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I. INTRODUCTION

Federalism comes in many forms and can be used either to praise or curse federal court action.[1] Discussions of federalism generally arise when federal courts assert their decision-making power to establish standards that are binding on states and state courts. This assertion of power can occur through more subtle methods than issuing binding standards. Federal courts can exert significant, and sometimes dominating, influence on discussions occurring under parallel federal and state issues and concerns. When federal courts issue very persuasive (albeit not technically binding) opinions, they assert a form of "persuasive federalism."[2] Through their dominant position and persuasive voice, the federal courts are altering the balance of power between federal and state systems.

This persuasive federalism is currently at work in the area of lawyer ethics. Traditionally, state courts have been the primary source for regulating lawyers and articulating standards of legal ethics. Although federal courts have asserted inherent power to regulate the attorneys before them in the past, they have not been the dominant voice in defining the lawyer's role in our adversary system.[3] When the Supreme Court amended Federal Rule of Civil Procedure Rule 11 in 1983, it gave federal district courts express authority to take greater control over the

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1. See, e.g., Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990) (forms in which federalism strikes balance of power between a federation and its component part); Brennan, *The Last Prerogative*, 6 HARV. J.L. & PUB. POL'Y 61, 62 (1982) ("[t]he ancient label 'Federalist' is a label which is sufficiently ambiguous to convey a sense of balance").

2. *Cf.* Fish, *Force*, 45 WASH. & LEE L. REV. 883, 899 (1988) (force is an assertion of some point of view).

3. *See infra* notes 24-28 and accompanying text.

conduct of attorneys appearing in federal court.[4] Despite its application solely to cases before federal courts, Rule 11 has begun to change the discussion about what constitutes proper attorney conduct.[5]

The question of proper attorney conduct is bound up with the question of the attorney's role in the adversary system. As this article will demonstrate, changes in ethical requirements for lawyers result in subtle shifts in the balance of lawyers' obligations to themselves, to their clients, and to society. As Rule 11 becomes the focus of discussion, it emerges as a vehicle to federalize our vision of an attorney's proper role in the adversary system.

Part II of this article traces the changing focus of who decides the role lawyers should play in our adversary system; it reveals the shift from a predominantly state-based system of self-regulation to federal regulation based on Rule 11. Part III evaluates this shift, its causes, and consequences. Finally, Part IV outlines strategies which lawyers might follow to attempt to preserve a stronger voice in the discussion of the role they will play in the future of our adversary system.

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4. Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983) [hereinafter Rule 11]. The relevant portion of Rule 11 states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

5. Rule 11 "occupies center stage" among the array of federal and state sanction laws. G. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 1 (1989) (Rule 11 "inaugurated the era of mandatory sanctions" and "is the focus of the whirling debate about sanctions").

II. The Changing Focus of Defining an Attorney's Role in Our Adversary System

A. *The State-Based System of Regulating Attorney Conduct and Defining the Lawyer's Role*

Both chronologically and functionally, the first formal control on attorney conduct is a system of self-regulation initiated by state courts working in conjunction with the state bar.[6] This system establishes standards for admission to the bar and rules of proper conduct for attorneys.[7] If attorneys violate these rules of conduct, they may be suspended or disbarred by the appropriate disciplinary body of the state bar.[8] Although this system has not been effective as a formal matter in disciplining large numbers of attorneys, it has served to require state bars to create lawyer codes and set the outer bounds of appropriate conduct.[9] Both federal and state courts support this system by allowing only attorneys licensed by a state bar to appear in their tribunals in a representative capacity.[10] The states also support this system through common law and statutory provisions prohibiting unauthorized practice.[11]

This system does not rest solely on attorney misconduct before a federal or state court; misconduct charges are often based on acts not related to litigation. Claims are usually brought to the attention of the disciplinary body through complaints filed by clients, other attorneys, or occasionally judges.[12] Each state's disciplinary body will then use the rules of conduct which have been adopted in that particular state to evaluate the attorney's behavior.

The American Bar Association (ABA) has, over the last three decades, provided states with two model codes for lawyers, which states have modified as desired.[13] In 1969 the ABA proposed the Model Code of Professional Responsibility, which was

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6. C. Wolfram, Modern Legal Ethics §§ 3.1-3.2 (1986).

7. *Id.* §§ 14.4, 2.6 (admission to bar and promulgating codes of ethics respectively).

8. *Id.* § 3.1.

9. *See infra* note 113 and accompanying text.

10. C. Wolfram, *supra* note 6, § 15.1.1 (noting a few exceptions; "the dominant doctrine for at least the last several centuries . . . has been that a nonlawyer may not appear in court to represent another person").

11. *Id.*

12. *Id.* § 3.4.2. *See also infra* note 90 (examples of courts who have ordered that a copy of the opinion criticizing the attorney be sent to state disciplinary authority).

13. *See, e.g.*, G. Hazard & W. Hodes, 2 The Law of Lawyering Appendix 4 (1989) (sets out state variations of the Model Rules of Professional Conduct).

eventually adopted either in whole or in part by all but one state.[14] The Model Code was immediately criticized for being unclear on important issues, failing to provide helpful guidance for non-litigation practice, and succumbing to self-interest through such practices as limiting advertising.[15] This criticism caused the ABA to revisit the issue of attorney codes. After several years of study and debate, the ABA promulgated the Model Rules of Professional Conduct in 1983, and submitted them to the states for their consideration.[16] The majority of states have adopted the Model Rules at least in part, but they have scrutinized and modified the Model Rules to a greater degree than the Model Code.[17]

This authority to define attorney qualifications and distinguish proper from improper conduct has given state courts and bars a significant voice in defining the lawyer's role in the adversary system.[18] Standards of ethical conduct define how a lawyer should behave in relations within the judicial system and thus what role lawyers will play in that system. Attempts to articulate these standards force lawyers to openly discuss duties owed to different elements within the system.

Virtually all lawyers and courts, both federal and state, agree with the general principle contained in both the Model Code and Model Rules that a lawyer "should represent a client zealously within the bounds of the law."[19] Most lawyers and

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14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter MODEL CODE]; C. WOLFRAM, *supra* note 6, § 2.6.3 (adopted in whole or with modification in every state but California and "it has had a strong influence in California as well").

15. *See, e.g.*, Sutton, *How Vulnerable Is the Code of Professional Responsibility*, 57 N.C.L. REV. 497 (1979); Frankel, Book Review, 43 U. CHI. L. REV. 874 (1976).

16. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

17. *See* C. WOLFRAM, *supra* note 6, § 2.6.4 ("[i]t seems apparent, after three-quarters of a century, that the ABA no longer has the capacity to generate a single set of standards of lawyer conduct that lawyers will generally accept"); G. HAZARD & W. HODES, *supra* note 13, Appendix 4 (by 1988, 28 states had adopted a version of the Model Rules).

18. The substantive law also defines the outer limits of an attorney's conduct by making lawyers subject to generally-applicable civil and criminal prohibitions. *See, e.g.*, G. HAZARD & S. KONIAK, THE LAW AND ETHICS OF LAWYERING 35 (1990); Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 199 (1987).

