional mandate and recognize a First Amendment right of court access.[111] That the Court more clearly defined *Noerr* immunity, however, does not mean that it defined the right to petition courts or that the *Professional Real Estate Investors* test is appropriate for judging the professional rules of conduct. As I note above, *Noerr* is both a constitutional mandate and an interpretation of the antitrust laws. In the next Section, I grapple with both defining the right to petition courts and applying that right to test the motive restrictions in the professional rules.

IV. A PETITION CLAUSE ANALYSIS OF MOTIVE RESTRICTIONS ON COURT ACCESS

My Petition Clause analysis of the professional restrictions on motive has three parts.[112] The first step, in Part A, is to define the scope of

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108. In *Noerr*, the Court allowed certain "sham" lobbying activity to be subject to antitrust liability (365 U.S. at 144). *California Motor Transport* applied the sham exception to judicial petitions, but defined sham litigation in a confusing manner. I discuss this confusion *infra* at notes 127-33.

109. 508 U.S. at 57.

110. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* at 60. I discuss *Professional Real Estate Investors* in more detail, *infra* at notes 131-33 & 138-39.

111. I collect the cases and academic literature in my previous article. *See* Andrews, *A Right of Court Access*, *supra* note 7, at notes 118-19.

112. I explain the structure of my analysis in more detail in my previous articles. It roughly approximates that of the Supreme Court in assessing rules that regulate speech, particularly the Court's defamation cases. Admittedly, however, the proper analysis of any constitutional right, particularly those under the First Amendment, is a matter of debate. The Court itself is not consistent and rarely labels its analysis. Indeed, the Court's prior assessment of motive and the exercise of First Amendment rights, including the Right to Petition, has not followed any particular approach in

the right to petition courts. This discussion recaps my prior efforts to define the right: the "core" or absolute right under the Petition Clause includes only the initial filing of a winning claim, but it is not defined by the motive of the plaintiff. Whether the Petition Clause demands further protection of court access is a separate question that I analyze under the breathing room doctrine in Part C. In Part A, I discuss the parameters of the core right and isolate potential applications of the professional rules that touch upon that core activity.

As the second step, in Part B, I apply strict scrutiny to the professional rules, assuming their application to the core activity of filing winning claims, and conclude that the rules fail under that analysis. In the third and last step, I analyze in Part C, under the more lenient balancing test of the breathing room doctrines, whether the professional rules may regulate motive in non-core activity—filing losing claims or subsequent motions and other civil papers. I conclude that any motive restriction that applies to meritorious claim, winning or losing, unduly chills access to court, but that motive restraints on subsequent litigation activity are permissible.

For the most part, this discussion will replicate my prior analysis of motive restrictions generally.[113] The professional rules, however, require some unique analysis. Unlike court rules such as Federal Rule of Civil Procedure 11, which govern both attorney and client behavior, the professional rules of conduct purport to regulate lawyer conduct only. By barring a lawyer from filing a claim, the rules do not directly prohibit the client from doing so. The right under the Petition Clause is that of the plaintiff, not the lawyer. The cause of action belongs to the client. Thus, when we assess the professional rules, we must bear in mind that their impact on the core right to petition is indirect, merely restricting a lawyer from assisting the client in his efforts to gain access to court.[114]

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testing selected motive restrictions on speech or even the right to petition. *See generally* Andrews, *Motive Restrictions*, *supra* note 9, § IV.

113. *See id.*

114. This also distinguishes Petition Clause analysis from previous challenges to the professional rules under the Speech Clause. *See supra* note 1. In those cases, the Court was addressing the lawyer's right of free speech, not necessarily that of his client. Thus, to the extent that the rules regulated speech, they direct infringed upon the right held by the lawyer. The most obvious example is the commercial speech cases, such as *Bates*, *Ohralik*, and *Primus*, involving the lawyers' efforts to advertise or solicit clients on his own behalf. *Id.* In *Gentile*, *supra* note 6 where the Court addressed the right of the lawyer to speak to the press concerning pending litigation,

The analysis is further complicated by the related issue of whose motive the rule purports to regulate. As I discuss in Section I, the professional rules are ambiguous as to whether they address the motive of the client, the lawyer, or both. A rule that addresses only lawyer motive has a different legislative purpose and effect than one that purports to control the client's motive. Their functions may overlap (they both aim to protect the court system, the legal profession and defendants from harm), but a rule addressing lawyer's personal motive has a unique aim of protecting the client from the lawyer's divided interests and potential impairment of judgment. As we shall see this difference is crucial. Most First Amendment analyses, particularly the strict scrutiny and breathing room tests, turn on the effect of and governmental interest behind a regulation.

A. Defining the Right to Petition Courts

Definition of the right to petition courts is an essential first step. This was the most controversial aspect of my previous analyses of the right of court access. In my first article, I argued that the right was narrow: the right of an individual or group to file a winning claim within the court's jurisdiction.[115] Only two elements of that right are relevant here – the client's right to *file* civil complaints that state *winning* claims.[116] In my second article, I argued that a plaintiff's motive does not define his right to petition courts. In other words, the right to petition for redress does not necessarily mean that redress must be a motive of the plaintiff. In this Part, I recap these three elements of my proposed definition of the right to petition courts and isolate how the professional rules may apply

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the right arguably could be attributed in part to the client. In other words, the lawyer as the representative of the imprisoned client was speaking on behalf of the client and exercising the client's right of speech. However, the Court did not make this distinction and addressed the right as that of the lawyer.

115. I admit that mine is a controversial definition, but I contend that it is consistent with Supreme Court precedent, historical practice and policy. In particular, I acknowledge that the historical basis for such an interpretation is somewhat weak, but the entire historical record concerning the right to petition, including whether the right extends to courts at all, is thin. *See* Andrews, *A Right of Court Access*, *supra* note 7, at § II(A).

116. I discuss the other two elements—that the right extended both to an individual and to groups of persons and that the right extended only to claims within the court's jurisdiction—at length in my earlier article. *See id.*, at §§ III(A) & III (D).

to impact that narrow right.

1. Defining the Right to Protect Only the Initial Filing of Claims.—First, I contend that the right of court access is one of initial access only, the right merely to file a civil complaint, and that it does not govern litigation procedure after the plaintiff files the complaint. This seems to be a logical reading of the Petition Clause, which guarantees only the right "*to petition.*" Indeed, the Supreme Court seemingly has adopted this view. The Court has held that the Petition Clause does not impose any duty on the government to respond to petitions.[117] Under this view, the right to petition courts would be one of access only and would not impact subsequent treatment of the petition.

However, some scholars argue that the right "to petition" necessarily includes a response to the petition and that the Court's holdings are contrary to historical practice.[118] This argument need not be resolved to understand the duty of courts in response to judicial petitions. To the extent that the scholars advocate a response duty under the Petition Clause, that duty is minimal and may require only a summary denial.[119] Due process already requires that much and more. The Due Process Clauses of the Fifth and Fourteenth Amendments require the government to give fair and reasonable consideration to a civil complaint once it is filed.[120] The

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117. Minnesota State Board of Community Colleges v. Knight, 465 U.S. 271, 285 (1984) ("nothing in the First Amendment or in this Courts' case law interpreting it suggests that the rights to speak associate, and petition required government policymakers to listen or respond to individuals' communications on public issues.").

118. *See* Andrews, *A Right of Court Access, supra* note 7, at notes 268-83.

119. *See supra* note 87, at 51 (noting that the historical "right to petition did include both the right to present a written petition and the right to receive a response, which, at a minimum, might be a summary denial").

120. This obligation under due process distinguishes judicial petitions from petitions to the executive or legislature, which, the Court has held, does not trigger any due process obligation on the government to respond. *See* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915) (holding that due process does not require that an individual have an opportunity to be heard on matters of public concern: "[t]here must be a limit to individual argument in such matters if government is to go on"). A civil complaint, unlike a legislative petition, is a property right, that once in the hands of the government, through its court system, requires due process. *See generally* Mullane v. Central Hanover Trust, 339 U.S. 306, 313 (1950) (noting that the civil actions are a form of property interest and that "there can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing . . .").

Petition Clause, with its attendant heightened scrutiny, protects the initial access, the ability to ask for justice, and due process steps in thereafter to guard, through its reasonableness standards, the procedure used to resolve the claim.[121]

The Speech Clause also protects the speech uttered in the litigation process. The Court has not extended absolute protection to such speech and in fact gives the government considerable latitude in controlling speech in court proceedings.[122] The unique nature of courts and the trial process require that the government have greater control of the process, including the speech. These doctrines and concessions primarily are questions of protection, not definition. Speech in a courtroom is still speech. I will discuss the appropriate standards of protection in more detail below, in Part B. I raise the issue here only to distinguish the petition right. The petition right is one of access and does not speak directly to either the

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121. The Supreme Court explained this different level of protection afforded due process and First Amendment freedoms, including the right to petition:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice. . . .
>
> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Thomas v. Collins, 323 U.S. 516, 530 (1945). For further discussion and application of the "strict scrutiny" applicable to the right to petition, see *infra*, at § III(B)(1)&(2).

122. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984), for example, the Court held that a court may restrain a party from publishing information gained in civil discovery: "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting." Regulation of speech in civil proceedings also can be justified under the Court's public fora doctrine, under which the Court places only reasonableness standards on governmental restriction of speech in government owned facilities, such as courtrooms, that traditionally have not been open to the public for open speech. *See generally* SMOLLA, *supra* note 5, ch. 8; *see also* McGowan & Lemley, *supra* note 87, at 381-89 (discussing a doctrine and the right to petition courts).

speech in the petition or to its later processing.[123]

This means that most applications of the motive restrictions in the professional rules of conduct are not regulation of core activity protected under the Petition Clause.[124] Unquestionably, Model Rule 3.1and DR 7-102(A) both govern the filing of an initial claim (i.e., their express terms

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123. A few other scholars have recognized this distinction between access and later processing of claims. Norman Smith argues that the petition right is one of access only and that post-filing protection of the petitioner is a question under other clauses of the constitution. Norman B. Smith, *"Shall Make No Law Abridging . . . :" An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CINN. L. REV. 1153, 1191 (1986) (stating that "the petition clause of the first amendment protects only the core petitioning activities–preparing and signing a written petition and transmitting it to the government" and that "[a]ny protection of activities beyon this scope is derived from other constitutional rights"). Smith uses this narrow feature of the petition right to conclude that the petition right is nearly absolute, and he argues that the Court wrongly decided cases such as *McDonald* (allowing defamation liability on speech in a petition, *see infra* note 128). As this and my previous analyses of the right to petition courts illustrate, I agree that the right to petition is narrow but dispute that the right is absolute. David McGowan and Mark Lemley also argue that the Petition Clause right, applied to courts, is at most a right of access:

> [T]here are vast differences between courts and other governmental bodies to which the right to petition might apply. Courts, for example, have almost plenary power to control the actual proceedings in the courtroom. . . .
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> According to the Court [in *California Motor Transport*], the First Amendment grants a right of *access* —it gives a petitioner the right to get insider the courthouse door. The opinion does not indicate what level of protection is afforded to speech that takes place once the petitioner is inside. . . .
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> Once in court, plaintiff's First Amendment rights are at the mercy of the rules of the forum. . . .

McGowan & Lemley, *supra* note 87, at 384, 385 & 389 (1994). McGowan and Lemley argue that such a right of access "is not much of a right" and question its impact on doctrines governing access, such as standing rules, jurisdictional limits, and rules governing litigation process. *Id.* at 386-87. I disagree that the right of access is meaningless but agree that careful consideration must be given to the meaning and application of the right. That is the point of this and my prior articles on the right to petition courts.

124. This definition does not, however, answer whether, under the breathing room doctrine, the First Amendment nevertheless invalidates the rules because they come too close to, and thus unduly chill, core activity. *See supra* § III(B)(3).

apply to the bringing of a proceeding and filing of a suit, respectively),[125] but these two rules also regulate other civil filings. They apply to defenses, whether raised in the answer pleading or in motions, and all other issues and actions in civil litigation. The lesser reasonableness standard of due process, as opposed to Petition Clause strict scrutiny, governs application of Model Rule 3.1 and DR 7-102(A) to civil papers other than those stating claims for relief.[126]

Model Rule 3.2 presents a similar split, although it primarily addresses activity outside of the core right. Model Rule 3.2 speaks to delay of litigation. Delay most commonly occurs through conduct other than the filing of a claim. To that extent, the right to petition courts would not govern the validity of the rule. However, the rule possibly could reach the framing or filing of a complaint. A litigant or lawyer, for example, could act for the purpose of delay by deliberately waiting until the last day of the limitations period to file a complaint or by separating the complaint into several counts or multiple complaints so as to make the litigation more complex and time-consuming. Because Model Rule 3.2 requires an attorney to expedite the litigation, he could not file a complaint or complaints for this purpose, whether it was his client's or his own purpose.

Model Rule 4.4 presents the same dichotomy. The rule in most applications to civil litigation would govern post-filing activity, such as examination at trial. Nevertheless, the rule potentially limits initial access to court. A lawyer or client might choose to frame or file a complaint with the specific intent to "embarrass, delay, or burden a third person." For example, they might elect to file a complaint with scandalous charges against one person in order to embarrass a third person (the spouse, employee, political protegee, etc. of the defendant). If the lawyer's or the client's "substantial" aim is to embarrass and burden the third party, Model Rule 4.4 would bar filing of the complaint and thus would regulate activity governed by the First Amendment.

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125. The claim need not be the original complaint. Arguably, a claim for relief in any form is within the right to petition and would include claims in amended complaints, counter claims, cross claims and third party claims. *See* Andrews, *A Right of Court Access*, *supra* note 7, at 588.

126. First Amendment principles may have some application to post-filing litigation activity. As I discuss in § III (B)(3)(b), the breathing room analysis arguably applies to such a rule to determine whether its regulation of non-core activity—filing motions–unduly dulls exercise of the core activity—filing a winning claim.

2. Defining the Right to Protect Filing of Only Winning Claims.—I also propose that the "core" or absolute right to petition courts extends only to winning claims and does not include losing claims, even those that had some merit when filed. A merits standard makes practical sense; it frees the courts and other parties of the burden and harm of such claims. Indeed, the Court already has imposed some form of "merits" standard on speech and petitions. The Court holds that some speech, such as false speech, is not within the First Amendment right of speech.[127] In *McDonald v. Smith*,[128] the Court imposed on petitions the same false and defamatory standards applicable to speech; in other words, there is no absolute right to utter false speech in petitions. In *Noerr* and *California Motor Transport*, the Court held that "sham" petitions, whether executive or judicial, were not within the protection of the First Amendment.[129]

The problem is setting the constitutional merits standard for judicial petitions. The Court has stated unequivocally that "baseless" litigation is not protected by the First Amendment, but it has not consistently defined "baseless."[130] The Court in *Professional Real Estate Investors* defined the standard as one of objective reasonableness,[131] and in *Bill Johnson's Restaurants*, it defined the test as a "win-lose" standard.[132] Which test

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127. The Court balanced competing interests to determine that "there is no constitutional value in false statements of fact:"

> Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential party of any exposition of ideas," and are of such light social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Gertz v. Welch, 418 U.S. 323, 340 (1924) (citations omitted).

128. 472 U.S. 479 (1985).

129. *See supra* notes 108-110. Even in *Button*, the court recognized that the First Amendment protection of litigation extended only to litigation "of lawful ends." 71 U.S. at 429 (*reprinted supra* at note 80.)

130. *Bill Johnson's Restaurants*, 461 U.S. at 743 ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.")

131. *See supra* notes 109-110.

132. The Court in *Bill Johnson's Restaurants* gave two tests for determining whether a suit is protected under the First Amendment, depending on status of the litigation. For on-going state court litigation, the Court adopted the test for summary judgment, whether employer's law suit presents "any genuine issues of fact." If it does, the Board may not enjoin the suit:

> When a suit presents genuine factual issues, the state plaintiff's First

did the Court intend to be the First Amendment standard?

Professional Real Estate Investors is the later case, but the Court did not overrule *Bill Johnson's Restaurants* and has continued to cite it with approval. Its lower standard therefore sets the constitutional floor—winning versus losing claims. The different standard in *Professional Real Estate Investors*—for losing but non-frivolous claims—likely is (and should be) a policy judgment as to the proper reach of the federal antitrust laws.[133] As I explore in more detail in my previous articles, the win-lose standard, though seemingly harsh, is consistent with the histori-

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> Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, leads us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

461 U.S. at 745. However, once the state claim is concluded, the test is whether the employer won or lost his suit:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves *meritorious and he has judgment against the employees*, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive is not an unfair labor practice. *If judgment goes against the employer* in the state court, however, or if his suit is withdrawn *or is otherwise shown to be without merit*, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor case. The *employer's suit having proved unmeritorious*, the Board would be warranted in taking that fact into account in determine whether the suit had been filed in retaliation of the exercise of the employees' . . . rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses.

Id. at 747 (emphasis added).

133. Most observers do not make this distinction and assume that *Professional Real Estate Investors* sets the constitutional standard. *See generally* Andrews, *A Right of Court Access*, *supra* note 7, at notes 118-19 (collecting cases and commentary). They tend to take an all or nothing approach—the case is either a constitutional mandate or entirely a question of antitrust law. I contend that part of the protection in *Professional Real Estate Investors* is required under the Petition Clause and the remainder is a policy choice. A few courts have recognized this distinction. *See* United States v. Robinson, Fair Housing-Fair Lending ¶ 15,979 (P-H) (D. Conn. Jan. 26, 1995) (recognizing that *Professional Real Estate Investors* has both First Amendment and policy elements and taking a policy and interest balancing approach to determine the degree of petitioning immunity available in defense to alleged violation of the Fair Housing Act).

cal tradition of punishing losing plaintiffs,[134] and is softened by application of doctrines such as the breathing room and prior restraint rules.[135]

This "win-lose" distinction by itself does not save any of the motive restrictions in the professional rules from a First Amendment challenge. The rules are neutral as to whether a claim is won or lost; they apply equally to winning and losing claims.[136] Nevertheless, the win-lose definition of the right to petition courts is essential to the remaining Petition Clause analysis of the professional rules. The distinction between a winning and losing claim plays a prominent role both in determining whether motive defines the right to petition courts and in applying strict scrutiny and breathing room analysis. In each step, I look at the effect of the professional rule on the core right—the filing of a winning claim (as opposed to the effect on filing a meritorious but losing claim).

