ENFORCING PROFESSIONAL NORMS FOR FEDERAL LITIGATION CONDUCT: ACHIEVING RECIPROCAL COOPERATION

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I. INTRODUCTION

In the United States today, lawyers are subject to "multiple centers of professional control."1 Professional norms for American lawyers spring from a variety of sources and are enforced in a variety of systems.2 Occasionally, those responsible for establishing norms differ from those operating norm-enforcement systems.3 Further, the same lawyer misconduct can violate norms emanating from several different sources and can attract the attention of several norm enforcers.4 This "multi-door" approach5 has been generally accepted because no single scheme "is likely to address all categories of lawyer misconduct efficiently."6

The varied norms and norm-enforcement systems for controlling lawyer conduct have generated much confusion. Even the terminology is puzzling. Consider the phrase "disciplinary action." For many, it means an independent proceeding concerning lawyer misconduct outside the scope of any traditional civil or criminal case. The consequences of such disciplinary action might be the loss of a law license, or some lesser public interest sanction such as a reprimand. Such disciplinary action usually is conducted before a state's high court lawyer disciplinary agency.7 Yet for others, "disciplinary

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2 See, e.g., id. at 805-09 (identifying four basic enforcement models: disciplinary, liability, institutional, and legislative controls, and discussing each model's source of authority).
3 See id. at 805 (stating that the reference point for the disciplinary control "model is the current disciplinary system, in which independent agencies . . . investigate and prosecute violations of the rules of professional conduct" while the rules are adopted by the state's highest court). In Illinois, a Hearing Board comprised of lawyer and non-lawyer appointees may reprimand an attorney, or recommend disciplinary action by the court, see ILL. SUP. CT. R. 753(c), but the rules are adopted by the Illinois Supreme Court, see ILLINOIS RULES OF PROFESSIONAL CONDUCT, reprinted in ILLINOIS CODE OF CIVIL PROCEDURE AND RULES OF COURT: STATE AND FEDERAL 396 (West 1996) [hereinafter ILL. RPC].
4 See, e.g., Wilkins, supra note 1, at 805-09 (explaining that state disciplinary bodies, legislative or executive agencies, courts, clients, and third parties are all potential norm enforcers).
5 Id. at 851 n.228 (borrowing the phrase from Frank E.A. Sander, Alternative Methods of Dispute Resolution: An Overview, 37 FLA. L. REV. 1, 12 (1985)).
6 Id. at 804. But see Linda S. Mullenix, Multiforum Federal Practice: Ethics and Erie, 9 GEO. J. LEGAL ETHICS 89, 129-31 (1995) (concluding that federal practitioners need only one uniform code of professional ethics and that standards should not vary from district to district or circuit to circuit).
7 See Wilkins, supra note 1, at 805; see also MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 2 (1989) (establishing "one permanent statewide agency to administer the lawyer discipline and disability system").
action” might also connote a proceeding on lawyer misconduct within a traditional civil or criminal case. The proceeding might lead not only to a public interest sanction, but also to a private interest sanction such as an award of attorney’s fees.\(^8\)

The differing standards and forums which address lawyer misconduct during federal litigation illustrate the multiple centers of professional control. Applicable norms spring chiefly from federal procedural rules,\(^9\) statutes\(^10\) and inherent power cases,\(^11\) as well as from state lawyer conduct codes\(^12\) and state malpractice cases.\(^13\) Available enforcement systems exist at both the federal and state levels. These enforcement systems include: a lawyer disciplinary proceeding before an agency of the state high court which licensed

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\(^8\) Compare the pre-1983 version of Rule 11 of the Federal Rules of Civil Procedure, and several contemporary state civil procedure laws, e.g., COLO. R. CIV. P. 11, ILL. SUP. CT. R. 137, and MASS. R. CIV. P. 11, with Rule 8 of the Rules of the Supreme Court of the United States, and several contemporary state high court rules, e.g., N.J. R. CT. 1:20-15(f)(3), TENN. R. SUP. CT. 9, § 5.5, and TX. R. CT. 3. The former allow “appropriate disciplinary action” during a civil case for a willful violation of the rule on signing pleadings, while the latter allow “appropriate disciplinary action” in a separate proceeding for conduct unbecoming a member of the bar. See generally RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10.13, at 708 n.3 (4th ed. 1996) (listing all state equivalents to FED. R. CIV. P. 11).

\(^9\) See, e.g., FED. R. CIV. P. 11 (imposing sanctions for improper signing of pleadings); id. R. 37 (imposing sanctions for failing to make disclosures or cooperate in discovery). Also, local federal district court rules usually set additional norms, typically relying upon a state high court or American Bar Association standards. See infra notes 12-13.

\(^10\) See, e.g., 28 U.S.C. § 1927 (1994) (providing that attorneys may be liable for excess costs and expenses incurred because of unreasonable and vexatious multiplication of proceedings).

\(^11\) See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (“In narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.”).

\(^12\) See, e.g., ILL. RPC 3.2, supra note 3 (requiring an attorney to “make reasonable efforts to expedite litigation”). This rule is made applicable in some Illinois federal litigation. See S.D. ILL. R. 29(d)(2) (stating that “[t]he Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois”). Compare the Rules of Professional Conduct of the U.S. District Court for the Northern District of Illinois 3.2, a distinct set of rules which adopts ILL. RPC 3.2, supra note 3.

\(^13\) When clients sue their attorney for acts of malpractice which occur during federal litigation, their primary focus is on conduct normally governed by state lawyer conduct codes. Thus, state tort or contract law should apply. Of course, not every violation of a state lawyer conduct code gives rise to malpractice liability. See, e.g., MALLEN & SMITH, supra note 8, § 18.7, at 577-80 (explaining that a violation of the Model Rules or Model Code does not automatically result in civil liability); Charles W. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. REV. 281, 319 (1979) (noting the lack of enhanced enforcement of lawyer conduct codes through malpractice suits). When adversaries of their clients sue lawyers for acts of malpractice (e.g., malicious prosecution, abuse of process, etc.) during federal litigation, state law usually applies as well. See MALLEN & SMITH, supra note 8, § 10.13, at 708-20 (noting that state sanction power is available to federal courts in the absence of a federal provision). But see Jeffrey A. Parness, Groundless Pleadings and Certifying Attorneys in the Federal Courts, 1985 UTAH L. REV. 325, 342-52 (urging application of federal common law principles where federal provisions are lacking).
the lawyer ("disciplinary control"); a lawyer malpractice proceeding typically commenced by an injured client before a state or federal trial court ("liability control"); and a lawyer sanction proceeding before the federal court hearing the case in which the lawyer's misconduct occurred ("institutional control").

The "multi-door" approach can present significant difficulties for state-licensed lawyers interested in following the appropriate rules during federal litigation.

For example, a securities lawyer might be placed in the uncomfortable position of having to decide whether to follow a series of SEC precedents that appear to require him to resign from representing a client whom he strongly suspects is involved in a fraudulent scheme, or a line of judicial precedents that suggests that resigning under these circumstances constitutes malpractice. The notion that a distinct set of professional norms under

Consider also an Assistant U.S. Attorney facing conflicting federal and state norms on ex parte communications during criminal investigations. He or she must work through the conflict between the Department of Justice's guidance permitting ex parte communications with adverse, represented parties, and state prohibitions on ex parte communications based on Model Rule 4.2 or Model Code DR 7-104. The notion that a distinct set of professional norms under

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14 See Wilkins, supra note 1, at 805-08. Professor Wilkins also notes that there are possible "legislative controls," wherein executive or legislative branch agencies investigate and prosecute lawyer misconduct. See id. at 808-09. To date, at best there are only a few such agencies. According to Professor Wilkins, one example is the California State Bar Court, established by the State Bar Board of Governors to undertake attorney disciplinary proceedings leading to public or private reproval or to recommendations to the state high court for disbarment or suspension. See id. at 808 n.31. The Bar Court provides "a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar," however, the high court's "inherent power" to discipline attorneys remains intact. CAL. BUS. & PROF. CODE §§ 6075, 6100 (Deering 1993).

15 Wilkins, supra note 1, at 851 n.230.

16 See Elizabeth A. Allen, Federalizing the No-Contact Rule: The Authority of the Attorney General, 33 Am. Crim. L. Rev. 189, 190-91 (1995) (describing the conflict and the Department of Justice's attempt to address the ethical problem by distinguishing a disinterested "party" from a disinterested "person"); see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 611 (1986) ("Although the matter is not entirely clear under the Code, probably DR 7-104(A)(1) and, clearly, MR 4.2 prohibit contact with any represented person . . . ."). Model Rule 4.2 reads, in relevant part, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995). DR 7-104(A)(1) states, "During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1995).
federal law should govern state-licensed lawyers litigating in federal courts is currently under serious debate before the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference. Some argue these norms should be comprehensive and displace any otherwise relevant state law, while others urge there is a need for only particularized federal law, with the remaining norms derived from state law.

The "multi-door" approach also can present significant difficulties for those operating norm-enforcement systems covering lawyer conduct during federal litigation. Problems include the potential for under or over-enforcement, as well as confusion over when particular systems apply.

While there is much current debate about professional norms for federal litigators, there is relatively little talk of norm-enforcement

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17 See Memorandum from Daniel R. Coquillette, Committee on Rules of Practice and Procedure of the U.S., Local Rules Regulating Attorney Conduct in the Federal Courts (July 5, 1995) at 38-41 (hereinafter Judicial Conference Report) (available in Westlaw, Q247 ALI-ABA 311, 370-74) (further citations will be to the Westlaw cite).

18 See id. at 370-71 (describing how such norms might be adopted). Strongly advocating such norms is Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?, 64 GEO. WASH. L. REV. 460 (1996), who urges the development of an independent set of detailed rules of conduct for lawyers practicing in federal court via federal judicial rulemaking procedures. See generally Fred C. Zacharias, Federalizing Legal Ethics, 73 TEX. L. REV. 335 (1994) (making the case for uniform legal ethics rules governing conduct in both federal and state courts via Congressional action). Of course, the need for comprehensive or limited federal court norms, or for national norms for all courts, presents differing questions than simply who should be making any such norms.

19 See Judicial Conference Report, supra note 17, at 333 (stating that the "balkanization" of local rules contributes to problems for norm enforcers).

20 See Wilkins, supra note 1, at 851 (expressing concern that "involving multiple actors in the enforcement process might cumulatively result in significant overenforcement"). Concerns about under-enforcement in state disciplinary boards of professional norms regarding conflicts of interest led one federal court to a more relaxed standard for motions to disqualify opposing counsel. See In re American Airlines, Inc., 972 F.2d 605, 610-11 (5th Cir. 1992).

