FRIVOLOUS CONDUCT UNDER MODEL RULE OF
PROFESSIONAL CONDUCT 3.1

I. INTRODUCTION

Under Model Rule of Professional Conduct 3.1 lawyers are ethically prohibited from advancing legal claims or defenses unless there is a basis for doing so that is "not frivolous." In conforming their conduct to this standard, however, lawyers face the difficult task of deciding exactly what claims qualify as "not frivolous." It is not clear on the face of Model Rule 3.1 whether the standard is the same as the former Model Code of Professional Responsibility's test for improper conduct, even though the language differs, or whether lawyers must meet different expectations under the two sets of professional rules.

This Article will describe the standard of improper conduct set forth by Model Rule 3.1. Part Two will briefly provide a working definition of frivolous conduct. Part Three will present the appropriate standard for evaluating the improper conduct of an attorney under Rule 3.1. In general, the standard used to evaluate frivolous conduct varies based on the level of knowledge required to support the violation. The objective standard, which ignores an attorney's subjective intentions, has been adopted by the Model Rules, and is used in the majority of jurisdictions; the subjective standard, which considers an attorney's intent, was the applica-

1. Model Rule 3.1 provides:
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for so doing that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). Throughout the body of this comment, the Model Rules of Professional Conduct (1983) will be referred to as the Model Rules; the Model Code of Professional Conduct (1969 & 1976) will be referred to as the Model Code.


ble test under the Model Code. Finally, Part Four will discuss the potential weaknesses of the objective standard, and argue that an objective-subjective hybrid is a more appropriate test than a pure form of either standard.

II. DEFINITION OF FRIVOLOUS CONDUCT

In general, claims are considered to be "not frivolous" if they are either based on existing law or on a good faith argument for an extension of existing law. This standard holds true under both the Model Code and the Model Rules, although the language of the two rule formulations differs. The difference between the two sets of rules arises not through the precise definition of frivolous conduct, but rather through the application of this standard to the conduct of attorneys. The key issue is whether the rule should be applied subjectively (taking into account the lawyer's motivation), or objectively (based upon an actual evaluation of the merits of the claim presented, regardless of the subjective motivations of the attorney). The Model Rule seemingly imposes a higher standard of con-

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4. See BNA/ABA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 61:101 (1988); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 & cmt. (1983). The comment states that "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 position ultimately will not prevail." CENTER FOR PROF'L RESPONSIBILITY, ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 120 (1987) [hereinafter Legislative History]. For further discussion of the Rule 3.1 requirement that attorneys investigate claims prior to asserting them, see the section entitled "Duty to Investigate." See infra notes 53-61 and accompanying text.

5. See BNA/ABA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT §61:101 (1988). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1969) provides that a lawyer may 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." In contrast, the Model Rules require that there be a basis for the litigation that is "not frivolous." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

duct upon lawyers than the Model Code, because it adopts the objective test for evaluating an attorney’s conduct.7

III. APPLICATION OF THE “NOT FRIVOLOUS” STANDARD

The legislative history of the Model Rules of Professional Conduct offers some guidance as to why the language of Rule 3.1 was changed from its predecessor in the Model Code. According to the reporter for the ABA Commission on Evaluation of Professional Standards, “[a] ‘not frivolous’ standard was adopted rather than one based on the concepts ‘harass’ or ‘maliciously injure,’ to track the standard generally used and defined in the law of procedure.”8 Thus, one would expect the Model Code’s standard for evaluating frivolous litigation to mirror the standard of procedural rules such as Rule 11 of the Federal Rules of Civil Procedure.9 Similarly, one might expect the standards to be applied in similar ways (objectively or subjectively). In fact, this is precisely the case; as a number of authors have noted,10 Model Rule 3.1 and Rule 11 not only use a similar “not frivolous” standard, but also apply the standard in the same manner, i.e., objectively.