3. Defining the Right to Include Complaints Filed for Ill Motives.—The final question of definition here is whether the motive of the plaintiff itself might take the filing outside the scope of the right to petition. In other words, if the plaintiff has an improper motive, is he filing a petition within the meaning of the Petition Clause? As I explain below, although there is some textual basis for this narrow reading, Court precedent as well as policy and historical practice argue for inclusion of all winning claims within the right to petition, regardless of the motive of the plaintiff.

First, the Court has suggested that a plaintiff's motive does not define his right to petition.[137] This is best seen in *Professional Real Estate*

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134. *See supra* notes 15-16; *see also* Andrews, *Motive Restrictions*, *supra* note 9, at § III(A).

135. *See infra* § III(B)(3); *see also* Andrews, *A Right of Court Access*, *supra* note 7, at § IV(D).

136. DR-7-102(A) and Model Rule 3.1 arguably would bar the filing of even a winning complaint if the lawyer's or the client's sole or primary purpose in filing was to harass the defendant. Model Rule 3.2 would bar the intentional framing and filing of a complaint to create delay even if the complaint states valid winning claims. And Model Rule 4.4 would bar the filing of a winning claim if the substantial purpose behind the filing was to embarrass or burden a non-party.

137. Likewise, the Court has held that motive is not a proper basis on which to restrict otherwise protected speech. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (holding that a parody of a public figure may not be subject to civil liability under the tort of emotional distress: "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public fig-

Investors and *Bill Johnson's Restaurants*. The Court in *Professional Real Estate Investors* held that litigation that has objective merit is protected, regardless of the actual motive of the plaintiff:

> We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claims premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals " an attempt to interfere *directly* with the business relationships of a competitor, through the "use [of] the government *process*—as opposed to the *outcome* of that process—as an anti-competitive weapon.[138]

Significantly, the Court included the intent to use litigation as a weapon as one of the motives that are irrelevant if the claim has objective merit. Thus, so long as the underlying claim has merit, the litigation is immune from antitrust liability regardless of the original plaintiff's intent to use the process of litigation to inflict harm on his competitor.

This view is consistent with the Court's holding in *Bill Johnson's Restaurants*. As I discuss above, *Bill Johnson's Restaurants* differed from *Professional Real Estate Investors* in setting the standard for merit, but both held that merit was the essential prerequisite to petitioning protection.[139] Indeed, the Court in *Bill Johnson's Restaurants* expressly rejected the NLRB position that liability could attach based solely on the employer's retaliatory motive in filing suit, regardless of the merit of the underlying claim.[140] Thus, *Bill Johnson's Restaurants* and *Professional*

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ures"); Garrison v. Louisiana, 379 U.S. 64 (1964) (quoting State v. Burnham, 9 N.H. 34, 42-43 (1837)) (holding that ill motive cannot subject true speech to punishment, at least not true speech about issues of public concern: "If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice.").

138. 508 U.S. at 60-61 (citation omitted) (emphasis in original).

139. The standard for completed suits was whether the plaintiff won or lost, and the standard for on-going suits was whether the suit had sufficient merit to withstand summary judgment. *See supra* note 132.

140. The Court summarized the Board's position:

> [T]he Board does not regard lack of merit in the employer's suit as an

Real Estate Investors are in agreement that the government cannot restrict court access based solely on plaintiff's motive.

It also is good policy to define the right to petition without regard to motive of the plaintiff. As noted by the Court in *Noerr*, most petitions are accompanied by some selfish or other "less than ideal" motive:

> The right of the people to inform their government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[141]

This practical reality extends to judicial petitions. Most plaintiffs bear ill feelings toward the defendant. Society might be deprived of important changes if the right to go to court were limited by the plaintiff's motive. The right to petition the courts is perhaps most important when the parties are hostile to each other. Indeed, one of the primary policy bases for

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> independent element of the Section 8(a)(1) and 8(a)(4) unfair labor practice. Rather, it asserts that the only essential element of a violation is retaliatory motive.

461 U.S. at 740. The Court explained the relationship of motive and the right to petition courts:

> In *California Motor Transport*, we recognized that the right of access to the court is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. We should be sensitive to these First Amendment values in construing the NLRA in the present context. . . . The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.

Id. at 741. *See also id.* at 743 ("The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.").

141. 365 U.S. at 139.

extending the right to petition to the courts assumes that such hostility. The ability to petition the government is a potential alternative to force.

Moreover, a core precept of the First Amendment is freedom of thought. Use of motive to limit the right to petition courts would undermine that goal.[142] Today, society might applaud a plaintiff who wants to destroy the Ku Klux Klan or the big tobacco companies through the filing of a winning claim and frown upon plaintiffs who have the same intentions with regard to an hourly wage earner or a political protester. Society in a different time or place might have another view. The availability of the courts to hear winning claims should not turn on popularity contests and mood swings.

Finally, use of motive to restrict court access is not mandated by historical practice.[143] Courts traditionally tied access to merit, not motive alone.[144] Motive barriers that directly restricted the client himself

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142. Unlike use of the speaker's state of mind as an awareness standard to put the speaker in control of his First Amendment rights, this use of motive limits the exercise of First Amendment freedoms and raises the specter of thought control. Professor Tribe analyzes these different functions of motive and their implications on the First Amendment in his essay on public and private motives. *See* Tribe, *The Mystery of Motive, supra* note 11. He concludes that government may use motive to define what facts the actor knows and what he perceives about his injury, but not to regulate his beliefs:

> [E]ven this justification for inquiring into motive stops short of a general invitation to unearth the inner belief systems that give to particular facts their motivating effect for . . . actors. It is true that, in relatively rare circumstances, one might be able to justify focusing on these belief systems in the private context as the only practical way of distinguishing isolated violations from violations that are likely to recur, and that one may thus be able to justify a differential response, on grounds of deterrence, to private acts motivated by different underlying beliefs. But few rights, if any turn on the beliefs or values that make various perception count for the people who act on them. On the contrary, one of the presumptive rights people . . . have under our constitutional system is that their values and beliefs ordinarily should not define what they are permitted to do, or shape the consequences that attach to how they choose to act.

Id. at 35-36.

143. The practice likely was the same for judicial petitions presented to legislative bodies. In England and colonial America, when legislatures heard judicial petitions, they generally followed court practice. *See* Andrews, *A Right of Court Access, supra* note 7, at notes 352-54.

144. *See infra*, § I(A); *see generally* Andrews, *Motive Restrictions, supra* note 9, at § III(A).

from filing a civil claim did not appear in the procedural codes until the twentieth century. To be sure, some very early lawyer oaths–those predating the Petition Clause–may have denied lawyer assistance based on motive,[145] but those limitations do not necessarily define the petition right. First, the limitation only denied lawyer assistance, not the litigant's access to courts. Lawyer assistance may be essential today, but it was not in colonial America. Colonial petitioners and litigants regularly represented themselves.[146] Second, the motive limitations in these early oaths apparently applied to the lawyer's personal motive. If this is true, a limitation on one particular lawyer, due to his personal ill motives, did not act as a significant obstacle even to a petitioner who desired assistance of counsel because he could retain another lawyer.

Perhaps the only argument for using motive to define the right to petition is textual, defining the word "for" in the Petition Clause to mean the petitioner's intent.[147] In other words, if a plaintiff does not genuinely seek relief from his claim, regardless of its merit, he arguably does not petition "for redress for grievances."[148] To put the argument in terms of DR 7-102(A), if an action is filed "merely" to harass or maliciously injure another, it arguably is not filed "for redress of grievances."

I reject this reading of the Petition Clause. First, the argument extends only to a very specific motive or state of mind of the client-plaintiff—the absence of his personal intent to obtain a judgment. If a plaintiff does not actually want relief, his claim (no matter how meritorious) arguably is not a petition "for" redress of grievances, but if he wants relief and acts out of some other ill motive (to harass the defendant), his claim nevertheless is "for" redress. For the same reasons, the *lawyer*'s motive does not define the client's right to petition. Even if the lawyer has an ill motive (he wants to harass a political opponent), the petition is still for redress of the client's grievances.

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145. *See supra* notes 22-23.

146. *See generally* WARREN, *supra* note 24, at 1 (discussing colonial practice). Indeed, Charles Warren entitles the introduction to his history of American lawyers, "Law Without Lawyers."

147. A late eighteenth century dictionary defines the word "for" as meaning, among other things "for the reason," or in other words purpose. SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1784).

148. The Court suggested this narrow reading of the Petition Clause in its definition of sham petitions in *Noerr*, by excluding from petitioning immunity certain "sham" petitions that were not genuinely aimed at influencing governmental action. 365 U.S. at 144.

Second, the narrow interpretation of "for" is not the only possible reading of the Petition Clause. "For" could be descriptive, in the sense that it distinguishes one form of petition from another—those that request relief and those that do not.[149] A complaint that states a winning claim certainly requests relief, regardless of whether the plaintiff actually wants or expects that relief. In terms of DR 7-102(A), a claim filed to harass nevertheless is a request for redress. Indeed, that the plaintiff has requested relief is essential to achieve the harassment effect. If the complaint did not request relief, it would be dismissed and would have minimal effect on the defendant.

