Client Interests and a Lawyer's Duty To Expedite Litigation: Does Model Rule 3.2 Impose Any Independent Obligations?

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CLIENT INTERESTS AND A LAWYER'S DUTY TO EXPEDITE LITIGATION: DOES MODEL RULE 3.2 IMPOSE ANY INDEPENDENT OBLIGATIONS?

ERNEST F. LIDGE III†

INTRODUCTION

Rule 3.2 of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client," while other rules impose complementary obligations. How far does this duty to expedite litigation extend? Is the client's interest an absolute defense to the charge of failing to expedite litigation, or are there some client interests that do not justify a lawyer's use of delaying tactics?

Consider the lawyers' conduct in the following hypotheticals. Have the attorneys behaved unethically?

Hypothetical 1—In a civil action, a court decides for the plaintiff and instructs the plaintiff's lawyer to draft a form of judgment and give it to the defendant's lawyer for approval. The defendant and the defendant's lawyer, however, prefer not to approve the proposed judgment because there is another case pending before a different court, and the ruling on appeal in the latter case could provide a justification for a reconsideration or reversal of the first judgment against the defendant. Once the judgment is entered in the defendant's case, the clock will begin

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1 MODEL RULES OF PROF'L CONDUCT R. 3.2 (2008).

2 See, e.g., id. R. 1.3 (requiring a lawyer to "act with reasonable diligence and promptness in representing a client"); id. R. 1.4 (requiring promptness in communicating with a client); id. R. 4.4(a) (barring a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person").
to run on an appeal or a motion for a new trial. Delaying the entry of judgment, therefore, could have a beneficial effect on the defendant's case. If the defendant's attorney fails to approve the proposed judgment, the plaintiff will have other means under the state's rules of civil procedure to pursue his judgment. In order to delay the entry of judgment, the defendant's lawyer refuses to approve the proposed judgment.³

**Hypothetical 2**—The plaintiff files a complaint in a civil action. The jurisdiction's rules of civil procedure allow the defendant thirty days to file an answer. The defendant's attorney, however, has the answer prepared within five days. Nevertheless, the defendant’s attorney waits until the thirtieth day to file the answer. He does not have a good reason for waiting.⁴

**Hypothetical 3**—A law firm represents an insurance company, a wholly-owned subsidiary of a national drug company. Insurance defense work for the insurance company forms a substantial portion of the billable hours of two of the law firm's partners. The insurance company informs the law firm that the drug company is drawing heavily on the insurance company's financial reserves to defeat an attempt at a leveraged buyout of the drug company. The insurance company requests that the law firm "seek[s] delays in all pending cases to avoid the possibility of adverse publicity and adverse cash flow that would result from unfavorable jury rewards."⁵ This course of action would presumably assist the drug company's fight against the buyout. The law firm accedes to the client's request.⁶

**Hypothetical 4**—A federal agency decided to impose a ban on certain chemical preservatives in wine that cause cancer. The lawyer's client, a vineyard owner, has already produced half of the current season's wines with one of those preservatives. The client is afraid that he will have to shut down the vineyard if he cannot sell the wine prior to the promulgation of the regulation. The owner laments the loss of his employees' livelihood and mentions the hope that, in the future, the federal agency will

⁴ See id.
⁵ Id. (emphasis added).
discover scientific evidence that will cause it to reverse the ban on the preservatives. He also mentions that it is “foolish to worry about carcinogenic additives to the food and liquids we consume” when there are “so many ‘natural’ cancer-causing agents.” The owner asks his lawyer to use the legal system to obtain enough of a delay to allow the vineyard to sell the wine before the ban goes into effect. The lawyer complies.

_Hypothetical 5_—Lawyer A is negotiating a settlement agreement with Lawyer B, who is desperately trying to finish the deal because he has bought non-refundable super-saver tickets for a European vacation with his family. Lawyer A’s client wants Lawyer A to use delaying tactics to take advantage of Lawyer B’s vulnerability to squeeze him for every possible advantage. Lawyer A does so.

_Hypothetical 6_—Plaintiff sues defendant for $10 million. The defendant acknowledges to his lawyer that he clearly owes the plaintiff the money, and the lawyer knows that the plaintiff will be able to prove the case at trial. The client, however, asks the lawyer to delay because he (the defendant) is earning an incredible return on the money, much more than the interest the defendant will have to pay on any judgment. The lawyer complies with the client’s request.

_Hypothetical 7_—In a criminal case, the defense lawyer makes a decision, with the consent of his client, to refrain from raising a speedy trial defense to delay trial “as long as possible so that the prosecution might make a serious error, witnesses’ memories might deteriorate, or witnesses may become unavailable.”

_Hypothetical 8_—A criminal defendant’s mental health problems make him incompetent to stand trial, although taking medication would restore the defendant’s competence. The defendant’s lawyer believes that delaying the trial might benefit the defendant (because witnesses may become unavailable or

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7 Id. at 777–78.
8 See id. at 777 (citing THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 136–40 (2d ed. 1981)).
9 See id. at 783.
11 See People v. Moody, 676 P.2d 691, 695 (Colo. 1984); see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.2.5 n.44 (1986).
the government may abandon the prosecution). The lawyer advises the defendant of the benefits of refusing medication in order to delay the return of the defendant's competence to stand trial.\textsuperscript{12}

\textit{Hypothetical 9}—The lawyer's client, a criminal defendant, acknowledges his guilt. The state is almost certain that it will be able to prove his guilt at trial and [that] the defendant will be sentenced to a lengthy jail term. The defendant is free on bond and asks his lawyer to keep him out of jail for as long as possible. The lawyer engages in delaying tactics to keep his client out of jail.

\textit{Hypothetical 10}—Same facts as in Hypothetical 9, but in this case, the client, a convicted murderer, is on death row. The client has asked his lawyer to delay his execution as long as possible. The lawyer does so.\textsuperscript{13}

These hypotheticals illustrate the problems with defining the duty to expedite litigation. Do delaying tactics that are not inherently unethical violate this obligation? Does delay have to be justified by a "legitimate" client interest? Are there client interests that are not legitimate? How much teeth does Model Rule 3.2 actually have? Does Model Rule 3.2 impose any independent obligation at all?

Part I of this Article discusses the ethical rules that are relevant to delay, particularly Model Rule 3.2 and its accompanying comment. The text of Rule 3.2 is clear, subordinating the lawyer's duty to expedite litigation to the interests of the client. The text does not distinguish between legitimate and illegitimate client interests. The comment to the Rule, on the other hand, is very ambiguous and provides little guidance. A close analysis of the Rule and the comment's language, however, demonstrates that, so long as a client's interest is lawful and not for the purpose of harassing another party, there is no basis for distinguishing between types of client interests in judging the propriety of a lawyer's delaying actions.


The key distinction is whether the tactics themselves are proper or improper.

Part II distinguishes between tactics that are inherently unethical and tactics that are not inherently unethical. There are some tactics that may cause delay that are unethical in and of themselves, such as filing a frivolous motion in a civil case, making a false statement of law or fact to a tribunal, lying to another person about a material fact, or unlawfully destroying evidence or obstructing another party's access to evidence. A lawyer's use of such tactics will always be unethical, regardless of the lawyer's reasons or the client's interests. On the other hand, there are delaying tactics, such as filing several non-frivolous motions, requesting a jury trial, or waiting until the last possible moment to file pleadings, which are not inherently unethical. Part II also discusses whether certain types of client motivations for delay can render a lawyer's use of an otherwise ethical tactic an unethical failure to expedite litigation. Part II concludes that the lawyer's use of ethical tactics will not be rendered unethical simply because the lawyer's motivation is to serve his client's lawful interest in delay. Part II also concludes that Model Rule 3.2 adds no duties to those mandated by other provisions in the Rules.

Part II ends with a discussion of the special problems inherent in criminal law practice. Model Rule 3.1, which bars lawyers from "defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous," contains an exception for criminal defense lawyers, allowing them to "nevertheless so defend the proceeding as to require that every element of the case be established." Thus, criminal defense lawyers may have greater leeway to seek delay in their client's interest.

Part III discusses cases in which courts have sanctioned attorneys for delays in litigation, either under court rules or Rule 3.2. Invariably, the attorney's delaying conduct is interwoven with improper tactics, such as making misstatements and misrepresentations to the court, disobeying court orders, or

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15 See id. R. 3.3.
16 See id. R. 4.1(a).
17 See id. R. 3.4(a).
18 Id. R. 3.1.
bringing frivolous contentions before the court. Part III concludes that if a lawyer is serving a lawful client interest by engaging in delaying tactics, courts will not sanction the lawyer unless the tactics themselves are improper.

Thus, a lawyer does not violate Rule 3.2 unless the lawyer engages in other improper conduct, thereby violating another one of the Rules. Part IV compares this to the law of duress. Under the law of duress or coercion, an action forcing another to do something against his will is not unlawful unless the action is independently wrongful. Although it may be immoral, "[i]t is not duress to threaten to do that which a party has a legal right to do." Similarly, the use of a delaying tactic is not unethical unless the delay is for an unlawful purpose or the tactic itself is inherently unethical. In other words, Rule 3.2 imposes no independent obligations. A violation of Rule 3.2 will always involve a violation of another Rule.

Thus, a lawyer who uses a delaying tactic that is not inherently improper to accomplish a lawful client purpose should not be subject to discipline. What if, however, the lawyer disagrees with the client's proposed course of conduct (perhaps for moral reasons)? If the client wants the attorney to use delaying tactics but the lawyer does not wish to use those tactics, must the lawyer do so? Part V discusses the division between the lawyer's and the client's authority and concludes that usually a lawyer does not have to engage in delaying tactics at the client's behest. In addition, the client's insistence on delaying tactics may, in some circumstances, provide grounds for the lawyer to withdraw from the representation.

Part VI applies the principles discussed to the hypotheticals raised in this Introduction. Assuming that the lawyers do not use improper tactics and that the client's interests are lawful, the lawyer's conduct in each of the hypotheticals is not disciplinable.

Given that Model Rule 3.2 imposes no independent ethical duty, the Conclusion discusses whether Rule 3.2 should be repealed. The situation is analogous to the old Model Code provision, DR 7-105(A), which banned a lawyer from threatening criminal prosecution to obtain an advantage in a court case. The provision was dropped when the American Bar

20 MODEL CODE OF PROF'L RESPONSIBILITY DR 7-105(A) (1980).
Association ("ABA") promulgated the Model Rules. The ABA deliberately omitted the Model Code's ban on threatening criminal prosecution because the ban was redundant and overbroad.\textsuperscript{21} It was redundant because the harmful conduct the ban prohibited was covered by other Rules. It was overbroad because the ban could, in some circumstances, prevent a lawyer from engaging in legitimate advocacy for his client.

