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DECIDING DIFFICULT QUESTIONS OF PROFESSIONAL ETHICS: A MODEL OF NUANCED DECISION-MAKING

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DECIDING DIFFICULT QUESTIONS OF PROFESSIONAL ETHICS: A MODEL OF NUANCED DECISION-MAKING

Nathan M. Crystal*

It was both an honor and a privilege to speak at the Symposium on "The Jurisprudence and Legacy of the Honorable Joseph F. Weis, Jr." held at the University of Pittsburgh School of Law on March 17, 2023. Our panel—"Civility, Professionalism, and Ethics in Defining the Lawyering Career"—gave me the opportunity to study and reflect on the reasoning used by Judge Weis in his well-known cases involving the determination of sanctions for violation of Rule 11 of the Federal Rules of Civil Procedure, particularly *Gaiardo v. Ethyl Corporation*.[1]

In Parts I and II of this Article, I distinguish between two modes of judicial decision-making: polar and nuanced. In polar decision-making, the judge articulates the contending arguments on the particular issue before the judge and then decides the issue, giving reasons for the decision. In nuanced decision-making, the judge discusses the issue from multiple perspectives, in particular the conduct of the attorneys, parties, and third parties affected by the issue, sending messages to those involved in the issue about the judge's expectations regarding their conduct. After considering these nuances, the judge decides the case. In both polar and nuanced decision-making, the judge fulfills his or her primary obligation to decide the matter before the judge. However, they differ because polar decision-making leads to a "yes/no" conclusion, while nuanced decision-making leads to multiple possibilities that need to be weighed against each other.

Part III of the Article explains my concept of a philosophy of lawyering and distinguishes among four philosophies: client centered, moral, institutional, and defensive. Part IV argues that a structure of ethical decision-making based on choice among the four philosophies is polar and can be improved by a model of nuanced

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[1] 835 F.2d 479 (3d Cir. 1987).

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ethical decision-making that combines the four approaches. Part IV provides an example of how nuanced ethical decision-making can be used by lawyers.

I. A CONTEMPORARY EXAMPLE OF POLAR JUDICIAL REASONING: *KING V. WHITMER*

On November 23, 2020, three weeks after the presidential election, "the bipartisan Board of State Canvassers unanimously certified" that Joseph Biden "had won the State of Michigan by 154,188 votes."[2] The losing candidate, then-incumbent President Donald Trump, had the right but chose not to seek a recount.[3] Two days later several voters and Republican nominees to the electoral college in Michigan brought suit seeking to overturn the results of the 2020 presidential election in the State of Michigan.[4] The complaint alleged a "wide-ranging interstate—and international—collaboration" had succeeded in generating hundreds of thousands of fraudulent votes, thereby swinging the state's election to Biden.[5] The complaint also alleged that Republican election challengers had been harassed and mistreated during the vote count in Detroit in violation of Michigan law.[6]

On December 15, 2020, one of the defendants, the City of Detroit, served the plaintiffs with a "safe harbor" letter under FRCP11 (c)(2), giving them twenty-one days to withdraw the complaint or be subject to a motion for sanctions.[7] Subsequently, the defendants filed motions for sanctions under Federal Rule of Civil Procedure (FRCP) 11 and 28 U.S.C. § 1927.[8]

On appeal the Sixth Circuit considered the following bases for sanctions under Rule 11:

[2] King v. Whitmer, 71 F.4th 511, 518 (6th Cir. 2023).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 517.

[7] *Id.* at 519.

[8] *Id.*

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*A. Whether the Plaintiffs Filed the Action for an **Improper Purpose** Under FRCP 11(b)(1)*

While the district court found in favor of the plaintiffs on this basis for sanctions, the Sixth Circuit reversed on this issue.[9] The circuit court held that "framing a public narrative" is the equivalent of speech, and "Rule 11 cannot proscribe conduct protected by the First Amendment."[10] The court went on to specify that "political speech outside a courtroom—including political speech about a lawsuit—is irrelevant to a Rule 11 inquiry about the suit itself."[11]

*B. Whether the Plaintiffs' Allegations of Fraud Had **Evidentiary Support** Under FRCP 11(b)(3)*

Under Rule 11(b)(3), attorneys must conduct a "reasonable prefiling inquiry" to determine that "a pleading or motion is 'well grounded in fact.'"[12] The Rule also implicitly includes a "'duty of candor,' which attorneys violate whenever they misrepresent the evidence supporting their claims."[13]

While the Complaint had "233 numbered paragraphs and over 800 pages of exhibits,"[14] for Rule 11 purposes, sixty of the allegations were irrelevant because they stated legal standards or undisputed facts.[15] The relevant allegations fell into three categories: "allegations about . . . voting systems; allegations about statistical anomalies in the election results; and allegations about misconduct by election workers in Detroit."[16]

1. Allegations About the Machines Supplied by Dominion Voting Systems

The complaint alleged that Dominion Voting Systems, which supplied voting machines used in Michigan, was founded by foreign dictators and oligarchs with a

[9] *Id.* at 520–21.

[10] *Id.* at 520.

[11] *Id.*

[12] *Id.* at 521 (quoting Merritt v. Int'l Ass'n of Machinists & Aerospace Workers, 613 F.3d 609, 626 (6th Cir. 2010)).

[13] *Id.* (quoting Rentz v. Dynasty Apparel Indus., 556 F.3d 389, 395 (6th Cir. 2009)).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 521.