19. MODEL CODE, *supra* note 14, Canon 7; MODEL RULES, *supra* note 16, 1.3 comment (1983)("[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"). C. WOLFRAM, *supra* note 6, § 10.1 (describing common features of American civil and criminal courts, including concept of representation and party-centered exploration of issues and presentation of evidence).

courts would also agree, however, that lawyers have some sort of generic duty to the legal system as a whole.[20] The primary issue which remains unresolved in legal ethics is how to accommodate potentially conflicting duties to the client, to the broad, amorphous "legal system" or public interest, and inevitably to oneself.[21] A difficult secondary issue is who should determine the proper resolution of the primary issue.

By promulgating two ethical models within twenty years, the ABA both reflected and contributed to the increasing discussion among lawyers and the public about the role of the lawyer in our adversary system. Because the ultimate authority to adopt a code rests with the states, the discussion about the lawyer's proper role has taken place primarily in state forums, particularly the state and local bar associations. Whatever flaws exist in attorney self-regulation, including powerful forces of economic and class self-interest,[22] allowing state and local bars

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20. *See, e.g.*, MODEL RULES, *supra* note 16, Preamble: A Lawyer's Responsibilities ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

21. The duty of zealous advocacy helps shape the lawyer's role by imposing on the lawyer a further duty of professionalism. Along with the duty of professionalism, some legal ethicists have asserted that lawyers are governed by a principle of nonaccountability, which means that the lawyer is "neither legally, professionally, nor morally accountable for the means used or the ends achieved" in pursuing the client's interests, as long as the means and the end are lawful. Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 84 (D. Luban, ed. 1983) (quoting Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 673 (1978)). The Model Rules reflect this concept by providing that representing a client "does not constitute an endorsement of the client's political, economic, social and moral views or activities." MODEL RULES, *supra* note 16, Rule 1.2(b). Although the Model Code does not have an express counterpart, Canon 2 states that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available," which in practice means that a lawyer should accept "his share of tendered employment which may be unattractive both to him and the bar generally." MODEL CODE, *supra* note 14, EC 2-26. This principle of "nonaccountability," in theory at least, should shield the lawyer from censure for representing a controversial client.

"When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." Luban, *supra*, at 84 (quoting Schwartz) ("principle of professionalism"). This principle of professionalism raises directly the question of how far the lawyer may, should or must go in pursuing the client's interests both within and without the legal system. Certainly one aspect of this duty is to pursue all readily available legal claims or defenses. Consequently, the Model Rules provide that an attorney may make a "good faith attempt to determine the validity, scope, meaning or application of the law."MODEL RULES, *supra* note 16, Rule 1.2(d). This generic standard does not (and cannot) tell the lawyer what constitutes "good faith" in a particular situation or what law is subject to challenge. It nonetheless sets up a strong advocacy model.

22. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639

to define the attorney's role in the adversary system allows lawyers a greater voice in the discussion.[23]

B. *Regulating Attorney Conduct by Federal Courts and the Advent of Rule 11*

1. *Regulating ethics and the influence of federal courts*

Although the formal rules of professional conduct and direct regulation occur at the state level, federal courts have exercised some influence in identifying proper attorney conduct. Both federal and state courts have traditionally asserted an inherent power to regulate the practice of law in their respective tribunals.[24] The Judiciary Act also provides that United States courts may establish rules governing who may act as counsel, and the individual federal courts are empowered to make local rules.[25] The federal courts have not established a separate bar examination and licensing system, but rather have relied on state courts to conduct the initial screening and licensing of attorneys.[26] In

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(1981); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

23. The tort system has also emerged as a strong voice in delineating proper and improper attorney conduct. Over the last 15 years, legal malpractice has emerged as a dominant method of regulating attorney conduct. C. WOLFRAM, *supra* note 6, § 5.6.1 (steady rise in legal malpractice claims, insurance settlements, and premiums). As state common-law actions, legal malpractice suits are largely brought in state courts and state judges and juries articulate standards for legal malpractice. Through malpractice, state judges and juries share the responsibility to articulate the boundaries of proper attorney conduct.

24. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980) (recognition of inherent power to impose sanction on attorneys); Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985)(same); R. RODES, K. RIPPLE, & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 73-74 (Report to the Federal Judicial Center 1981); C. WOLFRAM, *supra* note 6, at § 2.2.1; Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976) (discussing separation of power between legislative and judicial branches in regulating attorneys); Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960).

25. 28 U.S.C. § 1654 (1988) (codifying provision from the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92). The Rules Enabling Act, 28 U.S.C. § 2071, and Federal Rule of Civil Procedure 83 allow local federal courts to make local rules that are not inconsistent with the federal rules. *See also* Wolfram, *supra* note 18 at 203 ("on some matters of lawyer regulation each federal court (including each of the federal district courts) and many of the state courts have insisted that they retain a rule-making power to define the law of professional practice for themselves").

26. Theard v. United States, 354 U.S. 278, 281 (1957) ("a lawyer is admitted into a federal court by way of a state court"); *In Re* Evans, 524 F.2d 1004, 1007 (5th Cir. 1975) (admission to state bar creates presumption of good moral character when determining whether to admit attorney pro hac vice); C. WOLFRAM, *supra* note 6, § 15.4.1 ("[e]ven the

addition, federal courts normally limit the right of an attorney to appear before them if the state has suspended or disbarred the attorney.[27] Federal court power to define the attorney's role is technically limited to determining whether and how an attorney may practice in federal proceedings.[28] The federal courts have no authority to order state tribunals to disbar an attorney.

Despite these limitations federal courts, particularly the Supreme Court, on occasion have exercised great influence in defining lawyers' roles in both federal and state courts through their resolution of federal questions, evidentiary issues and disqualification motions.[29] For example, the Supreme Court has played a significant role in defining the scope of the attorney-client privilege as held by corporate clients, the protections given to an attorney's work product, and the scope of the lawyer's duty to a criminal defendant under the sixth amendment right to counsel.

In *Upjohn Co. v. United States*,[30] the Court held that the attorney-client privilege applies to communications made to a lawyer by all employees of a corporate client.[31] Although *Upjohn* is based on the Supreme Court's power under the Federal Rules of Evidence to create a common law privilege for

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national federal courts pay at least lip service to state lines by generally limiting admission to local lawyers"). Because of the increased specialization of the bar, some have argued for a federal bar. *See, e.g.*, Wilkey, *Proposal for a "United States Bar"*, 58 A.B.A. J. 355 (1972).

27. *See* Note, *Disbarment in the Federal Courts*, 85 YALE L.J. 975 (1976). *See also* Selling v. Radford, 243 U.S. 46 (1917) (state disbarment creates a presumption in federal court that the attorney lacks required moral character to practice law; presumption rebuttable based on showing absence of due process by state, patently insufficient proof, or other "grave reason"). *But cf. Theard*, 354 U.S. at 281 (a lawyer is "not automatically sent out of the federal court" merely because he has been previously disbarred by a state).