21 See Wilkins, supra note 1, at 851 (noting that "spreading enforcement authority . . . will inevitably produce substantive and jurisdictional conflicts" and that "a lawyer might still find herself confronting two control systems that express conflicting interpretations of the same professional norm").
systems. Some who urge the establishment of a new and comprehensive set of federal norms summarily conclude that their enforcement must be undertaken in a new, unitary federal "disciplinary control" system (i.e., not in a "disciplinary control" system established independently at the district or circuit court level). Others favoring federal norms wonder whether enforcement could be undertaken in existing state high court "disciplinary control" systems. To date, the U.S. Judicial Conference inquiry has focused little attention on appropriate norm enforcers or on the costs and benefits of employing multiple enforcement systems.

Recently, the U.S. Court of Appeals for the Seventh Circuit had occasion to reflect on norm-enforcement systems for lawyer misconduct during federal litigation. During its own disciplinary proceeding involving attorney Rufus Cook's conduct before a federal district judge, it said that earlier federal and state norm-enforcement efforts aimed at the Illinois-licensed lawyer should have been pursued in the spirit of reciprocal cooperation. Yet the desired coordination was found lacking in the enforcement systems used for the actual and alleged misconduct of Mr. Cook. While indicating

23 See, e.g., Mullenix, supra note 6, at 131 (arguing that a uniform federal code of ethics "will eliminate all problems relating to interdistrict and intercircuit conflicts"); see also Burton C. Agata, Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules, 3 HOFSTRA L. REV. 249, 285 (1975) (urging the adoption of a disciplinary structure in "the federal courts, as well as the states[,] that "provide[s] more centralization, greater power and swifter action"); Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 FORDHAM URB. L.J. 969, 977-78 (1992) (arguing that one of the benefits of a uniform federal enforcement mechanism would be the "demise of provisions like [Federal] Rule 11 that obliquely and fecklessly regulate litigation conduct") (footnote omitted).

24 See, e.g., Allen, supra note 16, at 223 (discussing the benefits of state disciplinary board enforcement of federal Justice Department norms on prosecutorial contact with represented persons). See also 28 C.F.R. § 77.12 (1996) (providing that when U.S. Attorney General finds a "willful violation" of certain Justice Department rules governing its lawyers, sanctions "may be applied, if warranted, by the appropriate state disciplinary authority"). For a review of the criticisms of the Justice Department rule, see generally, Jocelyn Lupert, Comment, The Department of Justice Rule Governing Communications with Represented Persons: Has the Department Defied Ethics?, 46 SYRACUSE L. REV. 1119 (1996).

25 See Judicial Conference Report, supra note 17, at 333-34 (outlining the problems that have arisen due to the Committee’s "do-nothing" approach in recent years).

26 See In re Cook, 49 F.3d 263 (7th Cir. 1995).

27 See id. at 265 (explaining that reciprocal cooperation is one of three reasons for state courts to enforce discipline for misconduct in federal court).

28 The court was most displeased with the manner in which the Illinois Attorney Registration and Disciplinary Commission (ARDC) responded to its referral of Cook for "[e]ncouraging and ignoring district court orders." Id. at 265 (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991)). It also criticized "the surprising fact that the district court, where the misconduct occurred, has never opened its own disciplinary
its disappointment in the lack of coordination, however, the Seventh Circuit said little about how to achieve better coordination.29

Techniques for coordinating enforcement efforts when state-licensed lawyers misbehave in federal court are important. Thus, implementing a change need not await full debate and reform on applicable professional norms for federal court litigators. Of course, norms are not independent of norm-enforcement systems.30 There is no guarantee that new professional conduct standards for federal litigation will be enforceable through existing enforcement schemes. However, the Cook case, among others, demonstrates that existing norms governing lawyer conduct during federal litigation are poorly enforced, in part because of the lack of reciprocal cooperation between available norm enforcers. Part II of this Article will review briefly the norms and norm-enforcement systems utilized and available in Cook. Part III will offer suggestions on achieving better coordination among the differing norm enforcers interested in the federal litigation misconduct of lawyers.

II. THE COOK CASE

A. What the Seventh Circuit Said

Rufus Cook, a member of the bars of Illinois, the U.S. District Court for the Northern District of Illinois (Northern District), and the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), represented a plaintiff class in a civil action in the Northern District against the City of Chicago.31 "Cook entered into a settlement on behalf of one subclass, with 19 members, and abandoned efforts to obtain relief for the remaining [class members]. Chicago agreed to pay $500,000, a sum that included all costs and attorneys' fees, in exchange for a release."32 The class action rule required approval of the settlement by the district judge, Ilana Rovner.33

29 See id. at 265-66 (criticizing the ARDC for failing to proceed against Cook unless Judge Rovner appeared as a witness). The ARDC stance was "equivalent to taking the position that it will disregard misconduct in federal court, period. [The ARDC action] cannot be described as a cooperative approach." Id. at 266.


31 See Cook, 49 F.3d at 264.

32 Id.

33 See id.; see also FED. R. CIV. P. 23(e).
Cook waived any claim for attorneys’ fees but sought to recover $350,000 in expenses, which would have left just $150,000 for distribution to the class. Judge Rovner disapproved this allocation of the proceeds, observing that the expenses were inflated—and suspect as well, because much of the work for which reimbursement was claimed had been done by firms in which Cook or his former wife had an ownership interest. Judge Rovner concluded that the combination of unusually high expenses and self-dealing was intolerable and curtailed the award accordingly. Both sides appealed, but before any decision on appeal was made, another settlement was reached. 

[The settlement] called for both sides to dismiss their appeals, for the district court to vacate its opinion (which had been highly critical of Cook’s ethics and performance), and for the district court to approve the original settlement. The agreement, which the district court entered as a judgment, provided: “Plaintiffs’ counsel is hereby awarded statutory costs of $128,705.68”, the same amount Judge Rovner originally had approved.

Chicago then disbursed the funds. Cook remitted $150,000 to the class members, keeping $350,000 for himself. When she found out what Cook had done, Judge Rovner was appalled. She ordered Cook to pay the residue, and when he did not pay she held him in contempt of court.

The Seventh Circuit affirmed the decision, rejecting Cook’s procedural and substantive defenses. Cook’s procedural defense was that Judge Rovner had not afforded him a proper hearing. “Cook’s substantive defense was that he kept the $350,000 not under the court’s order but under contingent-fee contracts with the plaintiffs, contracts that entitled him to full reimbursement for costs.” Responding to these arguments, the Seventh Circuit reached the conclusion “that Judge Rovner was entitled to find that she had never been notified of these agreements.” Both Judge Rovner and

34 Cook, 49 F.3d at 264.
35 See id.
36 Id. (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1021 (7th Cir. 1991)).
37 See Alexander, 927 F.2d at 1025.
38 See id.
39 Cook, 49 F.3d at 264 (referring to Cook’s substantive defense in the Alexander litigation).
40 Id.
the Seventh Circuit found that when Cook "disagrees with the Court's rulings, [he] believes [he] has the right to ignore them." At the conclusion of the Seventh Circuit opinion affirming the contempt order, the court said:

This opinion sets forth in some detail the unprofessional manner in which Cook Partners has prosecuted this litigation. Although many of the issues raised by Cook are frivolous, we see no point in heaping further sanctions on a lawyer and law office facing large contempt fines. However, a copy of this opinion will be submitted to the Illinois Attorney Registration and Disciplinary Commission with a suggestion that it investigate the conduct of Rufus Cook and Cook Partners in this litigation. Circumventing and ignoring district court orders in the manner described above will not be condoned.

The Illinois Attorney Registration and Disciplinary Commission (ARDC) opened an investigation and compiled a large record. But it did not reach a decision. Cook objected to any consideration of Judge Rovner's findings, and the ARDC issued a subpoena requiring Judge Rovner to appear and submit to cross-examination about the proceedings in her court and the rationale for her findings. Not surprisingly, she declined, observing that federal judges speak through their opinions, and that their mental processes are not subject to examination. The ARDC's hearing panel then excluded from evidence the district court's findings of fact and conclusions of law, its opinions, and even the transcript of the proceedings in the federal case. Following this decision, the Administrator of the

\[\text{References:}\]

\[\text{See id. (alterations in original) (quoting Alexander, 927 F.2d at 1022).}\]

\[\text{Alexander, 927 F.2d at 1025. The ARDC inquiry sparked by this 1991 referral was not the first time the ARDC investigated Cook's conduct in the class action case before Judge Rovner. In responding to the June, 1994 show cause order leading to his two year suspension, Cook noted: "Even before the Court's 1991 opinion, the ARDC had previously investigated the matters involved in the [Park District] litigation and had decided not to issue a complaint with respect to those matters." Respondent's Motion for Clarification (June 23, 1994) at 3, Cook (No. D-217).}\]

\[\text{It was not unreasonable for the Seventh Circuit to suppose the ARDC would demonstrate reciprocal cooperation by deferring to Judge Rovner's findings of misconduct and only independently considering the nature of any sanctions. In addition, Cook's stipulation before the ARDC on the misconduct in the federal district court was reasonably foreseeable to the Seventh Circuit. See, e.g., People v. Primavera, 904 P.2d 883 (Colo. 1995) (accepting hearing board's recommendation that a former district attorney who stipulated to failing to pay court-ordered child support in disciplinary proceeding after marriage dissolution could be publicly censured).}\]
ARDC withdrew the complaint, and the inquiry [ended]. The failure of the ARDC to complete its investigation led [the Seventh Circuit] to open a disciplinary proceeding of [its] own. [It] received the evidentiary record compiled by the ARDC and [heard] oral argument. Cook was offered an opportunity to make a statement but declined to do so.43

In its decision, the Seventh Circuit noted that there were three main reasons it traditionally refers incidents of federal litigation misconduct by lawyers to state bar officials. First, state “disciplinary controls” have better “means to investigate charges of misconduct and resolve factual disputes”;44 second, the state bar has a “superior perspective” on a lawyer’s pattern of conduct,45 and third, the state bar should reciprocate the “principles of cooperative federalism”46 which lead federal courts to defer to state judgments on lawyer competence. Here, however, the Seventh Circuit found cooperation had not been reciprocated because the ARDC’s insistence on Judge Rovner’s appearance as a witness was tantamount to its “taking the position that it will disregard misconduct in federal court.”47

The Seventh Circuit observed that reciprocal cooperation by the ARDC would have entailed giving “close consideration” to the possible binding effect of the federal findings that Cook defrauded a district judge and bilked his clients.48 It strongly hinted that upon such review, the ARDC should find that it is not free “to decline to respect federal judgments.”49

In considering its own possible discipline of Rufus Cook in 1995, the Seventh Circuit indicated surprise “that the district court, where the misconduct occurred, [had] never opened its own disciplinary proceeding.”50 The court went on to note that the acts of contempt before the district judge had occurred in 1989 and 1990;51 Cook had repaid the class members;52 and that there was “no indication that Cook [had] misbehaved in any state or federal tribunal since 1990.”53 The court also noted that Cook continued to defend his

43 Cook, 49 F.3d at 265 (citations omitted).
44 Id.
45 Id.
46 Id.
47 Id. at 266.
48 Id.
49 Id.
50 Id. at 267.
51 See id.
52 See id.
53 Id.
conduct, though the court opined that "[o]nly theft from a trust fund would be a clearer breach of an attorney's fiduciary duty to his client" than the breach committed by Cook during the case before Judge Rovner. This demonstrated that Cook's "clients remain[ed] in need of judicial protection." The Seventh Circuit further noted that in the past, it had "suspended from practice lawyers who fell behind in filing briefs or who did not exert themselves in protecting their clients' interests." The court concluded that "[i]t would be incongruous to permit a lawyer who has diverted funds from clients to himself to remain in good standing, while mere lassitude leads to suspension from practice." As a result, the court suspended Cook from membership in the Seventh Circuit bar, although he was permitted to apply for reinstatement after two years if he could then demonstrate that he is "in good standing in all other jurisdictions where he is admitted to practice.