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computerized ballot-stuffing feature to ensure that Hugo Chavez, the Venezuelan dictator, never lost an election.[17] The district court found, and the Sixth Circuit agreed, that this allegation was "entirely baseless."[18] The plaintiffs' only evidentiary support for this allegation was the anonymously-authored "Dominion Whistleblower Report,"[19] but the report only dealt with the founding of a company named Smartmatic, not with Dominion.[20]

The complaint also alleged that Dominion voting machines were "easy to hack and impossible to audit."[21] The problem with this allegation was that it did not apply to the Dominion voting machines used in Michigan.[22] An article attached by the plaintiffs to their complaint illustrated that "modern election-management systems come in three kinds," namely (1) hand-marked paper ballots that voters take to a machine for scanning and tabulation, (2) touchscreen ballots that are then printed for the voter to take to a scanner for tabulation, and (3) all-in-one machines where the voter marks the ballot on a touchscreen and the machine scans and then tabulates the ballots "without further action by the voter."[23] Michigan used the first type, under which the paper ballots completed by voters are retained and so can be recounted and audited.[24] Plaintiffs' counsel attached to the complaint an article stating that a hand-marked ballot system (such as the one used in Michigan) is "the only practical technology for contestable, strongly defensible voting systems."[25] Therefore, the circuit court found, "[p]laintiffs' own exhibits thus refuted rather than supported the complaint's allegations about the Dominion system used in Michigan," to such a degree that their prefiling inquiry was "patently inadequate."[26]

[17] *Id.*

[18] *Id.* at 521–22.

[19] *Id.* at 521.

[20] *Id.*

[21] *Id.* at 522.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

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The plaintiffs offered two alleged expert reports to bolster their claims about the Dominion voting machines.[27] The court noted that attorneys are rarely sanctioned for their use of expert reports because reports rely on "specialized knowledge" per Federal Rule of Evidence 702, and consultation with an expert is "itself a way to investigate a claim's factual plausibility."[28] However, "there is no Rule 702 exception to [FRCP] Rule 11," meaning that "an attorney's reliance upon a putative expert opinion must itself meet the standard of reasonableness."[29]

To support the complaint's allegation of an international conspiracy, the plaintiffs referred to a report by an "intelligence analyst," but the so-called analyst was actually an IT professional who had not completed a basic intelligence course—and whose report dealt with "the integrity of Dominion's public website, not its voting machines."[30] In addition, the complaint misrepresented the report by stating, without any support, that Dominion had intentionally given foreign adversaries access to its infrastructure.[31]

A second alleged expert opined that Dominion machines had been manipulated in four Michigan counties to produce 289,866 illegal votes.[32] The basis for this opinion was that "the Dominion machines used in those counties," which the expert identified by model number, "lacked the 'processing capacity' to count as many ballots as were counted" in those places on election night.[33] The expert assumed, however, that Michigan used a ballot-marking system that was different than the one actually used—and two of the counties where the expert claimed that illegal votes were counted "did not use Dominion systems at all."[34]

2. Allegations About Statistical Anomalies

The plaintiffs also relied on purported expert opinions about statistical anomalies in the voting in support of their claims of fraud.[35] One such opinion

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 523.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

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alleged that 13,248 voters "who had moved to another state had nonetheless illegally voted in Michigan," but this opinion "came in the form of four tweets, each 280 characters or less, which said nothing about" the supposed expert's qualifications or the data that he used.[36] The court found that this opinion was "unreliable on its face" and a violation of FRCP11 for plaintiffs' counsel to use it.[37]

Another "expert" opinion stated that thirty thousand Michigan ballots had been lost and an additional thirty thousand were fraudulent, but this opinion was based on the expert's telephone survey of 248 Michigan voters.[38] The court found that statistical extrapolation from this survey to thirty thousand lost and thirty thousand fraudulent ballots was unreliable on its face.[39]

A third expert opined that Biden's gains over Trump in 2020 compared to Hillary Clinton's margin of victory over Trump in 2016 in nine metropolitan areas totaling 190,000 "excess" votes were "unexpected."[40] While the court concluded that plaintiffs' counsel could have reasonably relied on the expert's opinion that Biden's gains were unexpected, the complaint (without support) transformed that opinion into one of fraud by stating that the 190,000 excess votes were "likely fraudulent."[41] Counsel's misrepresentation of the expert's report was sanctionable.[42]

The court discussed four other expert opinions that it concluded were not particularly persuasive but not facially unreasonable and therefore not a basis for sanctions.[43]

3. Allegations of Misconduct by Detroit Election Workers

One of the most serious allegations of the complaint was that absentee voter counting boards added, fraudulently, tens of thousands of new ballots—and new voters.[44] While the complaint referred to several affidavits to support this allegation,

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 523–24.

[39] *Id.* at 524.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 524–25.

[44] *Id.* at 525.

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those affidavits did not support what the complaint alleged.[45] For example, one affiant stated that she had witnessed two vans coming to the voting center, one in the morning and one at night, but she never saw anything coming from the vans.[46] However, the complaint alleged that the affiant had witnessed an illegal dumping of ballots.[47] The court noted that counsel could reasonably use these affidavits as the basis of further factual inquiry but not as sufficient independent grounds to allege fraud.[48] Another affiant stated that she "believed" that election counters were manually changing votes from Trump to Biden, but the complaint referred to this as "eyewitness testimony."[49]

The complaint alleged a number of other voting irregularities, but the court found these allegations without merit because "counsel apparently did not read the statute they said was violated."[50] For example, the plaintiffs alleged problems at the voting center with verification of birth dates on absentee ballots, but Michigan law did not require such verification.[51] In another example, the complaint alleged double voting—a person casting votes by absentee ballot and in person—but the allegation "misrepresented the supporting affidavit, which said only that some people who voted in person 'had already *applied* for an absentee ballot.'"[52]

The most credible allegations in the complaint involved claims that "election workers at the TCF Center [where Detroit's absentee ballots were counted] mistreated, intimidated, and discriminated against Republican election challengers."[53] The allegations were supported by some three dozen affidavits that consistently described the factual basis for this misconduct.[54] The court concluded that "the rank partisanship among election workers described in these affidavits undermines public confidence in elections just as much as bogus allegations about

[45] *See id.*

[46] *Id.*

[47] *Id.*

[48] *See id.* at 526.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 527.