7. See Model Rules of Professional Conduct Rule 3.1 cmt. (1983); see also Hazard & Hodes, supra note 6, at § 3.1:101. The comment to the Model Rules provides that “the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer ‘knows or when it is obvious’ that the litigation is frivolous.” Model Rules of Professional Conduct, Rule 3.1 cmt. (1983). The standard under the Model Code, in contrast to the Model Rules, was thus subjective.

8. See Legislative History, supra note 4, at 119; see also supra note 4 and accompanying text. Numerous authorities indicate that Model Rule 3.1 is best read in conjunction with Federal Rule 11. See, e.g., Hazard & Hodes, supra note 6, at § 3.1:301; ABA/BNA, Lawyer’s Manual on Professional Conduct § 61:109 (1988).


10. See, e.g., Judith McMorrow, Rule 11 and Federalizing Lawyer Ethics, 1991 BYU L. Rev. 959 (1991); see also Hazard & Hodes, supra note 6, at § 3.1:101.
A. Objective or Subjective Test

The "older test" for evaluating whether a claim was frivolous or not was the subjective standard, which dominated both the rules of procedure and the Model Code.11 This standard was most frequently interpreted as applying to all of the elements of a frivolous claim contained in DR 7-102.12 For example, in the recent case of Barnes v. State Bar of Texas,13 the Court of Appeals of Texas held that the term "knowingly" applied to all of the conduct expressed in DR 7-102(A)(2).14

Carolyn Barnes was a Texas attorney who appealed from a disciplinary suit brought against her by the State Bar of Texas.15 The disciplinary action was based on two complaints filed against Barnes, resulting from two separate litigations within six months of each other.16 The Court of Appeals in Barnes formulated the issue as "whether Carolyn Machalec Barnes advanced the Turley and Lemons suits knowing that they were unwarranted under existing law and whether she advanced these lawsuits knowing that they were not supported by a good-faith argument for an extension, modification, or reversal of existing law."17 This formulation amended the lower court's jury instructions, which merely asked whether "the Respondent, Carolyn Machalec Barnes, in representation of her client, Toni Turley, knowingly file[d] the Turley lawsuit?"18 or whether


12. Model Code of Professional Responsibility DR 7-102(A)(1) (1969) provided that an attorney could 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." Model Code of Professional Responsibility DR 7-102(A)(2) (1976) provided that a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good-faith argument for an extension, modification, or reversal of existing law."


14. See id. at 107. Note that Texas adopted the Model Rules, along with its objective standard of frivolousness, as of January 1, 1990. Hazard & Hodes, supra note 6, at Appendix 4. As the facts of this case arose when the Model Code was in effect, the Texas court analyzed the issues using the subjective standard.

15. See Barnes, 888 S.W.2d at 103.

16. See id. at 104-05.

17. Id. at 107.

18. Id. at 105.
"the Respondent, Carolyn Machalec Barnes, in representation of her client, Edwards, Parker & Brown, Inc., d/b/a South Texas Office Products, knowingly file[d] Plaintiffs' Fifth Amended Petition in the Lemons Lawsuit?" The Court of Appeals of Texas still incorporated the jury questions of the lower court, but shifted the emphasis from an objective inquiry to a subjective inquiry. In effect, the lower court was applying a more stringent standard than the objective test, as their jury instructions did not even inquire whether Barnes' conduct measured up to some "reasonable lawyer" standard—only whether she had knowledge that the claims had been made, whether frivolous or not.

In contrast with the "older," subjective test for frivolous claims, the objective application of the "not frivolous" standard has been adopted by Rule 3.1 and is the dominant approach today. This objective application has been formulated in two slightly different ways by different jurisdictions. First, some courts have applied a "reasonable lawyer" test, which poses the questions "would a reasonable attorney have known" or "would a reasonable attorney have made such an argument in 'good faith'?" Second, some jurisdictions have applied an "any rational basis" test, which labels a suit "frivolous" if found "beyond a doubt and under any conceivable argument" that the claimant would not be entitled to relief.