It could be argued that the ABA should drop Model Rule 3.2 for similar reasons. The Rule adds no independent obligations—using unethical tactics or serving unlawful client purposes are both covered by other Rules. In addition, the ambiguous comment could be read to ban legitimate advocacy. On the other hand, the text of the Rule itself is unambiguous, clearly subordinating the duty to expedite litigation to the interests of the client, and the Rule's language may have a beneficial hortatory effect. Accordingly, it is not necessary to repeal the Rule itself—any potential harm comes from the ambiguous and unhelpful comment. The ABA should delete the comment to Rule 3.2 and replace it with general language stating that a lawyer should act promptly at all times, so long as these actions are consistent with the interests of the client.

The Conclusion summarizes this Article's contentions. In interpreting Rule 3.2, courts and disciplinary authorities should adhere to the Rule's text. The text of the Rule subordinates the duty to expedite litigation to the client's interests. Authorities should only discipline attorneys for violations of Rule 3.2 in three circumstances: (1) when the delaying tactics themselves are unethical; (2) when the client's interest in delay is to serve an unlawful purpose;\textsuperscript{22} or (3) when the client has no substantial purpose other than spite—embarrassing, delaying, or burdening another person.\textsuperscript{23}

I. MODEL RULE 3.2 AND OTHER MODEL RULES

Several Model Rules directly deal with the issue of delay—Rules 1.3, 3.2, 3.4(e), and 4.4(a). Model Rule 1.3 requires that a lawyer "act with reasonable diligence and promptness in

\textsuperscript{22} See MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2008).
\textsuperscript{23} See id. R. 4.4(a).
representing a client." That Rule deals with a lawyer's duty to his client, while Rules 3.2, 3.4(e), and 4.4(a) relate to a lawyer's duty to others. Model Rule 4.4(a) bans a lawyer, when representing a client, from "using means that have no substantial purpose other than to embarrass, delay, or burden a third person." Model Rule 3.4(d) bans a lawyer from "making a frivolous discovery request or failing to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Model Rule 3.2, requiring that a lawyer expedite litigation, is also concerned with an opposing party's interests in avoiding delay.

What if, however, an opposing party's interest in expediting litigation conflicts with the interests of a client in delaying matters? The text of Model Rule 3.2 subordinates the interests of other people to the interests of the client. Model Rule 3.2 states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Thus, while a lawyer has to "make reasonable efforts to expedite litigation," this duty is qualified by "the interests of the client." The Rule leads to two questions. First, what are "reasonable" efforts? Second, do any and all of the "interests" of the client excuse the duty to expedite litigation?

The only comment to the Rule equivocates. The comment states:

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely

24 Id. R. 1.3.
25 See 1 HAZARD ET AL., supra note 10, § 6.2 n.1 (3d ed. Supp. 2003) ("[T]he 'promptness' requirement of Rule 1.3 has reference to handling a client's affairs with dispatch, and not procrastinating. When a lawyer unjustifiably delays a matter that is in litigation, to the detriment of an opposing party, the governing Rule is Model Rule 3.2, Expediting Litigation.").
26 MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (emphasis added).
27 Id. R. 3.4(d) (emphasis added); see also id. R. 3.4(c). Rule 3.4(c) bans a lawyer from "knowingly disobeying an obligation under the rules of a tribunal." Id. R. 3.4(c). Such obligations would include briefing schedules and Rule 11's ban on filing court papers for the purpose of delay. See FED. R. CIV. P. 11(b)(1); MODEL RULES OF PROF'L CONDUCT R. 3.2 annot.; id. R. 3.4 annot.; see also 1 HAZARD ET AL., supra note 10, § 6.2 n.1 (3d ed. Supp. 2003).
28 See MODEL RULES OF PROF'L CONDUCT R. 3.2.
29 Id. (emphasis added).
30 Id.
for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.\textsuperscript{31}

This explanatory comment is not helpful. In regard to what constitutes a failure to make "reasonable efforts," the comment states that "[a]lthough there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates."\textsuperscript{32} Presumably, a lawyer could seek an extension of a deadline if his child is sick or if he wants to take a vacation. The comment merely bans a lawyer from "routinely" engaging in such delaying practices "solely" for the lawyer's convenience.\textsuperscript{33} Accordingly, a lawyer may seek delay for his own convenience on a non-routine basis, and delaying matters for the client's interest would not fall under this sentence.

Suppose a lawyer does violate this sentence of the comment to Model Rule 3.2 by "routinely" failing to expedite litigation "solely" for the lawyer's convenience? While the lawyer would be violating Model Rule 3.2, that Rule would be adding nothing to other obligations in the Model Rules. If the lawyer is not pursuing the client's interests but solely the lawyer's own convenience, the lawyer would be violating Model Rule 1.3, which requires lawyers to "act with reasonable diligence and promptness in representing a client."\textsuperscript{34} As comment 3 to Rule 1.3 notes, procrastination can adversely affect a client's interests and "can cause a client needless anxiety."\textsuperscript{35} Furthermore, if a lawyer is charging an hourly fee, delaying actions that are not in the client's interest would violate the ban in Model Rule 1.5 on

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\item \textsuperscript{31} Id. R. 3.2 cmt. 1.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id. R. 1.3.
\item \textsuperscript{35} Id. R. 1.3 cmt. 3.
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charging an unreasonable fee.\textsuperscript{36} In addition, a lawyer who routinely ignores briefing schedules or other court-imposed deadlines, solely for the lawyer's convenience, would be violating the ban in Model Rule 3.4(c) on “knowingly disobey[ing] an obligation under the rules of a tribunal.”\textsuperscript{37} Thus, the ban contained in the comment to Rule 3.2 on “routinely fail[ing] to expedite litigation solely for the convenience of the advocates” does not add anything to duties contained in other Rules.\textsuperscript{38}

The comment to Model Rule 3.2 also states that the delaying action is not “reasonable” if the lawyer is motivated by "the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."\textsuperscript{39} Thus, delay solely for the sake of delay itself is unethical, but delay that has another purpose is not necessarily unethical. The language is similar to Model Rule 4.4(a), which states: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .”\textsuperscript{40} Similarly, another sentence in the comment to Rule 3.2 states that the test is "whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay."\textsuperscript{41} Thus, actions that cause delay—assuming they are not otherwise unethical—do not fall within the comment's ban unless the actions have no “substantial purpose other than delay.”\textsuperscript{42} Presumably, the language of Rule 4.4(a) and the comment to Rule 3.2 mean that a lawyer may not obey a client who spitefully says, “I hate the opposing party, and I simply do not want him to obtain his ‘rightful redress.’ I, therefore, instruct you to delay.”

In addition to Model Rule 4.4(a), court rules such as Rule 11 of the Federal Rules of Civil Procedure bar this type of conduct.\textsuperscript{43}

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\item \textsuperscript{36} See id. R. 1.5(a); id. R. 1.5 cmt. 5 (“A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.”).
\item \textsuperscript{37} Id. R. 3.4(c); see also 2 HAZARD ET AL., supra note 10, \S 30.7 (“The basic proposition of Rule 3.4(c) is . . . simply that court orders and court rules must be obeyed until such time as they are successfully challenged.”).
\item \textsuperscript{38} MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. 1.
\item \textsuperscript{39} Id. (emphasis added).
\item \textsuperscript{40} Id. R. 4.4(a).
\item \textsuperscript{41} Id. R. 3.2 cmt. 1.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See FED. R. CIV. P. 11(b) (requiring attorneys to sign pleadings, written motions, and other papers with such signature being a certification that the paper,
Therefore, the sentence in Rule 3.2's comment stating that the failure to expedite litigation is not reasonable "if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose" adds no independent duty to the ethical rules.

What about client purposes other than delay for the sake of delay, such as the client's acquisition of money, gaining a tactical advantage in litigation, or postponing incarceration or the death penalty? This brings us to another question: Does the language of Model Rule 3.2 mean that there are some client purposes that do not justify delay and others that do?

The text of the Rule itself does not support such a distinction. The language simply states that the duty to expedite litigation applies when "consistent with the interests of the client." The comment to Model Rule 3.2 offers little guidance, merely stating: "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." Does this mean that disciplinary authorities, when faced with a lawyer's delay in the client's interest or at the client's behest, must decide whether the client's interest is legitimate or illegitimate? The text of Model Rule 3.2's Proposed Final Draft stated that, "A LAWYER SHALL MAKE REASONABLE EFFORT CONSISTENT WITH THE LEGITIMATE INTERESTS OF THE CLIENT TO EXPEDITE LITIGATION." In the final version, the word "legitimate" was dropped from the text of the Rule and, according to one treatise, was "incorporated into the last sentence of Comment [1]." Dropping the word "legitimate" from the text, however, has changed its meaning. Under the language of the original Proposed Draft, the word "legitimate" modified the word "interests," presumably a significant narrowing of the types of interests that would justify delay. The current draft, in addition to significantly weakening the force of the language by dropping

to the attorney's best "knowledge, information, and belief... is not being presented for any improper purpose, such as to... cause unnecessary delay").
the word "legitimate" into the comment.49 has changed the language itself. The current comment states that "realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."50 Presumably, if the delay is not "otherwise improper," realizing financial or other benefit is a legitimate interest of the client.

Thus, an attorney may use delaying tactics in the client's lawful interests unless the tactics, in and of themselves, are improper. The key to interpreting Rule 3.2 is distinguishing between legitimate and illegitimate tactics.

II. DISTINGUISHING BETWEEN INHERENTLY UNETHICAL TACTICS AND PROPER, ALBEIT UNNECESSARY, TACTICS

A. Civil Cases

Tactics or strategies that lawyers may use to delay litigation can be divided into two categories. First, there are tactics that are unethical in and of themselves, such as filing frivolous papers, making frivolous assertions, lying to the court, or lying about a material matter to another party.51 The second category covers tactics that are not inherently unethical, although using such tactics might have the effect of causing delay. An example of this would be filing numerous non-frivolous motions. It is important to understand the distinction between tactics that are inherently improper and others that are not. Consider the following tactics that a lawyer may use to accomplish delay.

