

2003

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Recommended Citation

Freedman, Monroe H. (2003) "The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases," *Hofstra Law Review*: Vol. 31: Iss. 4, Article 9.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol31/iss4/9>

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THE PROFESSIONAL OBLIGATION TO RAISE FRIVOLOUS ISSUES IN DEATH PENALTY CASES

*Monroe H. Freedman**

[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.¹

[A] lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.²

I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.³

Lawyers are generally familiar with the ethical rule forbidding frivolous arguments,⁴ principally because of sanctions imposed under rules of civil procedure for making such arguments.⁵ Not all lawyers are aware, however, of two ways in which the prohibitions of frivolous arguments are restricted in both the rules themselves and in their enforcement. First, the ethical rules have express limitations with respect to arguments made on behalf of criminal defendants,⁶ and courts are

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1. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (2002) [hereinafter MODEL RULES].

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, PREAMBLE (1986) [hereinafter MODEL CODE].

3. *Ring v. Arizona*, 536 U.S. 584, 611 (2002) (Scalia, J., concurring) (explaining in a death penalty case why he concurred in overruling a case that the Court had decided twelve years before).

4. See MODEL RULES, *supra* note 1, R. 3.1 (2002); MODEL CODE, *supra* note 1, DR 7-102(A)(2), EC 7-4; RESTATEMENT (THIRD) THE LAW OF GOVERNING LAWYERS § 110 (2000) [hereinafter RESTATEMENT (THIRD)].

5. See *e.g.*, FED R. CIV P. 11; see also 28 U.S.C. § 1927 (2003) (applying to all proceedings); FED R. APP. P. 38 (applying to all appeals); see generally GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (3d ed. 2000 & Supp. 2003).

6. MODEL RULES, *supra* note 1, R. 3.1 cmt. 3; RESTATEMENT (THIRD), *supra* note 4, § 110, cmt. f.

generally loath to sanction criminal defense lawyers.⁷ Second, the term “frivolous” is narrowed, even in civil cases, by the way it is defined and explained in the ethical rules and in court decisions.

I. THE RARITY OF SANCTIONS FOR FRIVOLOUS ARGUMENTS IN CRIMINAL CASES

Criminal defense lawyers are rarely disciplined or otherwise sanctioned for asserting frivolous positions in advocacy.⁸ One reason is that criminal defense is different from other types of advocacy. As stated in the comment to Model Rule 3.1, which relates to frivolous arguments:

The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention *that otherwise would be prohibited by this Rule.*⁹

Also, a comment in the Restatement of the Law Governing Lawyers notes that while the section on frivolous arguments applies “generally” to criminal defense lawyers, they may nevertheless take “any step” that is either “required or permitted” by the constitutional guarantee of the effective assistance of counsel.¹⁰

Illustrating the rare cases in which criminal defense counsel have been sanctioned, the Restatement¹¹ cites *In re Becraft*.¹² There, the Ninth Circuit imposed a sanction against a lawyer in a criminal appeal who had repeatedly raised an argument that the court characterized as a “patent absurdity” and that the Eleventh Circuit had previously found to be “utterly without merit.”¹³ Even in such a case, however, the *Becraft* court emphasized its reluctance to sanction a criminal defense lawyer:

7. See *infra* notes 8-15.

8. See RESTATEMENT (THIRD), *supra* note 4, § 110, reporter’s note to cmt. f (“Advocacy in a criminal-defense representation”); see also *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (noting “the absence of authority imposing sanctions against defense counsel”).

9. MODEL RULES, *supra* note 1, R. 3.1, cmt. 3 (emphasis added).

10. RESTATEMENT (THIRD), *supra* note 4, § 110, cmt. f.

11. See *id.* at reporter’s note to cmt. f.

12. 885 F.2d 547 (9th Cir. 1989).

13. *Id.* at 548-49. In a number of tax evasion cases, *Becraft* had unsuccessfully contended that the Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens, and thus the federal income tax laws are unconstitutional with respect to such citizens. *Id.* at 548. It is difficult to contemplate the national chaos that would follow a decision that the collection of income taxes from resident citizens is unconstitutional, and that it has been so for almost a century.