Policy and history also argue against excluding even the rare case where the plaintiff does not desire relief. By my definition of the right to petition courts, we must assume that the complaint states a winning claim. Winning claims inform the government of problems, advance the law, and help others even if the plaintiff himself wants to use the prosecution of his winning claim to harass the defendant. Courts historically were as indifferent to this motive as they were to other ill motives of the plaintiff. Indeed, the tort of abuse of process, which is aimed at the improper use of process, is a relatively modern creation.[150] Even today, application of the tort of abuse of process to the filing of an otherwise meritorious lawsuit is not universally accepted.[151] In sum, a plaintiff's (or his lawyer's) bad motive in filing a civil action, so long as the suit states a winning claim, does not take the claim outside the First Amendment.

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149. The 1784 dictionary lists "with respect to" as an alternative meaning of the word "for." SAMUEL JOHNSON, *supra* note 147.

150. Professor Prosser credits the 1848 English case of *Grainger v. Hill* as the origin of the tort of abuse of process. W. PAGE KEETON ET. AL., PROSSER & KEETON ON TORTS, § 121, at 897 (5th Ed. 1984). The *Grainger* court described the new tort:

> This is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved.

Grainger v. Hill, 132 Eng. Rep. 769, 773 (1838). *See also id.* at (stating that "[t]his is a *case primæ impressionis* [first impression]"); Jacobsen v. Garzo, 542 A.2d 265, 267 (Vt. 1988) (noting that "[t]he tort of abuse of process first appeared in *Grainger v. Hill*").

151. *See* Andrews, *Motive Restrictions*, *supra* note 9, at § III (B)(4).

B. Protecting the Right to Petition Courts

Definition of the right does not end the analysis. Whether the Professional Rules impermissibly infringe upon rights protected by the First Amendment depends on the protection extended to the right. The proper level of protection due any constitutional right often is a difficult question, but protection of First Amendment rights, in particular, has confounded the courts and generated extensive debate. Further compounding the problem is the fact that the Petition Clause right of court access is a new and untested right. As I discuss in more detail in my other articles, I advocate use of the general principles applicable to speech but urge that they be refined to fit the question of court access. I primarily rely on two basic doctrines of protection: strict scrutiny analysis and the breathing room doctrine. I apply those here to test the Rules of Professional Conduct that regulate motive in civil litigation.

1. Standards of Protection.—Under strict scrutiny, the government may regulate exercise of the right to petition courts so long as the regulation passes two prongs of analysis.[152] First, the government must have a compelling interest in imposing its restriction. Second, the regulation must restrict no more First Amendment activity than necessary to achieve that aim. Unfortunately, the process of strict scrutiny is somewhat muddled. Strict scrutiny means different things to different people. Courts and observers are not in agreement as to the proper test for or circumstances requiring strict scrutiny, as opposed to a "lesser" form of review, or, on the other extreme, absolute protection.[153] In addition, the proper focus of each prong may vary from case to case. For example, in assessing whether civil rights laws impermissibly infringe the right of association, the Court variously has considered the degree of impact of the law under both prongs of strict scrutiny.[154] Nevertheless, generally speaking, strict

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152. *See* NAACP v. Button, 371 U.S. 415, 438-44 (1963) (describing and applying the strict scrutiny test applicable to First Amendment freedoms); *see also* Thomas v. Collins, (*quoted supra* at note 121). By contrast, protection of due process requires only that the state reasonably aim—not narrowly tailor—its regulation to achieve a legitimate state object—not necessarily a compelling state interest. *See* Jones v. Union Guano, 264 U.S. 171,181 (1924) (holding that a court will not invalidate a precondition to filing suit under due process if "the condition imposes has a *reasonable* relation to a *legitimate* object") (emphasis added).

153. *See* Andrews, *Motive Restrictions*, *supra* note 9, at §§ IV(A) & IV(C)(2).

154. *See infra* at notes 170-71.

scrutiny is a demanding test and has two essential elements—a compelling governmental interest aim and a narrowly drafted statute.

Whereas strict scrutiny focuses on laws that regulate core rights, the breathing room doctrine looks at laws that regulate related activity, on the periphery of the core right, to determine whether the laws unduly chill exercise of the core right. The breathing room concept comes from the Court's speech cases. It is best seen in the *New York Times* line of defamation cases, but it also is reflected by other speech standards such as the prior restraint rule and the vagueness doctrine. Under *New York Times*,[155] a speaker of false speech cannot be liable for defamation unless he spoke with actual malice or reckless disregard for the falsity of his statement.[156] Though false speech is not within the absolute speech right of the First Amendment, this narrow class of false speech nevertheless gets some protection in order to avoid chilling the expression of *true* speech about important issues.[157]

Whether speech merits "breathing room" depends on the relative interests at stake and can take different forms. In *Gertz v. Welch*, the Court refused to extend the protection of the actual malice standard to persons who defamed private persons, as opposed to public figures.[158]

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155. The New York Times Company v. Sullivan, 376 U.S. 254 (1964).

156. The Court summarized this standard:

> The constitutional guarantees require, we think, a federal Rule that prohibits a public official form recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the state was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80. The Court also imposed an additional protection in *New York Times*; it required that the defamation plaintiff prove actual malice under a higher standard of proof–clear and convincing evidence—than the usual preponderance of evidence standard applicable in civil cases. *Id.* at 285.

157. It is important to note, however, that this actual malice standard is not a motive restriction like those at issue in this article. The actual malice standard is not a test of ill will but is instead an awareness standard. *See supra* note 12. It specifies the degree to which the speaker must appreciate the falsity of his speech. Moreover, it is an additional *protection* of speech. To be liable under *New York Times*, the speaker's statement must not only be false (and otherwise defamatory), but the speaker also must actually know, or recklessly disregard, that it is false.

158. Gertz v. Welch, 418 U.S. 323, 334 & 342 (1974). The "breathing room" terminology comes from *Gertz*: "[W]e have been especially anxious to assure to the freedoms of speech and press that 'breathing space essential to their fruitful exercise.' To that end this Court has extended a measure of strategic protection to defamatory falsehood." *Id.* at 342.

The potential for defamation liability based solely on negligent speech certainly would have a chilling effect on that speech, but the Court tolerated this deterrent effect. It did so because the speech at issue was not as important as speech about public figures and because the state interest in protecting a private person is greater than for the public official.[159] Yet, the *Gertz* Court gave some breathing room to such speech but in another form: it forbid the imposition of presumed or punitive damages.[160] These harsh penalties unduly deterred speech.

Other doctrines reflect the concern about chilling exercise of First Amendment freedoms. For example, just as the *Gertz* Court expressed concern about harsh penalties, the prior restraint rule looks with disfavor on governmental restraint, as opposed to subsequent punishment, of speech.[161] The rule presumes that it is better to allow even improper speech than to restrain the speaker from ever uttering the speech. If the speech is not protected (e.g., false and defamatory), the appropriate remedy is later imposition of civil damages, not prior restraint.[162]

The Court similarly protects speech through the vagueness and overbreadth doctrines[163] and demands specificity in laws so that persons have fair notice as to prohibited conduct[164] and invalidates laws that

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159. *See id.* at 344-46.

160. *See id.* at 348-50 ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehoods to inhibit the vigorous exercise of First Amendment freedoms.") The Court later refined this aspect of breathing room by holding that presumed and punitive damages could be awarded if the speech concerned purely privates and persons. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of actual malice.").

161. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW *supra*, §16.16, at 1020 (5th ed. 1995) ("Punishment of speech, after it has occurred, chills free expression. Prior restraint freezes free speech.").

162. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); *see generally* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH, ch. 15 (West 1998).

163. City of Chicago v. Morales, No. 97-1121, 1999 WL 373152, at *2 (June 10, 1999) (rejecting an overbreadth attack on an anti-loitering ordinance but ruling that the ordinance was unconstitutionally vague).

164. The vagueness concern applies to all statutes and is a question of due process: does the statute put a person on notice of what behavior is permissible and what is outlawed? *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)

reach too widely and regulate both conduct within the state's police powers and the exercise of First Amendment freedoms.[165] A poorly written or broad statute might survive judicial scrutiny if it merely regulates non-protected activity, but such failings are not tolerated when they impede exercise of First Amendment rights. First Amendment freedoms are too precious to risk this chilling effect.

Whether these breathing room concepts neccesarily apply to Petition Clause cases is open to question. The Court has suggested that the doctrines will apply. In *McDonald v. Smith*,[166] the Court applied the *New York Times* "actual malice" standard to defamatory speech in petitions, and the Court's decision in *Bill Johnson's Restaurants* reflects the concerns of the breathing room doctrine and the hostility toward prior restraints.[167] In *Thomas v. Collins*, the court stated that strict scrutiny will apply to protect the right to petition.[168]

We must proceed cautiously and not blindly apply these speech

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("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"). The Court, however, has warned that statutes touching on First Amendment rights, including the right to petition, must be stated with "narrow specificity" in order to avoid chilling exercise of those rights:

> [S]tandards of statutory vagueness are strict in the area of free expression . . . . [T]he danger [is] tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Button, 371 U.S. at 432-33 (citations omitted). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (noting that "where a vague statute abuts upon sensitive areas of basis First Amendment freedoms, it operates to inhibit the exercise of those freedoms") (citations and quotations omitted).