B. What the Seventh Circuit Did Not Say

1. Barriers to Reciprocal Cooperation by the ARDC

While the Seventh Circuit chastised the ARDC for failing to give "close consideration" to the binding effect of Judge Rovner's finding that Cook defrauded a district judge and bilked his clients, the Seventh Circuit itself failed to consider closely the reasons the ARDC paid little attention to preclusion principles. The ARDC's inattention seemingly was prompted by the Illinois Supreme Court Rules which limit the Hearing Board in the "disciplinary control" system to deferring conclusively to only a few types of earlier judicial findings. One rule states that "[i]n any hearing conducted pursuant to this rule, proof of conviction is conclusive of the attorney's guilt of the crime." In cases where an attorney has been convicted of a crime involving fraud or moral turpitude, the rule requires the Administrator to petition the court "praying that the attorney be suspended

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54 Id.
55 Id.
56 Id.
57 Id. at 267-68.
58 Id. at 268.
59 Id. at 266.
60 ILL. SUP. CT. R. 761(f).
from the practice of law until further order of the court.\textsuperscript{61} The court then issues "a rule to show cause why the attorney should not be suspended \ldots until the further order of the court."\textsuperscript{62} After the court considers "the petition and the answer to the rule to show cause, the court may enter an order, effective immediately, suspending the attorney from the practice of law until the further order of the court."\textsuperscript{63} Another rule states that an Illinois-licensed attorney who is also licensed in another state and who "is disciplined in the foreign State, \ldots may be subjected to the same or comparable discipline in [Illinois], upon proof of the order of the foreign State imposing the discipline."\textsuperscript{64}

Because Cook was neither convicted of a crime involving fraud or moral turpitude nor disciplined in a foreign state, the Hearing Board in the ARDC proceeding felt it was required to conduct a new hearing on his conduct in federal court.\textsuperscript{65} This hearing had to be conducted in accordance with the Illinois Code of Civil Procedure, Illinois Supreme Court Rules, and the rules of the ARDC; at the conclusion, "the standard of proof" would be "clear and convincing evidence."\textsuperscript{66} Because the standard of proof in the civil contempt proceeding before Judge Rovner also was clear and convincing evidence,\textsuperscript{67} the Hearing Board in the ARDC proceeding should have

\begin{itemize}
\item \textsuperscript{61} Id. R. 761(b). For a crime not involving fraud or moral turpitude, upon notice to the Administrator ("the principal executive officer of the registration and disciplinary system," \textit{id. R. 751(e)(1))}, the matter is referred to the Inquiry Board, which upon "investigation and consideration" votes "to dismiss the charge, to close an investigation, or to file a complaint with the Hearing Board." \textit{Id. R. 753(a)(3).} Seemingly, should a complaint result from the events leading to a conviction of a crime not involving fraud or moral turpitude, the Hearing Board would consider proof of conviction under the Code of Civil Procedure, the rules of the Illinois Supreme Court, and the rules promulgated by the ARDC. See \textit{id. R. 753(c)(5)).
\item \textsuperscript{62} Id. R. 761(b).
\item \textsuperscript{63} Id. R. 763.
\item \textsuperscript{64} The ARDC prosecutor argued to the Hearing Board that its office was "not attempting to use a civil judgment to estop Respondent from contesting the disciplinary charges at hearing." Administrator's Response to Respondent's Motion to Dismiss Counts II and III of the Complaint at 4, \textit{in Volume III of Appendix to Respondent Rufus Cook's Memorandum of Law in Response to the Court's Orders to Show Cause & Request for a Formal Hearing in the Seventh Circuit at C39, Cook (No. D-217) [hereinafter Vol. III]}. The ARDC prosecutor did urge that papers from the federal court case were admissible evidence in the disciplinary proceeding. See Respondents' [sic] Memorandum of Law in Support of His Motion to Exclude Documents Containing Statements Made By the Honorable Ilana Diamond Rovner from Evidence at the Hearing at 3 \textit{in Vol. III, supra}, at C501.
\item \textsuperscript{65} ILL. SUP. CT. R. 753(c)(5)-(6).
\item \textsuperscript{66} See, e.g., Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (stating that to find a party in contempt of court, the complaining party must show "by 'clear and convincing' evidence" that the opposing party disobeyed the court's order). This standard in contempt
been able to consider her findings if permitted by Illinois statute or rule. In proceeding upon the complaint against Cook, however, the ARDC Hearing Board did not find such consideration was required.\(^{68}\) Perhaps such deference was deemed foreclosed as it was not included within the Illinois Supreme Court Rules on criminal conviction and foreign state discipline. Or perhaps, even if issue preclusion was available, it was deemed not to fit under Illinois law. As the Seventh Circuit noted, “Illinois does not use offensive nonmutual issue preclusion in attorney disciplinary proceedings.”\(^{69}\) Finally, while the Hearing Board was aware that “state tribunals must give federal judgments the same force that federal courts give them,”\(^{70}\) it may have determined, as the Seventh Circuit speculated, that “subsidiary issues” in federal judgments need not be respected by state courts and that the findings as to Cook’s conduct involved such “subsidiary issues.”\(^{71}\)

A closer look at the Hearing Board’s failure to consider the federal judgment on Cook’s contempt reveals several major barriers to the types of reciprocal cooperation desired by the Seventh Circuit. Incidentally, reciprocity should occur not only between the ARDC and federal courts, but also between the ARDC and Illinois state courts, between the ARDC and state courts outside of Illinois, and between the ARDC and other disciplinary tribunals, such as administrative agencies. One major barrier to reciprocity in cases like *Cook* is that not all of the available professional norm-enforce-

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\(^{68}\) *See In re Cook*, 49 F.3d 263, 265 (7th Cir. 1995).

\(^{69}\) *Id.* at 266 (citing *In re Owens*, 532 N.E.2d 248, 252 (Ill. 1988) (holding that “factual findings” based on clear and convincing evidence “in a civil fraud action” may not form the basis for collateral estoppel against attorneys in ARDC proceedings, since “[the risk of unfairly imposed discipline is too great, and the economy to be gained too minimal”]).

\(^{70}\) *Id.* See RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) (“Federal law determines the effects under the rules of res judicata of a judgment of a federal court.”).

\(^{71}\) *Cook*, 49 F.3d at 266. The Seventh Circuit itself noted “there remains some question about the extent to which states must respect federal decisions about subsidiary issues.” *Id.*
Disciplinary systems for lawyers are to be respected equally by a state's disciplinary body.\(^{72}\) While the results as well as the underlying findings in foreign state disciplinary control systems regarding the conduct of an Illinois-licensed lawyer generally were respected,\(^{73}\) the results in either a liability control system or an institutional control system outside of Illinois regarding the conduct of an Illinois-licensed lawyer were not respected.\(^{74}\) Why is deference accorded to a foreign state's disciplinary action, but not to the judgment of a foreign state or federal court, in a lawyer liability civil action or in a lawyer sanction proceeding? The answer to this question is unclear. Seemingly, Cook has comparable incentives, tools, and hearing opportunities when charged with contempt, legal malpractice, or the violation of a court rule, as when charged by a traditional disciplinary agency with breaching a professional conduct rule—at least in settings where the burden of proof remains clear and convincing evidence.\(^{76}\) While "courts must be more cautious in allowing collateral estoppel to be used offensively than in allowing

\(^{72}\) This can be seen in the varying levels of deference the Illinois Supreme Court Rules afford to different professional enforcement systems. For example, if an Illinois attorney is convicted of a crime in Illinois, only "proof" of the conviction is sufficient to justify the attorney being disciplined. See Ill. Sup. Ct. R. 761(f). And, if an attorney is subject to discipline in another state he also may be subject to discipline by the State of Illinois upon a showing of "proof of the order of the foreign State imposing the discipline," unless the procedures employed violated due process principles. Id. R. 763. Yet, the high court rules are silent with regard to deference accorded to other adjudicatory proceedings involving issues of attorney misconduct.

\(^{74}\) The situation is different outside of Illinois. See, e.g., General Rules U.S. District Court, Eastern and Southern District of New York 4(d) (providing that discipline imposed by another state or federal court may support an order of discipline), reprinted in McKinney's New York Rules of Court: State and Federal 1996 at 789 (West 1996); Iowa Sup Ct. R. 118.7 (providing that in state disciplinary proceeding, issue preclusion may be used from a civil judgment where the burden of proof underlying the judgment is greater than preponderance of the evidence); see also Bar Counsel v. Board of Bar Overseers, 647 N.E.2d 1182, 1185 (Mass. 1995) (concluding that offensive collateral estoppel is appropriate in some bar discipline proceedings based on earlier civil judgments).