[54] *Id.*

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voting machines do."[55] The Sixth Circuit found these allegations not sanctionable and criticized the district court for dismissing them without consideration.[56]

*C. Whether the **Legal Contentions** in the Complaint Were Sanctionable Under FRCP 11(b)(2)*

The court found that a number of the plaintiffs' claims were legally frivolous.[57] For example, claims against the Michigan Board of Canvassers were frivolous because the Board is a state agency and immune from liability under the Eleventh Amendment.[58] In addition, by the time the plaintiffs brought suit, the Board had already certified the election results and no longer had any authority over the election.[59] The court also found that a Section 1983 claim against Michigan Governor Gretchen Whitmer and the Secretary of State, based on a violation of the Elections and Electors Clauses of the Constitution, was frivolous because it failed to allege any specific conduct by those officials.[60] However, the court did find that a Section 1983 claim against those same state officials based on selective enforcement of the election laws was not frivolous on its face.[61]

D. Conclusion

The court's decision in *King* is a good example of polar reasoning because the court considered the various arguments made by counsel for the plaintiffs to justify their conduct, evaluated the opposing arguments, and then found the arguments made by plaintiffs' counsel to be unsupported under the standards of FRCP 11.

In characterizing the method of decision-making used in *King* as polar, I do not claim that this method of judicial decision-making is wrong.[62] In fact, it is a highly

[55] *Id.*

[56] *Id.*

[57] *Id.* at 528.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 528–29.

[62] The result and reasoning in *King* were clearly not wrong. A number of other courts have sanctioned lawyers for participation in frivolous litigation arising out of the 2020 election. *See, e.g.*, Mike Scarcella, *US Supreme Court Rebuffs Lawyers Punished After 'Woeful' Suit Backing Trump*, REUTERS (Oct. 2, 2023, 10:13 AM), https://www.reuters.com/legal/us-supreme-court-rebuffs-lawyers-punished-after-woeful-suit-backing-trump-2023-10-02.

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efficient method for courts to make decisions, much like the decision-making of an umpire at a baseball game or a referee in a football game (without instant replay). Further, these decisions are not per curiam orders that leave the parties and others interested in the decision without information about the reasoning of the courts. Readers of polar opinions learn the arguments that were made, the responses to those arguments, why the court concluded the arguments were persuasive or unpersuasive, the result of particular issues, and the overall result. So, what is missing?

II. JUDGE WEIS'S NUANCED APPROACH: *GAIARDO V. ETHYL CORP.*

Judge Joseph F. Weis Jr. authored a number of opinions on sanctions for violation of Rule 11 of the Federal Rules of Civil Procedure.[63] Among these, I found several that were particularly significant in revealing Judge Weis's method of reasoning. *Gaiardo v. Ethyl Corporation*, 835 F.2d 479 (3d Cir. 1987), is one of Judge Weis's most frequently cited Rule 11 opinions[64] and one that contrasts nicely with *King v. Whitmer*.

In *Gaiardo*, the plaintiff "alleged that after almost sixteen years of exemplary service, defendant company discharged him because he had refused to falsify quality control documents."[65] The district court had found that the plaintiff was an at-will employee and that his discharge did not violate the public policy exception to the employer's right to discharge an at-will employee regardless of cause.[66]

Remarkably, almost all of Judge Weis's opinion is devoted to a discussion of the philosophy, application, and limitations of Rule 11[67]—which had been amended significantly in 1983.[68] However, he does not do this in the style of a polar opinion (argument, counterargument, decision, reasoning) where he is acting as an umpire or referee. Judge Weis reasons more as a coach or teacher, giving guidance to those

[63] *See, e.g.*, Lieb v. Topstone Indus., 788 F.2d 151 (3d Cir. 1986); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988).

[64] According to LexisNexis, *Gaiardo*, 835 F.2d 479 (3d Cir. 1987), has been cited 555 times with positive citations exceeding the negative or cautionary citations by a 7:1 margin, approximately. In addition, the decision has been cited on a regular basis every year since it was decided in 1987, averaging more than ten citations per year. *Shepard's Citing Decisions Analysis*, LEXIS, plus.lexis.com (search in search bar for "835 F.2d 479"; click on the case name; click "Citing Decisions" at the top of the page; then click "Analysis" on the drop-down list at the top left of the page) (last visited May 11, 2024, 10:37 AM).

[65] *Gaiardo*, 835 F.2d at 481.

[66] *See id.*

[67] *See id. passim.*

[68] *Id.* at 482.

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who must deal with the Rule in future cases. In particular, Judge Weis speaks to litigants bringing claims to avoid Rule 11 sanctions, district judges who must decide claims for sanctions under Rule 11, and counterparties who might seek sanctions under Rule 11; he also offers guidance on issues that have arisen or are likely to arise in the future in the application of Rule 11, such as the line between proper and improper litigation conduct and the role of time in judging such conduct.

