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## Civil Procedure and the Legal Profession

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# FOREWORD

## CIVIL PROCEDURE AND THE LEGAL PROFESSION

*Howard M. Erichson\**

These rules govern the procedure in all civil actions . . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

- Rule 1, Federal Rules of Civil Procedure<sup>1</sup>

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct . . . . The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.

- Preamble & Scope, ABA Model Rules of Professional Conduct<sup>2</sup>

What's the difference between a proceduralist and an ethicist? It may sound like a joke in search of a punch line (if you come up with a good one, let me know), but here it serves as the set-up for a wide-ranging collection of papers on civil procedure and the legal profession.

Aficionados of civil procedure and legal ethics share much in common. Both deal with detailed sets of rules. Both try to understand these rules in light of their purposes, context, and interactions. Both sets of rules aim to regulate the operation of the legal system in the interest of justice. Both sets of rules govern essential aspects of the civil litigation process, while both stand apart from the substantive legal norms that govern civil disputes. That is, they are process rules; they are less about the *what* than about the *how*.<sup>3</sup>

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\* Professor of Law, Fordham University School of Law. Having taught both civil procedure and professional responsibility virtually every year since joining the legal academy over fifteen years ago, each subject has infused my thinking about the other and it has become second nature for me to think about procedural problems in light of lawyers' relationships to their clients and to the legal system. I thank Bruce Green and Jessi Tamayo for the opportunity to put together this symposium issue on the intersection of the two fields, and I thank the authors for a rich and provocative set of papers.

1. FED. R. CIV. P. 1.

2. MODEL RULES OF PROF'L CONDUCT pmb. & scope ¶¶ 7, 14.

3. The term "adjective law," while not used much these days, captures this aspect of commonality between procedural and ethical rules. Legal ethics can be either "adjective" or

Despite these commonalities, procedural and ethical rules differ both in their target and in the dominant theories that underlie them. Rules of civil procedure largely concern the doings of the courts whereas rules of professional responsibility concern the doings of lawyers. To the extent they embrace philosophical underpinnings, proceduralists tend to look to political philosophy<sup>4</sup> while ethicists more often look to moral philosophy.<sup>5</sup>

Procedural regulation of the courts and professional regulation of lawyers provide two approaches to problems that arise in civil litigation. These approaches sometimes prove to be complementary, sometimes duplicative, and sometimes conflicting. In the papers in this Symposium issue of the *Fordham Law Review*, we see examples of complementarity, duplication, and conflict between the law of civil procedure and the law of professional responsibility. We also see some differences between those who view the problems of civil litigation primarily through the lens of procedure and those who view these problems primarily through the lens of ethics.

In a paper that patrols the procedure-ethics boundary, Andrew Perlman confronts the tension raised by the existence of parallel bodies of law that purport to tell lawyers how to conduct themselves in civil litigation.<sup>6</sup> According to Perlman, “the parallel law in the civil litigation context does not merely supplement or complement the rules of professional conduct; it is increasingly in tension with the ethics rules.”<sup>7</sup> He points, for example, to provisions for punishing lawyer misconduct in civil litigation, particularly Rules 11, 26, and 37 of the Federal Rules of Civil Procedure<sup>8</sup> and Section 1927 of Title 28.<sup>9</sup> The Model Rules of Professional Conduct track the Rule 11 standard in Rule of Professional Conduct (RPC) 3.1;<sup>10</sup> they echo the

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“substantive” depending on the point of view. When viewed as a set of regulations governing the legal industry, rules of professional conduct may properly be understood as substantive to the same extent as rules governing insurance, banking, or any other regulated industry. When viewed as part of the operation of the justice system, however, rules of professional conduct are adjectival in the same sense as procedural rules—rather than speak to what result ought to be reached, they speak to how we get there.

4. See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

5. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008).

6. Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965 (2011).

7. *Id.*

8. FED. R. CIV. P. 11 (authorizing courts to impose sanctions on lawyers who present pleadings or other papers for an improper purpose or that contain legally frivolous positions, factually baseless allegations, or factually baseless denials); *id.* at R. 26(g) (authorizing courts to impose sanctions for frivolous discovery requests and responses); *id.* at R. 37 (authorizing courts to impose sanctions for discovery misconduct).

9. 28 U.S.C. § 1927 (authorizing courts to impose costs and fees on an attorney who “multiplies the proceedings in any case unreasonably and vexatiously”).