19. Id.
20. The court stated that the claim must have been "knowingly advanced." Barnes, 888.S.W.2d at 107. Certainly Barnes would always have to be found to have known of (or had reason to know of) the suits as the basis for any discipline, either applying a subjective or an objective standard. The distinction is one of knowledge of the claim itself, which is always required, as opposed to knowledge of the frivolous nature of the claim.
21. See supra note 7 and accompanying text.
22. See Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) (court imposed sanctions on lawyer for filing suit which reasonable inquiry would have shown was barred); First Nat'l Bank of Omaha v. Marquette Nat'l Bank, 482 F. Supp. 514 (D. Minn. 1979); Bird v. Rothman, 627 P.2d 1097 (Ariz. 1981); Sommer v. Carr, 299 N.W.2d 856 (Wis. 1981).
23. See Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986) (appeal based on severe misstatement of state law); Pyles v. Carlson, 532 F. Supp. 45 (W.D. Tenn. 1982) (same); Dolence v. Flynn, 628 F.2d 1280 (10th Cir. 1980) (claim insupportable by "rational argument" on either law or facts); Davis v. Oklahoma Dep't of Corrections, 516 F. Supp. 5 (W.D. Okla. 1980) (same); Harvey v. Clay County Sheriff's Dep't, 473 F. Supp 741 (W.D. Mo. 1979) (claimant's "realistic chances of success" slight).
The objective approach has been used even in states that have not fully adopted the Model Rules. For example, in New York, a state which has in effect an amended version of the Model Code incorporating some of the substance of the Model Rules, no inquiry is made into the state of mind of lawyers disciplined for frivolous claims. In *International Credit Corp. v. Roth*, the Court of Appeals of New York stated, when considering the imposition of disciplinary action, that "[t]he utter lack of merit in these motions and the virtual impossibility of affecting the final judgment at this late stage in the litigation confirm plaintiff-crossmovant's contention that this reargument motion was made primarily to delay enforcement of a judgment." The court observed that the documents before them raised "no significant issues requiring a further inquiry," and concluded that "[i]t is clear that the present motion was 'undertaken primarily to delay or prolong'" the enforcement of the judgment in the case. Thus, the subjective belief of the lawyer(s) involved was never considered in reaching the decision.

Although the subjective inquiry has been largely replaced by the Rules of Professional Conduct's objective inquiry, some jurisdictions still evaluate frivolous claims with reference to a lawyer's state of mind. This occurs in several situations; first, in states where the Model Rules have never been adopted, and the Model Code is therefore still in effect, the

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26. Id. at 689.
27. Id.
28. Id.
29. In contrast to New York, some states that have adopted the Model Rules still look to the subjective intentions of the lawyer. This is the case in Maryland, where the Model Rules have been in effect since January 1, 1987. ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 01:3 (1990). For example, in *Needle v. White*, the Court of Special Appeals found that, either by an articulated subjective belief or by a more rigorous objective standard, the defendants had pursued a frivolous claim. See Needle v. White, 568 A.2d 856 (Md. Ct. Spec. App. 1990). Thus, the court applied both standards, giving the defendants two opportunities to establish that they had not acted improperly. Note that, although this application of both standards favors the defendant, this is not always the case. Sometimes the application of both subjective and objective tests may work against the defendant. See infra notes 31-33 and accompanying text.
30. As of March, 1997, 37 states and the District of Columbia had adopted the Model Rules, while 13 either maintained the Model Code, maintain some mixture of the language and substance of the Rules and Code, or maintain their own ethical
subjective inquiry remains. Second, some states apply both tests, choosing to find a claim frivolous either (1) where an action is filed with intent to delay, harass, or injure; or (2) where the suit is utterly without any factual or legal support, irrespective of the lawyer’s state of mind in pursuing it. 31 This is the case in Arizona, where the State Supreme Court has held that “although the objective reasonableness of a legal claim is the standard to determine whether it is frivolous . . . the rule also requires . . . a subjective good faith argument by the lawyer.” 32 In a way, this standard is even harsher than a purely objective standard, as it gives disciplinary authorities two opportunities to establish a rule violation. That is, in contrast to jurisdictions that have held that the intentions of the lawyer are never relevant, 33 this standard allows sanctions for either improper motive or objective unreasonableness.