28. United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

29. Federal courts have issued many opinions disqualifying counsel in particular cases because of conflicts of interest. Several of these cases have become staples of professional responsibility casebooks and are taught to law students throughout the country. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 n.6-7, 1321 n.27 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (citing federal cases on when an attorney-client relationship is formed and on disqualification); Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979) (disqualifying attorney because of continuing duty to former client, citing the Model Code).

30. 449 U.S. 383 (1981).

31. *Id.* at 389 (under federal rules of evidence, attorney-client privilege is to be governed by principles of common law).

cases governed by federal law,[32] the decision has been widely cited by state courts.[33]

Hickman v. Taylor[34] provides another example of the Supreme Court's persuasive power. There the Court held that an attorney's work product was not subject to pretrial discovery in federal court.[35] Although state courts developed their own work product rules after *Hickman*,[36] they have extensively cited that decision.[37]

The ruling in *Nix v. Whiteside*[38] provides the best example of the Supreme Court's persuasive power. In *Nix* a criminal defendant claimed that he was denied his sixth amendment right to effective assistance of counsel when his lawyer threatened to disclose the client's perjury and withdraw from the case if the client testified falsely. In response to this threat the client did not perjure himself as he had proposed. The Iowa Supreme Court affirmed the conviction, holding that Iowa law required the attorney to act as he did.[39] The defendant sought habeas corpus relief in the federal courts. The United States Supreme Court found that the defendant had not been denied effective assistance of counsel. The Court acknowledged the importance of "the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts."[40] In defining the contours of the constitutional requirement of effective assistance of counsel, the Court

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32. FED. R. EVID. 501 (privileges to be governed "by the principles of the common law as they may be interpreted by the courts of the United States . . . [h]owever, in civil actions and proceedings . . . as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law"); Wolfram, *supra* note 18, at 203 ("the Supreme Court and lower federal courts exercise a common law adjudicatory power that is both independent of the states and apparently limited to federal question adjudications").

33. G. HAZARD & S. KONIAK, *supra* note 18, at 199-200, 202 (*Upjohn* not controlling in state courts or in federal diversity cases but most states reach the same result as *Upjohn*; most state courts follow the lead in *Upjohn* and hold that "absent some extreme necessity the mental impressions of lawyers are not discoverable" under work-product doctrine). The Shepard's entries under *Upjohn* indicate that this decision has been extensively cited in state courts.

34. 329 U.S. 495 (1947).

35. *Id.*

36. *See* C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE § 2022 at 95 n.98 (1970 & supp. 1990) (citing state versions of work product rule).

37. Shepard's lists a plethora of state court cases that cite *Hickman*.

38. 475 U.S. 157 (1986).

39. State v. Whiteside, 272 N.W.2d 468 (Iowa 1978) (DR 7-102(A)(4) of Iowa Code of Professional Responsibility prohibits an attorney from using perjured testimony).

40. *Nix*, 475 U.S. at 165.

spoke in general terms of the lawyer's duty to the client and cited general principles from the Model Code and Model Rules.[41]

The Court's broad language, however, does not emphasize that the technical issue confronting the Court was whether the lawyer's conduct fell within the range of reasonable professional responses to threatened client perjury under the sixth amendment.[42] The legal profession has long argued about the proper lawyer response to client perjury. Model Rule 3.3 prohibits the lawyer from knowingly offering evidence that is false, and requires that the lawyer "shall take reasonable remedial measures" if the lawyer offers evidence that he or she later learns is false.[43] The comments accompanying Rule 3.3 set out the legal community's three proposed methods of dealing with client perjury when the lawyer is unable to dissuade the client from committing perjury.[44] First, the lawyer might permit the client to testify in narrative form without attorney guidance. This reduces the lawyer's affirmative involvement in offering perjurious testimony while not expressly disclosing client confidences.[45] Second, the lawyer might proceed as if the testimony were true. This prevents the lawyer from directly or indirectly revealing

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41. *Id.* This approach is consistent with Strickland v. Washington, 466 U.S. 668, 688 (1984), in which the Court held that the right to effective assistance of counsel is shaped in part by the prevailing norms of practice. It is readily apparent when creating a federal common law of evidence or structuring constitutional standards, the federal courts are not bound by state codes. For example, when deciding whether to disqualify counsel appearing before it because of a conflict of interest, the federal courts tend to cite the provisions of the ABA Model Code or Model Rules rather than referring to the specific Code or Rules adopted within the state in which they sit. *See, e.g.*, Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) (referring to ABA Model Code); Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Liddell v. Bd. of Educ., 505 F.Supp. 654 (E.D. Mo. 1980) (citing ABA Model Code). Even when interpreting these Model versions, the courts are strongly governed by their own vision of the proper role of the lawyer. The effect is that the courts "appear much freer to manipulate or supplement" the language of the applicable lawyer code "or to ignore it altogether." Wolfram, *supra* note 18, at 209 ("This may be variously explained by the professional solidarity that exists between members of the bar and their colleagues on the bench, a tradition of judicial non-restraint in interpreting lawyer codes, or the absence of significant separation of powers constraints on the highest courts of most states when they interpret lawyer codes enacted as positive law for the state's lawyers.").

42. *Nix* 475 U.S. at 166.

43. MODEL RULES, *supra* note 16, Rule 3.3(a)(4).

44. *Id.* comments 9, 10.

45. *Id.* comment 9; STANDARDS FOR CRIMINAL JUSTICE, 4-7.7 (Proposed Standard 2d ed. 1982) (approved by Standing Committee on Association Standards for Criminal Justice but not submitted to House of Delegates)(lawyer may not refer to false testimony in closing).

client confidences.[46] The third alternative, adopted in the comments accompanying Rule 3.3 after vigorous debate, is that "the lawyer must reveal the client's perjury if necessary to rectify the situation."[47]

Any choice the attorney could make in this situation will be controversial, for any choice requires the attorney to compromise either a duty of candor to the court or a duty of confidentiality to the client. In *Nix* the attorney threatened to make disclosure, following the third approach. This approach was within the range of reasonable professional debate, and perhaps is the correct view, but it was not the only reasonable view, at least from the perspective of the legal profession. Thus, the Court technically held only that the attorney's threat was reasonable and did not violate the sixth amendment.

Yet the Court spoke in terms of a *single* proper approach to resolve this issue, establishing a standard consistent with the third approach.[48]

> A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence . . . . [T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. *No system of justice worthy of the name can tolerate a lesser standard.*[49]

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46. MODEL RULES, *supra* note 16, Rule 3.3 comment 9; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (obligation of confidentiality leaves lawyer no alternative but to put client on stand without implicit or explicit disclosure); ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (duty of confidentiality prevails over disclosure of client perjury).

47. MODEL RULES, *supra* note 16, Rule 3.3 comment 10. Comment 11, covering remedial measures after perjury has occurred, states that after the attorney has remonstrated with the client, and if withdrawal would not remedy the situation, "the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." *Id.* comment 11. This obligation is subordinate to constitutional requirements. "In some jurisdictions these [constitutional requirements] have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false." *Id.* comment 12.

48. *Nix*, 475 U.S. at 174.