A. Guidance for Litigants to Avoid Rule 11 Sanctions

In *Gaiardo*, Judge Weis noted that the Advisory Committee that revised FRCP 11 faced "a formidable task."[69] On the one hand, the Committee wanted to draft a rule that was "broad enough to curb abusive litigation tactics and misuse of the court's process" but, on the other hand, not so broad "as to hinder zealous advocacy."[70] The Committee also realized that broadening Rule 11 could result in collateral litigation that interfered with the efficient resolution of cases.[71]

The revised Rule 11 adopted an objective standard of "reasonable inquiry" into both the facts and the law, reflecting that the revision "was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence."[72] Under the revised Rule, any pleading, motion, or other filing must be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[73]

Adopting a standard that has often been cited,[74] Judge Weis likened the requirements of Rule 11 to:

> an obligation on counsel and client analogous to the railroad crossing sign, "Stop, Look and Listen." It may be rephrased, "Stop, Think, Investigate and Research" before filing papers either to initiate a suit or to conduct the litigation. These obligations conform to those practices which responsible lawyers have always

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See, e.g.*, Taylor v. Pennsylvania, 686 F. Supp. 492, 502 (M.D. Pa. 1988); *In re* Jazz Photo Corp., 312 B.R. 524, 531 (D.N.J. 2004); Young v. Smith, 269 F. Supp. 3d 251, 333 (M.D. Pa. 2017).

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> employed in vigorously representing their clients while recognizing the court's duty to serve the public efficiently.[75]

Judge Weis warned, however, that the goal of the Rule was to prevent abuse, so it should not be used as an "automatic penalty" against the attorney or party who is on the losing side.[76]

B. Guidance to Judges in Determining Sanctions

The *Gaiardo* opinion provides district judges with guidance in deciding what sanctions to impose.[77] While Rule 11 does not require intentional conduct, willfulness is a factor in selecting a sanction.[78] Courts have substantial leeway in choosing an appropriate sanction, including a warning; an oral reprimand in open court; a written admonition; circulation of the court's order finding pleadings in violation of Rule 11 within the firm where the offending lawyers practice; required attendance at a seminar on federal practice and procedure; financial penalties; and, ultimately, an extreme sanction of case dismissal.[79] Judge Weis emphasized that Rule 11 sanctions should not become "a general fee shifting device" and that generally, "federal courts are bound by the 'American Rule'" under which parties bear their own litigation expenses.[80]

Judge Weis indicated that judges should be cautious to avoid abuse of Rule 11.[81] He noted that some judges had stated that they would allow motions for sanctions only with the court's prior direction.[82] While judges should be restrained in imposing sanctions under Rule 11, he pointed out that judges should pay "greater attention" to pleading and motions abuses, awarding sanctions where appropriate to

[75] *Gaiardo*, 835 F.2d at 482.

[76] *Id.*

[77] *Id.* at 482–83.

[78] *Id.* at 482.

[79] *Id.*

[80] *Id.* at 483.

[81] *Id.* at 485.

[82] *Id.*

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"discourage dilatory or abusive tactics," thereby helping "to streamline the litigation process by lessening frivolous claims or defenses."[83]

C. Guidance to Counterparties

Directing his attention to parties seeking sanctions, Judge Weis pointed out that Rule 11 was intended to deal with litigation abuse rather than fee shifting.[84] The Rule authorizes courts to award "reasonable" fees, but "not necessarily actual fees."[85] Additionally, the party seeking fees has a duty to mitigate its damages.[86] As a result, the burden on the sanctioned party is reduced, and the party seeking sanctions has less tactical incentive to use the Rule to increase the cost of litigation for the opposing party.[87]

Going further on the obligations of litigants who are considering a sanctions motion, Judge Weis stated that litigants misuse Rule 11 when they seek sanctions against a party or counsel simply because they are on the losing side.[88] Sanctions do not routinely follow an adverse judgment or ruling.[89] The court went on to make several observations about the application of Rule 11: (1) if the case is close, a claim for sanctions under Rule 11 "border[s] on the abusive," as the Rule is "not to be used routinely" but "is instead reserved for only exceptional circumstances";[90] (2) neither the Rule's language nor the Advisory Committee Notes justifies a court in awarding sanctions just because the court rejected an unjustified argument within a non-frivolous motion;[91] (3) parties misuse the Rule when they employ it as a means of

[83] *Id.* (quoting Cinema Serv. Corp. v. Edbee Corp., 774 F.2d 584, 586 (3d Cir. 1985)).

[84] *Id.* at 483.

[85] *Id.*

[86] *Id.*

[87] *Id.* (citing United Food & Com. Workers Union Loc. No. 115 v. Armour & Co., 106 F.R.D. 345, 349–50 (N.D. Cal. 1985) (stating attorneys should use telephone conference call or status conference to alert court to abuse, rather than more expensive formal motion)).

[88] *Gaiardo*, 835 F.2d at 483.

[89] *Id.* (citing Lieb v. Topstone Indus., 788 F.2d 151, 157–58 (3d Cir. 1986)).

[90] *Id.* (quoting Morristown Daily Rec., Inc. v. Graphic Commc'ns Union Local 8N, 832 F.2d 31, 32 n.1 (3d Cir. 1987)).

[91] *Id.* (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540–41 (9th Cir. 1986)).