Finally, although Rule 3.1 adopts the objective standard, a lawyer’s state of mind is not totally irrelevant; due process concerns require that a lawyer not be punished where culpable conduct is not present. 34 In the case of the objective standard, responsible attorneys are charged with being able to recognize a genuinely frivolous claim. This is indicated by the Terminology portion of the Model Rules, which states that knowledge “may be inferred from the circumstances.” 35 Thus, prior to sanctioning an attorney, a court will generally infer that the attorney had knowledge that the claim was frivolous by examining the circumstances of the case.

rules apart from the ABA model standards. See ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, §§ 01:3 & 01:38-40 (1990 & 1995).

31. See ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, § 61:101 (1988); see also Robertson-Ryan & Associates Inc. v. Polhammer, 334 N.W.2d 246 (Wis. 1983) (holding subjective standard applied to finding whether proceeding was commenced or continued in bad faith for purpose of harassment, whereas objective standard applied to finding of frivolousness based on counsel’s knowledge that the action was without any reasonable basis in law); In re Marriage of Flaherty, 646 P.2d 179, 184-189 (Cal. 1982) (holding that an appeal is frivolous when it is either subjectively prosecuted for an improper motive or when it indisputably has no objective merit); Price v. Price, 654 P.2d 46 (Ariz. Ct. App. 1982) (same).

33. Supra notes 21-28 and accompanying text.

34. See HAZARD & HODES, supra note 6, at § 3.1:301; see also Flaherty, 646 P.2d 179 (discussing the requirement of due process protections for attorneys subject to professional discipline).

35. MODEL RULES OF PROFESSIONAL CONDUCT Terminology Section (1983); see also HAZARD & HODES, supra note 6, at § 3.1:301.
For example, in *Principe v. Assay Partners*, the Supreme Court of New York County adopted the objective standard for evaluating frivolous claims. In so doing, the court observed that the comments of the Committee on Federal Courts indicated that "the record allows a court to determine bad faith by the time-honored practice of drawing a conclusion from the pattern of conduct existing in the record." Thus, the court inferred the necessary culpable conduct from facts contained in the record before imposing sanctions.

B. Criminal Proceedings

Rule 3.1 clarifies a potentially problematic aspect of the rule against frivolous claims about which the Model Code was silent. Model Rule 3.1 specifies that different considerations apply to attorneys representing clients in criminal proceedings or in proceedings that could result in incarceration. It provides that attorneys, in such circumstances, may "so defend the proceeding so as to require that every element of the case be established." This provision reflects the United States Constitution's requirement that the burden of proving the guilt of the accused not be shifted to the defendant. As a result, frivolous claims and contentions generally, and the objective/subjective distinction more specifically, become largely meaningless in the realm of criminal defense.

Nevertheless, defense counsel is still under some Rule 3.1 duty not to interpose completely baseless objections or engage in delay tactics. That is, certain actions on the part of defense counsel that do not further the objective of making the prosecution prove its case may be improper. For example, in the case of *State v. Darnell*, the Court of Appeals of

37. See id. at 187. The standard was adopted for evaluating all frivolous conduct and tactics, including frivolous claims. See id.
38. Id. (citing Comm. on Federal Courts, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 THE RECORD 267, 293 (1991)).
39. Here, the defendant(s) had behaved in a rude, badgering, and disrespectful manner during depositions that amounted to nothing more than "name-calling." Id. at 184.
41. Id.
Washington turned away a claim of ineffective assistance of counsel by an accused based on the contention that defense counsel "failed to make any real objections to any evidence introduced by the prosecution." The court noted that the accused had demonstrated only one point at which a potentially valid objection had been overlooked by the defense attorney, and reasoned that any objections that may have been interposed would therefore have been legally baseless. The court went on to comment that objections with no legal basis lower the standards of the profession, bring disrepute on the court, and likely violate DR 7-102.