49. *Id.* (emphasis added). *See also id.* at 166 ("Although counsel must take all reasonable lawful means to attain the objectives of his client, *counsel is precluded* from taking steps or *in any way* assisting the client in presenting false evidence or otherwise violating the law." (emphasis added)).

The majority opinion leaves the reader with a firm impression that there is a dominant national vision of the proper role of the lawyer in this circumstance, thereby creating the strong implication that one who disagrees with the majority opinion is acting unethically under this uniform view.

As the concurrence in *Nix* points out, however, the larger legal community was more divided on the issue of client perjury than the majority opinion indicates.[50] Justice Brennan, writing separately, criticized the majority opinion because it "seem[ed] unable to resist the temptation of sharing with the legal community its vision of ethical conduct."[51] Justice Blackmun was "troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings."[52] Justice Blackmun also felt that the ABA's "implicit suggestion [in its amicus brief] . . . that the Court find that the [Model Rules] should govern an attorney's responsibilities is addressed to the wrong audience. It is for the states to decide how attorneys should conduct themselves in state criminal proceedings . . . ."[53] Understanding the Supreme Court's persuasive power, the ABA recognized that it was indeed addressing the correct audience. When the Supreme Court takes a strong stand on the propriety of attorney conduct, even if technically limited to interpreting the sixth amendment, that stand will have enormous persuasive authority. By asserting its vision of the lawyer's proper role, the Court helps to make it so.[54]

The purpose of this discussion is not to criticize the Su-

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50. *Id.* at 177 (Blackmun, J., concurring) ("How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue." (footnote omitted)).

51. *Id.* (Brennan, J., concurring).

52. *Id.* at 189 (Blackmun, J., concurring).

53. *Id.*

54. Federal law, usually as interpreted by federal courts, has also been highly influential in shaping how far attorneys, through their state and local bars, may go in regulating themselves and how far the state may go in authorizing that regulation. The legal profession is subject to antitrust laws, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and the first amendment protects individual lawyer's ability to advertise, at least to a limited extent. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (plurality opinion) (first amendment protects sending truthful and nondeceptive letters to potential clients facing particular legal problems); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (limiting ability of state under first amendment to prohibit solicitation of legal employment through advertisements containing truthful and nondeceptive information or advice); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may ban in-person solicitation); Bates v. State Bar, 433 U.S. 350 (1977) (lawyer advertising is constitutionally protected commercial speech).

preme Court's holdings in these cases. Their vision of lawyering may reflect the dominant, and even best, vision of proper conduct. Whether right or wrong, however, these examples demonstrate that federal courts do articulate a vision of proper lawyering when they define the outer limits of an attorney's conduct under federal law, procedure, or rules of evidence. These examples also show that the federal courts' views are important and impact on state courts, effectively exerting a form of persuasive federalism. This latter aspect becomes even clearer under Rule 11.

2. *Rule 11 and the increasing federal voice*

As originally written, Rule 11 was rarely enforced.[55] In 1983 the Supreme Court amended Rule 11 to provide that:

> The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[56]

A court "shall impose" an "appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses . . . including a reasonable attorney's fee."[57]

Rule 11 imposes at least three substantive duties on the attorney. First, the attorney has a duty of reasonable inquiry to determine that the paper is well grounded in fact. Second, the attorney must exercise reasonable legal judgment to determine that the position is warranted by existing law or a good faith argument for the extension, modification or reversal of the law. Finally, the attorney has a duty to determine that the paper is not interposed for an "improper purpose" such as to harass or delay proceedings.

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55. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34 (1976) (former Rule 11 not applied very often "or very helpfully").

56. Rule 11, *supra* note 4.

57. *Id.*

Ironically, Rule 11 was amended in the same year that the ABA adopted the Model Rules of Professional Conduct.[58] Two of the three Rule 11 duties have parallels in the Model Rules, which suggests that both Rule 11 and the ABA Model Rules reflect, at least on a general level, a larger movement in our vision of proper lawyering. Model Rule 3.1 prohibits a lawyer from asserting a position "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] The comments to Rule 3.1 state that an action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person."[60] The Model Code contains a similar objective standard requiring a good faith legal basis for a claim.[61] The standard for harassment and improper purpose was not clearly objective under the Model Code.[62] Just as Rule 11 was amended in 1983 to move from a subjective to an objective standard for frivolousness, the comments to the Model Rules also made clear that both frivolousness and harassment were to be governed by an objective standard.[63]

Unlike Rule 11, the Model Rules do not contain an express duty of factual inquiry. The comments to Model Rule 3.1 indicate that it might be somewhat less strict than Rule 11 by providing that "[t]he 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."[64] In this instance,

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58. *Id.* (designating Aug. 1, 1983, as effective date, absent congressional action). Rule 11 is turning out to be the more important of the two since it provides an actual tool to regulate lawyers. Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 43 (1987).

59. MODEL RULES, *supra* note 16, Rule 3.1.

60. MODEL RULES, *supra* note 16, Rule 3.1 comment 2. Although Model Rule 3.1 only prohibits the *client* from an improper purpose, we can fairly read into Rule 3.1 a requirement that the lawyer also abstain from pursuing a matter solely for an improper purpose.

61. MODEL CODE, *supra* note 14, DR 7-102(A)(2) ("a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law").

62. *Id.* DR 7-102(A)(1) ("a lawyer shall not . . . [f]ile 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").

63. MODEL RULES, *supra* note 16, Rule 3.1 comment 2 (objective standard).

64. *Id.*

Rule 11 fills not just an enforcement vacuum but also may create a standard distinct from the most common state provisions.

Like the lawyer codes, Rule 11 both serves a disciplinary function and embodies a notion of the lawyer's proper role. There can be no doubt that Rule 11 is a disciplinary tool. Rule 11's focus on the individual attorney's conduct emphasizes its disciplinary aspect.[65] According to the Supreme Court, its purpose is not to compensate, but to sanction and deter.[66] The most common sanction imposed for Rule 11 violations is the award of "reasonable expenses . . . including a reasonable attorney's fee."[67] Stories abound of high monetary sanctions, which have a deterrent effect not just on the sanctioned attorney but also on others.[68]

Although the potential "appropriate sanctions" under Rule 11 do not include withdrawing an attorney's license to practice law altogether,[69] Rule 11 can have significant regulatory consequences. District courts have reprimanded or censured[70] attorneys and ordered them to participate in continuing legal education.[71] Courts have ordered attorneys not to charge their client[72] and have required them to give mandatory *pro bono* representation.[73] Others have been suspended or disqualified from practice

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65. Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 460 (1989) ("purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility").

66. *Id.*

67. G. JOSEPH, *supra* note 5, § 16(B)(4).

68. In *Pavelic* the district court awarded $100,000 in sanctions after the District Court concluded that plaintiff's counsel had made factual allegations that were not well grounded in fact and had not been sufficiently investigated. 110 S. Ct. at 457. *See also* Brandt v. Schal Assoc., Inc., 131 F.R.D. 485 (N.D. Ill. 1990) (over $350,000). Many writers argue that Rule 11 has a chilling effect in the close cases. *See, e.g.*, Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 149-52 (1990). For a discussion of the deterrent effects of law, see generally J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975) and Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 32-33 (1986).