Category I

(1) Filing several frivolous motions.
(2) Filing frivolous discovery requests or failing to comply with proper discovery requests.

49 See MODEL RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (while the comments are "guides to interpretation," they "do not add obligations to the Rules," and "the text of each Rule is authoritative").

50 Id. R. 3.2 cmt. 1 (emphasis added).

51 See FED. R. CIV. P. 11(b)(2) (proscribing frivolous filings); MODEL RULES OF PROF'L CONDUCT R. 3.1 (proscribing frivolous filings and assertions); id. R. 3.3(a)(1) (prohibiting a lawyer from making "false statement[s] of fact or law to a tribunal"); id. R. 4.1(a) (prohibiting a lawyer from making "false statement[s] of material fact or law to a third person").
(3) Lying to a judge or lying to another party about a material matter.\footnote{52}

Category II

(1) Filing several non-frivolous, but unnecessary, motions.
(2) Waiting the full time period allowed to file pleadings throughout the litigation in spite of the fact that the pleadings are often ready for filing significantly before the deadlines.
(3) When a judge is establishing a briefing schedule or a trial date and when the judge asks for suggestions from the lawyers, asking for more time than is strictly necessary.
(4) Asking for a jury trial when the jurisdiction has a backlog on such trials. Assume that the jury trial request is made not because a jury trial is preferable, but because it will take longer.

In the context of civil litigation,\footnote{53} Category I's first tactic, the filing of frivolous motions, is always unethical, regardless of the reason. Even if the client has an excellent reason for delay, a lawyer may not file a frivolous motion. Model Rule 3.1 states: "A lawyer 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, which includes a good faith argument for an extension, modification or reversal of existing law."\footnote{54} Similar obligations are imposed by Rule 11 of the Federal

\footnote{52} There are also tactics that are improper (and thus fall within Category I), but are usually not sanctioned unless they are repeated or are particularly egregious. Examples of this would be lack of preparation for a trial or abnormally lengthy responses to a judge's questions during trial. \textit{Bawle v. Rockwell Intl Corp.}, 79 Fed. App'x. 875 (6th Cir. 2003), an opinion not recommended for full text publication, provides an example of a court sanctioning an attorney for such conduct. In \textit{Bawle}, the district court had ordered the plaintiffs' and defendant's counsel to file a proposed joint pretrial order. \textit{Id.} at 876–77. The parties filed the order tardily in part because of the plaintiff counsel's delaying tactics such as "habitually" cancelling scheduled meetings with the defense counsel, "often at the last minute." \textit{Id.} at 878. The plaintiffs' counsel also delayed the copying of exhibits. \textit{Id.} In addition, the district court found that it was an "unnecessarily long trial" because the plaintiffs' counsel engaged in the following conduct: (1) "consistently" engaging in "overly-long and often irrelevant presentation of direct examination," (2) providing unreasonably long responses to the court's questions, and (3) demonstrating a lack of preparation for trial. \textit{Id.} The Sixth Circuit found that the district court had acted within its discretion in imposing a $41,192 sanction against the plaintiffs' counsel. \textit{Id.} at 878–79.

\footnote{53} For a discussion of frivolous motions in the criminal context, see infra Part II.B.

\footnote{54} \textsc{Model Rules of Prof'L Conduct R. 3.1.}
Rules of Civil Procedure, which requires that all pleadings and other court papers be signed by a lawyer with such signature constituting a certification that the assertions in the paper “are warranted by existing law” and “have evidentiary support.”

Model Rule 3.4(c), in turn, bars a lawyer from “knowingly disobey[ing] an obligation under the rules of a tribunal.” Filing a frivolous motion in a civil case is always disciplinable, regardless of the purpose of the motion.

Similarly, the other Category I tactics will be disciplinable regardless of the lawyer’s desire to serve a client’s interest and regardless of the nature of that interest. Rule 3.4(d) bans a party from “mak[ing] a frivolous discovery request or fail[ing] to make [a] reasonably diligent effort to comply with a legally proper discovery request.” Rule 3.3(a) bars a lawyer from making false statements to a tribunal, and Rule 4.1 bars lawyers, while representing a client, from making false statements of material fact to third persons.

What about the first tactic in Category II—filing several non-frivolous motions? Model Rule 1.3 requires a lawyer to “act with reasonable diligence and promptness in representing a client.” The comment, requiring that the lawyer represent the client with “commitment,” “dedication,” and “zeal,” adds that “[a] lawyer is not bound, however, to press for every advantage that might be realized for a client.” The comment’s words “not bound” to push for a client’s “every advantage” and the subsequent sentence stating that the lawyer has “professional discretion in determining the means by which a matter should be pursued,” imply that a lawyer may “press for every advantage,” so long as the lawyer is not violating another Rule, such as the ban on filing frivolous motions. Of course, a separate question is whether the lawyer should press for every advantage in a given context, but

55 FED. R. CIV. P. 11(b)(2)-(3); see also FED. R. APP. P. 38 (giving courts of appeals discretion to “award just damages and single or double costs to the appellee” for the appellant’s frivolous appeal).
56 MODEL RULES OF PROF’L CONDUCT R. 3.4(c).
57 Id. R. 3.4(d).
58 Id. R. 3.3(a).
59 Id. R. 4.1(a).
60 Id. R. 1.3.
61 Id. R. 1.3 cmt. 1.
62 Id.
63 See infra Part V.
the question at hand is whether the filing of several non-frivolous motions is itself disciplinable. The answer is no. In and of itself, such a tactic is not a violation of the Rules.

The second tactic in Category II involves a lawyer waiting the full time period allowed to file pleadings or other papers throughout the litigation despite the fact that the papers are often ready for filing significantly before the deadlines. Presumably, it could be argued that the lawyer's duty to “expedite litigation” requires that the lawyer file the papers as soon as they are ready, but this would be an odd result. The rules of civil procedure, court rules, or a court order grant the party and its lawyer a certain time period to file a paper. The lawyer should be able to take advantage of that time period, regardless of the reason. This is illustrated by an ethical opinion from Arizona—Arizona Supreme Court Judicial Ethics Advisory Committee Opinion No. 90-16.64

In that opinion, the court, in a civil action, decided for the plaintiff and ordered the plaintiff’s lawyer to draft a form of judgment and give it to the defendant’s lawyer for approval as to form. The plaintiff’s lawyer had completed the proposed form of judgment, and the inquiring lawyer, who represented the defendant in the case, acknowledged that the proposed form of judgment complied “fully with the court’s decision.”65 The defendant's lawyer, however, knew of another pending case that could result in a ruling that would “justify reconsideration or reversal of the court's decision in this case.”66 Once the court entered judgment in the defendant's case, however, the time clock would begin to run on a motion for a new trial and for an appeal. The defendant wanted “to avoid having to pay fees to move for a new trial or to appeal until after there [was] a ruling on the appeal in the other case, and he...instructed the inquiring attorney to delay entry of judgment.”67 The defendant's attorney asked if he could “ethically decline to approve the proposed judgment as to form” in order to prevent judgment from being entered immediately.68 The defendant's lawyer also asked

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65 Id.
66 Id.
67 Id.
68 Id.
if he could “ethically object to the form of the proposed judgment.”

After quoting Rule 3.2 in its entirety, the Advisory Committee stated that the answer to the first question—whether the defendant could ethically decline to approve the proposed judgment in order to prevent judgment from being entered at once—was “yes.” The Advisory Committee gave two reasons for its decision. First, since Rule 3.2 subjected the duty to expedite litigation to “the interests of the client,” the client’s interests appeared to justify the attorney declining to approve the proposed judgment as to form to prevent the judgment from being entered at once. Besides, the state’s rules of civil procedure provided another means for the plaintiff to pursue the judgment. The second reason given by the Advisory Committee was that it believed that an attorney does not act unethically “if he takes advantage of the time limits provided for in the Rules.” The Committee stated:

A defendant may withhold answering a complaint for 20 days, and a party may withhold responding to discovery for the period of time prescribed in the Rules. In our view, such “withholding” does not become prescribed “delay” even if the party were ready to answer the complaint or reply to the discovery prior to expiration of the prescribed time limits. Likewise, we do not believe that an attorney is obligated to take affirmative steps to shorten the time within which relief may be awarded against his client.

In regard to the inquiring attorney’s second question—whether the attorney could “ethically object to the form of the proposed judgment”—the Advisory Committee answered “no.” Since the inquiring attorney acknowledged that the judgment was proper as to form, such assertion would violate Rule

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69 Id.
70 Id.
71 The state version of Rule 3.2 tracked an earlier version of Model Rule 3.2. In regard to that earlier version, in 2002, the ABA House of Delegates adopted the proposal of the ABA Ethics 2000 Commission to amend the comment to Rule 3.2. The amendment did not change the text of Model Rule 3.2 and was “minor.” See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 211 (Aspen Publishers 2004).
73 Id.
74 Id.
3.3(a)(1). Rule 3.3(a)(1) bars a lawyer from knowingly making a “false statement of fact or law to a tribunal.” The Advisory Committee also stated that such a false assertion would possibly violate Rule 11.76

The ethical opinion makes perfect sense. While one could argue that the duty in Model Rule 3.2 to expedite litigation requires an attorney who finishes a pleading early to file the pleading immediately, the ethical rules should not trump the rules of civil procedure. The lawyer is entitled to take the full amount of time allowed by the rules of civil procedure. The lawyer’s conduct becomes unethical only when the lawyer’s delaying tactic itself is improper, for example, lying to a tribunal.

What about the third Category II tactic? Suppose a judge asks the lawyers involved in a case for a suggested briefing schedule or a trial date. Assuming that delay will serve the client’s interest, may the lawyer ask for more time than is actually needed? The lawyer, in responding, cannot deceive the judge but a simple truthful response—“How about December 30th?”—would be fine. It is inconceivable that such a truthful response, in and of itself, would violate Rule 3.2.

The final Category II tactic involves an attorney asking for a jury trial because a backlog in the system will delay the onset of trial. This situation is similar to an attorney taking the full allotted time to file an answer. If the client has a statutory or constitutional right to a jury trial, the attorney is entitled to take advantage of that right, even if the jury trial request causes unnecessary delay. The tactic is not inherently unethical.

In summary, using Category I tactics, such as filing frivolous motions or asserting a frivolous position in a civil case, will always be unethical. Using Category II tactics, such as filing many non-frivolous motions, waiting the full allowed time periods to file pleadings throughout the litigation, or demanding a jury trial, will not, in and of itself, be unethical.