Becraft had also argued that state citizens are not subject to federal jurisdiction on the ground that federal authority is limited to the United States territories and the District of Columbia,

[W]e are hesitant to exercise our power to sanction under Rule 38 against criminal defendants and their counsel. With respect to counsel, such reluctance, as evidenced by the absence of authority imposing sanctions against defense counsel, primarily stems from our concern that the threat of sanctions may chill a defense counsel's willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client's conviction. Indeed, whether or not the prosecution's case is forced to survive the "crucible of meaningful adversarial testing" may often depend upon defense counsel's willingness and ability to press forward with a claim of first impression.¹⁴

The court added that because significant deprivation of liberty is often at stake in a criminal prosecution, "courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding."¹⁵

II. SANCTIONS IN CIVIL CASES UNDER RULE 11 AND SIMILAR RULES

During the decade after the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, a dangerous tendency developed to impose severe sanctions against lawyers under various federal and state rules.¹⁶ This excessive use of sanctions for allegedly frivolous filings prior to the 1993 amendment of Rule 11 has left a misleadingly broad impression of the meaning of "frivolous."

Rule 11 is similar to the ethical codes (discussed below) in permitting a claim or defense that is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."¹⁷ Giving added emphasis to the italicized language, the Advisory Committee's Notes to the 1983 version of Rule 11 cautioned that the rule is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."¹⁸ Nevertheless, there is significant evidence that creativity has been chilled by sanctions under Rule 11. In addition, judicial

an argument that makes one wonder how prescient Becraft was with respect to the Rehnquist Court's views on federalism. *See id.* at 549.

14. *Id.* at 550 (citing *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

15. *Id.*

16. *See, e.g.*, FED. R. CIV. P. 11; FED. R. APP. P. 38, 46; 28 U.S.C. §§ 1912, 1927 (2003).

17. FED. R. CIV. P. 11 (emphasis added).

18. 97 F.R.D. 165 (1983).

enforcement of the rule has had a disproportionate impact on plaintiffs' attorneys in civil rights cases, impaired lawyer-client confidentiality, and has been the cause of serious conflicts of interest between lawyers and clients.¹⁹

In an important article, *Rule 11 in the Real World*, Mark Stein explained, from his experience as a litigator, that lawyers are most inclined to threaten sanctions when an adversary's position is "not frivolous, but [rather, when it] is simultaneously dangerous and vulnerable."²⁰ That is, the unwarranted charge that an argument is frivolous has been used to distract the court from the merits of the argument. Moreover, even if the adversary lawyer is aware that his position is meritorious, "he may still be cowed by the threat of sanctions because of the unpredictable way in which courts award them."²¹

In response to broad criticism of the 1983 version of Rule 11, the rule was amended in 1993.²² Since then, the volume of cases involving charges of frivolous filings has been substantially reduced. However, the reason for that decrease is not clear. One reason could be that the amendment made imposition of sanctions discretionary with the judge, rather than mandatory. Another possible reason is that a motion for sanctions can no longer be simply an afterthought to another motion (e.g., a motion for summary judgment), but must be made and supported

19. See JEROLD S. SOLOVY ET AL., SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11 (1996); JOSEPH, *supra* note 5; *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1642, n.645 (more than twenty percent of lawyers interviewed "did not assert a potentially meritorious claim"); George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5 (1991); Carl B. Rubin & Laura Ringenbach, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 64 (1991); Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-V verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 259 (1991) (Rule 11 "discouraged innovative lawyering"); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 483-86(1991) (Rule 11 is being used to chill plaintiffs' access to courts); STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989); Paul Rothstein & Richard Wolfe, *Innovative Attorneys Starting to Feel Chill from New Rule 11*, LEGAL TIMES, Feb. 23, 1978, at 18; Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS (1988).

20. Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 313 (1990). Another lawyer has commented that sanctions aren't needed for claims that are truly frivolous, because "there has always been a sanction for frivolous claims, it's called—losing." Another lawyer has observed that "good judges don't need Rule 11, and bad judges shouldn't have it." (quoted from conference attended by author).

21. *Id.*

22. See Joseph, *supra* note 5, at 21-34.

in a separate pleading. Also, the 1993 Rule 11 has a “safe harbor” provision under which a lawyer whose filing is challenged as frivolous has twenty-one days to withdraw the filing without sanction. In one respect, this “safe-harbor” can be a potent threat, coercing withdrawal of arguments that Stein characterizes as “not frivolous, but . . . simultaneously dangerous and vulnerable.”²³ A positive effect of the “safe-harbor” amendment, however, is that a motion for sanctions cannot be filed at the end of litigation, because at that point it is no longer possible to make use of the “safe-harbor” withdrawal.