\(^{76}\) While the burden of proof in legal malpractice or in civil rule violation proceedings usually is not clear and convincing evidence, that standard generally applies in civil contempt proceedings. See Shepherd v. American Broad. Co., 62 F.3d 1469, 1475-78 (D.C. Cir. 1995) (discussing the punitive nature of inherent power sanctions and the social utility of using a heightened standard of proof). Aside from contempt, other inherent power sanctions, such as awards of attorneys' fees and the imposition of fines, may also require clear and convincing evidence of lawyer misconduct as they too may be fundamentally punitive or penal. See id.
it to be used defensively, it many of the pertinent reasons for caution are inapplicable to most ARDC disciplinary proceedings. A second major barrier to reciprocal cooperation between the ARDC and the federal courts is the lack of evidentiary standards guiding the Hearing Board’s consideration of certain earlier norm-enforcement proceedings. For example, where the burden of proof in a lawyer malpractice action or sanction proceeding is preponderance of the evidence, conclusive effect cannot be given their findings by the Hearing Board because it employs a clear and convincing evidence standard. It does not follow, however, that the Hearing Board should not consider any part of the malpractice or sanction case. In the ARDC hearing, when Judge Rovner declined to honor the Hearing Board subpoena, her findings, conclusions, and opinions, as well as the transcript of proceedings were excluded from evidence. The relevant Illinois Code, Supreme Court rules and ARDC rules should provide an avenue for consideration of these federal court materials as evidence, even if they are not conclusive.

2. Barriers to Cooperation Between Federal Disciplinarians

Along with its disappointment in the ARDC hearing, the Seventh Circuit also expressed dismay over the district court’s response to Cook’s misconduct. Upon finding that Cook defrauded the court and

78 In re Owens, 532 N.E.2d 248, 252 (Ill. 1988).
77 Illinois likely could not have joined as a party in Cook because no other inconsistent determination of the same issue existed, and it was foreseeable that federal litigation misconduct would be referred to, and considered by, the Illinois ARDC. See Restatement (Second) of Judgments §§ 28-29 (1982). It should be noted that when the ARDC Hearing Board deemed inadmissible Judge Rovner’s opinions regarding Cook’s contempt, it said that if Cook “had known that Judge Rovner’s remarks about him... would be presented at a later date in a disciplinary matter, he would have been placed in the awkward position of wanting to cross-examine Judge Rovner about her remarks... possibly to the detriment of his clients!” Order Excluding Documents and Testimony at 2-3 in Vol. III supra note 65, at C509-10 [hereinafter ARDC Order]. The ARDC Order did not explain why the Seventh Circuit’s referral to the ARDC in Alexander was not foreseeable to Cook or why an apparent conflict of interest between Cook and his clients should not have led Cook to cease representing the clients. In Florida, the high court resists the use of offensive collateral estoppel in bar discipline proceedings where an administrative agency previously has disciplined an attorney because the “primary purpose” of the agency “is not to ensure the qualification, supervision or regulation of lawyers.” Florida Bar v. Tepps, 601 So.2d 1174, 1175 (Fla. 1992).
78 See Ill. Sup. Ct. R. 753(c)(6).
79 See In re Cook, 49 F.3d 263, 265 (7th Cir. 1995). While the Hearing Board did mention the possibility that certain portions of the documents could be purged while the balance could be admitted into evidence, it strongly hinted that not much would be left in the “balance” because all materials “prejudicial in nature” to Cook would be excluded. See ARDC Order, supra note 77, at C509-10.
bilked his clients, the Seventh Circuit called it "surprising... that
the district court... never opened its own disciplinary proceed-
ing."\textsuperscript{80} But what was Judge Rovner or her colleagues to do? What
disciplinary proceedings could have been opened? A variety of
approaches to Cook's misconduct were available to the district court,
but guiding standards were lacking.\textsuperscript{81} The Seventh Circuit itself
said nothing of such choices, or of the techniques for facilitating
cooperation between federal district judges and the courts they serve,
or of better coordination between federal trial and appellate courts.
Also, the court said nothing about the processes for cooperation in
existence in 1989 and 1990, when the contempt before District Judge
Rovner occurred, or about the processes in place in 1995, when the
Seventh Circuit itself suspended Cook based on the 1989-1990
contempt.\textsuperscript{82}

In 1989 and 1990, the U.S. District Court for the Northern District
of Illinois had in place a series of local rules entitled "Discipline of
Attorneys."\textsuperscript{83} One rule recognized that the court's "disciplinary
powers" were "vested in its Executive Committee."\textsuperscript{84} This commit-
tee was then charged with overseeing the investigation, prosecution,
and adjudication of lawyer misconduct matters. Such matters
included, but were not limited to, acts occurring during litigation
before the district court.\textsuperscript{85} But the rules also expressly recognized
that lawyer misconduct in the district court could prompt other
responses, including referrals to an "appropriate state or local
disciplinary body"\textsuperscript{86} or the exercise of "the traditional powers of
each [district] judge to maintain decorum, dignity and integrity in
the courtroom and to compel obedience to its orders through the
contempt power."\textsuperscript{87} The rules did not elaborate on the nature of
these "traditional powers" or on the coordination of all the possible
responses to lawyer misconduct. These particular rules were also
quite comparable to earlier local court rules, including a rule on

\textsuperscript{80} Cook, 49 F.3d at 267.
\textsuperscript{81} See infra notes 119-21 and accompanying text (discussing other disciplinary approaches).
\textsuperscript{82} See Cook, 49 F.3d at 268.
\textsuperscript{83} U.S. DIST. CT. N.D. ILL. LOCAL GEN. R. 3.50-3.59, reprinted in ILLINOIS CODE OF CIVIL
PROCEDURE & RULES OF COURT: STATE AND FEDERAL 602-05 (West 1989) [hereinafter 1989
N.D. GENERAL RULES].
\textsuperscript{84} 1989 N.D. GENERAL RULE 3.51(a), supra note 83.
\textsuperscript{85} See id. R. 3.55.
\textsuperscript{86} Id. R. 3.55(a).
\textsuperscript{87} Id. R. 3.50.
discipline of attorneys adopted in April of 1974. Thus, Judge Rovner was left on her own to determine what forms of "traditional powers" she might exercise regarding Cook's conduct and in what form, if any, she should forward her concerns and findings about Cook to the court's Executive Committee or to the Illinois ARDC.

At the time of the Seventh Circuit's disciplinary action against Cook in early 1995, the district court's local rules entitled "Discipline of Attorneys" significantly differed from the rules in effect in 1989-1990. In 1991, the Northern District's rules on the disciplinary process were altered when the court's new Rules of Professional Conduct were adopted. New local rules addressed Executive Committee duties regarding disciplinary proceedings against lawyers convicted of crimes, lawyers disciplined by other federal or state courts, and lawyers who engaged in actual or alleged misconduct and who had not been subjected previously to such criminal or disciplinary proceedings. Under the 1991 rules, Cook was a lawyer who apparently engaged in actual misconduct, in that he had been found to have committed acts of contempt before Judge Rovner, but he had not been subjected to earlier related criminal or disciplinary proceedings elsewhere. The 1991 rules did not expressly require Cook or the clerk of the Northern District or anyone else to report the actual misconduct within the contempt finding to the Executive Committee or to the Illinois ARDC. In addition, the rules did not

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89 From 1989 through 1990, attorneys admitted to practice law in the Northern District were obliged to follow "the provisions of the Code of Professional Responsibility of the American Bar Association." 1989 N.D. General Rule 3.54(b), supra note 83. DR 1-103(A) of the Model Code seemingly mandated that lawyers report knowledge of other lawyers' misconduct. Model Code of Professional Responsibility DR 1-103(A) (1980). But such reporting duties only came to the attention of most Illinois lawyers with the decision in In re Himmel, 533 N.E.2d 790 (Ill. 1988), involving a lawyer's misconduct toward a client, rather than a lawyer's violation of a court order.
93 See id. R. 3.53(A).
94 Rufus Cook did have a duty to report to the Northern District the "public discipline" imposed by another court, while the clerk had duties to gather certified copies of criminal convictions and public discipline elsewhere. See id. R. 3.51(A), 3.59(A)-(B). Rule 8.3(a) of the Rules of Professional Conduct of the U.S. District Court for Northern District of Illinois man-
require the Executive Committee, upon learning of it, to view Judge Rovner's findings as conclusive of actual misconduct in the same way that earlier criminal convictions and disciplinary proceedings establish facts conclusively. Judge Rovner and others may have chosen to refrain from notifying the district court's Executive Committee (or other norm enforcers, including those in other states and courts where Cook was licensed to practice law) because the contempt proceedings in the Northern District could have been viewed as sufficient vindication of the public interest in regulating Cook's professional conduct. Also, the proceedings could have been viewed, in part, as a form of "vigilante discipline" which had awakened Cook to concerns about his legal practice, and as an "institutional control" response to misconduct which eliminated the need, in a "multi-door" approach, for utilizing any "disciplinary control."

In expressing surprise that Judge Rovner and her colleagues failed to open "disciplinary proceeding[s]," the Seventh Circuit not only failed to articulate relevant techniques and guiding standards, but also failed to explain why it delayed implementing its own Seventh Circuit disciplinary proceeding until 1994, after the termination of the ARDC inquiry triggered by the Seventh Circuit referral in 1991. When the court did refer Cook to the ARDC in 1991, it noted that there was "no point in heaping further sanctions on a lawyer and law office facing large contempt fines[,]" suggesting that the remedies in contempt, together with any ARDC action, would constitute sufficient norm-enforcement. Perhaps its own disciplinary proceeding

dates that lawyers report misconduct involving certain criminal acts or "dishonesty, fraud, deceit or misrepresentation" to authorities "empowered to investigate or act." This responsibility was infrequently assumed in Illinois, even after In re Himmel, 533 N.E.2d 790 (Ill. 1988). See, e.g., Jeffrey A. Parness, Disciplinary Referrals Under New Federal Civil Rule 11, 61 TENN. L. REV. 37, 52-54 (1993) (noting that surveys in 1992-1993 indicate few Rule 11 violations in federal courts reported to state disciplinary agencies). Compare the more explicit reporting duties in California, where courts since 1990 are required to notify state disciplinarians of "any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)." CAL. BUS. & PROF. CODE § 6086.7(c) (Deering 1993).

But cf. 1995 N.D. GENERAL RULE 3.50(C), supra note 90 (stating that a "certified copy of a judgment of conviction of any attorney for any crime shall be conclusive evidence of the commission of that crime"); id. R. 3.51(E) (stating that in most instances "a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct"); id. R. 3.53(C) (allowing for an "evidentiary hearing" for other allegations of misconduct).

In re Cook, 49 F.3d 263, 267 (7th Cir. 1995).