77 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (barring a lawyer from making “a false statement of law or fact to a tribunal”).
Should the reason for the client's desire to delay the case render an (otherwise proper) tactic unethical? Of course, if the client's purpose is criminal or fraudulent, the lawyer cannot in any way assist the client in achieving this goal.\textsuperscript{78} In addition, if a lawyer's use of a tactic had no substantial purpose other than to delay a third party, a lawyer's employment of this tactic would violate Model Rule 4.4(a).\textsuperscript{79} Suppose, however, that the client's goal is not illegal, fraudulent, or merely spiteful, but instead is only of questionable public benefit. For example, suppose the client wants to hang on to money a little longer, delay incarceration, or increase bargaining pressure on the opposing side. As discussed above,\textsuperscript{80} the text of Rule 3.2 does not distinguish between kinds of client interests. The text simply says that the lawyer has a duty to expedite litigation “consistent with the interests of the client.”\textsuperscript{81} The comment to the Rule, which cannot add obligations to the Rule,\textsuperscript{82} is ambiguous.\textsuperscript{83} Rule 3.2 provides no basis for, on the one hand, disciplining Lawyer A for using delaying tactics in pursuit of Client 1’s lawful (albeit, selfish) objectives while, on the other hand, permitting Lawyer B to use the same tactics in pursuit of Client 2’s more “worthy” or “legitimate” objectives.

Making such a distinction would present very thorny questions. For example, which client interests are “legitimate”? Assuming that the delaying tactics are not improper themselves, is a client’s desire to save money always inappropriate? What if the client is an employer who hopes to hang onto money a bit longer to save employee jobs or to pay for medical expenses for a sick mother? What about the client’s desire to delay incarceration? Assuming delaying incarceration is a legitimate purpose, does it become illegitimate if the client has confessed guilt to his attorney? What about a client’s desire to delay execution?

Even if one could distinguish between legitimate and illegitimate client interests, courts and disciplinary authorities are ill-equipped to make such determinations. How do they

\textsuperscript{78} See id. R. 1.2(d) (“A lawyer shall not . . . assist a client[] in conduct that the lawyer knows is criminal or fraudulent . . . .”).

\textsuperscript{79} Id. R. 4.4(a).

\textsuperscript{80} See supra note 45 and accompanying text.

\textsuperscript{81} MODEL RULES OF PROF'L CONDUCT R. 3.2.

\textsuperscript{82} See id. Scope ¶ 14.

\textsuperscript{83} See supra notes 46–50 and accompanying text.
discover what the client's purpose for the delay was without delving into confidential matters. If a lawyer is faced with sanctions for using otherwise legitimate tactics to accomplish an illegitimate (but legal) client purpose, the Rules allow the lawyer to reveal confidential information to defend his conduct. Should courts, however, interpret Rule 3.2 in a way that places attorneys in the position of having to reveal client confidences in order to defend their conduct?

All of these problems, and the text of the Rule itself, compel a simple conclusion: Assuming lawyers are serving a lawful client purpose (other than pure spitefulness), lawyers should not be disciplined for using proper tactics to accomplish delay, regardless of that purpose.

In other words, Model Rule 3.2 does not, and should not, impose any independent duties. This principle can be demonstrated by an example from one leading treatise. In an illustration of a violation of Model Rule 3.2, the treatise gives the following example:

Lawyer L has vigorously defended a products liability case in state court, but a large judgment has been entered and affirmed on appeal to the state's highest court. L tells his client that the client must eventually pay the judgment, but he suggests filing a petition for certiorari to the United States Supreme Court so that the finality of the judgment may be delayed a few more months.

L is aware that the case presents no substantial federal question, and that certiorari will certainly be denied. He nevertheless states that filing the petition will be in the client's best interest, for even though the client will incur additional liability for interest on the judgment, the client will be able to invest the money at higher market rates in the meantime.

L has clearly violated Rule 3.2. Deliberate delay of this kind is prohibited even though the delay would be in the direct financial interest of the client. This case is a graphic illustration of the tension between an advocate's duty to the

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84 See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (banning a lawyer from revealing information "relating to the representation").
85 See id. R. 1.6(b)(5) (allowing a lawyer to reveal confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of the client").
86 Rule 4.4(a) states that a lawyer, when representing a client, cannot "use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Id. R 4.4(a).
tribunal and his duty to his client. The tension is easily resolved in this instance because the interest of the client is not "legitimate" and is entitled to no weight.\textsuperscript{87}

Although the illustration demonstrates the "tension between an advocate's duty to the tribunal and his duty to his client,"\textsuperscript{88} it does not really demonstrate the independent efficacy of Model Rule 3.2. Under the illustration, the lawyer is aware that the case presents no substantial question and that certiorari will certainly be denied.\textsuperscript{89} Thus, the lawyer's conduct violates Model Rule 3.1 because the lawyer is "bring[ing] . . . a proceeding [the appeal], or assert[ing] or controvert[ing] an issue therein," where there is not "a basis in law and fact for doing so that is not frivolous."\textsuperscript{90} However, suppose that the first sentence of the second paragraph of the illustration is changed to state the following: "L is aware that the case arguably presents a federal question, but that certiorari will probably be denied." Even if the attorney's reason for filing the petition is that "the client will be able to invest the money at higher market rates in the meantime," would that conduct violate Model Rule 3.2? The Article contends that it would not and that the violation of Rule 3.2 in the original illustration rests on the attorney's violation of Model Rule 3.1. Although the treatise implies that the violation in the original illustration rests on whether the client's interest is "legitimate," I do not believe that is the case. The violation rests on the fact that the proposed certiorari petition is frivolous because it presents "no substantial federal question, and that certiorari will certainly be denied."\textsuperscript{91} Model Rule 3.2 does not impose independent duties in this illustration. In other words, a violation of Rule 3.2 depends on whether the lawyer uses improper tactics or not. A violation of the Rule does not depend on the distinction between legitimate and illegitimate client purposes.

B. The Special Case of Criminal Law

In regard to the distinction between proper and improper tactics, Model Rule 3.1’s ban on a lawyer’s assertion of frivolous

\textsuperscript{87} 2 HAZARD ET AL., supra note 10, § 28.4.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} MODEL RULES OF PROF'L CONDUCT R. 3.1.
\textsuperscript{91} 2 HAZARD ET AL., supra note 10, § 28.4 (emphasis added).
issues or claims contains an exception for criminal proceedings. The Rule states: "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." In criminal cases, the U.S. Constitution requires the government to prove all elements of the alleged crime. Accordingly, "a criminal defense attorney has both a right and a professional obligation to force the government to prove every element of its case."

There are different possible interpretations of Model Rule 3.1's exception for criminal proceedings. On the one hand, the exception could simply be a general relaxation of Model Rule 3.1, allowing criminal defense attorneys to always assert more questionable positions than attorneys in a civil context, but still holding criminal defense attorneys, in all situations, to a ban (albeit relaxed) on asserting frivolous positions. This interpretation seems to be the position of one treatise that states:

[T]he fact that defense counsel may passively "put the government to its proof" does not mean that counsel may file frivolous court papers or engage in frivolous legal argumentation. Such tactics may demonstrate "diligence" (see Rule 1.3), but zeal must be subordinated to other concerns and kept within the bounds of law. The point of Rule 3.1 in particular is that that boundary line is where a contention on behalf of a client would be frivolous. Practical difficulties arise in drawing the line between the frivolous and the "nonfrivolous but extremely weak." The dilemma is especially troublesome in criminal matters, where the lawyer's partisan latitude is greatest, but where the law is often in flux. If a legal contention is frivolous, it may not be advanced, but if it has sufficient merit to meet the standard of Rule 3.1, then an advocate ordinarily has a duty to make the
contention, even if it does not reflect what he personally considers to be sound law (compare Rule 1.2(b)).

The treatise seems to imply that Rule 3.1 is relaxed and allows for weaker arguments but still applies to criminal defense lawyers in all situations, including when challenging the prosecution's case-in-chief.

On the other hand, another interpretation of Model Rule 3.1 is possible. A strict interpretation of the language of the criminal defense exception would grant a complete exemption from the Rule in certain circumstances—when challenging the prosecution's case-in-chief—while retaining the full force of the Rule in all other circumstances. The Rule states that the lawyer "may nevertheless so defend the proceeding as to require that every element of the case be established." The use of the term "nevertheless" implies a true exception—the lawyer is completely relieved from the requirements of Model Rule 3.1 when the lawyer attacks the elements of the prosecutor's case-in-chief. Thus, even though a criminal defendant has told the lawyer that he committed the crime, and the lawyer absolutely and reasonably believes that the client is guilty, the lawyer may, nonetheless, attack the prosecution's case by any legitimate means, including the aggressive cross-examination of truthful prosecution witnesses, advancing alternate theories, and pointing out weaknesses in the prosecution's case.

The text of the Rule, however, appears to state that the criminal defense lawyer is fully bound by the mandates of Rule 3.1 if the issue does not involve the prosecution's case-in-chief. For example, under this interpretation of the language of Rule 3.1, a lawyer could raise a "frivolous" challenge to the state's attempt to prove the defendant's state of mind (assuming that this was an element of the charged crime), but the criminal defense attorney could not raise an insanity defense unless there

97 MODEL RULES OF PROF'L CONDUCT R. 3.1.
98 See United States v. Wade, 388 U.S. 218, 257–58 (1967) (White, J., dissenting in part and concurring in part) (stating that it is proper for criminal defense counsel to confuse or impeach a truthful witness during cross-examination). On the other hand, since the defendant told the attorney that he is guilty and the attorney absolutely and reasonably believes him, the lawyer may not place the defendant on the stand to perjuriously deny his guilt. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3).
was a non-frivolous basis for doing so. A suppression motion, however, falls somewhere in between. While the motion itself is not an element of the prosecutor’s case-in-chief, the challenged evidence may support an element of the prosecutor’s case.