There is still reason for concern, therefore, that Rule 11, and similar rules in state courts, are continuing to have a deleterious effect on creative lawyering in civil cases. This is so in part because of the abuse of the rule by some judges, especially prior to the 1993 amendments, and because of the continuing *in terrorem* effect of possible sanctions under Rule 11 and similar rules. Nevertheless, the reduction in Rule 11 sanctions in federal courts since 1993 is a salutary development.

III. DEFINING “FRIVOLOUS”

Despite the earlier abuses under Rule 11 and similar rules, the definition of “frivolous” has been an extremely narrow one. The traditional legal definition of frivolous is “obviously false on the face of the pleading,” as when something was pleaded that “conflicted with a judicially noticeable fact or was logically impossible, such as a plea of judgment recovered before the accrual of the cause of action.”²⁴ Surely, a lawyer could properly be subjected to sanctions for filing a pleading that is frivolous in the sense of being “obviously false on [its] face.” Moreover, lawyers can properly be punished for filing or maintaining pleadings that are “sham” or “baseless,” that is, those that appear to state proper claims or defenses, but that are known to the lawyer to be false in fact.²⁵

The Supreme Court has gone somewhat further, by unanimously defining a “frivolous” claim as one based on an “indisputably meritless” or “outlandish” legal theory, or one whose “factual contentions are clearly baseless,” such as a claim describing “fantastic or delusional scenarios.”²⁶ Elaborating on that definition, the Court held that

23. Stein, *supra* note 20, at 313.

24. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some ‘Striking’ Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 18 (1976).

25. *See id.* at 26-29.

26. *Neitzke v. Williams*, 490 U.S. 319, 328-30 (1989) (construing 28 U.S.C. § 1915(d) (1948)).

frivolousness can be found when the facts alleged “rise to the level of the irrational or the wholly incredible.”²⁷

In addition to establishing this highly restrictive definition, the Supreme Court has cautioned judges against finding arguments to be frivolous. “Some improbable allegations might properly be disposed of on summary judgment,” the Court explained, “but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be ‘strange, but true; for truth is always strange, Stranger than fiction.’”²⁸

Nevertheless, some judges have tended to ignore that guidance, and have imposed sanctions against lawyers who file pleadings or make arguments that have proven to be unavailing. When that happens, zealous advocacy is not the only value that is placed at risk. The genius of our common law is also jeopardized.

For example, Justice Cardozo noted that nine out of ten, and perhaps even more, of the cases taken to the New York Court of Appeals during his time on that bench were “predetermined,” their fate “preestablished” by “inevitable laws” from the moment of their filing. *MacPherson v. Buick Motor Co.*²⁹ appears to be a perfect example. In 1908, the Court of Appeals of New York had reaffirmed the long-established rule that a consumer cannot recover against the manufacturer of a product for negligence.³⁰ Not long thereafter, MacPherson, who had been injured while driving a car with a defective wheel, sued the Buick Motor Company for negligent manufacture. Surely, MacPherson’s case was one of those that Cardozo called “predetermined.”³¹ The result of MacPherson’s appeal, however, was Cardozo’s most celebrated torts opinion, reversing long-established law by allowing a consumer to sue a manufacturer for a defective product, and demonstrating the creative common-law judging for which he has been so highly regarded.³²

As Professor Grant Gilmore observed, the *MacPherson* decision “imposed liability on [a defendant] who would almost certainly [] not have been liable if anyone but Cardozo had been stating and analyzing

27. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

28. *Id.* (quoting LORD BYRON, DON JUAN, CANTO XIV, stanza 101 (Truman Steffan, Esther Steffand, & Willis Pratt eds., 1977)).

29. 217 N.Y. 382 (1916).

30. *See Torgesen v. Schultz*, 84 N.E. 956, 1000 (1908).

31. The point is underscored by *Cadillac Motor Car Co. v. Johnson*, 221 Fed. 801, 803 (1915).

32. *See G. EDWARD WHITE, TORT LAW IN AMERICA* 120 (2003).

the prior case law.”³³ At the time of filing the complaint, however, MacPherson’s lawyer could not have known that Cardozo would choose to reverse a century of unbroken precedent that had only recently been reaffirmed. Much less could he have known that Cardozo would be able to carry a majority of the court with him. Without that frivolous-appearing complaint, however, Cardozo could not have changed the common law of manufacturer’s liability as he did.