165. Not just any potential improper application will invalidate a statute that otherwise properly reaches activity within the police power of government. The test is whether the statute substantially burdens protected activity. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1077 (1991) ("The 'overbreadth doctrine' applies if an enactment 'prohibits constitutionally protected conduct.' To be unconstitutional, overbreadth must be substantial.") (citations omitted).

166. 472 U.S. 479 (1985).

167. *See* Andrews, *Motive Restrictions*, *supra* note 9, § IV(C)(3)(b).

168. *Supra* notes 84 and 121.

holdings to petition cases. The breathing room doctrines by definition require a close examination of the relative interests at stake and the impact of the government regulation on the core First Amendment right. The interests at stake in a judicial access case are usually different than those at issue in a speech case. For example, the defamation distinctions between public and private speech likely are not appropriate for judging court access, in part because all civil lawsuits involve matters of public concern. Instead, the fundamental factors–effect of the statute and the relative interests–better determine the degree and type of breathing room necessary to protect the ability to file winning claims.

Another fundamental question here is whether strict scrutiny applies at all, or, does the entire analysis come under the various breathing room doctrines. As I discuss in the previous Part, the professional rules regulate the *lawyer's* ability to file a winning claim on behalf of his client, if he or his client has the proscribed ill motive. In theory, even if the prohibition applies, the client is free to file the suit on his own, without the assistance of a lawyer. Yet, the prohibition unquestionably impacts the client. A typical plaintiff would be impeded, if not completely thwarted, in his attempt to gain access to court if he could not use the services of a lawyer.

This fact—that the rules do not directly regulate the protected right but instead only indirectly impede or deter exercise of the right—suggests breathing room analysis. Breathing room analysis looks to whether laws that touch the periphery of core rights unduly deter exercise of the core right (i.e., does civil liability for false and defamatory speech unduly chill true speech?). But the application at issue here is not the typical breathing room case, because to the extent that the professional rules regulate access to court at all, they impact winning and losing claims alike. By contrast, a rule imposing civil liability on false speech punishes only false speech. It might deter true speech, but it would not directly punish true speech.

The effect of the Professional Rules on the ability to petition courts might be better considered as an issue of the degree of intrusion. If the impact on the core right is significant, it is an infringement that must pass strict scrutiny analysis. The Court suggested a degree of intrusion test in analyzing whether civil rights laws impermissibly infringe upon the right

of association.[169] In cases such as *Roberts v. United States Jaycees*,[170] the Court purported to apply strict scrutiny and, in doing so, emphasized the degree of intrusion that the law had on the exercise of the core rights protected by the First Amendment.[171] Significantly, the Court also hinted at a degree of intrusion approach in an adjudicatory right to petition case—*Walters v. National Association of Radiation Survivors*.[172] Admittedly, the proper analysis of such a claim is anything but clear in *Walters:* the 1985 opinion is confusing and seems to undermine, rather than apply, the Petition Clause right of court access. Nevertheless, its approach is at least consistent with a degree of intrusion test for application of strict scrutiny.

In *Walters*, individuals and groups of veterans challenged the constitutionality of a statute that set a maximum $10 fee that veterans could pay attorneys in Veteran's Administration claims proceedings. Their principal challenge was under due process, but the veterans also claimed that the fee limit violated their First Amendment right of "meaningful access to court" as established by cases such as *United Mine Workers of America* and *Railroad Trainmen*.[173] The Court rejected the challenge. The Court first questioned whether the First Amendment right at stake in *United Mine Workers of America* and *Railroad Trainmen* extends to individuals, as opposed to merely groups and associations of people.[174]

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169. I discuss these cases in more detail in my previous article. *See* Andrews, *Motive Restrictions, supra* note 9, at § IV (C)(2).

170. 468 U.S. 609 (1984).

171. To be sure, the proper role of a degree of intrusion test is not clear in the Court's opinions. It may not be a test for application of strict scrutiny, but instead a factor in that analysis. The Court in *Roberts* suggested that the degree of intrusion fell under the second prong of strict scrutiny – whether the regulation was narrowly tailored. However, in *Hurley v. Irish-American Gay, Lesbian & Bi-sexual Group*, 515 U.S. 557 (1995), it also suggested that it was relevant both to the first prong—the state interest in regulating the activity—and to whether the First Amendment right was implicated. *Id.* at 578-79.

172. 473 U.S. 305 (1985). *Walters* involved access to an administration claims process and not courts. The Court in *California Motor Transport* extended the right to adjudication generally, including administrative proceedings. *See supra* note 100. Whether the right of access to administrative judicial process has the same parameters of the right of court access is beyond the scope of the article.

173. 473 U.S. at 334.

174. The Court stated:

> There are numerous conceptual difficulties with extending the cited cases [*UMW* and *Railroad Trainmen*] to cover the situation here; for example, those cases involved the rights of unions and union members to retain

Then, putting aside that fundamental question, the Court dismissed the First Amendment claim as having "no independent significance."[175] The Court held that the "First Amendment interest would attach only in the absence of a meaningful alternative" and concluded that the First Amendment claim raised the same issue as due process analysis: whether "the process allows the claimant to make a meaningful presentation."[176]

The Court's statements regarding the First Amendment right of court access are unfortunate. First, the Court failed to recognize that just two years before, in *Bill Johnson's Restaurants*, it had applied the Petition Clause to an individual plaintiff (as opposed to a group or association).[177] Second, the Court did not fully acknowledge that the First Amendment right of court access is a right distinct from that under due process. The Court's use of due process tests and terminology to answer a First Amendment challenge might suggest that the Petition Clause right of initial court access is as weak as that under due process—available only when fundamental rights are at stake and when courts are the only means of resolving a dispute.[178] This conclusion is belied by the Court's treatment of the right in cases such as *Bill Johnson's Restaurants* and *Professional Real Estate Investors*.

Although the language of *Walters* is flawed, its test and holding may not be. Much of the issue in *Walters* was in fact a question under due process. The fee cap provision applied not only to attorney assistance in filing the initial claim but also to the processing of the claim. As I explain above, the Petition Clause reaches only the filing of the claim, not its subsequent resolution. The claim processing standards generally are due process issues.

> or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. IN contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across-the-board to individuals and organizations alike.

Id. at 334-35.

175. *Id.* at 335.

176. *Id.* at 335; *see also id.* ("appellees' First Amendment arguments, at base, are really inseparable for their due process claims").

177. *See supra* notes 102-04. In addition, in my first article, I discuss the textual, historical and policy bases for applying the right to petition courts to individuals. *See* Andrews, *A Right of Court Access*, *supra* note 7, at § III(A).

178. *See infra* notes 89-93; *see also* Andrews, *A Right of Court Access*, *supra* note 7, at § IV.

However, even as to the question of initial access, *Walters* could be read as setting a standard for determining whether that right of access is implicated. If under the regulation, the claimant has a "meaningful alternative" in presenting his claim, the regulation does not rise to the level of an infringement of the First Amendment right of access and therefore does not require strict scrutiny.[179] On the other hand, if the regulation deprives him of meaningful access, the law fails unless it survives strict scrutiny (i.e., the government has a significant interest in regulating access and has narrowly tailored the law). To be sure, the Court never announced this latter point. It did not have to do so because it concluded that the VA claimants had a meaningful opportunity to file present their claim. Arguably, the need for strict scrutiny never arose.

The Professional Rules at issue here do not allow us to avoid strict scrutiny. In holding that the VA fee limit did not deprive claimants of meaningful access, the *Walters* Court relied upon the special nature of the administrative process at issue. Unlike the typical court system, the VA process was "not designed to operate adversarilly."[180] Even without a lawyer, the claimant had meaningful access to present his grievance. Of particular importance to the question of initial access, as opposed to later processing of the claim, were the narrow breadth of the issues at stake in each claim,[181] the claimant's ability to gain access merely by completing

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179. 473 U.S. at 335 (the "First Amendment interest would attach only in the absence of a 'meaningful alternative'")

180. *Id.* at 333. The Court explained:

> While counsel may well be needed to respond to opposing counsel or other form of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concession with respect to the claimant's burden of proof, the need for counsel is considerably diminished.

Id. at 333-34. The Court also noted that the underlying interest at stake in *Walters* was not of fundamental importance; it distinguished the VA benefits, which were not granted on the basis of need, from welfare payments upon which recipients depend for their daily subsistence. *Id.* at 332-34. This aspect of *Walters* replicates the Court's holdings in the due process court access cases in which it invalidated filing fees only in matters of "fundamental importance." Yet, even in those cases, the Court's primary emphasis was on the availability of another means, such as private negotiation, to resolve the dispute outside of court. *See supra* at notes 89-93.

181. *See id.* at 306.

a form supplied by the VA[182] and the availability of "trained service agents, free of charge, to assist claimants in developing and presenting their claims."[183] These unique features of the VA claim system protected the claimant's First Amendment right of access, even in absence of lawyer assistance.