Id. at 266 (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991)).
initiated in 1994 was deemed necessary to supplement the district court contempt proceeding, after the ARDC failed to supplement the proceeding and the large contempt fines were removed.98

But why refer Cook to the ARDC in 1991, fail to open simultaneous Seventh Circuit disciplinary proceedings against him, and then fail to suggest that the district court act against Cook? The answer cannot be "reciprocal cooperation," because the Seventh Circuit and the Northern District Executive Committee just as easily could have respected Judge Rovner's findings in a 1991 federal disciplinary proceeding, as the Seventh Circuit expected the ARDC to respect her findings upon the 1991 referral. By contrast with such federal disciplinarians, the ARDC likely did have a "superior perspective" on Cook's pattern of conduct and a better "means to investigate" his entire professional record.99 But why should discipline by the federal courts, limited to federal court misconduct (which had already been determined so that issue preclusion principles probably applied), await Illinois ARDC proceedings? No good reason exists for this state of affairs. As the Seventh Circuit noted in 1995, lawyers who only "fell behind in filing briefs" and otherwise engaged in "mere lassitude" were routinely being suspended from practice in that court.100

III. COORDINATING NORM-ENFORCEMENT SYSTEMS FOR LAWYER MISCONDUCT DURING FEDERAL LITIGATION

The benefits of coordinating norm-enforcement systems for lawyer misconduct during federal litigation are self-evident. Yet such coordination was lacking throughout the Cook matter, seemingly because the Seventh Circuit failed to articulate techniques and standards for better coordination in the earlier Alexander proceeding. Exploration of such techniques is particularly appropriate today, as there are now serious debates and reform efforts aimed at expanding federal professional norms governing the conduct of state-licensed lawyers in the federal courts.101

98 See id. (explaining that the ARDC's failure to complete investigations on Cook, and its response to the matter, caused the Seventh Circuit to consider the "continuing vitality of [their] practice[]" of referring disciplinary matters to the ARDC, thus deeming it necessary to open their own disciplinary proceeding).

99 Id.

100 Id. at 267-68.

101 See Allen, supra note 16, at 201 (detailing the Justice Department's goal of regulating the "No-Contact Rule" which would provide uniform regulations for government attorneys'
New techniques for coordinating norm-enforcement systems for lawyer misconduct during federal litigation can be explored by considering how the responses to Cook’s conduct by the ARDC, the district judge, the district court, and the Seventh Circuit could have been coordinated better.

For the Seventh Circuit, cooperation between norm-enforcement systems in Cook chiefly entailed the coordination of two systems. One is the “institutional control” system, which the district judge used in sanctioning Cook for contempt. The other is the “disciplinary control” system of the Illinois Supreme Court, the U.S. District Court for the Northern District of Illinois, and the Seventh Circuit Court of Appeals, each of which could examine whether to continue Cook’s license to practice law. The Seventh Circuit neither addressed Judge Rovner’s choice to proceed against Cook in contempt as the only vehicle for “institutional control,” nor did it address other weapons that may have been available in the “institutional control” arsenal of her district court. The court also did not address whether any of these other weapons should have been employed together with, or instead of, contempt. Before exploring the relationships between the contempt proceeding and the possible license-related “disciplinary control” proceedings before the Illinois Supreme Court, the district court, and the Seventh Circuit, other weapons in the district court’s “institutional control” arsenal will be examined first, as their effective coordination should facilitate the achievement of enhanced cooperation among norm enforcers.

A. “Institutional Controls” in the Federal District Court

“Institutional controls” enforce professional norms for lawyers where the governmental institutions in which the lawyers practice (e.g., courts and agencies), undertake to uncover and sanction internal lawyer misconduct. Because their reach is limited, however, “the substantive jurisdiction of these institutional enforcement officials is likely to be confined to the area in which the institution operates. For example, SEC officials cannot discipline lawyers outside of the securities area.” Thus, it seems that an

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conduct during criminal and civil investigations, applicable to both state and federal courts); see generally Judicial Conference Report, supra note 17, at 370 (suggesting options for long-term reform, one of which is establishing a uniform national set of rules governing attorney conduct in federal courts).

102 See Wilkins, supra note 1, at 807.
103 Id. at 808.
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行政法官在SEC的听证会中，可以主要关注律师的不当行为。然而，“机构控制”可以有效解决律师的不当行为。该机构可以快速而经济地应对，因为执法机构通常是“直接观察律师不当行为的”。

“机构控制”允许在聆讯的安排和惩罚的时机上具有灵活性，且该机构通常包含负责执行的官员，他们“参与了与律师的持续关系”。这允许执法机构通过亲身观察律师的行为。

在Cook的不当行为最初发生的联邦地方法院，以不同的方式实施“机构控制”来对律师的不当行为进行制裁。例如，涉及违反刑事规范的，如违反起诉或发现规则，北方地方法院法官可以在案件中立即对不当行为进行制裁。这些规范执行程序（以及适用的规范本身）在联邦规则、判例法和法院裁决中均有定义。法官Rovner仅通过她的法院命令的违反进行规范执行。

如前所述，法院的执行委员会负责“对律师的纪律”。Cook的违反也可能会触发执行委员会的“机构控制”响应。在许多方面，这种执行委员会的“机构控制”响应是对律师不当行为的制裁。

104 See id. at 807-08 (explaining that some federal administrative agencies may request that sanctions be imposed on lawyers who have not properly advised clients about their duties under certain "regulatory regimes").

105 Id. at 808.

106 Id.

107 See, e.g., FED. R. CIV. P. 11(c) (pleadings and motions); id. R. 37 (discovery). Incidentally, efforts to unify norm-enforcement procedures for all federal civil rule violations have failed. See id. R. 11(d) (stating that pleading standards are distinct from discovery standards).


109 See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (noting that aside from contempt, there is comparable inherent authority over litigants and attorneys to achieve order and expedition).

110 See, e.g., id. at 764 (stating that the contempt sanction is the "most prominent" exercise of the federal courts' inherent authority).

111 See supra text accompanying notes 83-85.
before a judge of the Northern District parallels the response to the same misconduct by an agency within a "disciplinary control" system, such as the Illinois ARDC.\footnote{For example, both bodies can, and in 1989-1990 could, suspend a lawyer from the practice of law for certain misconduct during litigation in a federal court. See, e.g., 1989 N.D. GENERAL RULES 3.55(a), 3.56(f), supra note 83 (providing that Executive Committee disciplinary proceedings can be initiated upon receipt of "a report of professional misconduct" and can lead to disbarment, suspension or censure); 1995 N.D. GENERAL RULE 3.52(A), supra note 90 (providing that the Executive Committee receives referrals of attorney misconduct or allegations of misconduct where discipline might be warranted); \textit{see also} ILL. SUP. CT. R. 751(a), 771 (providing that disciplinary proceedings are supervised by the ARDC and may lead to disbarment, suspension or censure where the conduct violates professional responsibility norms, brings the legal profession into disrepute, or tends to defeat the administration of justice).} Yet, unlike the Illinois ARDC and other "disciplinary control" agencies, when focusing on lawyer misconduct which occurred before one of its district judges, the Northern District's Executive Committee is not an independent body acting under the supervision of another court.\footnote{See \textit{supra} text accompanying notes 83-85 (stating that the Executive Committee is vested with "disciplinary powers" to adjudicate matters of misconduct in the district court system).} The Executive Committee can act on an earlier criminal conviction or disciplinary order imposed by another court, where its conduct is part of a "disciplinary control" system, and the Executive Committee can discipline a lawyer licensed by the court for violating the court's own general norms in a case pending before a judge of the court.\footnote{See 1995 N.D. GENERAL RULE 3.50-3.52, \textit{supra} note 90.} There, such disciplinary action is a part of the Northern District's "institutional control" system. The Northern District's norms in such a disciplinary action have changed significantly since 1989-1990. Misconduct triggering such Executive Committee action prior to 1991 typically involved the enforcement of the norms found in the A.B.A. Code of Professional Responsibility,\footnote{See Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 214 (N.D. Ill. 1975), rev'd on other grounds, 532 F.2d 1118 (7th Cir. 1976); \textit{see also} 1989 N.D. GENERAL RULE 3.54(b), \textit{supra} note 83 (providing that disbarment is the sanction for acts of professional misconduct such as fraud, deceit, malpractice, or failure to abide by the provisions of the A.B.A. Code of Professional Responsibility).} since 1991, the relevant norms are the court's own independently developed Rules of Professional Conduct.\footnote{See 1995 N.D. GENERAL RULE 3.52(B), \textit{supra} note 90.} These post-1991 rules, like the A.B.A. Code, are more general in nature than the norms applicable in certain types of cases (e.g., federal civil procedure rules on pleading...
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or discovery) or in a particular case as a result of a court order (e.g., contempt).117

When the Seventh Circuit lamented over Judge Rovner’s failure to open “disciplinary proceedings,”118 it may have been concerned with her choice of contempt as the only vehicle employed for “institutional control.” Arguably, she also could have proceeded against Cook under a federal rule,119 her inherent authority,120 or perhaps even a statute.121 Also, the Seventh Circuit may have been concerned that she failed to refer Cook either to her own court’s Executive Committee or to the ARDC. Yet the local rules of the Northern District give its judges no guidance on these matters.122 The Seventh Circuit itself failed to instruct district judges on how to blend “institutional” and “disciplinary controls.” The following sections discuss how lawyer litigation misconduct in a federal district court can be handled better through the coordination of the district court’s “institutional controls,” as well as through better reciprocal cooperation between the district court’s “institutional controls” and the “disciplinary controls” of other courts, both federal and state.

B. Coordination of the Federal District Court’s “Institutional Controls”

In finding good cause to believe Cook made misrepresentations to the court and bilked his clients, and in determining to do something about it, Judge Rovner had available a variety of professional norms and “institutional controls.” Available norms appeared in the

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118 In re Cook, 49 F.3d 263, 267 (7th Cir. 1995).


120 See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (holding that in order to sanction a lawyer by assessing attorney’s fees under a federal court’s inherent powers, the lawyer’s conduct in a case must ‘constitut[e] or [be] tantamount to bad faith’); see also Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 n.11 (3d Cir. 1995) (concluding that the inherent power to sanction attorneys by means other than assessing attorneys’ fees does not require a finding of bad faith).

121 See, e.g., 28 U.S.C. § 1927 (1994) (stating that attorneys may be liable for excess costs and expenses incurred because of unreasonable and vexatious multiplication of proceedings).