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harassment;[92] and (4) use of the Rule as a tactic of intimidation by lawyers and their clients as part of "hardball" litigation invites judicial retribution.[93]

D. For All Groups—Drawing the Line Between Proper and Improper Litigation Conduct

Judge Weis noted that the Advisory Committee expressed concern that the rule might be used to inhibit creative lawyering: "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[94] Lawyers should not be sanctioned for such creativity, "especially when they advise the court of existing law" and their rationale for seeking modification or reversal.[95] Instead, Judge Weis remarked that the "Rule seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and vitality in the law."[96] On the other hand, he noted, creativity alone is insufficient to withstand Rule 11 sanctions and tortured interpretations of a statute for the purpose of harassment or delay warrant sanctions.[97]

E. Guidance Regarding the Time for Judging Conduct and the Relevance of Changes in Circumstances

The Rule focuses on the act of signing as a certification that a pleading, motion, or other document complies with the Rule and is not for an improper purpose.[98] To avoid the "wisdom of hindsight," the Advisory Committee notes, a court "should test the signer's conduct . . . at the time the pleading, motion, or other paper was submitted."[99]

Obligations under Rule 11 generally speak to the time of filing, and the Rule does not authorize sanctions for failure to amend a pleading, motion, or other

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[92] *Id.* at 484 (citing Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987)).

[93] *Id.* at 485.

[94] *Id.* at 483 (quoting FED. R. CIV. P. 11 note on 1983 Amend.).

[95] *Id.*

[96] *Id.* at 483–84.

[97] *Id.* at 484 (citing Pawlowske v. Chrysler Corp., 623 F. Supp. 569, 573 (N.D. Ill. 1985)).

[98] FED. R. CIV. P. 11(a)–(b).

[99] *Id.* at note on 1983 Amend.

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document.[100] However, "because Rule 11 applies to all papers filed in the litigation," there is "an implicit obligation to update" subsequent filings—though again, these are judged based on information available at the time of that filing.[101] Thus, while an original pleading may have complied with Rule 11, a later pleading such as a motion for summary judgment would also need to take into account information or research showing that the initial filing was incorrect in order to comply with the Rule itself.[102]

An important limitation to note is that Rule 11 does not apply to conduct that does not involve the signing of a paper, and so a lawyer's failure to dismiss a case after the opposing party presents evidence showing that the statute of limitations has run would not be subject to sanctions under Rule 11.[103]

F. Conclusion

In broad terms Judge Weis dealt with an important aspect of the adversarial system: the tension between the need for effective, sometimes creative, advocacy and the risk that the system can be abused. In speaking to that tension, Judge Weis addresses various actors: litigants presenting claims and defenses, trial judges, and prevailing parties exploring the various aspects of their roles.

III. LAWYER DECISION-MAKING—THE NEED FOR A PHILOSOPHY OF LAWYERING

In my book on professional responsibility and in articles I have written, I argue that lawyers need to adopt a "philosophy of lawyering" to guide them in making the numerous and difficult discretionary ethical decisions they face in practice, and I have discussed four philosophies: client-centered, moral values, institutional values, and defensive lawyering, a subset of self-interest.[104]

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[100] Note, however, that the discovery rules do require supplementation of discovery, and violation of these rules is a separate basis for sanctions. *See* FED. R. CIV. P. 26(e), (g).

[101] Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987).

[102] *Id.* The subsequent comments by the Advisory Committee on Rule 11 make it clear that "later advocating" a baseless position is a ground for sanction, an area that the 1983 Amendment left ambiguous; see Highmark Inc. v. Allcare Health, 732 F. Supp. 2d 653, 666 (N.D. Tex. 2010) for a short discussion of it.

[103] Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987); *see* FED. R. CIV. P. 11.

[104] *See* NATHAN M. CRYSTAL & GRACE M. GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 20–26 (8th ed. 2024); Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L., ETHICS & PUB. POL'Y 75 (2012); Nathan M. Crystal, *Using the Concept*

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As I have written in my most recent book on professional responsibility, a ***client-centered philosophy*** is the:

> traditional approach to resolving questions of professional ethics when the rules are unclear . . . . Under a client-centered philosophy, lawyers must take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law (the principle of professionalism). Moreover, lawyers are not morally accountable for any actions they take on behalf of clients in their professional role (the principle of nonaccountability). Professor William Simon . . . one of the leading critics of client-centered lawyering, has characterized this philosophy as an "ideology of advocacy" involving two principles of conduct—neutrality and partisanship. Many writers now use the term "neutral partisanship" to refer to the standard conception of the lawyer's role. A more colloquial way of stating these ideas is to say lawyers are "hired guns."[105]

Critics of the client-centered philosophy have argued that it is "morally unsound because it requires lawyers in the course of representation of clients to engage in conduct that violates conventional morality."[106] These critics offer "an alternative philosophy" that I have termed a ***philosophy of morality***:

> Under this philosophy, lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do. Adoption of a philosophy of morality has practical lawyering consequences. Lawyers would decline representation in more cases than under a client-centered philosophy, turning down cases in which the lawyers concluded that the representation was morally indefensible. Lawyers would withdraw from representation more frequently, for example in cases in which clients demanded that lawyers pursue goals or tactics that the lawyers found to be morally unsound. Lawyers would take a broader view of their obligations as counselors, at a minimum raising moral issues with their clients and often trying to convince their clients to take what the lawyer considered to be the morally correct action. In situations in which lawyers had professional discretion about how to act or in which the rules were unclear, a lawyer acting under a philosophy of morality

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of "A Philosophy of Lawyering" in Teaching Professional Responsibility, 51 ST. LOUIS U. L.J. 1235 (2007) [hereinafter Crystal, *Using the Concept*].