69. Piazza v. Carson City, 652 F. Supp. 1394, 1395 (D. Nev. 1987).

70. *See, e.g.*, Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1065-66 (7th Cir. 1987).

71. *See, e.g.*, Stevens v. City of Brockton, 676 F. Supp. 26 (D. Mass. 1987).

72. *See, e.g.*, Markwell v. County of Bexar, 878 F.2d 899, 903 (5th Cir. 1989) (attorney fined and precluded from charging client for filing two frivolous motions).

73. *See, e.g.*, Bleckner v. General Accident Ins. Co. of Am., 713 F.Supp. 642, 653 (S.D.N.Y. 1989).

before that federal court.[74]Rule 11 sanctions also affect an attorney's reputation.[75]

Moreover, magazines directed toward practicing lawyers categorize Rule 11 under such topics as "attorney discipline."[76] Judges themselves recognize that the power of Rule 11 comes as much from the threat of its use as from its actual use. A recent study of Rule 11 sanctions in the Northern District of California indicated that fifty-five percent of the responding judges issued Rule 11 warnings to counsel at least "occasionally."[77]

There can be no doubt that Rule 11 embodies a vision of lawyering. The advisory committee's notes accompanying Rule 11 state that the Rule was amended in 1983 to cure "abuses."[78] Rule 11 often raises the tension between zealous client representation and fair administration of justice.[79] For example, the duty of reasonable inquiry to determine that the paper is well grounded in fact alters the extent to which the lawyer can rely unquestioningly on the client's version of events. The Model Code expressly allows the lawyer to "resolve reasonable doubts in favor of his client," at least in issues involving the client's state of mind.[80] The Rule 11 duty of factual inquiry may cause a subtle change in the relationship between the lawyer and the client.

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74. *See, e.g., In re* Disciplinary Action Boucher, 837 F.2d 869 (9th Cir.) (suspended for 9 months), *modified*, 850 F.2d 597 (9th Cir. 1988) (suspension revoked solely on the ground that the lawyer's sanctionable conduct arose in part from inexperience); Donaldson v. Clark, 819 F.2d 1551, 1557 n.7 (11th Cir. 1987) (en banc) (noting availability of suspension or disbarment from practice before the court).

75. Solovy, *The Cost of Rule 11: Con*, 7 THE COMPLEAT LAWYER Spring 1990, at 27, 30 (1990); RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 88 (1989) (affects of Rule 11 on bar discipline) [hereinafter THIRD CIRCUIT TASK FORCE].

76. *See, e.g.*, Belasco, *Attorney Discipline*, 36 PRAC. LAW. 12 (1990) (reporting on recent Supreme Court case on Rule 11).

77. Nelken, *supra* note 68, at 151.

78. FED. R. CIV. P. 11, advisory committee's notes (1983 amendment) [hereinafter Advisory Committee Notes], *reprinted in* 28 U.S.C.A. Rule 11 (Supp. 1990).

79. Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 261 (E.D. Mich. 1985) ("[c]ounsel has a duty to his client, and he has a duty to the fair administration of justice").

80. MODEL CODE, *supra* note 14, EC 7-7. The Model Rules do not contain an express parallel, but can be read similarly. Model Rule 1.2(a) requires the lawyer to abide by a client's decisions concerning the objectives of the representation. Under Model Rule 1.2(d), the lawyer "shall consult with the client regarding the relevant limitations on the lawyer's conduct" when a lawyer "*knows* that a client expects assistance not permitted by the rules of professional conduct or other law." MODEL RULES, *supra* note 16, Rule 1.2 (emphasis added).

As noted above, two of the Rule 11 duties—to determine that the complaint "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and that it "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"—have parallels in the Model Code and Model Rules.[81] Although the "warranted by law" and "harassment" provisions of the Model Rules and Rule 11 are similar, these standards can be construed broadly or narrowly. Few reported decisions, however, have construed the state disciplinary code provisions that parallel Rule 11[82] and scholars have paid scant attention to these provisions under the Model Code and Model Rules. In contrast, Rule 11 has clearly dwarfed the Model Rules in regulatory power and persuasive force.[83] Within its first five years, courts published over 1,000 recorded opinions under Rule 11 and issued an unknown, but probably much larger, number of unpublished opinions.[84] Rule 11 has brought the concepts of "warranted by law" and "harassment" to life and given them meaning. As a result, we care about Rule 11. We argue, conduct studies, and respond to the actions of the courts.

Moreover, lawyers do not just talk about Rule 11. Studies of the effect of Rule 11 demonstrate that Rule 11 has altered attorneys' conduct in a variety of ways. Attorneys appear to be reviewing their own documents, co-counsel's documents, and op-

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81. Rule 11, *supra* note 4.

82. I conducted a LEXIS search in New Jersey, Arizona, Montana, Minnesota and Washington, which were the first five states to adopt the Model Rules (amended in some cases). *See* G. HAZARD & W. HODES, *supra* note 13, Appendix 4 [p.866] (chronological order of adoption of Model Rules). Only eight cases cited Rule 3.1, which prohibits bringing frivolous cases. (LEXIS, states library [NJ, ARIZ, MONT, MINN, WASH]).

83. "That a procedural rule can achieve in just a few months what codes of ethics failed to achieve—or what codes may actually have impeded—over eight decades suggests that something is amiss." Patterson, *supra* note 58, at 44.

84. G. JOSEPH, *supra* note 5, § 3 ("[t]he sanctions movement has generated striking momentum"). *See also* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988) (almost 700 district and circuit court Rule 11 decisions from Aug. 1, 1983 to Dec. 15, 1987); Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HAST. L.J. 383 (1990) ("[i]n 1988 alone, four circuits accounted for another seventy-five appellate decisions"); Nelken, *supra* note 68, at 148 (survey of the Northern District of California indicates that "Rule 11 has been far more widely used than the number of published opinions. . .might suggest"); Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1956 (1989) (many unreported decisions); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) (reported opinions "can only be a fraction of the number of instances in which sanctions have been imposed" under Rule 11).

posing counsel's work differently.[85] If this means only that attorney's are more careful and precise in their own work, we would probably have little worry. But Rule 11 is also altering the way in which lawyers counsel clients. Rule 11 appears to be influencing attorneys' practices in counseling clients not to file a complaint or other papers. It is causing lawyers to counsel clients about possible conflicts of interest between the attorney's concern about sanctions and the client's interests.[86] Rule 11 appears to be altering the lawyer's role; making the lawyer screen weaker cases out of the federal courts. This shifts the balance between the attorney's responsibilities to clients and to society. Opponents of Rule 11 argue that this shift may cause a chilling effect on creative advocacy, which in turn impedes the development of the law.[87]

The Model Code and the Model Rules have a strong client-centered focus, coupled with a heavy dose of self-protection.[88] But Rule 11 is subtly changing this client-dominated approach. Perhaps this changed relationship is indeed a better balance among lawyer, client, and society. It is happening, however, largely through an adversarial model developed by federal courts rather than through lawyers' self-developed standards or through a process designed to have greater meaningful public input. Rule 11 may be emerging as a method for federal judges "to mold the bar in their own image."[89]

State bars do not have to follow the federal courts' statements on Rule 11. Because Rule 11 overlaps with state bar concerns, however, the state disciplinary apparatus occasionally becomes involved with Rule 11. Some courts refer instances of Rule 11 sanctions to bar disciplinary authorities.[90] The Third

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85. Nelken, *supra* note 68, at 152 (comparing the Northern District of California study and the Third Circuit study).