122 See supra notes 83-95 and accompanying text.
generally applicable federal rules and statutes,\textsuperscript{123} in her own
court's local rules,\textsuperscript{124} and in her own particular orders directing
Cook to undertake certain conduct.\textsuperscript{125} Some of the norms seemingly
involved duties owed by Cook to his clients and to his clients' adversaries, including both opposing parties and their lawyers. Other norms involved duties owed to Judge Rovner and to the Northern District which had licensed Cook to practice law.\textsuperscript{126} "Institutional controls" for norm-enforcement included \textit{sua sponte} proceedings on sanctions for violation of a rule or statute, referral to her court's Executive Committee for possible discipline, and contempt proceedings for violation of a court order.\textsuperscript{127} As noted, Judge Rovner had little guidance on how to choose among these norms and controls. Of course, these norms and "institutional controls" could have been used together with a referral to a disciplinary control system of another court, including the Illinois Supreme Court and the Seventh Circuit. Each of these two courts also had licensed Cook to practice law, and their own norms addressed conduct occurring outside their own courts and inside the Northern District.\textsuperscript{128} Recall that at the time of Cook's actions in 1989-1990, Judge Rovner was subject to a Northern District local rule which recognized not only the "disciplinary powers" of her court's Executive Committee, but also her own authority to refer lawyer misconduct to state disciplinary bodies and to exercise "traditional powers...to maintain decorum, dignity and integrity in the courtroom and to compel obedience to its orders through the contempt power."\textsuperscript{129}

Judge Rovner's choice to proceed in civil contempt seems quite sensible. As a result, Cook's clients are more likely to obtain the relief that Judge Rovner ordered earlier. And in the contempt

\textsuperscript{124} See supra notes 83-95 and accompanying text (detailing the local rules for the Northern District of Illinois in effect at the time of Cook's misconduct).
\textsuperscript{125} See In re Cook, 49 F.3d 263, 264 (7th Cir. 1995) (describing Judge Rovner's order to Cook to pay the residue of settlement funds to plaintiffs and holding him in contempt when he failed to do so).
\textsuperscript{126} See id. at 264-65 (explaining Judge Rovner's rationale in holding Cook in contempt and whom she sought to protect by her actions).
\textsuperscript{127} See id. (listing the options that Judge Rovner had available).
\textsuperscript{128} See, e.g., ILL. RPC 8.5(a), supra note 3 ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."); see also Fed. R. APP. P. 46(b) (providing that an attorney is "subject to suspension or disbarment" for "conduct unbecoming a member of the bar"); id. R. 46(c) (providing that a court of appeals has the power to take "any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar").
\textsuperscript{129} 1989 N.D. GENERAL RULES 3.51(a), 3.55(a), supra note 83.
process, Cook is pushed to think about his professional duties as an officer of the court and as an agent of his clients.

While it is wise to recognize broad discretion in the federal district judges to choose among available “institutional controls” when faced with lawyer misconduct in a pending case, such controls could be coordinated better and employed more equitably with some new local rule amendments or with some new uniform national policy expressed in generally applicable rules or statutes. Such law reforms would promote more consistent treatment of comparable professional misconduct in a single court. Uniform national policy is preferable, for “a lawyer who has diverted funds from clients to himself [should not] remain in good standing” while another lawyer who has engaged in “mere lassitude” is suspended or disbarred from legal practice. The differing treatment should not be determined by the unguided choices of federal district judges, often aided by the parties who pursue private interest sanctions (such as an award of attorney’s fees) in selecting which norms and norm-enforcement systems to employ. Fortunately, an available avenue presently exists to consider uniform national policy on “institutional controls” within the federal district courts. The U.S. Judicial Conference Committee on Rules of Practice and Procedure is now examining local federal district rules regulating attorney conduct. In refining the “multi-door” approach to controlling lawyer misconduct during federal district court litigation, the Committee should consider not only the substantive norms, but also the available norm-enforcement systems.

In addressing coordination of district court institutional controls, certain premises seem key. First, there are at least two forms of “institutional controls” within every district court; the first is norm-enforcement by a district judge during the case in which the lawyer misconduct occurs. The second form is norm-enforcement outside the setting of a traditional civil or criminal case, usually within a separate disciplinary proceeding before a body of the court’s judges with disciplinary authority delegated by local rule. While typically there is only a single form of separate disciplinary proceeding in each district court, there are usually a variety of “institutional

150 Cook, 49 F.3d at 267-68.
151 Similar criticism of the confusion caused by the differing standards and methods of sanctioning pleading abuses in the federal district courts is found in Parness, supra note 13, at 358-60.
152 See Judicial Conference Report, supra note 17, at 339 (discussing recent local rule revisions).
controls” available to a judge in a single case. “Institutional controls” include proceedings for contempt, rule violations, or statutory violations. These controls vary, in that they may be spurred by either a party’s motion or by the district judge sua sponte, or both.

Second, some “institutional controls” within a case permit only private interest sanctions, that is, sanctions which provide remedies for the litigants harmed by lawyer misconduct during litigation. Some permit only public interest sanctions, that is, sanctions which benefit public, rather than private litigant, interests, while others allow judges a choice of either public or private interest sanctions, or both. Consider the differences between lawyer responsibility for “the excess costs, expenses and attorneys’ fees” resulting from their unreasonable and vexatious multiplication of case proceedings, for a fine or imprisonment upon a summary criminal contempt proceeding, and, for either “reasonable attorneys’ fees and other expenses” of a party or for a penalty payable “into court” for bad pleadings.

Third, in a “multi-door” approach, several “institutional controls” can be employed within a single case simultaneously or consecutively. Parties may call upon a variety of norms and norm enforcers simultaneously for the same or different private interest sanctions due to a single act of lawyer misconduct. Thus, motions regarding rule and statutory violations are regularly joined. With particularly egregious lawyer misconduct, a district judge can order consecutive “institutional control” proceedings. For example, a party’s motion for sanctions may be heard immediately if the relevant attorney misconduct effects substantive legal results, while

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134 See discussion supra Part III.A.
135 See, e.g., 28 U.S.C. § 1927 (1994) (providing that a court may order an attorney to reimburse the opposing party for excessive costs due to unreasonable and vexatious multiplication of proceedings).
136 See 18 U.S.C. § 401 (1994) (providing that the court has the power to punish contempt by fine or imprisonment).
137 See, e.g., FED. R. CIV. P. 11(c)(2) (providing that the court may order an attorney who has violated the rule to pay sanctions to either the opposing party or the court).
138 See 18 U.S.C. §§ 401, 402, 3691 (providing that the court has the power to punish contempt by fine or imprisonment and that an attorney may request a jury trial if charged with criminal contempt).
139 FED. R. CIV. P. 11(c)(2).
140 See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 767-68 (1980) (affirming the decision of violation of 28 U.S.C § 1927, but rejecting the claim that “costs” include attorneys’ fees, and remanding for determination of violation of FED. R. CIV. P. 37).
other lawyer misconduct may be held over for a separate public interest disciplinary action.\textsuperscript{142}

Fourth, while many federal district courts expressly vest the court's "disciplinary" authority by local rule in their Executive Committee or a similar body of judges,\textsuperscript{143} this disciplinary authority is not fully exclusive. Thus, individual judges within pending cases can also discipline errant lawyers in what might be called "vigilante discipline."\textsuperscript{144} Yet, certain disciplinary sanctions, such as disbarment, i.e., termination of the license to practice law in the court, should be within the sole power of some judicial body or independent agency.\textsuperscript{145}

In taking these premises into account, the U.S. Judicial Conference (Conference) would promote better coordination of the district court's "institutional controls" by surveying, and then comparing, both the available norms and the relevant norm-enforcement systems so that all district judges would become better informed of the available alternatives in the "multi-door" approach. By elaborating on the differences in certain norms and their norm-enforcement systems, as well as by urging the elimination of any irrational differences, the Conference would promote a more uniform, or national, approach to similar instances of attorney misconduct where local tradition, circumstances, and the like, do not warrant district to district

\textsuperscript{142} See In re Tutu Wells Contamination Litig., 162 F.R.D. 46, 81 (D.V.I. 1995) (ordering attorneys to appear at a separate hearing to determine the "nature and extent of sanctions warranted by [the attorneys'] misconduct" where the court found the attorneys had committed discovery violations), opinion clarified by 162 F.R.D. 81 (D.V.I. 1995); see also Mullenix, supra note 6, at 128-29 (urging that federal courts develop a means of separating ethical challenges that affect substantive legal claims and those that are collateral to the underlying legal dispute, with the result that the former type of ethical challenge is heard during the adjudication, while the latter type is referred to an independent federal grievance commission).

\textsuperscript{143} See, e.g., In re Jacobs, 44 F.3d 84, 87, 91 (2d Cir. 1994) (explaining that in the Eastern District of New York, the chief judge of the district court appoints a "board of judges known as the committee on grievances," as well as an advisory panel of attorneys to assist the grievance committee), cert. denied, 116 S. Ct. 73 (1995); see generally Agata, supra note 23 (noting the great variation among district courts).

\textsuperscript{144} Parness, supra note 94, at 69-61 (stating that "serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge presiding in the relevant civil case").

\textsuperscript{145} But see Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 561-64 (Fed. Cir. 1996) (affirming district judge's order permanently and prospectively barring an attorney from appearing before him pro hac vice); In re Maurice, 73 F.3d 124, 126-27 (7th Cir. 1995) (suspending attorney from practice of law in all federal courts within the circuit until certain conditions were met); Kendrick v. Zanides, 609 F.Supp. 1162, 1173 (N.D. Cal. 1985) (ordering attorneys to show cause "why they should not be suspended from practice" after assessing fees and costs under FED. R. CIV. P. 11).
variation. Coordination among a single district court’s varying “institutional controls” would be enhanced if:

1. Exclusive authority was delegated expressly to an independent body within the court, such as its Executive Committee, to disbar or suspend a lawyer from practice before the court, or before any judge of the court, because of litigation misconduct during a case;

2. Proceedings before such a body for possible suspension or disbarment were facilitated by requirements that district judges refer certain instances of lawyer conduct (e.g., egregious misconduct) to the body;\(^\text{146}\)

3. The use of issue preclusion was facilitated in such license proceedings by requiring district judges employing “institutional controls” in addressing lawyer misconduct to undertake certain processes, including mandates on notice, opportunity to be heard, factual findings, and conclusions of law;

4. The body within the district court responsible for license proceedings also was assigned information-gathering duties regarding all lawyers licensed to practice before the court, aided by new reporting duties or options for district judges, lawyers, witnesses and others knowing of their own or some other lawyer’s misconduct of certain types. Standardized reporting forms would make it even easier for the court’s license review body to gain “superior perspective” on a lawyer’s pattern of conduct; and