Even Cardozo, the great innovator, observed that “the range of free activity [for judges] is relatively small,”³⁴ in part because judges are limited to the issues that are brought before them by counsel. Behind every innovative judge, therefore, is a lawyer whose creative (and, arguably, frivolous) litigating opened up that small range of judicial opportunity, thereby making the precedent-shattering decision possible.

Innovative judging (and lawyering) is not restricted to common law cases. Depending on how one counts the cases, the Supreme Court has overruled its own decisions 200 to more than 300 times. On at least sixteen occasions, this has happened within three years.³⁵ At other times, the most venerable of precedents have fallen, including at least ten cases that were overruled after as many as 94 to 126 years.³⁶ For example, in

33. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 135 (1977), *quoted in* WHITE, *supra* note 32, at 120 (1980).

34. BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 60 (1924).

35. *See* *Rose v. Himley*, 8 U.S. 241 (1808), *overruled by*, *Hudson v. Guestier*, 10 U.S. 281 (1810); *Kansas Pac. R. Co. v. Prescott*, 83 U.S. 603 (1873), *overruled by* *Railway Co. v. McShane*, 89 U.S. 444 (1874); *Harshman v. Bates County*, 92 U.S. 569 (1875), *overruled by* *County of Cass v. Johnston*, 95 U.S. 360 (1877); *Jones v. Opelika*, 316 U.S. 584 (1942), *vacated by* 319 U.S. 103 (1943); *Minersville District v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educators v. Barnette*, 319 U.S. 624 (1943); *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946), *overruled by* *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949); *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Kinsella v. Krueger*, 351 U.S. 470 (1956), *overruled by* *Reid v. Covert*, 354 U.S. 1 (1957); *Ladner v. United States*, 355 U.S. 282 (1958), *overruled by* *Ladner v. United States*, 358 U.S. 169 (1958); *Kesler v. Dep’t of Pub. Safety*, 369 U.S. 153 (1962), *overruled by* *Swift v. Wickham*, 382 U.S. 111 (1965); *State Dep’t of Health and Rehab. Servs. of Fla. v. Zarate*, 407 U.S. 918 (1972), *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974); *Sterett v. Mothers’ & Children’s Rights Org.*, 408 U.S. 809 (1972), *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972), *overruled by* *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Bonelli Cattle v. Arizona*, 414 U.S. 313 (1973), *overruled by* *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *United States v. Jenkins*, 420 U.S. 358 (1975), *overruled by* *United States v. Scott*, 437 U.S. 82 (1978); *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by* *Pervis Tyrone Payne v. Tennessee*, 501 U.S. 808 (1991).

36. *See* *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by* *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *Schooner Catherine v. Dickinson*, 58 U.S. 170 (1854), *overruled by* *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Pennoyer v. Neff*, 95 U.S. 714 (1887), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Rolston v. Missouri Fund Comm’rs* 120 U.S. 390 (1887), *overruled in part by* *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984); *Coffey v. United*

Erie Railroad v. Tompkins,³⁷ the Supreme Court overruled a precedent that had been applied every day in every federal trial court for nearly a century.³⁸ On the occasion of one about-face by the Court, Justice Roberts protested that “[n]ot a fact differentiates [the overruled case] from this [one] except the names of the parties.”³⁹ Indeed, the majority itself acknowledge in that case, “The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*,” which the Court then proceeded to overrule.⁴⁰

The Rehnquist Court has overruled prior authority in over forty cases.⁴¹ Most recently, in *Lawrence v. Texas*,⁴² the Court struck down state legislation outlawing private, consensual, homosexual conduct. In doing so, the Court overturned *Bowers v. Hardwick*,⁴³ decided seventeen years before. In *Bowers*, a majority of the Court had described the legal argument that ultimately prevailed in *Lawrence* as “at best, facetious.”⁴⁴ Since the dictionary definition of “facetious” is “not meant to be taken seriously or literally . . . ,”⁴⁵ the Court was characterizing that argument in a way that was perhaps even more pejorative than the word “frivolous.”