86. *Id.*

87. *See, e.g.*, Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-43 (1986); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 634-44 (1987).

88. *See* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 735-39 (1977).

89. THIRD CIRCUIT TASK FORCE, *supra* note 75, at 21.

90. *See, e.g.*, McGoldrick Oil Co. v. Campbell, Athey, & Zukowski, 793 F.2d 649, 653-54 (5th Cir. 1986) (directing clerk to forward copy of opinion to appropriate Texas bar grievance committee); Steinle v. Warren, 765 F.2d 95, 102 (7th Cir. 1985) (directing clerk to transmit copy of record to Wisconsin Board of Attorney's Professional Responsibility).

Circuit Task Force on Rule 11 contacted seven bar associations and found that all expressed interest in Rule 11 sanctions and indicated that they would pursue questions of whether inculpated attorneys had committed ethical violations.[91] This does not necessarily indicate that the state bars would adopt the federal court's standard for Rule 11 sanctions.[92] The federal court standard, however, will inevitably provide significant persuasive authority for interpreting the parallel provisions of the Model Code or Model Rules. In addition, at least twenty states authorize sanctions for frivolous suits.[93] Even if these state sanction provisions are not modeled after Rule 11, such parallel state provisions are ripe for influence from Rule 11.

Thus, the federal courts, through persuasive federalism emerging under Rule 11, are becoming the dominant voice in defining the lawyer's role in the adversary system. State and local bars may retain significant influence, but increasingly, federal courts are articulating the proper balance between duties to the client and duties to society.

III. Evaluating of the Changing Focus of Discussion

A. *Inevitability of Federal and Court-Based Standards*

The swift rise of Rule 11 tempts one to infer that something is intrinsically right with Rule 11 or similarly wrong with state regulation of ethics. As the following discussion indicates, however, the rise of Rule 11 more likely reflects both the dominance of the federal court system and the superior ability of courts, rather than bar disciplinary committees, to evaluate specific conduct.

1. *Dominance of national, uniform approach*

Because the federal courts are the largest court system in the United States, because they cross all jurisdictions, and because they fill a leadership role for other courts, they are in an

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91. Third Circuit Task Force, *supra* note 75, at 89.

92. A New York disciplinary hearing panel held that Rule 11 sanctions would not be automatic proof of professional misconduct. *Id. See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1539-42 (9th Cir. 1986) (Rule 11 does not require courts to enforce ethical standards of advocacy beyond the terms of the Rule itself).

93. Johnson & Cassady, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available*, 36 Ala. L. Rev. 927, 958-60 (1985). At least one federal court has applied the state sanction provision to pre-removal misconduct. *See* Schmitz v. Campbell-Mithun, Inc., 124 F.R.D. 189, 192-93 (N.D. Ill. 1989).

unequaled position to assert a dominant vision of competence. The Federal Rules have been in force for over fifty years and generally "constitute a mature procedural system in harmony with our overall legal system."[94] The federal courts, and in particular the Federal Rules of Civil Procedure, have had an enormous influence on state courts.[95] A majority of states have adopted the Federal Rules of Civil Procedure either in whole or in part.[96] The Federal Rules start, then, with a strong presumption of credibility.

The vastness of the federal courts means that conflicting decisions are likely.[97] One irony of conflicting decisions is that those subject to the conflicting decisions will inevitably seek consistency. Even a standard with which one disagrees, if uniformly applied, is preferable to sporadic application of a favorable standard because it at least allows individuals to predict what rule will apply and adjust their conduct accordingly.[98] Supreme Court intervention is already helping to cure, or at least mitigate, some of the problems of conflicting decisions under Rule 11.[99] Consistency in the federal courts has a subtle consequence, however, for the rise of a consistent approach means that the ultimate decision wields even greater influence with the state courts and among lawyers.

As noted above, state bar disciplinary authorities and state ethics commissions are not technically bound by Rule 11. But the application of Rule 11 can spill over into state court pro-

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94. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1022, 1025 (1989). We have long ago learned that the "procedural" label has enormous impact on substance, and the procedure-substance dichotomy is not always a useful dividing line.

95. *See supra* notes 29-54 and accompanying text.

96. C. WRIGHT, THE LAW OF FEDERAL COURTS 406 (4th ed. 1983); Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377-78 (1986).

97. *See, e.g.*, conflicts resolved in cases cited *infra* note 99.

98. *See, e.g.*, Solovy, *supra* note 75, at 30 (criticizes Rule 11 but seeks consistency); G. JOSEPH, *supra* note 5, at 1 ("Uncertain standards and uneven enforcement, however, give everyone reason to pause. The lawyer aggrieved on one occasion may be the target next time.").

99. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990) (Rule 11 sanctions permissible even after plaintiff voluntarily dismisses action, appellate courts will apply an abuse of discretion standard on appeal, Rule 11 does not authorize attorney's fees for appeal); Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989) (Rule 11 liability does not extend to law firm of plaintiff's attorney). *See also* Burbank, *supra* note 84, at 1930-32.

ceedings. For example, although Rule 11 does not apply to complaints and papers originally filed in state court when a proceeding is later removed to federal court,[100] it does apply to papers subsequently filed in federal court after the case is removed.[101] Consequently, in any case that *could* be removed to federal court, a prudent attorney is likely to prepare documents with Rule 11 in mind.

Far more important is the effect of Rule 11 on the lawyer's day-to-day life. Rule 11 studies indicate that federal court litigation represents only a portion of the surveyed attorneys' litigation practice;[102] attorneys are likely to practice before both federal and state courts, with the majority of time spend in state courts. Were Rule 11 merely a mechanical rule, with a checklist of requirements, lawyers could treat it as they do filing rules established by court clerks, modifying their behavior to suit the particular court. Lawyers function quite well using regular size paper in some courts and legal size paper in other courts.

Rule 11, however, reaches much farther into the lawyer's role to identify the balance between an attorney's zealousness to the client and duty to the court. It represents a philosophical approach. Lawyers cannot for long compartmentalize their lives,

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100. *See, e.g.*, Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Schmitz v. Campbell-Mithun, Inc., 124 F.R.D. 189 (N.D. Ill. 1989).