C. Duty to Investigate

Under the Model Code's subjective standard, it was unclear whether a lawyer was under an obligation to investigate the facts presented by a client. For example, in *Nelson v. Miller*, the Supreme Court of Kansas rejected the position that a lawyer is entitled to file suit without looking into the facts presented by a client. The court commented that "such a rule is degrading to the legal profession and not acceptable in these times." One of the authorities cited by the court for its decision was DR 7-102(A)(1). In contrast, in *Friedman v. Dozorc*, the Supreme Court of Michigan interpreted DR 7-102 in exactly the opposite way. The court found that DR 7-102 does not impose any obligation on attorneys to "conduct an independent investigation of the merits of a client's claim." The court reasoned that the rule incorporated "a requirement of scienter as to groundlessness or vexatiousness, not a requirement that the lawyer take affirmative measures to verify the factual basis of a client's

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44. *Id.* at 120.
45. *See id.*
47. 607 P.2d 438 (Kan. 1980).
48. *Id.* at 448.
49. *Id.*
51. *Id.* at 605.
position." Thus, the same provision of the Model Code has been interpreted in contradictory ways by different courts.

Under Model Rule 3.1's objective standard of evaluating frivolous claims, it is initially unclear whether any investigation of the claim to be filed is actually necessary, as the face of the rule imposes no requirement of investigation. There is, however, support for the view that Rule 3.1 does impose some obligation to investigate claims. For example, the Comment to the Model Rules states that an attorney must generally "satisfy himself or herself that there [are] good grounds for the pleading." In addition, other authorities maintain that Model Rule 3.1, in its move toward objectivity, "encourages disciplinary authorities to hold lawyers to a standard requiring a reasonable investigation into the law and the facts of a client's claim before asserting it." This trend can be seen in cases such as Thunberg v. Department of Transportation, where the Supreme Court of Pennsylvania indicated that attorneys should investigate claims prior to asserting them as part of their ethical duty. The court stated that "[p]laintiffs should only bring actions against another party where they have a reasonable basis to believe that the allegations contained in the complaint are true." Here, where the claim asserted had no "legitimate basis in law or in fact," and despite the fact that no improper motives existed, the court found the conduct improper. Had some investigation of the facts surrounding the complaint been made, however, the court indicated that no sanctions would have been

52. Id.
53. Of course, a duty to investigate representations made by a client may well be required by other rules of professional conduct or procedure. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); FED. R. CIV. P. 11.
55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1983). The Comment indicates that this standard held true under the Model Code as well, but this was not necessarily the case. See supra notes 47-52 and accompanying text.
58. See id. at 302.
59. Id.
60. Id.
61. Id.
62. Although the court did not impose sanctions under Rule 3.1, it relied on Rule 3.1 in holding that an award of attorney's fees was warranted for the improper conduct. See Thunberg, 682 A.2d at 302.
imposed.63

IV. TOWARD AN OBJECTIVE-SUBJECTIVE HYBRID

The shift toward objectivity by the Model Rules reflected the general perception that frivolous litigation was on the rise, and higher standards of conduct were therefore warranted.64 As a more objective standard presumably has a greater deterrent effect on frivolous litigation, the move toward objectivity was expected to lead to a decline in frivolous claims.65 Unfortunately, although it potentially deters frivolous litigation, the objective standard has several undesirable effects on the legal system.