With specific reference to death penalty cases, the Rehnquist Court has overruled itself twice in relatively short periods of time. In *Atkins v. Virginia*,⁴⁶ holding that the Eighth Amendment forbids the execution of a mentally retarded person, the Court overturned *Penry v. Lynaugh*,⁴⁷ decided thirteen years before. In the same term, the Court held in *Ring v. Arizona*,⁴⁸ that the Sixth Amendment requires that a jury, not a judge,

States, 116 U.S. 436 (1886); *Ex Parte Bain*, 121 U.S. 1 (1887), *overruled in part by* United States v. Cotton, 535 U.S. 625 (1985); *Kentucky v. Dennison*, 65 U.S. 66 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987); *Kring v. Missouri*, 107 U.S. 221 (1883), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990).

37. See 304 U.S. 64, 79 (1938).

38. See generally *Swift v. Tyson*, 41 U.S. 1 (1842).

39. *Smith v. Allwright*, 321 U.S. 649 (1944), citing *Grovey v. Townsend*, 295 U.S. 45 (1944).

40. See *id.* at 652.

41. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2245-56 (Johnny H. Killian & George A. Costello eds., 1996); *id.* at 171 (2000 Supp.); L. EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 194-206 (3d ed. 2003); Major Decisions of the Court, 1790-2002: Congressional Quarterly 87-141.

42. See 123 S. Ct. 2472 (2003).

43. See 478 U.S. 186 (1986).

44. *Id.* at 194.

45. WEBSTER'S COLLEGE DICTIONARY (Random House 1991).

46. See 536 U.S. 304 (2002).

47. See 492 U.S. 302 (1989).

48. See 536 U.S. 584 (2002).

make the finding of any fact on which the death penalty depends; in doing so, the Court overruled *Walton v. Arizona*,⁴⁹ decided twelve years before. In *Ring*, the Court candidly acknowledged that “[o]ur precedents are not sacrosanct.”⁵⁰ As explained by Justice Scalia, concurring in *Ring*, “I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.”⁵¹

Recognizing how creative lawyering can dispel “old ignorance” and impart “new wisdom” to judges, the American Bar Association has taken care in its ethical rules not to discourage lawyers from challenging established precedent or otherwise seeking to make new law on behalf of their clients. For example, Model Rule 3.1 provides that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous.”⁵² Under such a rule, of course, MacPherson’s lawyer would be subject to professional discipline, along with countless other lawyers whose creative litigating helped to shape our law. However, a contention is not frivolous within the rule if it is made as “a good faith argument for an extension, modification or reversal of existing law.”⁵³ Also, the Comment notes that “the law is not always clear and never is static.”⁵⁴ Accordingly, “in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.”⁵⁵ Moreover, filing an action or defense is not frivolous under the Model Rules “even though the lawyer believes that the client’s position ultimately will not prevail.”⁵⁶ Model Rule 3.1 does say expressly that in criminal cases the defense can always put the prosecution to its proof. This is worth reiterating, although we are not aware that there has ever been any confusion about the point under the Model Code.

49. See 497 U.S. 639 (1990).

50. 536 U.S. at 608.

51. *Id.* at 611.

52. MODEL RULES, *supra* note 1, R. 3.1.

53. *Id.*

54. *Id.*

55. *Id.*

56. A related provision in the Model Code is DR 7-102(A)(1). In the Model Rules, the Model Code Comparison to MR 3.1 suggests that there are three noteworthy differences between MR 3.1 and DR 7-102(A)(1). However, these differences do not appear to be significant. Conduct is improper under DR 7-102(A)(1) if the purpose is “merely” to harass or maliciously injure another. Under MR 3.1 there must be “a” basis that is not frivolous (and frivolous is defined the same as under the Model Code), but if there is a non-frivolous basis, then there is ground for a good faith argument, and if there is ground for a good faith argument, then the purpose is not merely to harass or injure another. The comparison also says that the test under MR 3.1, unlike DR 7-102(A)(1), is an objective one. However, DR 7-102(A)(1) applies if the lawyer “knows or when it is obvious” that the litigation is frivolous. The emphasized language is an objective standard.

Similarly, DR 7-102(A)(2) of the Model Code begins by forbidding a lawyer to “[k]nowingly advance a claim or defense that is unwarranted under existing law.”⁵⁷ Again, however, the exception to the rule is crucial: the lawyer is permitted to advance a claim that is unwarranted under existing law “if it can be supported by good faith argument for an extension, modification, or reversal of existing law.”⁵⁸ EC 7-4 adds that “a lawyer is not justified in asserting a position in litigation that is frivolous.”⁵⁹ The same Ethical Consideration says, however, that the advocate may urge any permissible construction of the law that is favorable to his client “without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.”⁶⁰

Further, if the advocate has doubts about the bounds of the law, she should resolve them in favor of the client’s interests.⁶¹ Thus, a lawyer contemplating a novel legal argument, or even one that has been rejected by the court in previous litigation, can nevertheless act ethically in presenting that argument despite her own professional opinion that the argument will be rejected. In other words, a lawyer can make an argument in “good faith” under DR 7-102(A)(2) even if the lawyer has no faith that the argument will prevail.