May a criminal defense lawyer file a frivolous suppression motion? An ethics opinion by the Maryland Bar Association is illustrative. In Ethics Docket 87-30, a defense lawyer in a criminal case filed a “motion[] to suppress for the sole purpose of generating a hearing in the hope that necessary witnesses [would] fail to appear.” The committee concluded that such an action would not violate the ethical rules. The opinion was apparently based on an actual case in which the police arrested a lawyer’s client following a raid in an area that had a lot of drug activity. Defense counsel filed a motion to suppress evidence, but on the day of the hearing, the prosecutor told the court that the police officer was in another city. The prosecutor sought guidance from the court. The court told the prosecutor that if the police officer was not present by a certain time, the court would have to consider whether to grant a continuance or dismiss the charges entirely. The defense counsel “informed the Court that if the police officer arrived, counsel intended to withdraw his motion to suppress, but if the police officer did not show up, he would press for dismissal.” The defense attorney also told the court that if the court intended to grant a continuance, then that, of course, could be done. The police officer did arrive later that day, and the defense attorney withdrew the motion to suppress evidence. Relying on the language in Rule 3.1 stating that the defense lawyer could “defend the proceeding as to require that every element of the case be established,” the committee

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100 Md. State B. Ass'n Comm. on Ethics, Ethics Docket 87-30 (1987) (discussing the “filing of motions in criminal cases”).

101 Id.

102 Id.

103 Id.

104 MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008). Maryland’s Rule 3.1 was broader than the Model Rule, applying the “every element” exception to all lawyers, not just criminal defense attorneys. The equivalent sentence in Maryland’s Rule states that “[a] lawyer may nevertheless so defend the proceeding as to require that
included the motion to suppress within the “every element” exception. The committee stated:

Once a motion to suppress evidence has been filed, the burden is on the state to prove that the search . . . was done legally. A necessary requirement of proving the legality of the state action is the existence of a live witness who can testify on behalf of the state. It is the right of a criminal defendant to require that the state prove every element of its case by producing witnesses to testify on the state’s behalf to prove the legality of a search and seizure. This right is recognized in Rule 3.1 and it is irrelevant whether or not counsel for the defendant intends to withdraw the motion if the police officer arrives to testify. As you stated in your inquiry, if the police officer did not arrive, you, as a judge, would have to consider whether or not to dismiss the charges. The defendant is entitled to know that the state is prepared to prove each and every element of its case by having witnesses present and ready to testify.\(^{105}\)

The committee opined that “an attorney who withdraws a pre-trial motion merely because a witness is present to testify for the state to prove its case is not violating Rule 3.1 and its prohibition against frivolously asserting or controverting an issue before the court.”\(^{106}\) In fact, criminal defense counsel has “a duty to challenge the state to prove every element of its case and may require the presence of witnesses to testify on each and every element before withdrawing a pre-trial motion.”\(^{107}\)

It is beyond the scope of this Article to delve more deeply into the criminal defense exception to Rule 3.1. The point is that the demands of Rule 3.1 are in some ways relaxed for criminal defense lawyers.\(^{108}\) But the principles elucidated in this Article in discussing civil cases are the same when applied to the criminal defense context. Assuming a tactic (such as filing a weak, or even frivolous, motion) is not unethical, then a criminal defense lawyer may employ that tactic in pursuit of any lawful client interest, including the hope that witnesses will become unavailable and the client’s desire to delay incarceration or


\(^{107}\) Id.

\(^{108}\) Indeed, “courts are generally loath to sanction criminal defense lawyers.” Freedman, supra note 13, at 1167–68.
execution. Indeed, one scholar has argued that a criminal defense lawyer has a duty to file frivolous motions in a death penalty case.\textsuperscript{109}

III. COURT CASES

Court cases support the notion that Rule 3.2 imposes no independent duty. Court sanctions that are imposed for delay almost invariably involve other conduct by the sanctioned person, such as advancing frivolous arguments, violating court orders, or failing to respond to discovery requests. For example, in \textit{Jones v. United Parcel Service, Inc.},\textsuperscript{110} the court relied on Rule II and on section 1927 of Title 28, which authorizes a court to sanction an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."\textsuperscript{111} The court believed that certain parts of a document submitted by the attorney were designed "intentionally to delay the proceedings."\textsuperscript{112} The court noted that the document ran "a monumental 480 pages" and was "untrustworthy" and "mendacious."\textsuperscript{113} The court added that the lawyer's "intent in opposing summary judgment with [the document] was not to defend the case on the merits, but to survive summary judgment by inundating the parties and the Court with pages upon pages of information that was largely irrelevant and inadmissible."\textsuperscript{114} The court also stated that the documents "contained misstatements, misrepresentations, and mischaracterizations of the evidence and the record."\textsuperscript{115}

So, while the court sanctioned the attorney for delay, the court acknowledged that it was "in no way contend[ing] that length alone [was] a sufficient basis for sanctions."\textsuperscript{116} However, when the "length of the document, 480 pages and 948 paragraphs of Fact Statement, [was] coupled with numerous misstatements and mischaracterizations of the record," the document became "unduly burdensome."\textsuperscript{117}

\textsuperscript{109} \textit{Id.} at 1177–80.
\textsuperscript{112} \textit{Jones}, 2005 U.S. Dist. LEXIS 33553, at *4–5.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at *6.
\textsuperscript{115} \textit{Id.} at *12.
\textsuperscript{116} \textit{Id.} at *17.
\textsuperscript{117} \textit{Id.} at *17–18.
The lawyer’s objective was “to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drown[] in a sea of bombast.” Therefore, “the oppressive size combined with the overall untrustworthy nature of the document had a cumulative effect which this Court found to be ‘repugnant to the very concept of judicial economy.’” Thus, the court, in sanctioning the lawyer, did not rely solely on the policy of avoiding delay (or expediting litigation) but relied also on the fact that the offending document was of an oppressive length and full of inadmissible, irrelevant, and mendacious assertions. Delay, in and of itself, did not provide a basis for sanctions.

Similarly, in In re Marriage of Quinlin, an attorney filed a motion to reduce visitation rights and a peremptory challenge, seeking another judge. The court denied the peremptory challenge because it was untimely. At the hearing on the motion to reduce visitation rights, the attorney conducted a lengthy cross-examination of the opposing party. When the judge informed the lawyer that he was out of time, the lawyer said he had more questions and it was going to take more than an hour. Because matters taking more than two hours had to be heard in another department, the judge declared a mistrial. The trial court imposed sanctions because the lawyer “had intentionally exceeded the one-hour estimate knowing the expenditure of time was unwarranted and had filed a meritless peremptory challenge.” While the appellate court reversed the sanctions and granted a hearing because the lawyer had not received notice and an opportunity to respond, the appellate court agreed that the attorney’s conduct had been improper. The court stated that the lawyer had “accomplished by delay what he had failed to accomplish by filing the peremptory challenge”—that is, obtaining a new judge. Here again, a court found a lawyer’s conduct improper because of delay, but this time the delay was in furtherance of an attempt to get around a court rule regarding the deadline for filing peremptory challenges.

118 Id. at *18.
119 Id. (emphasis added).
120 257 Cal. Rptr. 850 (Ct. App. 1989).
121 Id. at 851.
122 Id.
123 Id. at 852.
124 Id.
Other cases are similar. In *Storey v. Cello Holdings, L.L.C.*, the court imposed sanctions on an attorney under Rule 11 in part because the lawyer's "answer and defenses were asserted for improper purposes"—to harass the other party and "to cause unnecessary delay or needless increase in the cost of litigation." However, in addition, the court found that the lawyer's factual assertions and denials did "not have evidentiary support" and were "not warranted on the evidence." The lawyer's legal arguments and defenses were "not objectively reasonable" and had "no reasonable basis in law or fact."

In *Karutz v. Chicago Title Insurance Co.*, the court approved of sanctioning parties and lawyers "who frustrate the expeditious disposition of appropriate litigated matters by engaging in dilatory or frivolous conduct during the course of litigation." In *Karutz*, however, the offending lawyer delayed by using inherently improper tactics—the lawyer twice failed to appear for a court-ordered examination.

Some cases in which a court found that an attorney engaged in improper delay involve an attorney's failure to comply with discovery requests or to follow court orders. In *In re Alcorn*, the attorney violated Rule 3.2 by failing to respond to discovery requests and by disobeying discovery orders. The failure to file discovery responses also violated Rule 3.4(c), which states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal."

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126 *Id.* at 366.
127 *Id.*
128 *Id.*, see also *In re Shearin*, 721 A.2d 157, 163 (Del. 1998) (stating that the attorney's conduct in the litigation violated Rule 3.2's requirement that a lawyer expedite litigation and Rule 3.1's ban on bringing "non-meritorious claims and contentions before the courts").
130 *Id.* at 820, 451 N.Y.S.2d at 1004.
131 *Id.* at 816, 451 N.Y.S.2d at 1002.
133 *Id.* at *42.
134 *Id.* at *42-43 (internal quotation marks omitted); see also *In re Griffiths*, No. SB-02-0114-D, 2002 Ariz. LEXIS 190, at *5–8 (Oct. 31, 2002) (disciplining lawyer for failing to appear at numerous court hearings, thus violating ethical rules by failing "to make reasonable efforts to expedite the litigation" and failing "to obey court orders"); Attorney Grievance Comm'n v. Lee, 903 A.2d 896, 902 (Md. 2006) (stating that attorney violated Rule 3.2 when he "[f]ailed to respond to numerous requests of the Bankruptcy Trustee to provide necessary annuity documents[,] . . . thus delaying the [litigation]"); Attorney Grievance Comm'n v. Culver, 849 A.2d 423, 446 (Md.
Conversely, if an attorney does not engage in independent misconduct, there is no violation of Rule 3.2. In *In re Pangman*, both the attorney and the Wisconsin Board of Attorneys Professional Responsibility ("the Board") appealed a referee's findings concerning a number of alleged disciplinary violations. At issue was the attorney's conduct in litigation involving the attorney's own divorce. There were contentious and extensive post-divorce proceedings, in which the attorney Pangman represented himself. Among the allegations brought by the Board was that attorney Pangman "failed to make reasonable efforts to expedite that litigation, as required by [the Wisconsin version of Rule 3.2]." The court said that the litigation generated 1200 pages of transcript, several orders to show cause—three by Attorney Pangman, six by his former spouse—and numerous motions and petitions—27 by Attorney Pangman, 15 by his former spouse. In addition, Attorney Pangman filed seven appeals, one supervisory writ petition, two petitions for review, and five habeas corpus petitions.