The typical court system does not offer these alternatives. Courts do not give plaintiffs simple forms that can state every civil case. The range of potential legal and factual issues is too great. The courts do not provide free assistance of lawyers or other specialists to help plaintiffs develop and present their claims. Indeed, the court system is the base system to which the Court contrasted the VA process in *Walters*. It is one in which the assistance of lawyers makes a "meaningful" difference. Thus, a rule that bars all assistance of a lawyer in identifying, investigating and presenting a claim significantly intrudes upon the right to present that claim. This is not to say that the failure of the government to affirmatively provide counsel in civil cases is itself an infringement of the First Amendment right of court access, only that a law affirmatively *banning* assistance of a lawyer is a significant enough intrusion to require strict scrutiny of that law.

2. Strict Scrutiny of the Professional Rules' Motive Restrictions on Winning Claims .—The first step under strict scrutiny is identification of the governmental interest behind the regulation. Why does the state prohibit lawyer assistance in presenting a winning claim–and thereby limit court access–where the client or the lawyer has an ill motive? The government may have any number of reasons or aims. One is to deter frivolous lawsuits. Deterrence of baseless litigation serves several interests that likely are "compelling." As noted by the Court in *United States v. Harriss*[184] (a Petition Clause challenge to federal restrictions on lobbying), the government has a "vital" interest in ensuring that the voices of all of the people are not drowned out by some of the people.[185] Likewise, the government has a similar interest in ensuring that the limited resources of the courts are not consumed by frivolous claims and that the

182. *See id.* at 309.

183. *Id.* at 311.

184. 347 U.S. 612 (1954).

185. *Id.* at 625 (stating that Congress had a "vital national interest" in regulating lobbying to prevent the voice of the people from otherwise being "drowned out by the voice of special interest groups").

persons with meritorious claims have access to court.

Even taxpayers who do not themselves need access to court pay a high cost when plaintiffs file frivolous suits. Taxpayers must build court houses, hire judges and court staff, and otherwise process every claim, but they do not get value in return if the claim is baseless. Frivolous claims also hurt the defendant. He suffers injury to his reputation and the high cost, in terms of time, money and other resources, of defending a suit. In short, the government likely has compelling interests in stopping or deterring frivolous claims.

This conclusion does not end the analysis. The restriction must pass the second prong of the strict scrutiny test. That is the problem here. Motive restrictions are not narrowly tailored to achieve the end of avoiding frivolous claims. To be sure, motive restrictions penalize some frivolous lawsuits. Many improperly motivated claims–whether the bad motive is that of the lawyer or of the client–are also factually or legally frivolous. A motive restriction, however, is not necessary to curb frivolous lawsuits.

Model Rule 3.1 and its comment prove this point. The text of the black letter rule bars an attorney from filing claims that are objectively frivolous. That rule is narrowly tailored to achieve the compelling state interest. However, the official comment to the rule broadens the prohibition. It adds the case where the client intends primarily to harass or injure the opponent. Since the rule otherwise bars claims that lack factual and legal merit, the only additional effect of the comment provision is to punish claims that are not frivolous. In short, Model Rule 3.1, when interpreted as instructed by the official comment, is not narrowly tailored to achieve the aim of deterring objectively baseless claims.

The analysis returns to the first "interest" prong of strict scrutiny: does the government have any direct interest in restricting a plaintiff's or his lawyer's motive in the filing of winning claims (other than deterrence of baseless claims)? One possibility is the interest in avoiding abuse of the litigation process other than the filing of frivolous claims. This is similar to but distinct from the prior interest. Even meritorious litigation can inflict harm. If harm is all that plaintiff desires, the state has some interest in avoiding that harm. Indeed, both DR 7-102 speaks directly to such malicious injury. A prohibition against using courts as a weapon maintains the integrity of courts and protects citizens from this type of harm. Is this interest sufficient to justify restriction of *winning claims*?

Because the analysis varies depending on whose motive is at issue, I will focus first on the client's intent to abuse the system. Winning claims,

even if a plaintiff files them to injure another, do not present the type or degree of harm presented by frivolous claims. Other plaintiffs will suffer little by their filing. These claims are a small minority of all total claims and present little risk of consuming court resources to the exclusion of other plaintiffs. The defendant certainly suffers when the plaintiff strives to use the process of litigation as a weapon, but it is a harm that the defendant has to suffer any time a plaintiff gains access to court. Plaintiff's ill motive does not by itself add any specific harm to the defendant, other than the emotional harm if he knows the plaintiff's ill feelings. The taxpayers pay a cost, as they do with every claim, but they also get the benefits arising from the filing of a winning claim: advancement in the law and a cure of wrongdoing by the defendant or by others. In short, the state does not have a *compelling* interest in avoiding the filing of any winning claim, even if the plaintiff's motive is to harm the defendant through its filing.

By contrast, the government may have a compelling interest in imposing a comparable restriction on the *lawyer's* motive. The government has the same interests in such a rule as it does in a ban on the client's motive, but regulation of the lawyer's motive serves an additional interest: protection of the lawyer's client, the plaintiff himself. A lawyer who is motivated by his own ill motives may put his interests above those of the client. His judgment may be impaired. Moreover, a ban on lawyer motive would have minimal effect on the client's right of access. The client could find another lawyer with a pure motive. Thus, a rule restricting the lawyer's motive likely could survive strict scrutiny. The problem with the professional rules, as currently written, is that they do not speak solely to attorney motive. The rules arguably include client motive and thus fail the second prong of strict scrutiny.[186]

Finally, perhaps the most obvious aim of the motive regulation in the Rules of Conduct is the professionalism of the plaintiff's lawyer. The government has an interest in maintaining the integrity of and public confidence in the legal profession by not allowing lawyers to act with spite, ill will or other bad motive, whether that bad motive is their own or that of their client. The Court's group litigation cases of the 1960s, beginning with *Button*, give some guidance on assessing these interests. In those cases, the states sought to use their professional regulations, those barring solicitation and conflicts of interests, to stop the NAACP

186. Another view of this deficiency is that the rules are overbroad in that they regulate both the motive of the lawyer and that of the client.

and labor unions from encouraging and sponsoring litigation among its members.[187] The solicitation and conflicts laws at issue in the group litigation cases—indeed most professional regulations—aimed to avoid both activity that actually harms clients and the appearance of lawyer impropriety.[188] As the Court explained in *United Mine Workers of America*, these dangers were too remote to justify their significant intrusion into First Amendment rights:

> [In *Button*], we held that dangers of baseless litigation and conflicting interest between the association and individual litigants far to speculative to justify the broad remedy invoked by the state, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the *Trainmen* case there was a theoretical possibility that the unions interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interest of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.
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> The decree at issue here thus substantially impairs the associational

187. *See supra* at notes 79-88.

188. The reputation of the profession was a primary concern of early ethics codes and of the 1908 ABA Canons. *See supra* at notes 21-47. This concern carried over to the more recent model standards, albeit, with less emphasis. For example, the ninth and final Canon of the 1970 Model Code stated that "a lawyer should avoid even the appearance of professional impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1970). The new Model Rules format focuses more on enforceable, concrete rules, the Model Rules still cite professional integrity concerns as one of the driving forces behind the rules. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT, Preface. In addition, some rules, such as those addressing conflicts of interest, are precautionary and seek to avoid the potential problems of conflicts, not just their current and actual harm. *See generally id.* Rules 1.7 through 1.12. *See also* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.7.01 at 224-25 ("Since the modern approach takes into account reasonable fears that improper lawyer behaviors 'may' develop, it has an historical kinship with the old method of judging conflicts of interest on the basis of 'the appearance of impropriety.'").

> rights of the Mine Workers and is not needed to protect the State's interest in high standard of legal ethics.[189]

The motive rules at issue here also seek to avoid the appearance of lawyer impropriety.[190] The rules achieve this aim through two different applications. First, reputation of an attorney can be damaged by the ill motive of his client in that the lawyer is the representative of a mean-spirited person and is facilitating that person's ill intentions. But this connection is weak when applied to the narrow scenario at issue—a lawyer who personally has pure motives and who files a winning claim. The probability is low that a lawyer will damage his own reputation or that of the profession as a whole by taking such an action, or, in terms of *Button* and *United Mine Workers of America*, the danger is too remote and speculative.

The better argument goes to the second application of the professional rules on motive—limiting the ill motives of the *lawyer*. When the lawyer's own motives are impure, the effect on his own reputation is direct and the impact on the profession is great. More importantly, as I discuss above, such a lawyer is a danger to his client. However, the professional rules as currently written do not speak solely to the lawyer's motives. They thus fail because they are not narrowly tailored to achieve the arguably compelling governmental aims of protecting the client and the reputation of the legal profession. In sum, the rules—as they are now stated in the codes of conduct—do not pass strict scrutiny and impermissibly infringe on the client's First Amendment right to petition courts.

3. Breathing Room Balancing Analysis of Motive Restrictions on Non-winning Claims.—The next and final step is to analyze the rules under the breathing room doctrine. This is not an alternative to strict scrutiny. Rather, this doctrine assumes that the rules would be re-written to avoid the problem under strict scrutiny—they do not directly apply to

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189. 389 U.S. at 223, 225.