Thus, the Model Code encourages the litigating lawyer to foster growth and change in the law, urging the lawyer, “with courage and foresight,” to be “able and ready to shape the body of the law to the ever-changing relationships of society.”⁶²

The Restatement of the Law Governing Lawyers has almost identical language to the Model Rules and Model Code.⁶³ In addition, the comment to Section 110 urges judges to exercise restraint in disciplining lawyers for frivolous advocacy, noting that “[a]dministration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.”⁶⁴

Moreover, judges who have imposed sanctions against lawyers have typically ignored the constitutional limitations on sanctioning

57. MODEL CODE, *supra* note 1, DR 7-102(A)(2).

58. *Id.*

59. *Id.* EC 7-4.

60. *Id.*

61. *See id.* EC 7-3. In counseling a client, however, the lawyer should be candid regarding the probable outcome of the issue in litigation. *See id.*

62. *Id.* at PREAMBLE.

63. *See* RESTATEMENT (THIRD), *supra* note 4, § 110 (1) (“A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.”).

64. *Id.* at cmt. b.

lawyers for filing frivolous pleadings.⁶⁵ As the Supreme Court has reiterated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,⁶⁶ there is a First Amendment right to petition for redress of grievances by litigating civil cases. That right has, of course, been severely chilled by sanctions intended to discourage litigation.

A “sham” lawsuit is an exception to the constitutional right to petition through the courts. However, the “sham” exception does not apply unless the suit is “objectively baseless” or “objectively meritless.”⁶⁷ To satisfy that test, the litigation must be “so baseless that no reasonable litigant could realistically expect to secure favorable relief.”⁶⁸ All that is necessary to establish the constitutional right is an objective “chance” that a claim “may” be held valid.⁶⁹ In that event, the First Amendment right is secure, even if the litigant has no subjective expectation of success and has a malicious motive for pursuing the claim.⁷⁰

IV. THE NECESSITY TO MAKE “FRIVOLOUS” ARGUMENTS IN DEATH PENALTY CASES

As we have seen, even in civil cases, lawyers have considerable range, both ethically and constitutionally, in raising issues that are arguably frivolous. With respect to criminal defense, moreover, courts are loath to impose sanctions against lawyers in any case in which the defendant’s liberty is at stake.⁷¹

Furthermore, as serious as is loss of liberty, our jurisprudence recognizes that death is different.⁷² This is so not only as a fact of life and death, but also for the practical reason that appellate and post-conviction remedies are pursued in almost 100% of cases in which the death penalty is imposed.⁷³ It is therefore crucial that in any capital case,

65. See, e.g., Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983).

66. See 508 U.S. 49 (1993).

67. *Id.* at 60.

68. *Id.* at 62.

69. *Id.* at 62-63.

70. See *id.* at 57.

71. See *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989).

72. See, e.g., *California v. Ramos*, 463 U.S. 992, 998-99 (1983); see also *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., disapproving but recognizing the Court’s “death-is-different jurisprudence”).

73. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, GUIDELINE 10.8 (rev. ed. 2003).

“any and all conceivable errors” be preserved for review.⁷⁴ The alternative is that a client may be put to death by the state, despite reversible error, because counsel has waived the issue or defaulted on it.

An example is *Smith v. Kemp*.⁷⁵ This was one of two prosecutions for the same murder. In the case involving co-defendant Machetti, who was the “mastermind” in the crime,⁷⁶ the lawyers timely raised the issue that women had been unconstitutionally under-represented in the jury pool.⁷⁷ As a result, Machetti’s conviction and death sentence were overturned, resulting in a new trial and a sentence of life in prison.⁷⁸ Co-defendant John Eldon Smith was tried in the same county, by a jury drawn from the same jury pool. However, Smith’s lawyers did not timely raise the constitutional issue, because they had overlooked authority that gave support to the argument.⁷⁹ Since his lawyers’ failure to raise the issue was not adequate to overcome non-constitutional reasons of comity, finality, and agency, Smith was electrocuted.