The court, however, found that Pangman had not violated Rule 3.2. First, there was no evidence that Pangman engaged in any frivolous action. Second, since Pangman represented himself, not a client, "there was no violation of the [R]ule's requirement to make reasonable efforts to expedite litigation 'consistent with the interest of the client.'" Third, if Pangman believed that the court's actions were erroneous, he had the right to challenge those actions. Fourth, there was no evidence that

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2004) (stating that the attorney "violated Rule 3.4(d) by failing to respond to discovery requests and defying a court order to be deposed" and also violated Rules 3.1 and 3.2); Attorney Grievance Comm'n v. Hermina, 842 A.2d 762, 771 (Md. 2004) (finding that an attorney had violated Rule 3.4(c) and Rule 3.2 by failing to participate in a court-ordered pre-trial conference); *In re Allen*, 621 S.E.2d. 356, 357-59 (S.C. 2005) (reprimanding lawyer for violating Rule 3.2's duty to expedite litigation when the lawyer violated 3.4(c), among other rules, by knowingly disobeying his obligation under the rules of a tribunal by failing to respond to a court order to deliver to opposing counsel an executed covenant not to execute); *In re Arthur*, 694 N.W.2d 910, 921-22 (Wis. 2005) (disciplining attorney for violating Rule 3.2 because he engaged in conduct such as "duplicitous litigation, failure to comply with discovery requests, or other conduct that frustrated the discovery process").

135 574 N.W.2d 232 (Wis. 1998).
136 *Id.* at 233–34.
137 *Id.* at 236.
138 *Id.*
139 *Id.*
"Attorney Pangman's intent in making those challenges was merely to delay the outcome of the proceeding or obtain some financial advantage."¹⁴⁰ The referee found that Pangman had not violated Rule 3.2, and the Board did not appeal that finding.¹⁴¹

Thus, violations of the duty in Rule 3.2 to expedite litigation involve violations of other Rules. If an attorney files frivolous motions in order to delay, the attorney violates Rule 3.1. If the attorney delays by failing to respond to discovery requests, the attorney violates Rule 3.4(d). If the attorney delays by violating court orders, he violates Rule 3.4(c). Indeed, if an attorney merely neglects a matter to the detriment of a client, the attorney violates Rule 1.3.¹⁴² If an attorney is serving a client's interest and uses tactics that are not inherently unethical, however, the attorney does not violate Rule 3.2.

IV. MODEL RULE 3.2 IMPOSES NO INDEPENDENT DUTIES

Thus, a violation of Rule 3.2 requires some wrongful conduct in addition to delay, such as filing frivolous motions, disobeying court orders, or failing to respond to discovery requests. An analogy can be drawn to another area of law—the law of coercion or duress. The Restatement of Contracts defines duress as

(a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
(b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.¹⁴³

¹⁴⁰ Id. The court did not state that a lawyer's desire to obtain financial advantage would be a violation of Rule 3.2.
¹⁴¹ Id.
¹⁴² See In re Alcorn, No. SB-02-0097-D, 2002 Ariz. LEXIS 171, at *42 (Oct. 3, 2002) ("Conduct violative of Rule 3.2 correspondingly breaches the basic duties imposed by Rule 1.3, the latter being broader in application."); see also In re Loftus, No. SB-01-0070-D, 2001 Ariz. LEXIS 50, at *19 (Apr. 6, 2001) (stating that lawyer's failure to pursue the client's case violates Rule 1.3 and, "similarly," Rule 3.2); MODEL RULES OF PROF'L CONDUCT R. 1.3 annot. (2008) ("Violations of Rule 1.3's duty of diligence typically accompany violations of other ethics rules, most frequently Rule 1.1 (Competence) . . . .").
¹⁴³ RESTATEMENT OF CONTRACTS § 492 (1932). As noted by Professors Rhode and Luban, "[t]he Restatement of Contracts (Second) does not define duress, but its
The Restatement notes that “duress under part (a) is very rare, because it refers to cases in which the person ‘is a mere mechanical instrument or wholly unaware of what he is doing,’ as when he is hypnotized.” According to Alan Wertheimer, part (b) of the Restatement adopts a “two-pronged theory of duress.” Under this two-pronged approach, “[f]irst, the statement must leave the victim no reasonable choice but to acquiesce; and second, it must be independently wrongful.”

Thus, exploiting a party’s vulnerability may be coercive without constituting duress if the conduct was not fraudulent or otherwise illegal. Versions of this theory inform not only the law of contracts, but also the law of torts, marriage, adoption, wills, confessions, plea bargaining, and the duress and necessity defenses in criminal law.

According to Wertheimer, there are two “most important principles” in deciding whether something is “wrongful” as opposed to morally objectionable:

First, it is wrong to propose to do that which is independently illegal. Second, and a corollary of the first principle, it is generally not wrong to propose to exercise a legal right: “It is not ‘duress’ to threaten to do that which a party has a legal right to do.”

Thus, an action compelling another to do something against his will is not considered duress unless the action was independently wrongful. Similarly, delay, in and of itself, should

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discussion of duress in §§174-76 is consistent with the definition quoted here.

DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 384 n.10 (3d ed. 2001).

144 RHODE & LUBAN, supra note 143, at 384 (quoting RESTATEMENT OF CONTRACTS § 492 cmt. a (1932)).


146 RHODE & LUBAN, supra note 143, at 384 (citing WERTHEIMER, supra note 145, at 129–45).

147 Id. at 384. Professors Rhode and Luban describe a tactic that many people would find unfair or immoral but that is a legal use of bargaining power.

Consider the “ultimatum bargaining game”: Rich and Poor are offered $1000 to divide as they will, provided that they agree on a division. If they don’t agree, neither of them gets any money at all. Rich offers Poor $100, threatening to walk unless Poor accepts. Since Rich can afford to make good on the threat, and Poor needs the money, Poor accepts. Is this coercive or otherwise unfair use of bargaining power?

Id.

148 WERTHEIMER, supra note 145, at 38.

149 Id. at 39 (quoting Ellis v. First Nat’l Bank, 260 S.W. 714, 715 (Ark. 1924)).
not be considered unethical unless there is another independently wrongful action.

V. THE DIVISION OF AUTHORITY BETWEEN CLIENT AND ATTORNEY: MUST AN ATTORNEY SEEK DELAY AT THE CLIENT'S BEHEST?

A lawyer may use tactics that are not inherently unethical to achieve delay to serve a client's lawful purposes. Must a lawyer, however, always follow a client’s instructions to seek delay? The answer is clearly no. Model Rule 1.2(a) distinguishes between objectives, purposes, or ends of the representation and the means or tactics used to accomplish them. Model Rule 1.2(a) states: “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Thus, the Rules place responsibility for decisions regarding the objectives of the representation in the hands of the client while the lawyer generally has responsibility for decisions regarding means or tactics.

In fact, if a client orders his lawyer to employ means that would violate the Rules of Professional Conduct or violate other law, the lawyer would have a duty both to explain matters to the client and to refuse to obey the client's instructions. What if the client, however, wants to use means that do not, in and of themselves, violate the rules but with which the lawyer fundamentally disagrees? Under most circumstances, the lawyer may, after consultation, refuse to abide by the client's decisions. If this becomes a contentious issue between the lawyer and the client, the lawyer may withdraw from the representation under Model Rule 1.16(b)(4), which allows for withdrawal if “the client insists upon taking action that the lawyer considers repugnant or

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151 See 1 Hazard et al., supra note 10, § 5.5 (3d ed. Supp 2004).
152 See Model Rules of Prof'l Conduct R. 1.4(a)(2) (requiring the lawyer to “reasonably consult with the client about the means by which the client's objectives are to be accomplished”).
153 See id. R. 1.16(a)(1) (requiring the lawyer to withdraw from representing a client if “the representation will result in violation of the Rules of Professional Conduct or other law”); see also id. R. 1.16 cmt. 2 (stating that ordinarily a lawyer must withdraw “if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct”).
with which the lawyer has a fundamental disagreement.” For example, if the client insists on using delaying tactics and the lawyer fundamentally disagrees, the lawyer may withdraw. On the other hand, if the client has a problem with the lawyer's refusal to engage in delaying tactics, the client may discharge the lawyer. Under Model Rule 1.16(a)(3), the client’s termination of the lawyer requires that the lawyer withdraw.

Thus, a lawyer does not have to agree to a client's desire to engage in delaying tactics. While a lawyer must pursue the client’s interests with zeal, commitment, and dedication, the lawyer “is not bound . . . to press for every advantage that might be realized for a client.”

If a lawyer has objections to the client’s desire to use delaying tactics, the lawyer should consult with the client about those objections and may give the reasons for them, including moral reasons. Model Rule 1.4(a)(2) requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” The duty to “reasonably consult” should include the lawyer’s reasons for disagreeing with the client’s proposed course of action. Furthermore, Model Rule 2.1 states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

To summarize, assuming that a lawyer uses tactics that are not inherently unethical, a lawyer may seek delay to serve a client’s interest so long as that interest is not unlawful or fraudulent. Rule 3.2 imposes no independent duties. A violation of Rule 3.2 does not rest on the distinction between “legitimate”

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154 Id. R. 1.16(b)(4); see also id. R. 1.2 cmt. 2 (noting that if, after consultation, the lawyer and the client cannot agree about means or tactical matters, “the lawyer may withdraw from the representation” (citing id. R. 1.16(b)(4))). When a lawyer withdraws, the lawyer must “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation” and must take reasonable measures to protect the client’s interests. Id. R. 1.16(c), (d).
155 Id. R. 1.16(a)(3).
156 Id. R. 1.3 cmt. 1.
157 Id. R. 1.4(a)(2).
158 Id. R. 2.1.
and “illegitimate” client interests. The key distinction is between improper and proper tactics.

On the other hand, if a lawyer fundamentally disagrees with the client’s desire to seek delay or with the client’s reason for doing so, the lawyer may raise these objections with the client. If the lawyer cannot persuade the client, the lawyer can, in most circumstances, refuse to “press for every advantage” or seek to withdraw from the representation. Conversely, if the client is dissatisfied with the lawyer’s performance, the client may discharge the lawyer and the lawyer must withdraw. These principles can now be applied to the hypotheticals presented at the beginning of this Article.

VI. THE HYPOTHETICALS

Assuming that the lawyer does not use tactics that are inherently unethical, may the lawyer delay in the following situations?