10. MODEL RULES OF PROF'L CONDUCT R. 3.1 (prohibiting frivolous claims, defenses, and contentions). In this Foreword, I use “Rule” to refer to a Federal Rule of Civil Procedure and “RPC” to refer to a Model Rule of Professional Conduct.

discovery obligations of Rules 26 and 37 in RPC 3.4(d);<sup>11</sup> and they reflect the duty implicit in Section 1927 in RPC 3.2.<sup>12</sup> One might assume that such redundancy is costless or that these echoes are not really redundant because the civil procedure provisions authorize judicial sanctions as part of the litigation process whereas the rules of professional conduct authorize professional discipline through the lawyer disciplinary process. Perlman argues, however, that not only do these rules of professional conduct serve no useful purpose on top of the procedural provisions, they create confusion and “undermine the law-like status of the Model Rules.”<sup>13</sup> Using similar examples concerning conflicts of interest and inadvertent disclosures, Perlman shows the dangers of parallel sets of rules governing lawyer conduct. He makes the case that the rules of professional conduct should cede responsibility for regulating lawyer conduct in civil litigation where those rules “are not enforced as a matter of discipline, are in conflict with other sources of law, and are causing confusion about the applicable governing standards.”<sup>14</sup> A scholar whose work straddles both ethics and procedure, Perlman comes down firmly on the side of the rules of civil procedure in these areas of overlap, but mostly as a means to safeguard the integrity of the rules of professional conduct.

Several of the papers in the Symposium focus on particular aspects of civil litigation and flesh out the procedural issues in terms of lawyers’ duties to their clients and to the legal system. Michele DeStefano Beardslee looks at the work product doctrine as a way to understand the evolving role of the corporate attorney.<sup>15</sup> Benjamin Spencer considers the pre-litigation duty to preserve evidence and asks what role the Federal Rules of Civil Procedure can play in defining lawyers’ duties to their clients and to the legal system in this increasingly contentious area.<sup>16</sup> Lynn Baker and Charles Silver consider contingent-fee representation of plaintiffs in civil litigation in light of lawyers’ fiduciary duties to place their clients’ interests ahead of their own.<sup>17</sup> In each paper, procedural issues shed light on the duty and role of lawyers, and vice versa.

Beardslee tackles a procedural question and an ethical one. The procedural question is whether the work product doctrine<sup>18</sup> should apply differently to “law” work and “business” work. The ethical question then becomes what is the proper role of a corporate lawyer. According to Beardslee, we cannot make sense of the work product doctrine in the

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11. *Id.* at R. 3.4(d) (prohibiting frivolous discovery requests and failures to comply with proper discovery requests).

12. *Id.* at R. 3.2 (requiring lawyers to “make reasonable efforts to expedite litigation consistent with the interests of the client”).

13. Perlman, *supra* note 6, at 1973.

14. *Id.* at 1984.

15. Michele DeStefano Beardslee, *Taking the Business out of Work Product*, 79 FORDHAM L. REV. 1869 (2011).

16. A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005 (2011).

17. Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011).

18. *See* FED. R. CIV. P. 26(b)(3).

corporate context unless we properly understand the evolving role of the attorney in corporate practice.<sup>19</sup> In a world where corporate clients demand holistic and interdisciplinary advice from lawyers, she argues, the discoverability of lawyers' work should not depend upon a distinction between "law" and "business" functions that lawyers perform for clients in connection with civil litigation. Beardslee, whose work has largely focused on professional responsibility, fruitfully approaches the discoverability issue as a question about the corporate lawyer-client relationship.

Of the participants in the Symposium, Benjamin Spencer is probably the one most thoroughly a proceduralist. Whereas Beardslee takes a procedural question and explores it in light of professional duties, Spencer takes a question of professional duty and explores it in light of litigation procedure. As electronic information storage and discovery have gained in centrality, questions about the duty to preserve evidence have become some of the hottest questions in civil litigation. Spencer urges the adoption of a uniform federal approach to the pre-litigation duty to preserve and to sanctions for spoliation of evidence.<sup>20</sup> He proposes amendments to Rules 26 and 37 of the Federal Rules of Civil Procedure to codify and clarify the judicial power to impose sanctions for the failure to preserve evidence.<sup>21</sup> Interestingly, Spencer describes his proposed rule as one that creates an *obligation or duty* to preserve information in anticipation of litigation.<sup>22</sup> This description needs no further explanation in terms of how litigators experience sanctions rules, but in the context of this Symposium, it is worth pausing over the question of what sorts of rules create professional duties as opposed to establishing powers and processes. For the most part, rules of procedure create lawyer duties implicitly or indirectly whereas rules of professional conduct create lawyer duties explicitly and directly. Returning to an example from Perlman's paper, Rule 11 spells out what an attorney's signature signifies and procedures for sanctioning lawyers when these significations prove false,<sup>23</sup> in contrast to RPC 3.1's explicit instruction to lawyers that they "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."<sup>24</sup> Perlman makes the point that rules of procedure and ethics nonetheless overlap in their goals and instructions, and regulation of lawyer conduct in civil litigation may be better handled by rules of procedure.<sup>25</sup> Spencer's proposed rule may be understood in the same light.

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19. Beardslee, *supra* note 15.

20. Spencer, *supra* note 16.

21. *See id.* at 2021–23.

22. *Id.* at 2022 ("The proposed amendment to Rule 37(e), below, establishes the *preservation obligation* itself by authorizing courts to sanction discovery responses that are incomplete due to the failure to preserve information in anticipation of litigation. It also affirms the existence of a *duty to preserve* once litigation commences . . . ." (emphasis added)).