The agency issue is an essential part of the jurisprudence of death. The Supreme Court, in an opinion by Justice O’Connor, expressly relied upon the Restatement of Agency Section 242, for the “well-settled principle of agency law” that a master is subject to liability for harm caused by the negligent conduct of a servant within the scope of the employment.⁸⁰ Thus, the Court could “discern no inequity” in requiring a criminal defendant (“the master”) to “bear the risk of attorney error.”⁸¹ The error in that case was that the attorney (“the servant”) was 72 hours late in filing a “purely ministerial” notice of appeal in the state court.⁸² Accordingly, Roger Coleman was precluded from raising eleven constitutional challenges to his conviction, and he too was put to death by the state.⁸³

74. *Id.* at GUIDELINE 10.8, commentary (quoting Steven B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43).

75. *See* 715 F.2d 1459, 1476 (1983).

76. *Id.* at 1476 (Hatchett, J., concurring in part and dissenting in part).

77. *See id.*

78. *See id.* (Hatchett, J., concurring in part and dissenting in part).

79. *See id.* at 1470-71 (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979)).

80. *See Coleman v. Thompson*, 501 U.S. 722 (1991).

81. *Id.* at 754.

82. *Id.* at 742.

83. Justice O’Connor also relied on federalism to support her opinion. Indeed, the first words of her opinion in a case involving whether a person will live or die are: “This is a case about federalism.” *Id.* at 726. *But see Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (where Justice O’Connor chose to ignore the federalism issue (raised by her dissenting colleagues) to allow a cause of action for sexist harassment of a schoolgirl, an important issue, but not one as compelling as death by electrocution).

A similar problem arises when a lawyer makes the tactical decision to omit an argument that appears to be weak (or when a lawyer claims to have done so when challenged with ineffective assistance of counsel). An illustration of that is *Smith v. Murray*.⁸⁴ There the lawyer chose to forgo an argument that was contrary to an opinion that the Virginia Supreme Court had handed down only two years before. Writing for the United States Supreme Court, Justice O'Connor praised the lawyer for "winnowing out" the weak argument and focusing on those more likely to prevail, and lauded this practice as the "hallmark of effective appellate advocacy."⁸⁵

As a result of this model of effective appellate advocacy in the state court, however, the client was precluded from raising a winning constitutional issue in the federal courts.⁸⁶ As Justice O'Connor held, the lawyer's "deliberate, tactical decision" to winnow out what appeared to him to have been a weak argument in the state appeal, made it "self-evident" that the client had lost the right to raise the issue on habeas corpus in the federal courts.⁸⁷

V. CONCLUSION

The conclusion is therefore clear. Counsel in a capital case must, as a matter of professional responsibility, raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court or in the Supreme Court, in direct appeal or in a collateral attack on a conviction or sentence. This is the essence of the ABA's Guideline 10.8 in its new Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February, 2003). In addition, as noted in the commentary to Guideline 10.8(A)(3)(d), assertion of a claim (even a "frivolous" one) might increase the chances of a desirable plea agreement or might favorably

84. 477 U.S. 527 (1986).

85. *Id.* at 536 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). This position is not universally accepted. See, e.g., Monroe H. Freedman, *Briefing and Arguing Federal Appeals*, by *Federick Bernays Wiener*, 30 GEO. WASH. L. REV. 146 (1961) (book review) (arguing that effective advocacy requires that the lawyer raise every issue that might conceivably attract even one vote on a multi-judge panel).

86. See *Jones*, 463 U.S. at 751-53 (Stevens, J., dissenting); see also, FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS 136-37 (2d ed. 2002) (discussing *Estelle v. Smith*, 451 U.S. 454 (1981)).

87. *Jones*, 463 U.S. at 534. Justice O'Connor also noted "the profound societal costs that attend the exercise of habeas jurisdiction," but had nothing to say about the costs to society and to the individual when a hearing on a legitimate constitutional claim is denied in a death case. *Id.* at 539.

influence a governor or other official in making a decision regarding clemency.

In short, in a capital case, the lawyer for the accused has a professional obligation to assert at every level of the proceedings what otherwise might be deemed a frivolous claim.⁸⁸

88. The same is true, of course, in any case involving potential deprivation of liberty in which an appeal or collateral attack might be contemplated.