Rules concerning frivolous claims and contentions are difficult to formulate because of the fine line between discouraging frivolous lawsuits while not inhibiting non-frivolous actions.66 When the rules are applied objectively, their is a greater deterrent effect on frivolous litigation, yet genuine claims may also be deterred; when they are applied subjectively, genuine claims are deterred to a lesser degree, but so are frivo-

63. See id. Note that requiring an attorney to investigate the facts surrounding a claim is perhaps better characterized as a way of ensuring that frivolous claims are not filed, as opposed to an independent ground on which attorneys may be sanctioned. That is, the court in Thunberg did not truly sanction the attorney in this case for the lack of investigation; the objective frivolity of the claim was still the basis for finding improper conduct. Rather, the court looked to the lack of investigation as the cause of the frivolity, indicating that no claim would have been filed had the facts surrounding the case been investigated. Thus, the requirement of investigation serves as an additional safeguard against frivolous claims, rather than an additional ground for finding improper conduct. Nevertheless, lack of investigation may always serve as evidence of the frivolous nature of a claim.

64. See supra notes 8-10 and accompanying text; see also McMorrow, supra note 10, at 971. For additional background information on the rise of frivolous litigation and the reactions of the public and the legal community, see generally Dan Hurley, Much Ado About Nothing: An Epidemic of Frivolous Law Suits is Turning Our Legal System into a Courtroom of the Absurd, 17 DOCKET CALL 14 (1982).


lous claims. The first drawback of the objective standard is therefore that it runs the risk of "chilling" all litigation, even that which would be considered non-frivolous. That is, as lawyers observe the increasing number of actions for sanctions under this rule, truly bona fide (although perhaps not entirely clear-cut) claims may be deterred for fear of treading into Rule 3.1 territory. When such claims are not brought, the duty of loyalty to one's client also set forth by the Model Rules is undermined, as is the entire system of legal advocacy.

The second disadvantage of the objective standard is that, because it ignores subjective motivations, it places even attorneys who have acted in "good-faith" on trial. As a result, these "good faith" attorneys will have the obligation of defending their actions by proving that they did not violate the "not frivolous" standard. States that use the most objective formulation of the test, as it requires the lowest threshold for establishing a violation, will see the greatest effect on attorneys who have acted in good faith; however, even states that use the less stringent formulation will adversely affect "good faith" attorneys. The overall effect of the objective test will therefore be to sanction attorneys for "poor judgment" as opposed to "bad conduct." This seems to weigh against the Model Rules' indication that this ethical standard is intended to target the "abuse of the legal system."

Finally, the objective standard arguably creates a new kind of frivolous lawsuit to be abused. That is, as opposed to deterring frivolous litigation, it may actually encourage the very activity that it is designed to

67. See FREEDMAN, supra note 66, at 127-35.
68. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).
69. See Keeling, supra note 66, at 1070-73.
70. The burden of proof for the attorney with respect to the subjective standard is merely to demonstrate that he or she acted with a belief that the action was not frivolous, while the burden with respect to the objective standard is to demonstrate that the claim was, in fact, non-frivolous. See FREEDMAN, supra note 66, at 130.
71. See supra note 22 and accompanying text.
72. See supra note 23 and accompanying text.
73. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1983).
74. See Craig Enoch, Incivility in the Legal System? Maybe It's the Rules, 47 SMU L. REV. 199 (1994) (proposing that legal tactics that evoke criticism result not from the lawyer's choice to pursue a legal avenue, but rather from rule-imposed rigidity); see also David T. Pritikin et al., The Sham Litigation Doctrine in Patent Litigation: The Nexus Between Bad Faith Enforcement of Patent Rights and the Antitrust Laws, 414 PRAC. L. INST. 661 (1995) (noting that inequitable conduct is charged in almost every major patent case).
control by facilitating a "back and forth" dynamic of litigation. In fact, in a number of the cases discussed in this comment, the sanctions were instituted at some point during, not after, the principal litigation. This may indicate that these sanctions were being used less for the purpose of redressing improper conduct, and more for some other adversary purpose.