190. In addition, the motive rules, like the rules at issue in *Button* and *United Mine Workers of America*, seek to avoid the many actual dangers of frivolous litigation. The connection between a motive rule and deterrence of baseless litigation may be more direct than that of the anti-solicitation or conflicts rules (i.e., most motive rules directly address litigation and likely will encompass more frivolous cases than the other rules). Nevertheless, as I discuss above, a motive prohibition is not narrowly tailored to address claims that lack legal and factual merit.

the client's motive in filing winning claims.[191] I use two hypothetical variations on the rules—one in which the rules are re-written to apply to the filing of suits other than winning claims, and another in which the rules apply only to civil papers that do not state claims for relief (e.g., motions, defensive pleadings and discovery papers). The question for both is whether these rules would have an undue chilling effect on the right to file winning claims. In both, I assume that the rule would speak to the client's motive and would bar lawyer assistance if the client had the specified ill intent.[192] I contend that such a motive restriction on the ability to file meritorious (but losing) claims would have a undue effect on the exercise of the core right to file winning claims and would therefore violate the First Amendment. However, a motive rule limited to civil papers other than claims for relief would not have such an effect and survive First Amendment scrutiny.

a. Rules Limiting Motive in Filing Non-winning Claims for Relief

Even if a regulation such as DR 7-102(A) were re-written to restrict only losing claims (and thereby avoid direct regulation of the core right), it nevertheless would have an undue chilling effect on the right to file winning claims. Although breathing room analysis requires an examination both of the rule's effect on exercise of the core right and of the governmental interests behind the rule, the analysis here is principally one of effect. The hypothesized revised rule would tell the plaintiff's lawyer that he cannot file a *losing* claim if his client's purpose is to maliciously injure or harass (he could file a similarly motivated winning claim). Where the client has such improper motives, the lawyer must determine whether the claim will win or lose. This is impossible. The lawyer cannot possibly know before filing the complaint whether the claim will prevail.[193] That result turns on many factors, such as the scope and out-

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191. To be sure, the rules now address litigation activity beyond the filing of winning claims–losing claims and other civil papers—but this application does not save them. Because their impact on winning claims is substantial—the lawyer cannot file winning claims if the motive is improper—the rules would be invalid under the overbreadth doctrine. *See supra* at notes 163-65 (discussing the overbreadth doctrine).

192. For the reasons stated in the preceding discussion of strict scrutiny, the rules may bar the lawyer from doing any of these activities for his own personal ill motives.

193. For these reasons, no rule could restrict the filing of losing but meritorious

come of discovery, that are unascertainable when the complaint is filed. Thus, whenever the client's motive is impure, this rule requires the lawyer to not file the claim, even if that claim might have been a winning claim.

Such a rule raises at least some of the problems of a prior restraint. To be sure, the disciplinary bodies will not assess professional discipline at such an early stage (i.e., they will not disbar the lawyer to prevent him from filing the particular suit). But the rules are meant to govern lawyer behavior in the first instance. They tell lawyers that if they are ethical, they must refrain from certain actions. Since the lawyer cannot know for sure which claims are winners or losers, this necessarily would force the "ethical" lawyer to not file some claims that could prevail. Thus, the lawyer may himself act as the restraint on the client, and in doing so, the lawyer in some cases will deny the client a core right under the First Amendment—the right to file a winning claim, regardless of motive.

To be sure, some, perhaps most lawyers, would not read such rules to prohibit the filing of a winning claim. They might be optimistic and go ahead and file strong claims. Under the proposed rule, the state could not punish any lawyer who in fact won the suit. But this does not save the rules. The proposed rule still would chill the highly ethical lawyer.

The arguments that I outline above go to the degree of chilling effect that the Professional Rules have on the filing of winning claims—a profound effect. The next step of breathing room analysis ordinarily is to balance the governmental interests behind the core activity against that in regulating the non-protected activity. That step is essentially moot here. The government has some interest in stopping general ill motives through its court access rules—the integrity of the process and attorney professionalism interests that I discuss Section III (b)(11) under strict scrutiny. However, these interests fail to justify the significant intrusion of the core right protected by the Petition Clause. The effect of these rules is to stop, not just deter, the filing of winning claims, if improperly motivated. It is not a case where a person might risk the possibility of subsequent punishment in the form of civil damages. Instead, the rules aim to stop the

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claims, whether in a motive restriction or otherwise. By contrast, the rules could restrict motive in filing frivolous claims. In this case, compliance is not impossible. The plaintiff's lawyer can use objective criteria to distinguish between baseless and meritorious claims, especially those that are strong enough to win. Moreover, the government's interest in stopping frivolous claims is compelling. *See* discussion *supra* at note 185.

plaintiff from ever filing any claim in the first place. The effect therefore is undue, and the rule is invalid.

b. Rules Limiting Motive In Filing Civil Papers Other Than the Initial Complaint

The next question is whether the rules may limit the client's motive in filing other papers in civil litigation.[194] As I discuss in Part A of this Section, the core right under the Petition Clause, as I define it, does not include the right to file these other papers. I argue elsewhere that the reasonableness standards of due process, not the higher protections of the First Amendment, govern the propriety of rules regulating civil papers other than the initial complaint.[195] However, because rules regulating the processing of claims are on the periphery of protected activity, they might have some impact on the initial filing of a winning claim. Whether this effect is undue is a question under the First Amendment breathing room standards.[196]

The first step is identification of the effect. How, if at all, does a rule regulating whether a lawyer may file a motion impact the initial filing of a winning claim? At first it would seem that such a rule would have no impact because it regulates only subsequent conduct. Yet, the rule very well could influence the initial decision to file. If a client has an ill motive in filing the suit in the first place, he likely will have a similar motive with regard to the later processing of the suit. Indeed, if the client's original purpose in bringing the suit was improper, the client likely will not have a "good" motive in filing any paper that advances that suit. If this were the case, the Professional Rules would tell the lawyer that although he could file the suit (assuming that the rules were rewritten to avoid application to claims for relief), he could not file any

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194. Indeed, the primary impact of rules, such as Model Rule 3.2 and 4.4 (as the latter rule is applied to civil litigation), is to limit the motive with which a lawyer files papers other than the initial complaint (winning or losing). They speak to delay of litigation and harassment of third parties, respectively, and therefore rarely will apply to the filing of initial claims. *See* discussion *supra*, at § I(B).

195. *See supra* notes 120-23; *see also* Andrews, *A Right of Court Access*, *supra* note 7, at § I(b)(2).

196. The result likely will be the same under either a due process reasonableness analysis and the balancing test of breathing room analysis. Both are lesser standards of review than strict scrutiny and both look to reasonableness issues (the breathing room doctrine looks to whether any chilling effect is "undue").

subsequent papers. This would tie the hands of the lawyer and may prompt an ethical lawyer to decline the representation.

Although such a motive restriction can have a chilling effect in these circumstances, its effect on initial access is less than other possible proscriptions. A lawyer could still assist the client in exercising his First Amendment right of access (preparing and filing the complaint), but he could not help him later harass or injure the defendant. The client might elect to take this limited help and then represent himself in subsequent proceedings. Or, he might take the initial complaint filing as good enough. He has publicly aired his views and told the government of his problems.[197]

The next question is whether the lesser chilling effect of a motive restriction on subsequent papers is justified by the dangers that such a rule aims to avoid. This requires a balancing of interests. The governmental interests behind such a rule generally mirror those of a ban on filing claims for improper purposes–avoidance of the societal and personal costs and harms associated with baseless filings, preserving the integrity of the judicial system and maintaining the reputation of the legal profession. These are strong governmental interests even though they are not sufficient to justify a direct ban on the filing of winning claims (under strict scrutiny of the current motive restrictions, as I discuss in Section III(B)(3)) or a near total chilling effect on the filing of a winning claim (under a breathing room analysis of a motive restriction on losing claims, as I discuss in Section III(B)(3)(a)). In this analysis, however, the interests need not be compelling or narrowly connected to the regulation at issue — they only need to be sufficient to justify their deterrent effect. This is more akin to a reasonableness analysis. That difference alone may argue for upholding a revised set of motive restrictions, applicable only to subsequent papers.

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197. By contrast an absolute ban on filing any form of subsequent papers would unduly deter filing of an initial claim. The initial filing would be futile if the plaintiff could do nothing, under any circumstances, to obtain resolution. Such a ban would not give enough breathing room to filing the initial complaint and would be invalid under the Petition Clause. This conclusion corresponds to the position of legal scholars who advocate that the right to petition includes some duty of the government in response. *See supra* note 118 and Andrews, *A Right of Court Access*, *supra* note 7, at notes 268-83. The distinction is that I recognize this minimal duty not as part of the core right but instead mandated by the breathing room doctrine and contend that it is a question of balancing of interests rather than the higher standard ordinarily afforded core activity under First Amendment.

Moreover, the interest in preserving free motion practice is far less than that in preserving initial access to court to present a claim for relief. A meritorious complaint, even if it is not ultimately successful, serves important interests. It can inform the government of societal problems, it can advance the state of the law, and it provides the opportunity for peaceful resolution of disputes. These aims cannot be achieved unless the litigant files his claim. By contrast, most individual motions, or other litigation steps, are not essential to the claim.[198] Today's systems of procedure provide almost endless possibilities for motions, hearing and discovery. The claim may be resolved in any number of ways. Thus, the interest in preserving any single motion is less than protecting the initial claim.