23. FED. R. CIV. P. 11(a) (requiring signature); *id.* at R. 11(b) (stating what an attorney certifies by presenting a pleading or other paper to the court); *id.* at R. 11(c) (authorizing sanctions and establishing procedures).

24. MODEL RULES OF PROF'L CONDUCT R. 3.1.

25. *See* Perlman, *supra* note 6.

By authorizing sanctions and spelling out their basis, his rule would establish a duty for lawyers and litigants in an area that Perlman's analysis suggests is more effectively governed by rules of procedure than by rules of ethics.

Lynn Baker and Charles Silver, in their paper on fees and fiduciary duties, draw a distinction between self-interested conduct by lawyers in connection with lawyers' contractual right to payment and self-interested conduct by lawyers in violation of fiduciary duties to clients.<sup>26</sup> They apply their analysis to several issues concerning steps lawyers take to protect their fee interests, such as fighting judicial fee-capping orders.<sup>27</sup> On the question of whether fees may be addressed as part of a multiparty settlement negotiation, they take a strong position that "there is no reason whatsoever for issues involving the allocation of the gross settlement process between the plaintiffs and their attorneys to be included in the settlement negotiations between the plaintiffs' attorneys and the defendant."<sup>28</sup>

The Baker and Silver analysis, while applicable to fee issues in both single-client and multi-client situations, focuses significantly on problems that arise in mass multi-plaintiff litigation.<sup>29</sup> Mass litigation raises special problems at the intersection of civil procedure and legal ethics. In this area, procedures such as class actions<sup>30</sup> and multidistrict litigation (MDL)<sup>31</sup> permit aggregation that alters the nature of the attorney-client relationship. Thus, it makes sense that two of the Symposium papers examine the role of lawyers in particular types of mass litigation. Charles Silver explores the role of lawyers appointed to leadership roles in multidistrict litigation,<sup>32</sup> and Alexandra Lahav offers a new way of thinking about the attorney-client relationship in class actions.<sup>33</sup>

In a piece that builds on the fiduciary duty paper he co-authored with Baker, Silver takes up the question of the duties owed by lawyers appointed to leadership positions in MDL.<sup>34</sup> He shows that although courts regularly award significant fees to leadership counsel, courts virtually never squarely address the question of lead counsel duties.<sup>35</sup> Treating the question as a corollary of procedural due process, he concludes that lead attorneys in MDL owe fiduciary duties to all of the litigants whose interests they are appointed to serve, and that lead attorneys also owe fiduciary duties to the other lawyers. In other words, "they must use their control of MDLs solely to benefit claimants (directly) and disabled lawyers (indirectly) by

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26. Baker & Silver, *supra* note 17.

27. *Id.* at 1845–50.

28. *Id.* at 1866.

29. *See id.* at 1845–50, 1865.

30. FED. R. CIV. P. 23.

31. 28 U.S.C. § 1407 (2006).

32. Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations*, 79 *FORDHAM L. REV.* 1985 (2011).

33. Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939 (2011).

34. Silver, *supra* note 32.

35. *See id.* at 1986–87.

maximizing claimants' recoveries. They may not lawfully use their powers to enrich themselves."<sup>36</sup> Criticizing the lead attorneys' conduct in the Vioxx litigation as "opportunistic,"<sup>37</sup> he encourages judges to rein in self-enriching conduct by lead counsel.

Nowhere does procedure alter the attorney-client relationship more emphatically and mysteriously than in class actions. Alexandra Lahav describes the legal system's "deep ambivalence about class actions"<sup>38</sup> and the resulting incoherence of class action law. She suggests that class certification renders the lawyer-client relationship largely an exercise of imagination. To Lahav, "[t]he class is a phantom client; like a ghost it at once exists and does not exist."<sup>39</sup> Some view class action lawyers as entrepreneurs while others view them as public servants, but Lahav notes that both views unduly liberate the lawyer from the client.<sup>40</sup> She suggests that lawyers should attempt to reconstitute the phantom client by polling the class to determine class members' interests, rather than relying solely on class representatives.<sup>41</sup> Lahav, whose work often bridges the gap between procedure and ethics, shows the value of integrating the two fields. She begins with a procedural rule, explores how this procedural rule creates an ethical dilemma by obscuring the lawyer-client relationship, and concludes with a procedural suggestion for solving the ethical dilemma.

What's the difference between a proceduralist and an ethicist? In their examinations of civil litigation, both proceduralists and ethicists look at problems transsubstantively—they are interested in rules and approaches that apply across different areas of law and different factual circumstances—and both ask not what the outcome should be but how we should get there. But they are interested in different *hows*. The proceduralist asks how the litigation process should work; the ethicist asks how the lawyer should conduct herself. As the papers in this Symposium demonstrate on questions as wide-ranging as sanctions, work product, preservation, fees, multidistrict litigation and class representation, one cannot fully understand the problems of civil litigation without taking both *hows* into account.

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36. *Id.* at 1990.

37. *Id.* at 1992.

38. Lahav, *supra* note 33, at 1939.

39. *Id.* at 1939.

40. *Id.* at 1941–42.

41. *Id.* at 1947–50.