101. Peffley v. Durakool, Inc., 669 F. Supp. 1453, 1462-63 (N.D. Ind. 1987). Some courts have also held that Rule 11 imposes a continuing obligation to reevaluate his or her position. Meadow Ltd. Partnership v. Heritage Sav. & Loan Assoc., 118 F.R.D. 432 (E.D. Va. 1987), *aff'd sub nom.* Fahrenz v. Meadow Farm Partnership, 850 F.2d 207 (4th Cir. 1988) (Rule 11 duty to inquire into facts is continuing); Houston *ex rel.* Woodfork v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (if attorney becomes aware of information that leads to reasonable belief that position has no factual or legal basis, attorney has obligation to reevaluate prior certification).

102. The Third Circuit Task Force sent a survey to approximately 1270 attorneys who were identified as having an active federal court practice. THIRD CIRCUIT TASK FORCE, *supra* note 75, at 147. Approximately 33.5% of the attorneys responded. When asked what percent of their practice was devoted to federal court litigation, they indicated that less than 12% devote more than 75% of their litigation efforts to federal court practice.

% of Litigation Devoted to Federal Court Practice	No.	% Responding
0-10%	51	12%
11-25%	79	19%
26-50%	139	33%
51-75%	86	20%
76-100%	50	12%
No Response	21	05%

Id. at 149. *See also* Nelken, *supra* note 68, at 148 (26% of respondents spend more than half of their time litigating in federal court).

functioning with a different philosophy of their duty to a clients depending on whether they are in federal or state court.[103] Suppose five years from now many of the frayed edges of Rule 11 have been trimmed and clarified. Suppose as well that a state disciplinary bar says that a less stringent standard will apply in that state. Lawyers in their day-to-day activities will likely react by conforming their conduct to satisfy the more restrictive standard.[104] If lawyers remain silent or ineffective, the federal courts will take charge of the ethics discussion and assert their persuasive federalism by effectively implementing their vision of lawyering.[105]

2. *Superior ability of courts to discover misconduct*

As the first public entity to see the manifestation of the lawyer's conduct, it is probably inevitable that the courts will also be the first line of defense against attorney abuse.[106] Courts readily see the specific acts that will be the basis of sanctions. If the courts do not see the conduct themselves, the opposing attorney often has an incentive to bring a claimed violation to the court's attention. Because an award of attorneys' fees is a common sanction under Rule 11, attorneys who think there is a good faith basis for a Rule 11 sanction probably have a *duty* to seek that sanction in the course of zealously representing their clients.

In contrast, state bars labor under a disadvantage even if we assume that they have a sincere desire to sanction wrongful conduct and protect both clients and the public from errant attorneys. State bars must ferret out misconduct, which often occurs in another city within the state. The state bar usually depends on aggrieved persons to bring claims to its attention. Although the Model Code and Model Rules both require attorneys to re-

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103. *Cf.* R. FRANK, PASSIONS WITHIN REASON 18-20 (1988) (person acts honestly even when unlikely to be caught in order "to maintain and strengthen the predisposition to behave honestly").

104. Of course, if the state adopts a more stringent standard, the lawyer will likely comply with that standard.

105. See for example the discussion of Nix v. Whiteside, 475 U.S. 157 (1986), *supra* text accompanying notes 38-54. *Cf.* Fish, *supra* note 2, at 899-900 ("force wears the aspect of anarchy only if one regards it as an empty blind urge, but if one identifies it as *interest aggressively pursued*, force acquires a content and that content is a complex of goals and purposes, underwritten by a vision, and put into operation by a detailed agenda complete with steps, stages, and directions") (emphasis in original).

106. Louis, *supra* note 94, at 1033.

port violations of professional rules to the appropriate authority,[107] "[p]robably no other professional requirement is as widely ignored."[108]

Once a violation is brought to its attention, the bar disciplinary action proceeds through very formal steps infused with procedural due process.[109] In contrast, courts need only identify a single wrongful act in order to sanction that act. Although a court must also comply with due process requirements before imposing sanctions,[110] fact-finding is likely to be more efficient. As the advisory committee's notes to Rule 11 state, "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary."[111] The advisory committee's notes also state that discovery should be conducted only in extraordinary circumstances to avoid satellite litigation.[112]

In addition, however beneficial the system of state bar regulation is in theory, state disciplinary mechanisms have generally been only marginally effective, largely due to lack of resources and self-protective attitudes.[113] The federal courts have a strong interest in requiring attorneys that appear before them to act according to the federal courts' vision of lawyering, especially

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107. *See* MODEL CODE, *supra* note 14, DR 1-103(A) ("lawyer possessing unprivileged knowledge of a violation of [the disciplinary rules] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation"); MODEL RULES, *supra* note 16, Rule 8.3(a) ("lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority").

108. C. WOLFRAM, *supra* note 6, § 12.10.1.

109. Hazard & Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060, 1066-67 (1987) (describing typical procedure). *See also* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 425-27 (1982) (describing New Jersey's disciplinary process).

110. Advisory Committee Notes, *supra* note 78 ("[t]he procedure [for awarding Rule 11 sanctions] obviously must comport with due process requirements"); G. JOSEPH, *supra* note 5, at 285-98.

111. Advisory Committee Notes, *supra* note 78.

112. *Id.*

113. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981). *See also* ABA, SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1970) (called the "Clark Committee Report" after its chairman Justice Tom C. Clark, the report found the disciplinary machinery in most jurisdictions in poor shape); HALT, ATTORNEY DISCIPLINE NATIONAL SURVEY 2 (1990) (report of legal consumer group that "the state of attorney discipline across the country continues to be inexcusably irresponsible toward consumers").

when it will help alleviate the congested federal court docket.[114] The state bars were apparently unwilling, unable or failed to see the need to give greater meaning to the concepts of frivolousness, what constitutes harassing or malicious injury in a litigation context, or what duty of factual inquiry the lawyer should assume. It was perhaps inevitable that the courts, and particularly the federal courts with their relatively mature, uniform, and well accepted procedural system, would step in to fill the void.[115]

B. Some Dangers From Federalizing Ethics

A clear and national vision of the lawyer's ethical duties may well help the legal profession better define its role in the adversary process. The impact of Rule 11 is at least getting lawyers to talk about central issues of their role in the adversary system—if only to complain about it. A national standard, however, is not without cost. The potential dangers of having a dominant vision of competence derived from the federal judiciary are threefold. First, judges differ from lawyers in their evaluation of lawyer conduct. Second, this vision of lawyering is being made by federal judges who may come from different backgrounds and experience than the bar in general or the general public. Finally, and related to these first two points, the judicial process may not be well suited for creating a community of interest.

Under Rule 11, judges—not lawyers or the general public—are defining frivolousness. In this process, "all but the judge are at risk."[116] Judges obviously view the issue of frivolousness from the perspective of the bench. That vantage requires the judge to determine the *best* interpretation of every issue presented. In contrast, lawyers "are fully licensed to present arguments to judges . . . that they do not believe and that, indeed,

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114. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 577 (1987) (Rule 11 as method to curb misuse of judicial process and negligent or incompetent use of litigation in order to reduce pressure on court dockets).

115. *Cf.* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1489 (1987) ("the state that fails to function effectively should suffer federal interference, while the properly functioning state should enjoy a 'reward' of separateness"). *See also* Note, *Disbarment in the Federal Courts*, 85 YALE L.J. 975, 981-82 (1976) (since state disciplinary proceedings were effective, federal courts should take a more active role in attorney discipline).