_Hypothetical 1_—In a civil action, a court decides for the plaintiff and instructs the plaintiff’s lawyer to draft a form of judgment and give it to the defendant’s lawyer for approval. The defendant and the defendant’s lawyer, however, prefer not to approve the proposed judgment because there is another case pending before a different court and the ruling on appeal in the latter case could provide a justification for a reconsideration or reversal of the first judgment against the defendant. Once the judgment is entered in the defendant’s case, the clock will begin to run on an appeal or a motion for a new trial. Delaying the entry of judgment, therefore, could have a beneficial effect on the defendant’s case. If the defendant’s attorney fails to approve the proposed judgment, the plaintiff will have other means under the state’s rules of civil procedure to pursue his judgment. In order to delay the entry of judgment, the defendant’s lawyer refuses to approve the proposed judgment.

The lawyer may refuse to approve the proposed judgment. The client’s interests justify the lawyer’s refusal to approve the proposed judgment to prevent judgment from being entered

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159 _Id._ R. 1.3 cmt. 1.
160 _See id._ R. 1.16(b)(4).
161 _See id._ R. 1.16(a)(3).
immediately. The defendant’s attorney is not “obligated to take affirmative steps to shorten the time within which relief may be awarded against his client,” and the procedural rules provide [other] means for the plaintiff to pursue his judgment.164

The requirement in Rule 3.2 that attorneys expedite litigation does not prevent the attorney from delaying matters in this context, nor should it. As far as the attorney’s duties are concerned, the client’s interests in delaying the entry of judgment should prevail.

Hypothetical 2—The plaintiff files a complaint in a civil action. The jurisdiction’s rules of civil procedure allow the defendant thirty days to file an answer. The defendant’s attorney, however, has the answer prepared within five days. Nevertheless, the defendant’s attorney waits until the thirtieth day to file the answer. He does not have a good reason for waiting.165

The attorney may wait the full thirty days to file the answer. A defendant may withhold answering a complaint, and a party may withhold responding to discovery for the full time period allowed by the jurisdiction’s rules; “such ‘withholding’ does not become prescribed ‘delay’ even if the party were ready to answer the complaint or reply to the discovery prior to expiration of the prescribed time limits.”166 Notwithstanding the requirements of Rule 3.2, if the rules of civil procedure grant a party a certain amount of time, the party is justified in taking the full amount of time allowed.

Hypothetical 3—A law firm represents an insurance company, a wholly-owned subsidiary of a national drug company. Insurance defense work for the insurance company forms a substantial portion of the billable hours of two of the law firm’s partners. The insurance company informs the law firm that the drug company is drawing heavily on the insurance company’s financial reserves in order to defeat an attempt at a leveraged buyout of the drug company. The insurance company requests the law firm to “seek delays in all pending cases to avoid the possibility of adverse publicity and adverse cash flow that would result from unfavorable jury rewards.”167 This course of action

163 See id.
164 Id.
165 See id.
166 Id.
167 See Elkins, supra note 6, at 774 n.79.
would presumably assist the drug company’s fight against the buyout. The law firm accedes to the client’s request.\footnote{Id.}

The lawyer may seek delay, assuming the lawyer uses tactics that are not inherently unethical. The comment to Model Rule 3.2 states that “realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.”\footnote{MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. 1 (2008) (emphasis added).} Here, the delay is not “otherwise improper” and the client’s interest in preserving financial reserves will trump the interest in expediting the litigation. The lawyer, of course, may tell the client, “I do not practice that way,” and refuse to obey the client’s instructions,\footnote{See infra notes 173–186 and accompanying text.} but the lawyer will not be subject to discipline if she follows the client’s instructions.

**Hypothetical 4**—A federal agency decided to impose a ban on certain chemical preservatives in wine that cause cancer. The lawyer’s client, a vineyard owner, has already produced half of the current season’s wines with one of those preservatives. The client is afraid that he will have to shut down the vineyard if he cannot sell the wine prior to the promulgation of the regulation. The owner laments the loss of his employees’ livelihood and mentions the hope that, in the future, the federal agency will discover scientific evidence that will cause it to reverse the ban on the preservatives. He also mentions that it is “foolish to worry about carcinogenic additives to the food and liquids we consume” when there are “so many ‘natural’ cancer-causing agents.”\footnote{See Elkins, supra note 6, at 777–78 (citing MORGAN & ROTUNDA, supra note 8, at 136–40).} The owner asks his lawyer to use the legal system to obtain enough of a delay to allow the vineyard to sell the wine before the ban goes into effect. The lawyer complies.\footnote{Id.}

The lawyer may delay. Since the sale of the wine is not currently illegal, the lawyer will not be assisting the client in violating the law.\footnote{See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . . “).} Assuming the lawyer uses tactics that are not inherently unethical, the delay is not “otherwise improper.”\footnote{See id. R. 3.2 cmt. 1.} The lawyer can certainly attempt to talk his client out of selling
the wine. In addition, the lawyer's use of delaying tactics to allow the client to sell the wine may be immoral, and the lawyer, after consultation with the client, can refuse to go along with the client's wishes. However, the use of delaying tactics in these circumstances does not violate Model Rule 3.2.

**Hypothetical 5**—Lawyer A is negotiating a settlement agreement with Lawyer B who is desperately trying to finish the deal because he has bought non-refundable, super-saver tickets for a European vacation with his family. Lawyer A's client wants Lawyer A to use delaying tactics to take advantage of Lawyer B's vulnerability in order to squeeze him for every possible advantage. Lawyer A does so.

Again, the lawyer may use delaying tactics to exploit the opposing lawyer's vulnerability. While the tactics are not appealing and the lawyer is entitled to refuse to engage in such tactics, the lawyer is not subject to discipline. In fact, it is actually the vacationing attorney who allows his vulnerability to be exploited at his client's expense who will be subject to discipline.

**Hypothetical 6**—Plaintiff sues defendant for $10 million. The defendant acknowledges to his lawyer that he clearly owes the plaintiff the money, and the lawyer knows that the plaintiff will be able to prove the case at trial. The client, however, asks the lawyer to delay because he (the defendant) is earning an incredible return on the money, much more than the interest the defendant will have to pay on any judgment. The lawyer complies with the client's requests.

The lawyer may delay the proceedings. While the comment to Model Rule 3.2 states that “[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client,” there is no showing that the delay is “otherwise improper.” The text of the Rule clearly subordinates the duty to expedite litigation to “the interests of

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175 See supra notes 159–160 and accompanying text.
176 See Elkins, supra note 6, at 783.
177 The vacationing lawyer would probably be violating Model Rule 1.1, which requires a lawyer to provide competent representation, MODEL RULES OF PROF'L CONDUCT R. 1.1, and Model Rule 1.7, which bans the representation of a client if “there is a significant risk that the representation... will be materially limited... by a personal interest of the lawyer,” id. R. 1.7(a)(2).
179 MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. 1.
180 Id.
the client.\textsuperscript{181} The lawyer may refuse to go along with the client's request to use delaying tactics, but if the lawyer chooses to use tactics that are not inherently unethical to achieve delay, the lawyer should not be disciplined.

*Hypothetical 7*—In a criminal case, the defense lawyer makes a decision, with the consent of his client, to refrain from making a speedy trial defense in order to delay a trial "as long as possible so that the prosecution might make a serious error, witnesses' memories might deteriorate, or witnesses may become unavailable."\textsuperscript{182}

The defense lawyer has no duty to make a speedy trial defense. It is up to the prosecution to accelerate matters if the prosecution is concerned about proving its case. This is similar to *Hypothetical 2*, in which a lawyer uses the full amount of time allowed to file papers.

*Hypothetical 8*—A criminal defendant's mental health problems make him incompetent to stand trial although taking medication would restore the defendant's competence. The defendant's lawyer believes delaying the trial might benefit the defendant (because witnesses may become unavailable or the government may abandon the prosecution). The lawyer advises the defendant of the benefits of refusing medication to delay the return of the defendant's competence to stand trial.\textsuperscript{183}

Assuming that the client has the right to refuse medication, then the lawyer can advise him of that right.

*Hypothetical 9*—The lawyer's client, a criminal defendant, acknowledges his guilt. The state is almost certain that it will be able to prove his guilt at trial and that the defendant will be sentenced to a lengthy jail term. The defendant is free on bond and asks his lawyer to keep him out of jail for as long as possible. The lawyer engages in delaying tactics to keep his client out of jail.

The client's desire to avoid jail for as long as possible is an interest of the client that trumps the lawyer's duty to expedite litigation. In addition, a criminal defense lawyer has a certain leeway in regard to the tactics that she uses.\textsuperscript{184} The lawyer,

\textsuperscript{181} Id. R. 3.2 cmt. 1.
\textsuperscript{182} See People v. Moody, 676 P.2d 691, 695 (Colo. 1984); see also WOLFRAM, supra note 11, § 11.2.5 n.44.
\textsuperscript{183} See Siegel, supra note 12, at 22, 28–30.
\textsuperscript{184} See supra Part II.B.
therefore, may engage in such delaying tactics to keep her client out of jail.

Hypothetical 10—Same facts as in Hypothetical 9, but in this case the client, a convicted murderer, is on death row. The client has asked his lawyer to delay his execution as long as possible. The lawyer does so.\textsuperscript{185}

The lawyer is in the same boat as the lawyer in Hypothetical 9 but with the added factor of the death penalty. In fact, it could be argued that the lawyer has an ethical and moral duty to delay the client's execution as long as possible, and one scholar has contended that the lawyer has a duty to raise even frivolous issues in death penalty cases.\textsuperscript{186}

In all of these hypotheticals an attorney may use ethical tactics to delay. It is up to courts, through the use of deadlines and docket management, to move these cases along.