Moreover, a motion or other litigation paper actually can undermine the societal interests behind court access. A motion may be well-founded in law and in fact but nevertheless detract from resolution of the dispute. Take, for example, the case where the plaintiff makes an error in serving the defendant but despite this error the defendant timely receives the complaint and summons.[199] The defendant files a motion to dismiss for improper service solely because he wants to harass the plaintiff and delay the litigation. The motion itself would be meritorious in that it has legal and factual merit, but its purpose would run afoul of the professional rules and a lawyer could not file it. The motion might advance the law concerning service, but it would detract from the goal of resolving the underlying dispute. It does not fully serve the aims of the Petition Clause. Indeed, a rule that would prevent a lawyer from filing such a motion for the defendant would promote the aims of the Petition Clause; the plaintiff

198. The procedural step of the answer may be the one civil paper that is essential in that it states the position of the defendant. However, the defendant's ability to file a civil pleading is not relevant to the question at hand, whether the regulation will unduly chill the plaintiff's access to court. That a defendant may be barred from responding would encourage, not discourage, plaintiff's resort to court. Of course, due process demands that defendant have a reasonable opportunity to be heard in response to the claim. *See supra* note 120 (discussing due process standards).

199. Federal Rule of Civil Procedure 4, for example, allows service on the defendant by giving the complaint to a person of suitable age and discretion living at the usual abode of the defendant. FED. R. CIV. P. 4(e)(2). Suppose that the process server gave the complaint and summons to defendant's 4-year old daughter and that she dutifully gave the papers to her father when he returned home. This service would be improper under Rule 4, but defendant nevertheless received the same quality of service had the process server given the papers to defendant personally.

would have more incentive to file suit if he knew that the defendant would be barred from such harassing tactics.

This danger of abusive motions is not limited to papers filed by the defendant. Although defendants are usually the party with the most incentive for delay, plaintiffs may have similar delay motives or desire to harass. Plaintiffs, like defendants, can achieve these ill aims with well-founded motions or other papers. An obvious opportunity for such abuse is in discovery. A plaintiff might file otherwise legitimate discovery (asking for relevant material that might lead to admissible evidence),[200] not for the purpose of advancing resolution of the case, but instead for the sole purpose of harassing the defendant or embarrassing a third party. Here, the civil paper, though meritorious under the rules of procedure, would slow the case and not necessarily advance ultimate resolution of the case.

In short, the balance of interests is different for motions than for initial claims. Motions have less justification and more danger of abuse. Accordingly, a Professional Rule that restricts lawyer assistance in presenting subsequent litigation papers, where the client has ill motives, survives breathing room analysis. It does not unduly chill access to court.

V. CONCLUSION

The right of access to court is a fundamental right under the Petition Clause of the First Amendment. Although the right is relatively undeveloped, the petition right would seem to protect clients from a Rule of Professional Conduct that would bar, based solely on the client's motive, lawyer assistance in presenting meritorious claims. To the extent that such a rule would bar core activity under the Petition Clause–the filing of a winning claim–it would fail strict scrutiny. To the extent that the rule would prohibit claims that are meritorious but losing, the rule fails because it does not give sufficient breathing room to the core right of filing winning claims.

This means that the states and the American Bar Association must clarify the current rules: DR 7-102(A) of the Model Code and Model Rules 3.1, 3.2 and 4.4 of the Model Rules format. To be sure, one might more narrowly construe each of these rules, as currently written, so as to

200. *See* FED. R. CIV. P. 26 (setting forth the general standards and scope of civil discovery in federal court).

avoid a direct collision with the Petition Clause. However, the First Amendment demands more precision in rules that touch upon First Amendment rights. Because the rules have the potential to limit protected access to court, the states must revise the rules, or at a minimum, the official comments interpreting the rules.[201] I suggest the following:

> *Model Rule 3.1.* The text of the black letter rule, the duty to present meritorious claims and contentions, itself does not run afoul of the Petition Clause. Its literal terms use an objective merits ("frivolous") criteria and do not impose a motive restriction on court access.[202] The problem is in the official comment; it equates improper motive with "frivolous." Simply deleting this sentence likely would suffice, but the better approach, given the historical presence of this comment, would be to affirmatively clarify the rule. A simple sentence in the comment stating that the rule does not limit the filing of an otherwise meritorious claim, even if the client has an improper motive for filing, would end the confusion.
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> If the rulemakers want to retain the permissible motive elements the reform is more complicated. This is a question of policy. Under the Petition Clause the rules could continue to ban a lawyer from acting from his own ill motives, but such prohibition arguably is better addressed by the rules prohibiting conflicts of interests.[203] The rules also could retain a motive prohibition on motions and civil papers other than claims for relief. Although I do not necessarily support such a rule, as a matter of policy and practice, if that is the state's choice, I would propose adding to the rule a second paragraph to specifically bar a lawyer from assisting a client who has an "improper purpose" in filing papers other than claims for relief. Finally,

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201. A clarification in an ABA ethics opinion will not suffice. Those opinions are too removed from the source of the problem—the rules and their official commentary. Moreover, ABA opinions are only advisory, and have no direct impact on the *state* codes of conduct. For a discussion of the impact and influence of ABA opinions. See Laurence K. Hellman, *"When Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS, 317 (1996).

202. An objective merits standard for claims is permissible under the Petition Clause. As I discuss *supra* in Section III(B)(3) and at note 193, a law barring frivolous claims would serve compelling state interests and would have negligible impact on the client's ability to file winning claims.

203. Model Rule 1.7(b), for example, bars a lawyer from representing a client where his own interests might materially limit his responsibilities to the client and adversely affect the representation. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b).

the rule could include a restriction on the client's motive as to frivolous claims,[204] but such a rule would weaken the rule. It would bar only baseless claims that are filed to achieve the client's purpose of harassing the defendant, rather than punishing all baseless claims regardless of intent.

Model Code DR 7-102(A). Reform of this rule may be more problematic. The ABA already has reformed the rule by adopting Model Rule 3.1 in 1983. In the states that still use the Model Code format, the easiest solution would be to replace DR 7-102(A) with Model Rule 3.1 (assuming that the official comment is modified as I propose above). However, some states, such as Alabama, have kept the old rule even despite adoption of the Model Rule format. The intention in these states might be to retain a motive prohibition or to retain the harassment effect standard. If this is the state's policy, then simple adoption of the Model Rule will not achieve that governmental purpose. To achieve the first aim–a motive limit on subsequent litigation papers (everything but claims for relief)—the state could adopt Model Rule 3.1 with the second paragraph as I discuss above.

If the state's aim is to achieve the second aim (an effect standard), then the reform is more complicated. An effect standard may not pass First Amendment scrutiny to the extent that it limits the filing of claims for relief, for much of the same reasons that a motive restriction fails. Because a defendant feels harassed or burdened in all litigation, such a rule would severely restrict court access to file winning claims. An additional problem with an effect rule, as applied to the filing of claims, is that it does not give clear notice of the prohibited activity. The litigant and lawyer must guess as to whether the other party will feel harassed or maliciously injured. The Court has been hostile to such tests when applied to limit First Amendment freedoms.[205] However, an effect test may survive First Amendment scrutiny to the extent that it applies to conduct other than the filing

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204. *See supra* note 193.

205. The standard renders the rule vague, the litigant will not have sufficient basis to assess whether the conduct is permissible. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (invalidating as unconstitutionally vague an ordinance that outlawed assemblies of three or more persons on sidewalks where such assembly was "annoying" to passers-by: "[c]onduct that annoys some people does not annoy others"); *see also* Grayned v. City of Rockford, 408 U.S. 104, 111 (noting that an anti-picketing ordinance that outlawed noise that "tends to disturb" was troubling and presented a close question as to vagueness, absent the state court's narrowing construction).

of claims for relief. In this is the aim, rulemakers should consider putting a clearly stated effect test (as opposed to the current wording) in a separate paragraph addressing only civil papers that do not state claims for relief.

Model Rule 3.2. This rule, the duty to expedite litigation, in most of its foreseeable applications does not present a problem under the Petition Clause. It rarely applies to the filing of complaints—only where a plaintiff deliberately frames and files his complaint to cause delay. Therefore, the Petition Clause likely does not mandate change to the black letter rule. Instead, a sentence in the comments clarifying that the rule does not apply to the filing of a claim for relief will eliminate any ambiguity and avoid any potential clash with the First Amendment.

Model Rule 4.4. The same analysis applies to Model Rule 4.4, the duty to respect third parties. The rule is not addressed to litigation, and even to the extent that its prohibition against harassing third parties would apply to litigation conduct, the rule would apply rarely to claims for relief. Therefore, a clarification in the comments should suffice.

In sum, unlike the Professional Rules that regulate lawyer speech, these rules require only minor modification to conform to the First Amendment. Nevertheless, the ABA and state rulemakers must take heed of the client's right to court access and avoid any possible interpretation of the Professional Rules that would violate the Petition Clause. The right of court access is too precious: it is the starting point of justice.