\(^{146}\) Upon receipt of such referrals, the body would determine whether to proceed itself, or delay its own proceeding pending a referral to a state disciplinary agency, or to some other federal court disciplinary agency, which may already have begun a license review hearing. See Parness, supra note 94, at 59-61 (suggesting that “disciplinary referrals should be guided by the principles that serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge”).
Achieving Reciprocal Cooperation

5. Limits were placed on a lawyer’s ability to eliminate afterward, or avoid beforehand, judicial findings within a case relating to that lawyer’s misconduct during the case.\(^{147}\)

C. Cooperative Federalism Between Federal Courts and State Disciplinary Agencies

The Seventh Circuit determined that it could not condone Cook’s actions in “[c]ircumventing and ignoring district court orders.”\(^{148}\) Therefore, in 1991 the court referred Cook to the Illinois ARDC, without opening its own disciplinary proceeding.\(^{149}\) When the ARDC complaint against Cook was dismissed after Judge Rovner refused to testify, the Seventh Circuit could not employ its rule on reciprocal discipline. The Seventh Circuit lamented that the ARDC action constituted a failure of reciprocal cooperative federalism between Illinois federal courts concerned with a lawyer’s misconduct during federal litigation\(^{150}\) and the lawyer disciplinary agency in Illinois where that lawyer was licensed to practice, especially as the Illinois license allowed the attorney to practice in two additional Illinois federal courts.\(^{151}\) After the ARDC inaction, the Seventh Circuit began its own disciplinary proceeding against Cook for his misconduct in 1989-1990 before Judge Rovner.\(^{152}\) This proceeding, which led to Cook’s suspension, was held before a Seventh Circuit panel of three judges different from the panel that made the referral.\(^{153}\) One judge sat on both panels, however, he authored

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\(^{147}\) While an appeal was pending in the Seventh Circuit, a settlement was reached over the litigation expenses awarded to Cook. The agreement directed “the district court to vacate its opinion (which had been highly critical of Cook’s ethics and performance).” *In re Cook*, 49 F.3d 263, 264 (7th Cir. 1995). Had the opinion not been vacated, the appeals would have been reinstated. *See Alexander v. Chicago Park Dist.*, 927 F.2d 1014, 1020 (7th Cir. 1991).

\(^{148}\) *Alexander*, 927 F.2d at 1025.

\(^{149}\) *See id.*

\(^{150}\) *See id.* at 264 (disciplinary proceeding before Circuit Judges Easterbrook, Ripple and Kanne which resulted in the suspension of Cook’s membership in the Illinois bar); *Alexander*, 927 F.2d at 1015 (referral ordered by Circuit Judges Posner, Ripple and Manion).
neither the opinion which affirmed the finding of contempt, nor the opinion which suspended Cook from practice.\textsuperscript{154}

As noted earlier, Illinois Supreme Court rules were read by the ARDC Hearing Board to require a new hearing to consider the Cook referral by the Seventh Circuit.\textsuperscript{155} If the Hearing Board was correct, the rules also prohibited the ARDC from using as evidence the federal court's findings on Cook's conduct.\textsuperscript{156} Reciprocal cooperative federalism would be enhanced if conclusive, or at least significant, evidentiary status was accorded to the federal court findings of an Illinois lawyer's misconduct in the federal court.\textsuperscript{157} The major rationales offered against such respect seemingly are that "Illinois does not use offensive nonmutual issue preclusion in attorney disciplinary proceedings,"\textsuperscript{158} or perhaps that "subsidiary issues" in federal court judgments need not be respected.\textsuperscript{159}

As noted by the Seventh Circuit, \textit{In re Owens}\textsuperscript{160} is the major Illinois precedent regarding offensive nonmutual issue preclusion.\textsuperscript{161} Yet, Illinois ARDC Hearing Boards should conclude that this case does not preclude them from deferring to findings of lawyer misconduct made by a federal court in later ARDC proceedings. In \textit{Owens}, the Illinois high court ruled that "factual findings based on 'clear and convincing evidence' in an earlier Illinois civil court fraud action, brought by former clients against two lawyers, were not entitled to offensive collateral estoppel effect in a later ARDC proceeding against the two lawyers."\textsuperscript{162} Clearly, Illinois supplied the applicable collateral estoppel law.\textsuperscript{163} Despite this, the Illinois Supreme Court frowned upon relegating the fact-finding function in a lawyer disciplinary proceeding to mechanisms "outside of formal disciplinary proceedings."\textsuperscript{164} When it does so, as when a criminal

\footnotesize{\begin{itemize}
\item \textsuperscript{154} See \textit{Cook}, 49 F.3d at 264 (Judge Ripple concurred in Judge Easterbrook's opinion); \textit{Alexander}, 927 F.2d at 1015 (Judge Ripple concurred in Judge Manion's opinion).
\item \textsuperscript{155} See supra text accompanying notes 60-65.
\item \textsuperscript{156} See supra text accompanying notes 66-69.
\item \textsuperscript{157} See \textit{Cook}, 49 F.3d at 266 (stating that a state "is not free to prefer its internal processes to those of the federal courts and to decline to respect federal judgments").
\item \textsuperscript{158} Id.
\item \textsuperscript{160} 532 N.E.2d 248 (Ill. 1988).
\item \textsuperscript{161} See \textit{Cook}, 49 F.3d at 266.
\item \textsuperscript{162} See \textit{Owens}, 532 N.E.2d at 252.
\item \textsuperscript{163} See \textit{id.} (holding that in Illinois, courts could go beyond the "threshold requirements" for collateral estoppel in their application of offensive collateral estoppel to ensure fundamental fairness to defendants).
\item \textsuperscript{164} Id.
\end{itemize}}
conviction is used in an ARDC proceeding, the high court said that it is more assured that the lawyer "made every reasonable effort to cast doubt on his guilt."\(^{165}\) Also, it can "more confidently rely" on the earlier findings because the burden of proof is "extremely high, higher than is the burden of proof in a disciplinary proceeding."\(^{166}\)

Whatever merit there is in the ARDC not according respect to an earlier Illinois civil court's findings on fraud, two reasons exist why the *Owens* court's rationales are inapplicable to many lawyer misconduct findings in earlier federal court proceedings where the burden of proof is comparable. First, it is federal collateral estoppel law which applies, as federal law determines the res judicata effects of a federal court judgment.\(^{167}\) Second, the Illinois Supreme Court already recognizes that absolute deference must be accorded to earlier findings outside criminal courts, because its reciprocal discipline rule provides that factual findings on lawyer misconduct during foreign state disciplinary proceedings normally should be deemed conclusive by the ARDC.\(^{168}\) No good reason exists why other states' disciplinary proceedings should be respected, but not a federal court contempt proceeding. While a *per se* rule requiring the ARDC to treat as conclusive all federal court findings of lawyer misconduct, regardless of context, may be overly broad,\(^{169}\) deference

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\(^{165}\) *Id.*

\(^{166}\) *Id.* A very different, and more deferential, approach to applying issue preclusion in state disciplinary proceedings to earlier civil fraud findings is found in *Iowa Sup. Ct. R.* 118.7 (stating that issue preclusion may be used where there is a final judgment in a civil case whose burden of proof is greater than preponderance of the evidence). *See* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. D.J.I., 545 N.W.2d 866 (Iowa 1996) (affirming use of *Iowa Sup. Ct. R.* 118.7 to invoke issue preclusion); Bar Counsel v. Board of Bar Overseers, 647 N.E.2d 1182, 1184 (Mass. 1995) (holding that the doctrine of collateral estoppel is appropriate in "bar discipline cases to the same extent that it applies to civil cases").

\(^{167}\) *See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) (stating that Articles I and III of the U.S. Constitution are the source of the federal courts' authority and that "in the absence of some other provision by Congress, the effects of a federal judgment are a legal implication of those provisions"); *see also* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 773, 776-77 (1986) (stating that "[a]fter a federal court adjudicates matters of federal law," uniform federal law will determine whether strangers can use findings offensively or defensively in later state litigation).

\(^{168}\) *See* ILL. SUP. CT. R. 763.

\(^{169}\) For example, the burdens of proof may differ. Many federal institutional controls addressing attorney misconduct, such as *Fed. R. Civ. P.* 11, do not require proof by clear and convincing evidence. Nevertheless, foreign state disciplinary actions founded on less than clear and convincing evidence may still be conclusive in Illinois. *See* ILL. SUP. CT. R. 763; Wolfram, *supra* note 13, at 292 n.47 (demonstrating that a few states use the "preponderance of the evidence" standard in attorney discipline cases"); *see also In re* Friedman, 609 N.Y.S.2d 578, 586 (App. Div. 1994) (holding that due process was not violated when the fair preponderance
should not be foreclosed altogether for such findings. A new Illinois Supreme Court recognizing guidelines that accord conclusive effect to certain earlier federal court lawyer misconduct findings would promote cooperative federalism.

Cooperative federalism also would be promoted if federal court lawyer misconduct findings would be recognized as admissible evidence, though nonconclusive, in later ARDC proceedings. It is hard to imagine that lawyer misconduct constituting contempt involves "subsidiary" issues lightly decided and undeserving of any recognition. While the Illinois Supreme Court Rules directed the ARDC Hearing Board to consider evidence in the Cook inquiry in accordance with the Illinois Code of Civil Procedure, other Illinois Supreme Court Rules, and ARDC Rules, the Hearing Board deemed Judge Rovner's findings inadmissible upon her refusal to testify. Yet it did not explain why certain exceptions to the hearsay rule were not germane and why her findings were otherwise unreliable. It was concerned that employing the findings would deprive Cook of an opportunity to cross-examine Judge Rovner. But

of the evidence is the standard in an attorney disciplinary proceeding, appeal dismissed, 635 N.E.2d 295 (N.Y. 1994), and cert. denied, 115 S. Ct. 810 (1994). Incidentally, the standard of proof in disciplinary cases before the Northern District Executive Committee may be only preponderance of the evidence. See 1995 N.D. GENERAL RULES 3.50, 3.51, 3.53, supra note 90; see also In re Palmisano, 70 F.3d 483, 486-87 (7th Cir. 1995) (finding that the clear and convincing evidence standard used by the Illinois court was as demanding as the federal approach, though the federal approach may require only preponderance of the evidence).

See In re Cook, 49 F.3d 263, 266 (7th Cir. 1995). The Seventh Circuit urged the ARDC to give close consideration to the "subsidiary issues" point when handling subsequent federal court referrals. See id. (citing Burbank, supra note 167, at 791-97). On subsidiary issues, see, e.g., RESTATEMENT (SECOND) OF JUDGEMENTS § 27 cmt. j (1982) ("The appropriate question . . . is whether the issue was actually recognized by the parties as important and by the trier [of fact] as necessary . . . . If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception . . . .").