[105] CRYSTAL & GIESEL, *supra* note 104, at 21–22 (footnotes omitted) (quoting William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34–39 (1978)).

[106] *Id.* at 22 (footnote omitted).

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> would take the action that the lawyer believed to be indicated by principles of morality, even if this action was not necessarily in the client's interest.[107]

In my book, I go on to speak briefly to important issues that arise in using this particular philosophy:

> Implementation of a philosophy of morality faces some difficulty. First, what source of moral values does a lawyer use? Philosophers have debated moral values for centuries, but no one system has received universal or even widespread acceptance. Moreover, most lawyers lack knowledge of philosophical theories of moral values.
>
> Second, if a lawyer relied on the lawyer's moral values, how does a lawyer proceed when those values differ from those of the client? If lawyers defer to moral values of their clients over their own, then the philosophy of morality seems to transform itself into client-centered lawyering. On the other hand, if lawyers use their own moral values, even when they conflict with those of the client, the lawyer can be accused of acting immorally by infringing on the liberty of the client without justification. This criticism becomes particularly strong when the moral values of the client are religiously based. How can lawyers justify imposing their moral values over the religious values of their clients? Such an approach seems inconsistent with First Amendment rights of clients.
>
> Third, if lawyers intend to use a philosophy of morality, do they have an obligation to disclose to their clients the use of this approach so that clients can make informed decisions about choice of counsel? Such a disclosure could be made either orally in the first meeting with the client, in engagement agreements, or on lawyer websites. Many lawyers will find it difficult to make such a disclosure for various reasons, including fear of loss of potential clients.[108]

I go on in that same text to define a **philosophy of institutional values**:

> Other critics of the client-centered philosophy have sought to develop approaches based on social or professional values or norms rather than principles of morality. The major advantage of such a philosophy, which could be called a *philosophy of institutional values*, is that norms expressed in an institutional form are likely to be seen as more objective and justified than moral values, which are often viewed as individual, subjective, and controversial. Note that the

[107] *Id.* (footnotes omitted).

[108] *Id.* at 22–23 (footnote omitted).

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philosophies of morality and institutional value are not inconsistent because institutional values often embody moral principles.

The most comprehensive statement of a philosophy of lawyering based on social values is found in Professor Simon's work. He argues for the following basic principle: "[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." Simon uses the term "justice" not in some abstract or philosophical sense, but rather as equivalent with "legal merit" of the case. In deciding the legal merit of the case, the lawyer must exercise contextual or discretionary decision-making. Simon identifies two dimensions to this approach. First, in deciding whether to represent a client a lawyer should assess the "relative merit" of the client's claims and goals in relation to other clients that the lawyer might serve. Simon recognizes that financial considerations play a significant role in lawyers' decisions to represent clients, but he calls on lawyers to take into account relative merit in addition to financial considerations. Second, in the course of representation, Simon calls on lawyers to assess the "internal merit" of their clients' claims. Simon rejects the view that lawyers should assume responsibility for determining the outcome of cases, stating: "Responsibility to justice is not incompatible with deference to the general pronouncements or enactments of authoritative institutions such as legislatures and courts. On the contrary, justice often, perhaps usually, requires such deference." When procedural defects exist, however, the lawyer's obligation to do justice requires the lawyer to assume responsibility for promoting the substantively just outcome: "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice."

The legal profession itself has felt the need to supplement the rules of professional conduct with institutional values. The ABA, many state bar associations, and some courts have adopted codes of professionalism designed to articulate institutional values of the profession. Lawyers could rely on such codes as a basis for discretionary decision-making. Moreover, most lawyers should be comfortable disclosing their reliance on such codes to their clients.[109]

Finally, "[a]ny discussion of philosophies of lawyering would be incomplete if it did not include the fact that lawyers' own interests and values profoundly affect

[109] *Id.* at 23–24 (footnotes omitted) (quoting WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9, 138, 140 (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092–93 (1988)).

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their views of practice."[110] I have termed this as the **philosophy of self-interest**, noting:

> [m]any discretionary decisions that lawyers face can have substantial economic consequences. For example, how aggressively should a lawyer counsel a client to accept a settlement that the lawyer believes to be desirable but which the client is reluctant to accept? Other discretionary decisions can involve the risk of professional discipline or damage to the lawyer's reputation. Some lawyers may choose to adopt a *philosophy of self-interest*, acting in their own interest when confronted with discretionary decisions. A more limited variation of this philosophy could be called "defensive lawyering." Defensive lawyering means acting or refraining from behaving in a way that minimizes the risk that the lawyer will suffer adverse consequences, such as disciplinary action, criminal or civil liability, or damage to reputation.[111]

IV. NUANCED DECISION-MAKING BASED ON JUDGE WEIS'S APPROACH IN RULE 11 SANCTIONS CASES AS A PHILOSOPHY OF LAWYERING

In my article *Using the Concept of "A Philosophy of Lawyering" in Teaching Professional Responsibility*, I give an example of a young law school graduate facing a situation in which the lawyer's employer may have misappropriated client funds.[112] The article examines various options available to the lawyer to deal with the situation and considers each of the options from the perspective of one of the four philosophies of lawyering.[113] However, when considered separately, each of the four philosophies of lawyering is, in a sense, an example of bipolar reasoning. The lawyer decides which philosophy of lawyering to apply based on the contending arguments for that philosophy when compared to the other approaches and then applies that approach to the particular situation the lawyer faces. My preparation for this symposium in honor of Judge Weis led me to consider an alternative philosophy—or perhaps more precisely a merger of the four philosophies—which I label the "Nuanced Decision-Making Philosophy of Lawyering."