The solution to the problems with the objective standard, however, does not mandate a return to the subjective standard of the Model Code. The subjective standard is itself not without disadvantages—it serves as little deterrent at all to frivolous litigation, and does not reach a variety of objectively unreasonable claims that should be curtailed. Rather, the standard that would best achieve a balance between the competing interests of stemming frivolous claims while not infringing on legitimate ones is an objective-subjective hybrid.

The subjective-objective hybrid approach to frivolous litigation would limit the most severe sanctions to individuals whose conduct reflects subjective bad faith (a willful intent to harass the opposing party, stall the proceedings, or some other similar intentional conduct). If the evidence established bad faith, the court would be authorized to impose any sanction that it, in its discretion, found appropriate, provided that it was proportional to the circumstances of the violation.

At the same time, while the most severe sanctions would be confined to conduct that violates a subjective standard, the objective standard would also be used as part of the test for improper conduct. If the evidence demonstrated that an attorney acted in subjective good faith, the court would then evaluate whether the claim met a standard of objective reasonableness. If the court found that a litigant had acted unreasonably, a limited range of sanctions would be available. For example, a nominal

75. See Enoch, supra note 74.
76. See supra notes 22, 23, 25, 37, & 57 and accompanying text.
77. See Freedman, supra note 66, at 130.
78. See Keeling, supra note 66, at 1100-01.
79. A compelling argument for such an approach is presented by Keeling, supra note 66, at 1152-60.
80. To avoid allowing individuals to claim merely good faith to escape being sanctioned, courts should be able to examine the evidence critically. That is, if a preponderance of the evidence—either direct or circumstantial—established that the offender acted in bad faith, the court should be able to enforce a severe sanction, regardless of whether the offender claimed to have acted in good faith. See Byron C. Keeling, A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct, 25 Tex. Tech L. Rev. 31 (1993).
fine could be imposed, a public or private reprimand could be issued, or
the attorney could be required to attend continuing educational instruction
in the particular substantive area.

Limiting the range of sanctions for conduct that violates the objective
standard does not leave courts powerless to redress litigation abuse. For
example, at least one federal court has observed that the "biggest
sanction" for an attorney is often a formal rebuke in open court that tells
the sanctioned individual that the conduct at issue was inappropriate.\footnote{81}
In addition, most lawyers consistently remain conscious of their public
image, even as they assert potentially frivolous positions.\footnote{82}

Ultimately, the hybrid approach balances the goals of the subjective
and objective approaches, while minimizing their disadvantages. That is,
by limiting the most severe sanctions to conduct that reflects subjective
bad faith, it preserves the goal of ensuring free access to the courts. As
long as attorneys believe in good faith either that their arguments are
valid or that their they reflect legitimate grounds for changing the law,\footnote{83}
they are immune from the kinds of sanctions that otherwise might inhibit
their access to the courts. At the same time, by authorizing a range of
lesser sanctions against conduct that violates the objective standard, the
hybrid approach preserve the goal of redressing and deterring litigation
abuse.

V. CONCLUSION

Thus, the Model Rule 3.1 requirement that a lawyer assert legal
claims and positions that are "not frivolous" generally requires that
claims be grounded in existing law or a good faith argument for an exten-
tion of the law. This test may be applied either objectively or subject-
ively, depending on the jurisdiction, although the Model Rules adopt the
objective application. Regardless of whether the purely subjective or the
purely objective test is used, however, each has significant drawbacks. A
potential solution to these drawbacks involves adopting a hybrid test—one
that inquires into both the subjective and objective reasonableness of a
claim, but that applies different sanctions depending on whether or not an
attorney intended to assert a frivolous position. This solution appropri-
ately balances the competing objectives of punishing and deterring improper

\footnote{81}{See} Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 841 (1st Cir. 1990).
\footnote{82}{See} Keeling, supra note 80, at 66.
\footnote{83}{See} MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).
claims, while not "chilling" proper litigation or punishing attorneys that act in good faith.

James W. MacFarlane