116. G. JOSEPH, *supra* note 5, at 1.

they would quickly reject were they in the judge's place."[117] This model of advocacy benefits the judicial process by advancing the outer edges of the law. Because lawyers necessarily view the law differently, in the words of Sanford Levinson, "lawyers and judges live remarkably different lives as servants of the law."[118] The judge's greatest power—to say what the law or facts *are*—is the perspective from which they determine how lawyers ought to proceed. As a result, lawyers and judges develop a subtle but distinct vision "of what counts as genuine legal argument."[119]

The power to define frivolousness is being exercised not merely by judges, but by *federal* judges who have life tenure. In addition, it is not clear whether they are representative of state judges, lawyers, and the general public in background, experience, and political perspective. Social science research "has identified a consistent link between the politics of federal judicial appointments and subsequent judicial rulings across a variety of dispute categories."[120] This link has been widely recognized since the time of legal realism.[121] "The most persistent and powerful extra-legal predictor of district judges' policy judgments is their appointing president."[122] Inasmuch as President Reagan appointed forty-seven per cent of the sitting federal district court judges,[123] it is apparent that many federal judges may share among themselves a similar outlook on the lawyer's role. That perspective may indeed represent a dominant perspective in the bar and informed public, but it may not.

The district court's decision is a fact-dependent assessment that is entitled to deference on appeal. Consequently, a "court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the find-

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117. Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353, 363 (1987).

118. *Id.*

119. *Id.* at 371 ("[t]hose who take seriously the notion of frivolousness must, in the absence of greater specification of formal standards, take with equal seriousness the existence of a coherent legal community with shared understandings of what counts as genuine legal argument").

120. Alumbaugh & Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153 (1990).

121. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 119 (1958) ("[t]he particular traits, disposition, biases and habits of the particular judge will . . . often determine what he decides to be the law").

122. Alumbaugh & Rowland, *supra* note 120, at 154.

123. *Id.* at 162.

ing were clearly erroneous."[124] This combination of circumstances gives a body of judges great authority to define the role of a body of lawyers who are likely to hold very different views of what that role should be.

Finally, the federal judiciary's vision of lawyering is not well suited to creating a community of interest among lawyers. By limiting the discussion of lawyer ethics to the terms of Rule 11, lawyers are less likely to converse among themselves and instead are more likely to present legal arguments to judges. The conversation is conducted in an adversarial setting in which the lawyers stake out a position and defend it to the end. Litigating attorneys are less likely to internalize and accept the court's position when that position is imposed as a disciplinary sanction,[125] even assuming that the judge's position is articulated in a well-reasoned opinion.[126] Perhaps it is wishful thinking to suggest that if lawyers discussed how one ought to conduct lawyering, then the conversation would be richer and more likely to persuade the lawyer. The vision of proper lawyering would then be internalized, not just commanded. The judge as lawyer would come to the discussion not with the power to sanction but only the power to persuade as an individual. The full community of lawyers would then have an equal persuasive voice.

IV. Alternatives to Federalized Ethics

Each of the points discussed above—dominance of the judicial perspective, dominance of the federal judicial perspective, and difficulty in creating a community of interest -- should encourage lawyers to assert a stronger voice in defining the lawyer's role in our adversary system. The difficult question is how

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124. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990).

125. In her survey of lawyers in the Northern District of California, Professor Melissa Nelken noted this phenomenon:

> While the rule appears to have altered lawyers' behavior, it is also clear that these new attitudes have not been completely internalized. Many lawyers have a purely pragmatic attitude toward the obligations imposed by Rule 11 and the apparent lack of uniformity in its application: 39 per cent of the respondents said that they give more attention to a case before a judge with a reputation for imposing sanctions than to a case before one who does not have such a reputation.

Nelken, *supra* note 68, at 149.

126. Third Circuit Task Force, *supra* note 75, at 36, 43 (reasoned decision may be an important part of the deterrent and professional goals of Rule 11).

to assert oneself. Lawyers have at least two routes to asserting a greater voice.

First, lawyers can continue to present their views of Rule 11 disputes. Practicing lawyers present their positions in seeking or defending a motion for sanctions. On appeal, where notice is available, lawyers' groups can present a group perspective through amicus briefs. Academics can continue to present their perspectives through scholarly articles.[127] In shaping this debate, however, lawyers may be benefitted by advocating not just what they perceive is wrong with Rule 11 but ways in which lawyers can assert a clearer vision of what it means to be a lawyer. Unfortunately, as long as the discussion is dominated by how the courts should interpret Rule 11, the viewpoints of practicing attorneys and scholars will be implemented only if the federal court is persuaded that the view is accurate and consistent with the court's reading of Rule 11. Although vigorous advocacy may force judges to confront alternative visions and make it more uncomfortable for judges to reject arguments by fiat, Rule 11 advocacy is thus inherently limited. Proposals to amend Rule 11 give a wider range for discussion, but are still limited by the general goals of federal civil procedure.

An alternate route is for lawyers to change the focus of the conversation altogether. The most likely way in which this could occur is through state and local bar associations. In other words, if lawyers force themselves to articulate what specific duties they owe to the legal system, and develop a meaningful method of enforcement, they can shape the lawyer's role. This laudable goal is obviously extremely difficult to achieve. The diversity of viewpoints reflected in the legal profession may make consensus extremely difficult. This difficulty in achieving consensus is probably what has caused lawyers, though the bars, to shy away from questions of frivolousness, harassment, and the meaning of a duty of factual inquiry. Rule 11 is not allowing us the luxury to avoid these difficult questions. If we want a meaningful voice in defining these concepts, we had better speak now.

V. CONCLUSION

This article does not claim that Rule 11 is becoming a

127. *See generally* Note, *Rule 11 and Papers Not Warranted By Law*, 58 FORDHAM L. REV. 1085 (1990) (noting volume of Rule 11 scholarship and frequency with which courts refer to that scholarship).

source of comprehensive lawyer regulation or that defining the lawyer's role has escaped completely the realm of local participation. Rule 11 nonetheless allows the federal judiciary to speak with a powerful voice in identifying the scope of the adversary ethic and "has tremendous potential for transforming the bar without people knowing about it."[128] In our imperfect legal system, fraught with self interest by all parties, a national standard of lawyering may ultimately be preferable. Even so, lawyers should create for themselves the opportunity to participate in any decision which impacts so forcefully on their role in society. Because of the administrative advantages of Rule 11 over state and local self-regulation, lawyers must take credible affirmative steps toward establishing workable standards of conduct. Even if the ultimate result is the federalization of legal ethics, lawyers should participate actively in the transfer of power. Without such broad-based participation, the transformation will occur by federal judicial fiat and we lawyers will have only ourselves to blame.

128. Samborn, *Rule 11 Tremors Continue* 12 NAT. L.J. 1, 32 (July 30, 1990) (quoting Prof. Stephen B. Burbank, U. Pa. Law School).