See Ill. Sup. Ct. R. 753(c)(5)-(6).

See ARDC Order, supra note 77, at C510 (excluding Judge Rovner's remarks because they fell "outside the realm of 'readily verifiable facts which are capable of instant and unquestioned demonstration'" and excluding the "'balance' of the documents as evidence . . . [because] the Hearing Panel question[ed] whether or not the 'balance' of the documents ha[d] any evidentiary value" (quoting May Dept. Stores v. Teamster's Union Local No. 743, 355 N.E.2d 7, 9 (Ill. 1976))).

See id.; cf. In re Friedman, 51 F.3d 20, 22 (2d Cir. 1995) (holding that respondent in disciplinary proceeding who contests earlier finding by another disciplinary agency has no right to an evidentiary hearing, only a right to be heard which should be used to demonstrate by clear and convincing evidence that the earlier agency's procedures were wanting), cert. denied, 116 S. Ct. 1040 (1996); In re Jacobs, 44 F.3d 84, 89 (2d Cir. 1994) (rejecting the claim that "an attorney subject to a state disciplinary proceeding enjoys the full panoply of federal constitutional protections" and that an advisory panel's denial of the attorney's request for an evidentiary hearing did not violate due process), cert. denied, 116 S. Ct. 73 (1996).
it failed to explain in any significant way why an adequate opportunity to challenge Judge Rovner had not been available in the federal court contempt proceeding. Further, it articulated neither the factual issues that would necessitate Judge Rovner’s testimony, nor the special procedures required to receive her testimony.174

Cooperative federalism between Illinois federal courts and the Illinois ARDC also would be promoted if federal court referrals of lawyer misconduct were more standardized. Here again, the U.S. Judicial Conference could help by formulating guidelines. Copies of federal judicial opinions containing findings of lawyer misconduct are not always sufficient to inform state lawyer disciplinary agencies. Recall that in *Cook*, the Seventh Circuit referral constituted an opinion affirming an order finding Rufus Cook in contempt;175 yet the contempt was not the only actual or possible misconduct by Cook during the federal litigation.176 The Seventh Circuit could have aided the ARDC by referring other relevant instances of misconduct which were found by the district or appeals court, along with other useful information, such as the burden of proof employed. An opinion sustaining a lower court order serves many different purposes, but it should be separate from an order explaining a referral of lawyer misconduct to a state disciplinary agency.

Guidelines prompted by a U.S. Judicial Conference inquiry would also be helpful in determining: when federal court “institutional controls” alone would be appropriate to address lawyer misconduct in federal litigation; when referrals to state disciplinary agencies alone would suffice; and when both federal “institutional controls”

174 ARDC order, supra note 77, at C511 (declaring that the federal court findings and other documents are inadmissible unless Judge Rovner is available for a deposition and agrees to testify at a trial on the ARDC charges). In indicating Judge Rovner was not then able to testify, the U.S. Attorney objected on grounds of judicial independence and that the information was available from other sources, however, he did recognize her testimony would be forthcoming if “unusual circumstances” were shown. See Letter from Michael J. Shepard, U.S. Attorney, to Mary Foster, ARDC Counsel (Oct. 12, 1993) in Vol. III, supra note 65, at C496. Cf. Jones v. Clinton, 72 F.3d 1354, 1366 (8th Cir. 1996) (Beam, C.J., concurring specially) (stating that the trial judge can carefully supervise civil litigation involving the testimony of the President, with “maximum consideration” given to the President’s constitutional duties), cert. granted, 116 S. Ct. 2545 (1996).

175 See Alexander v. Chicago Park Dist., 927 F.2d 1014, 1023 (7th Cir. 1991) (affirming the district court’s order and stating that “a copy of this opinion will be submitted to the Illinois Attorney Registration and Disciplinary Commission with a suggestion that it conduct a referral of Rufus Cook”).

176 See id. at 1018-19 (reviewing Judge Rovner’s critical assessment of Cook’s request for litigation expenses). In fact, prior to the referral, the ARDC had already investigated Cook’s conduct in the case before Judge Rovner. See supra note 42.
and state disciplinary referrals should be undertaken. In the *Cook* litigation, for example, neither the Seventh Circuit opinion referring Cook to the ARDC, nor the later Seventh Circuit order suspending Cook from the practice of law, explained why a federal court disciplinary proceeding had to await ARDC inquiry. To limit *ad hoc* decisionmaking, the U.S. Judicial Conference should consider guidelines that would attempt to standardize federal court disciplinary referrals and "institutional control" practices.

**D. Coordination Between Federal District and Appellate Court Disciplinarians**

Finally, aside from the need for better coordination of a trial court's "institutional controls" and better cooperation between federal courts and state disciplinary agencies, *Cook* demonstrates the need for better coordination of inquiries into lawyer misconduct by the federal district and appeals courts.

In 1995, the Seventh Circuit suspended Rufus Cook for his 1989-1990 misconduct in the federal district court, and openly questioned why the district court had not "opened its own disciplinary proceeding."\(^{177}\) The court never explained why it failed to open an appellate court disciplinary proceeding against Cook upon affirming his acts of contempt in 1991, nor did the court explain why it did not refer Cook, in 1991, to the Executive Committee of the Northern District, nor did it consider sanctioning Cook for pursuing a frivolous appeal. Further, the court failed to explain why its own 1994 show cause order on why Cook should not be disciplined\(^ {178}\) included references to the Federal Rules of Appellate Procedure as well as to Seventh Circuit Rule 38. The referenced Federal Rules of Appellate Procedure cover not only "suspension or disbarment"\(^ {179}\) but also "disciplinary action,"\(^ {180}\) while Seventh Circuit Rule 38, which deals with "sanctions on... an attorney as otherwise authorized by law,"\(^ {181}\) seemingly draws authority from Federal Rule of Appellate Procedure 38 to "award just damages and single or double costs to the appellee" for frivolous appeals.\(^ {182}\) Evidently, in 1994 the court

\(^{177}\) *In re Cook*, 49 F.3d 263, 267 (7th Cir. 1995).


\(^{179}\) FED. R. APP. P. 46(b).

\(^{180}\) *Id.*. R. 46(c).

\(^{181}\) 7TH CIR. R. 38.

\(^{182}\) FED. R. APP. P. 38.
was willing to consider, after the ARDC proceeding, not only Cook's suspension or disbarment, but also other forms of discipline and sanctions involving monies to be received by private parties who were compelled to defend against a frivolous appeal pursued by Cook a few years earlier. In its 1995 order, the court did not explain why an award of damages and costs was not forthcoming. Further, in 1995, the court did not address the circumstances under which attorney misconduct in the federal courts should be addressed immediately, either via a sanction awarded to a private party or via "vigilante" discipline (such as a reprimand). Moreover, it did not address how federal trial and appellate court efforts should be coordinated better in the future with regard to attorney misconduct.

U.S. Judicial Conference study and guidance are needed here.

Certain principles should underlie the coordination of federal district and appeals court efforts regarding lawyer misconduct during federal litigation. First, district judges, via a body such as an Executive Committee, should be responsible primarily for traditional lawyer discipline arising out of lawyer misconduct in federal litigation, whether the conduct occurred before an appellate court, a district court, or before a magistrate or bankruptcy judge. Much of the lawyer misconduct in the Article III courts occurs before district judges, and such judges are accomplished hearing providers and fact finders. Circuit-wide disciplinary bodies have some appeal, but calling in lawyers far from home or far from where their alleged misconduct occurred seems too burdensome. District court disciplinary bodies should focus primarily on issues involving licenses to practice law. "Institutional controls," such as vigilante discipline for pleading or discovery abuse, of course, may still be utilized by individual federal appellate judges and by the federal magistrate, bankruptcy and district judges where a "multi-door" approach is warranted. Once suspension, disbarment, and the like are determined at the district court level, reciprocal discipline can occur in the federal appeals court and in other federal adjudicatory settings (and, presumably, in the state high court).

Second, federal district court disciplinary bodies, such as the Northern District Executive Committee, should operate under guidelines setting forth the means by which federal judges and others can report actual and alleged lawyer misconduct. Such guidelines should be part of a uniform federal policy for all district court disciplinary bodies. Upon receipt of reports, standards are needed on the issue preclusion effects of earlier factual findings made by judges who address lawyer misconduct in "institutional
control” settings. Thus, at least upon the affirmance of Cook’s contempt before Judge Rovner, the Northern District Executive Committee should have received a referral of the factual findings underlying the contempt, as well as reports of any other actual or alleged egregious misconduct (e.g., a rule or statutory violation, or conduct unbecoming an attorney).183

IV. CONCLUSION

Spurred by a U.S. Judicial Conference inquiry, there is now serious debate over the appropriate professional norms for lawyers litigating in the federal courts. Unfortunately, little attention has yet been focused on appropriate norm-enforcement systems. As a “multi-door” approach to such professional norm-enforcement is likely to continue at both the federal and state levels, serious discussion of the techniques for reciprocal cooperation between all norm enforcers becomes necessary. Such coordination was found wanting by the Seventh Circuit Court of Appeals in the federal and state enforcement proceedings involving Cook’s misconduct in a federal district court.184 But the Seventh Circuit offered little guidance on enhancing reciprocal cooperation between norm enforcers. Better coordination requires examination of each federal district court’s “institutional controls” on lawyer conduct, of the appropriate interplay between federal district and appeals courts’ “institutional” and “disciplinary controls,” and of the relationship between the federal trial and appellate courts’ norm enforcers and the relevant state disciplinary controls. The U.S. Judicial Conference Standing Committee on Rules of Practice and Procedure should undertake such examinations as it discusses the breadth and content of appropriate professional norms for state-licensed lawyers practicing in the federal courts.

183 The Seventh Circuit, even before its disappointment with the ARDC proceedings against Cook, did not always refer sanctionable attorneys to the state disciplinary agencies, though there were benefits in “cooperative federalism.” See In re Cook, 49 F.3d 263, 265 (7th Cir. 1995); see also Phillips Med. Sys. Int’l B.V. v. Bruetman, 8 F.3d 600, 607 (7th Cir. 1993) (referring case to Executive Committee of Northern District). Arguably, the new rule provisions on federal appellate court practices, effective in December 1995, counsel against ad hoc decisionmaking in favor of more standard practices articulated in local court rules. See FED. R. APP. P. 47(a)(1) (“A generally applicable direction to ... a lawyer regarding practice ... shall be in a local rule rather than an internal operating procedure or standing order.”).

184 See Cook, 49 F.3d at 266 (pointing to the ARDC’s failure to take a cooperative approach).