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[110] *Id.* at 24.

[111] *Id.*

[112] Crystal, *Using the Concept*, *supra* note 104, at 1253.

[113] *Id.* at 1253–54.

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An immediate objection to this approach is that lawyers are not federal judges, and it is inappropriate to apply a method of reasoning used by a federal judge—who was appointed with life tenure and enjoyed great independence in his decision-making—to lawyers, who are agents of their clients, who can be terminated at will, and who must (with limited exceptions) follow the decisions of their clients with regard to the objectives of representation.[114] However, the differences between federal judges and lawyers is not as great as it first appears. While federal judges do have life tenure, like lawyers they do not have complete freedom on how they decide cases; instead, federal judges are bound by their oath to follow the Constitution and the law, and their decisions (except those of the Supreme Court of the United States) are subject to appellate review.[115] Even federal judges' discretionary decisions are subject to review under an "abuse of discretion" standard.[116] While lawyers must follow the decisions of their clients as to the objectives of representation, such as whether to settle a case, for many matters, lawyers have substantial discretion how to act and—through their ability and obligation to counsel clients—they can and do exercise enormous influence over client decisions.[117]

How then would a nuanced decision-making philosophy of lawyering work? As I discuss in my article on *Using the Concept*, the lawyer must first employ "practical reasoning" to identify the options available to the lawyer to deal with the particular issue the lawyer faces.[118] Once the lawyer identifies the options, which may involve consultation with the client or an ethics advisor, the lawyer then considers the options from each of the different philosophies of lawyering, similar to Judge Weis's nuanced reasoning in *Gaiardo*. From this analysis, a clear decision may emerge; if not, preference should be given to the result flowing from the application of the philosophy of lawyering that is most predominant in the matter. For example, consider a situation in which a potential juror answers falsely to a voir dire question (probably unintentionally) but the client believes the juror would be favorable to his case. Should the lawyer bring the juror's false answer to the court's attention if the ethics rules are unclear on the matter? In this case, the institutional

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[114] *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

[115] *See* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1043–44 (1977).

[116] Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 8–9 ; *see generally* Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIA. L. REV. 947 (2010) (discussing the meaning, scope, and application of "discretion" and its abuse).

[117] *See* MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

[118] Crystal, *Using the Concept*, *supra* note 104, at 1246–47.

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interest in the integrity of the proceeding seems to be the more fundamental interest and should be given preference by the lawyer in his or her decision-making.

Consider the following problem drawn from my text on professional responsibility:

> (a) You represent Paul, the plaintiff, in a products liability action against the maker of a bus tire that exploded and severely injured Paul as he walked by the bus. Paul's wife has joined in the action seeking loss of consortium. Counsel for the tire maker asked Paul the following questions during his deposition.
>
> Q: Were you having marital problems during the one-year period before the accident?
>
> A: Well, like any couple we would argue, but nothing serious.
>
> Q: Have you had an affair during the five-year period prior to the accident?
>
> A: No.
>
> A few days after the deposition, Paul called you and said that he has had a few sleepless nights about the deposition. He says that in fact he had an affair two years before the accident, but he broke it off shortly after it began. He says that his wife never knew about the situation. . . . How would you proceed?[119]

A lawyer using a nuanced method of decision-making would consider the situation from a variety of perspectives. From a *client-centered* perspective, the lawyer would need to decide if the rules of professional conduct are clear with regard to the lawyer's obligations about Paul's false testimony. Model Rule of Professional Conduct 3.3(a)(3) provides: "If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[120] The Rule applies to testimony by the lawyer's client even if the lawyer did not "call" the client; in this case, defense counsel called the client for the deposition, but Rule 3.3(a)(3) still applies. Additionally, the Rule applies even to an ancillary proceeding such as a deposition.[121] However, at least two aspects of Rule 3.3(a)(3) make application of the Rule unclear and leave the lawyer with a certain amount of professional discretion. First, the duty to take reasonable remedial measures only applies if the false testimony is material.[122] In this case, it is questionable whether Paul's false testimony about an affair that ended two years ago

[119] *Id.* at 158–59.

[120] MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2020).

[121] *Id.* at r. 3.3 cmt. 1.

[122] *Id.* at r. 3.3(a)(3).

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is material. If Paul and his wife have had normal marital and sexual relationships in the two years before the accident, then evidence of the affair may not be material. However, since opposing counsel asked questions about affairs at the deposition, he or she seems to consider the topic material, though deposition questions are typically exploratory and do not necessarily show materiality. Furthermore, Paul's attorney did not object to the questions, as such objections are usually reserved until trial. Second, the Rule does not mandate disclosure; it only requires "reasonable remedial measures."[123] Comment 10 to the Rule indicates that the lawyer should remonstrate with the client "and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."[124] This could include a modification of Paul's testimony by way of notation on his errata sheet to correct any errors in the transcription of the deposition (if Paul reserved signature) or frank communication to opposing counsel about the situation.[125]

There are other client-centered dimensions for the lawyer to consider. The lawyer should counsel Paul that under the law he has an obligation to testify truthfully, that false testimony can be punished criminally, and that voluntary full disclosure before the false testimony is discovered reduces this risk. On the other hand, the false testimony might never be discovered by the other side, or it might not be considered material even if discovered—but if the testimony is in fact not material, then disclosure should be relatively harmless to Paul's case.