VII. SHOULD MODEL RULE 3.2 BE REPEALED?

Since Model Rule 3.2 adds no independent duty to the Model Rules and the comment to the Rule is confusing, the question arises: Should Model Rule 3.2 be repealed? An analogous example is the history of the ban on threatening prosecution to obtain an advantage in a civil matter. The original Model Code of Professional Responsibility DR 7-105(A) stated: “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”\textsuperscript{187} Some authorities applied the provision rather strictly. As Professor Wolfram has pointed out:

Courts applying the rule commonly draw no distinction between well-founded or ill-founded charges or between serious crimes and minor infractions. The decisions have also not accepted lawyer arguments that a veiled allusion to the criminal nature of a person’s conduct or the like does not constitute a “threat” or that the lawyer was motivated by concerns in addition to “solely” obtaining an advantage in civil litigation. The courts apply the Code rule as a pure attempt prohibition; a violation is made out by proof of a threat, regardless of the fact that no

\textsuperscript{185} See Freedman, \textit{supra} note 13, at 1178 (discussing Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983)).
\textsuperscript{186} \textit{Id.} at 1179–80.
\textsuperscript{187} \textit{MODEL CODE OF PROF’L RESPONSIBILITY} DR 7-105(A) (1980).
criminal charges are in fact brought or any settlement achieved.\textsuperscript{188}

In promulgating the Model Rules of Professional Conduct, the American Bar Association deliberately omitted the Model Code's ban on threatening criminal prosecution to obtain an advantage in a civil matter because it was "redundant or overbroad or both."\textsuperscript{189} The ban covered "much the same ground as the crimes of extortion and compounding crime," conduct already banned by Model Rule 8.4.\textsuperscript{190} In Formal Opinion 92-363,\textsuperscript{191} the American Bar Association Committee on Ethics and Professional Responsibility noted that Model Rule 8.4(b) bans a lawyer from committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,"\textsuperscript{192} and a lawyer's unlawful extortionate conduct would violate that provision.\textsuperscript{193} An attorney who used "even a well-founded threat of criminal charges merely to harass a third person" would violate Model Rule 4.4, which bans a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person."\textsuperscript{194} An attorney who threatened criminal prosecution "without any actual intent to so proceed, violates Rule 4.1," which requires lawyers "to be truthful when dealing with others on a client's behalf."\textsuperscript{195} Furthermore, an attorney who threatened criminal prosecution that was "not well founded in fact and in law," or "threaten[s] such prosecution in furtherance of a civil claim that is not well founded," would violate Model Rule 3.1, which "prohibits an advocate from asserting frivolous claims."\textsuperscript{196} Finally, in certain circumstances, the ban in Model Rule 8.4(d) and (e) on a lawyer engaging in conduct that is "prejudicial to the administration of justice" and stating or implying "an ability improperly to influence a government official or agency" may be implicated.\textsuperscript{197}

\textsuperscript{188} See WOLFRAM, supra note 11, § 13.5.
\textsuperscript{190} Id.
\textsuperscript{192} MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2008).
\textsuperscript{194} Id. (quoting MODEL RULES OF PROF'L CONDUCT R. 4.4).
\textsuperscript{195} Id. (citing MODEL RULES OF PROF'L CONDUCT R. 4.1).
\textsuperscript{196} Id. (citing MODEL RULES OF PROF'L CONDUCT R. 3.1).
\textsuperscript{197} Id. (citing MODEL RULES OF PROF'L CONDUCT R. 8.4(d), (e)).
The Committee concluded that a threat to bring criminal charges for the purposes of advancing a client's civil claim would not violate the Model Rules unless the underlying criminal charges "were unrelated to the client's civil claim," or "the lawyer did not believe both the civil and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process."\(^{198}\)

The Committee noted that dropping the general ban on threatening criminal prosecution was justified because "such a prohibition would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system."\(^{199}\) Placing limits on an attorney's duty to his or her client was not "justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client."\(^{200}\)

**CONCLUSION**

The ABA's deletion of the ban on threatening criminal prosecution could serve as a model for the deletion of Model Rule 3.2. As with the ban on threatening criminal prosecution, the worst evils that Rule 3.2 covers are dealt with by other Rules. If a lawyer delays to serve a client's illegal or fraudulent purposes, the lawyer violates Rule 1.2(d).\(^{201}\) If the client has no reason for delay, but simply wants to delay in order to harass the opposing party, a lawyer who engages in delaying tactics in furtherance of that goal violates Rule 4.4(a).\(^{202}\) A lawyer who neglects a matter to her client's detriment violates Rule 1.3.\(^{203}\) On the other hand, a lawyer who uses unethical tactics to serve a lawful client interest in delay violates specific rules governing those tactics. A

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\(^{198}\) *Id.*

\(^{199}\) *Id.*

\(^{200}\) *Id.*

\(^{201}\) **MODEL RULES OF PROF'L CONDUCT** R. 1.2(d) ("A lawyer shall not . . . assist a client in conduct that the lawyer knows is criminal or fraudulent.").

\(^{202}\) *Id.* R. 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.").

\(^{203}\) *Id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").
lacks the duty to expedite litigation. A lawyer who delays by filing frivolous motions in a civil case,\(^{204}\) lying to a tribunal,\(^{205}\) lying to another person about a material fact,\(^{206}\) disobeying court orders,\(^{207}\) making frivolous discovery requests, or failing to respond to an opposing party’s discovery requests\(^{208}\) violates specific rules governing those actions. Thus, unless certain lawful client interests (for example, money, tactical advantages in litigation, delaying incarceration, or the death penalty) render the use of otherwise legitimate tactics unethical, Model Rule 3.2 does not add any independent obligations. As discussed in this Article, courts and disciplinary authorities should not construe Rule 3.2 to deem some lawful client purposes “legitimate” and other purposes “illegitimate.” A lawyer should not be disciplined for using ethical tactics to serve lawful client interests. Courts and disciplinary authorities are not equipped to render judgment on whether a certain client interest is legitimate or illegitimate. In addition, making such determinations in disciplinary settings may force attorneys to reveal confidential information in order to defend their conduct.

Furthermore, if Model Rule 3.2 is interpreted to legitimize certain lawful client interests and delegitimize others, lawyers will not be able to predict what conduct will subject them to discipline. Ethical lawyers may be deterred from giving their clients the zealous representation that they deserve. As stated by the American Bar Association Committee on Ethics and Professional Responsibility, in discussing the deletion of the ban on threatening criminal prosecution, “such a prohibition would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to ‘zealously’ assert the client’s position under the adversary system.”\(^{209}\) Model Rule 3.2 could have the same effect.

\(^{204}\) Id. R. 3.1 (“A lawyer 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.”).

\(^{205}\) Id. R. 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal.”).

\(^{206}\) Id. R. 4.1(a) (stating that a lawyer representing a client “shall not knowingly make a false statement of material fact or law to a third person”).

\(^{207}\) Id. R. 3.4(c) (barring a lawyer from “knowingly disobey[ing] an obligation under the rules of a tribunal”).

\(^{208}\) Id. R. 3.4(d) (barring a lawyer from “mak[ing] a frivolous discovery request or fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party”).

All of these concerns support an argument for the repeal of Model Rule 3.2. However, there are opposing arguments. Since courts have not construed Rule 3.2 to impose independent duties on lawyers, there is little danger of squelching zealous advocacy. When lawyers are serving a lawful client interest, courts do not sanction the lawyers unless the attorneys engage in other misconduct. In addition, the text of Model Rule 3.2 serves a hortatory purpose, expressing the general policy of the Rules of favoring promptness and diligence. There is nothing wrong with reiterating that attorneys should act expeditiously, so long as the lawyer acts consistently with the client’s interests. Thus, it is not necessary to drop the text of Model Rule 3.2.

The comment to Model Rule 3.2, however, is another matter. The comment is confusing and provides very little guidance. The comment’s ambiguity presents a danger that authorities could interpret the comment in a way that will hinder zealous advocacy. One highly regarded treatise, in analyzing the comment’s language, states: “Plainly, under the Rules delay in litigation can no longer be justified simply by invoking client interest. Enforcement of such a rule, however, will probably require an adjustment to the professional expectations of many lawyers and judges. The treatise cites to People v. Moody and parenthetically describes the case in the following manner: “[D]efense lawyer not ineffective for failure to raise speedy trial defense in view of lawyer’s strategy to delay trial ‘as long as possible so that the prosecution might make a serious error, witnesses’ memories might deteriorate, or witnesses may become unavailable,’ ” Hypothetical 7 was based on this case. The treatise’s implication is that the lawyer’s conduct in Moody was improper under the comment’s language. This is an amazing result—foregoing a speedy trial defense in the client’s interest is disciplinable! The same logic could make the attorney’s conduct in all the other hypotheticals disciplinable. Even the lawyer in Hypothetical 2, who finished drafting an answer early, but took the allotted time to file, would be subject to discipline. Such a

210 See generally supra Part I.
211 MODEL RULES OF PROF’L CONDUCT Pmbl. ¶ 4 (“In all professional functions a lawyer should be competent, prompt and diligent.”).
212 WOLFRAM, supra note 11, § 11.2.5 (emphasis added).
213 676 P.2d 691 (Colo. 1984).
214 WOLFRAM, supra note 11, § 11.2.5 n.44 (quoting Moody, 676 P.2d at 695).
215 See supra notes 11, 182 and accompanying text.
result would truly be a revolution in litigation practice, one not supported by the text of Rule 3.2. As discussed above, the text of the Rule subordinates the duty to expedite litigation to lawful client interests.216

Although the text of the Rule is authoritative and a comment cannot add obligations to the Rule,217 the comment to Rule 3.2 is highly confusing and may be susceptible to an erroneous interpretation. Thus, the comment to Model Rule 3.2 should be deleted and replaced with a bare bones comment that reinforces the hortatory language of the text. An appropriate comment would simply reiterate that an attorney should act promptly at all times so long as those actions are consistent with the lawful interests of the client.

In conclusion, in interpreting Rule 3.2, courts and disciplinary authorities should adhere to the language of the Rule's text. That language subordinates the requirements to expedite litigation to the interests of the client. The only time authorities should find a violation of Rule 3.2 is in two sets of circumstances: The first set of circumstances is when the lawyer delays by using inherently unethical tactics. Such tactics violate other provisions of the Rules, such as the ban on filing frivolous motions,218 filing frivolous discovery requests,219 or lying to a tribunal.220 The second set of circumstances is when the lawyer delays to serve an unlawful or fraudulent client purpose (a violation of Rule 1.2(d)),221 or the delaying action has no substantial purpose other than to delay, embarrass, or burden a third party (a violation of Rule 4.4(a)).222 Assuming, however, that the client has some lawful purpose (such as saving money, obtaining an advantage in litigation, delaying incarceration, or delaying imposition of the death penalty), and the lawyer does not use tactics that are inherently unethical, Rule 3.2 should not come into play. Courts should not distinguish between types of lawful client purposes, deeming some of them “legitimate” and others “illegitimate.” A lawyer, of course, does not have to

216 See supra notes 29–30 and accompanying text.
218 See id. R. 3.1.
219 See id. R. 3.4(d).
220 See id. R. 3.3(a)(1).
221 Id. R. 1.2(d).
222 Id. R. 4.4(a).
always acquiesce in a client’s request for delay. If, however, a lawyer delays by using ethical tactics to serve a lawful client purpose, the lawyer should not be subject to discipline.

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222 See supra notes 150–161 and accompanying text.