Another client-centered aspect of the case is that the lawyer represents not only Paul, but also Paul's wife. Does the lawyer have an obligation to disclose Paul's testimony to his wife because it could affect the value of her claim for loss of consortium? This issue presents a somewhat complex relationship between the ethical duty of confidentiality and the attorney-client privilege. A well-recognized exception to the attorney-client privilege is the joint-client exception.[126] This exception provides that, in a dispute between jointly represented clients, any communication made by either client to their attorney is not privileged.[127] However, there is no joint-client exception to the ethical duty and, in addition, there is (at least at this point) no dispute between Paul and his wife. In fact, disclosure of Paul's affair

[123] *Id.*

[124] *Id.* at r. 3.3 cmt. 10.

[125] *See* CRYSTAL & GIESEL, *supra* note 104, at 162.

[126] *See id.* at 248 (discussing the joint client exception to the attorney-client privilege).

[127] MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 30 (AM. BAR ASS'N 2020).

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to his wife might lead to marital disharmony by creating a dispute and potentially leading to divorce. A related issue is whether the attorney's knowledge of Paul's false testimony creates a conflict of interest requiring the lawyer either to obtain informed consent from Paul and his wife to continue the representation or to withdraw from representation altogether.[128] In conclusion, application of a client-centered philosophy to the facts of this case seems unclear.

From the perspective of a *philosophy of morality*, the lawyer might feel that he or she does not want to do anything to condone extramarital relationships, but a remedial measure involving disclosure to either the court or opposing counsel will not likely have a negative impact on extramarital relationships, either in general or in this case. Another moral principle that might be applicable in this situation is protection of the integrity of marriage. Disclosure of Paul's extramarital relationship is likely to harm Paul's relationship with his wife and may lead to divorce proceedings, which could be avoided if counsel does not take any action to deal with Paul's false testimony. The philosophy of morality points against disclosure.

From the perspective of an *institutional philosophy of lawyering*, prevention or rectification of false testimony in a legal proceeding is an important institutional value. In fact, this value outweighs the value of confidentiality as set forth in Model Rule 3.3(c): "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and *apply even if compliance requires disclosure of information otherwise protected by Rule 1.6*."[129] However, the institutional interest in this case is weakened by the fact that the materiality of the testimony is in doubt. In addition, while Rule 3.3 does apply to collateral proceedings such as a deposition, the testimony may never be presented to a court if the case is settled. The institutional philosophy points slightly in the direction of some form of disclosure.

From the perspective of *defensive lawyering*, the lawyer would want to minimize the risk of negative consequences, whether they be related to malpractice, a disciplinary proceeding, or the lawyer's reputation. The risks to the lawyer from nondisclosure are probably somewhat greater than the risk of disclosure. The worst-case scenario is one in which the lawyer does not disclose the false testimony; the defense has learned of the prior affair through independent investigation (in fact, they may already know of the affair at the time of the deposition and are simply trying to pin down Paul's testimony in preparation for a credibility attack at trial); the defense uses the affair in cross-examination of Paul to undermine his credibility; Paul's wife is exposed to the affair for the first time at trial; and, as a result, both Paul and his

[128] *See id.* at r. 1.7.

[129] *Id.* at r. 3.3(c) (emphasis added).

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wife lose their cases, leading to malpractice claims and disciplinary charges against the lawyer, and perhaps resulting in a divorce by Paul and his wife. All of this could lead to the lawyer's loss of job or partnership depending on where he or she is employed, and so while the risk of all of this happening may be small, the negative consequences are large. The philosophy of defensive lawyering points toward disclosure, and the more risk averse the lawyer, the stronger the argument for disclosure.

The following table summarizes the nuanced analysis of Paul's case:

Philosophy	Guidance
Client-centered	Neutral due to conflicting considerations and multiple clients
Morality	Against disclosure because of possible harm to marriage
Institutional	Slightly in favor of disclosure
Defensive	Solidly in favor of disclosure

This nuanced analysis points somewhat in favor of disclosure, with the strongest argument against disclosure coming from the philosophy of morality based on possible harm to Paul's marriage. Perhaps this concern can be minimized, or even eliminated, by use of the concept of "reasonable remedial measures" in Model Rule 3.3(a)(3).[130] Suppose the lawyer strongly counsels Paul about the need for disclosure, perhaps emphasizing the "house of horrors" that could result from nondisclosure, and suggests that the remedial measure could be an informal communication with counsel for the defendant, informing him or her that out of embarrassment, Paul did not reveal his prior affair, of which his wife knows nothing. Perhaps defense counsel will not consider the matter material, or perhaps defense counsel would be available for settlement negotiations at that point. If defense counsel insists on reopening the deposition, Paul's counsel could consent to doing so. Counsel for Paul could also advise him to consider disclosing the affair to his wife and seeking forgiveness, rather than trying to keep it a secret from her. After all, the affair ended two years ago, so she may be forgiving depending on the status of the marriage now.

[130] *Id.* at r. 3.3(a)(3).

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V. CONCLUSION

As a person, a lawyer, and a judge, Judge Weis had an enormous positive impact on many people. Judge Weis's method of decision-making has affected my thinking about how lawyers should deal with difficult decisions of professional responsibility. Perhaps this Article's argument for a nuanced decision-making philosophy of lawyering, based on Judge Weis's nuanced approach in Rule 11 sanctions cases, will impact the thinking of other lawyers. In today's toxic social, political, and legal environment, the more Judge Weis's influence grows, the better.

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