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The Rule of Unanimity's Circuit Splitting Effect: The Problem with Consent—Griffioen v. Cedar Rapids & Iowa City Railway Co.

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**THE RULE OF UNANIMITY’S CIRCUIT SPLITTING
EFFECT: THE PROBLEM WITH CONSENT—*GRIFFIOEN*
V. *CEDAR RAPIDS & IOWA CITY RAILWAY CO.***

Aaron P. Meland[†]

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I. INTRODUCTION

In *Griffioen v. Cedar Rapids & Iowa City Railway Co.*,¹ the Eighth Circuit split from two circuit courts when it adopted a new stance on the rule of unanimity,² dealing with removal³ based on a federal question.⁴ Specifically, the court strayed from its prior precedent⁵ when it held that representation in a removing defendant's notice—stating that its codefendants consented to the removal—satisfies the United States Code's unanimity requirement.⁶ As part of its reasoning, the Eighth Circuit held that because the defendant who gives consent on behalf of the codefendants is subject to Rule 11 sanctions,⁷ policy considerations support the validity of the consent.⁸

This note begins by exploring the history, development, and construction of removal and the rule of unanimity in the United States.⁹ The note will then discuss the development of the rule of unanimity's consent requirement as it has been used by the circuit

1. 785 F.3d 1182 (8th Cir. 2015).

2. See 28 U.S.C. § 1446(b)(2)(A) (2012). The rule of unanimity requires all defendants to join in or consent to removal from a state court on any civil action. *Id.*

3. "Removal" is the process of allowing a defendant who has been sued in state court the opportunity to "substitute a federal forum for the state court originally selected by the plaintiff." 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2008).

4. See *Griffioen*, 785 F.3d at 1186–88 (explaining that the Eighth Circuit will now split away from the Seventh Circuit's decision in *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994) as well as the Fifth Circuit's decision in *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988)).

5. See *Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927, 933 (8th Cir. 2012) ("We also emphasize that non-removing defendants who wish to evince consent to removal should either sign the notice of removal or file a timely and unequivocal consent to such course of conduct.").

6. See *Griffioen*, 785 F.3d at 1188.

7. See FED. R. CIV. P. 11 (explaining that sanctions may result when a party submits a pleading or motion to the court that includes assertions that lack evidentiary support).

8. *Griffioen*, 785 F.3d at 1187 ("The potential for Rule 11 sanctions and a codefendant's opportunity to alert the court to any falsities in the removing defendant's notice serve as safeguards to prevent removing defendants from making false representations of unanimous consent and forcing codefendants into a federal forum against their will.").

9. See *infra* Part II.

courts.¹⁰ Next, this note will analyze an important case from the splitting Seventh Circuit court.¹¹ Following the reasoning of the Seventh Circuit, this note will explain the facts of *Griffioen* and examine the reasoning of the majority opinion.¹² Next, using statutory interpretation and policy implications brought about by the Model Rules of Professional Conduct, the note will analyze the Eighth Circuit's decision, showing that the court correctly veered away from its own prior decisions and the precedent set by the Seventh Circuit when it held that a sole defendant may give consent for codefendants.¹³ Finally, this note concludes by contending that although the Eighth Circuit's decision in *Griffioen* was correct, the holding may have paved the way for defendants to exploit the rule of unanimity in order to force a non-consenting defendant into a federal forum against his or her will.¹⁴

II. HISTORY OF THE RELEVANT LAW

A. *A Brief History of Removal*

Although the U.S. Constitution makes no mention of removal,¹⁵ and “[n]o procedure comparable to removal was available at English common law,”¹⁶ the principle underlying removal based on federal subject matter jurisdiction has been prominent in the development of U.S. procedural law.¹⁷ Over two centuries ago, in 1789, Congress enacted the first removal procedures in the United States.¹⁸ Congress did not include the foundation for removal based on federal subject matter jurisdiction

10. See *infra* Section II.B.

11. See *infra* Section III.A.

12. See *infra* Section III.B.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 BROOK. L. REV. 1, 2 (2011) (“The United States Constitution expressly authorizes arising-under and diversity jurisdiction, without mentioning removal.”).

16. WRIGHT ET AL., *supra* note 3, § 3731.

17. See Tristin K. Green, *Complete Preemption—Removing the Mystery from Removal*, 86 CALIF. L. REV. 363, 364 (1998) (“[Removal] has been a part of American jurisprudence for over 200 years.”). See generally *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 807–09 (1986) (discussing the history of the removal process).

18. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73; see Bassett & Perschbacher, *supra* note 15, at 2; Green, *supra* note 17, at 364–65.

at that time.¹⁹ Instead, it took nearly one-hundred years until, in 1875, Congress extended removal to include claims arising under federal subject matter jurisdiction.²⁰ The only current significance of the 1875 Act, granting either party the right to remove based on federal subject matter, was that it was changed by the Removal Act of 1887 only twelve years later.²¹

The Removal Act of 1887 provided for an important change in United States removal law when it expressly revised the provision of the 1875 Act which granted *either party* the right to remove to federal court based on federal subject matter jurisdiction.²² Specifically, the Removal Act of 1887 expressly granted the *defendant* the right to remove to federal courts based on federal subject matter jurisdiction.²³ This revision, which allowed for only defendants to remove based on federal question, is the basis for the current removal statute that is in place today.²⁴

B. *History of the Unanimity Requirement*

In *Chicago, Rock Island & Pacific Railway Co. v. Martin*,²⁵ the theory of the rule of unanimity was first brought to the Supreme Court's attention.²⁶ *Martin* dealt with a wrongful death lawsuit

19. See § 12, 1 Stat. 73; Green, *supra* note 17, at 365 (“In that Act, however, removal was limited to actions in diversity.”).

20. See Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (“[For] any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court . . . and arising under the Constitution or laws of the United States . . . either party may . . . remove said suit into the circuit court of the United States for the proper district.”).

21. See Adam R. Prescott, *On Removal Jurisdiction's Unanimous Consent Requirement*, 53 WM. & MARY L. REV. 235, 241 (2011).

22. See Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553; Prescott, *supra* note 21, at 241; *Diversity Jurisdiction in the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/jurisdiction_diversity.html (last visited Mar. 4, 2016).

23. See § 2, 24 Stat. at 553; Prescott, *supra* note 21, at 241.

24. See 28 U.S.C. § 1441 (2012) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant or the defendants*”) (emphasis added); Green, *supra* note 17, at 365.

25. 178 U.S. 245, 246 (1900).

26. See Marie E. Chafe & Peter M. Durney, *The Rules on Removal in Multiple-Party Cases: A Reprise*, A.B.A. SEC. LITIG. (Aug. 16, 2012), <http://apps.americanbar.org/litigation/committees/masstorts/articles/summer2012-0812-rules-removal-multiple-party-cases-reprisal.html>.

against two railroad companies.²⁷ One of the defendant railway companies—Union Pacific Railway Company—sought to remove the action from Kansas state court to federal court.²⁸ The remaining defendant—Chicago, Rock Island, & Pacific Railroad Company—did not join in the removal.²⁹ This circumstance presented the Court with a difficult question: “[W]hether it was necessary for the Chicago, Rock Island, & Pacific Railroad Company, defendant, to join in the application of its codefendants, the receivers of the Union Pacific Railway Company, to effect a removal to the circuit court.”³⁰ Ultimately, the Court held that “a removal could not be effected unless all the parties on the same side of the controversy united in the petition.”³¹ This holding thus brought about the notion that, in a case involving multiple defendants, each defendant must join in the removal.

The principle of unanimity in removal motions existed as merely case law until 2011, when President Obama signed into law the Federal Courts Jurisdiction and Venue Clarification Act of 2011.³² One of the purposes of this Act was to “make several changes to judicial procedures, including the determination of original jurisdiction and court venue for certain types of cases.”³³ Importantly, this Act expressly codified the requirement of unanimity among multiple defendants in a removal motion.³⁴ Section 1446 of the United States Code states: “When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served *must join in or consent to the removal of the action.*”³⁵

27. See *Martin*, 178 U.S. at 246.

28. See *id.*

29. See *id.* The Supreme Court did not explain why Chicago, Rock Island, & Pacific Railroad Company did not consent to removal. *Id.*

30. *Id.*

31. *Id.* at 248.

32. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended at 28 U.S.C. § 1446); Jayne S. Ressler, *Removing Removal's Unanimity Rule*, 50 HOUS. L. REV. 1391, 1392 (2013).

33. H.R. REP. NO. 112-10, at 4 (2011).

34. See 28 U.S.C. § 1446(b)(2)(A) (2012).

35. *Id.* (emphasis added).

1. *History of the Unanimity Requirement of the Eighth Circuit and Other Circuits Adopting the Sole Consent Rule*

Much of the debate surrounding the rule of unanimity does not deal directly with the notion of whether *each* defendant is required to submit some form of consent to removal. Instead, the major issue that courts have struggled with historically has been when the thirty-day time frame that allows for consent is to commence.³⁶ Prior to the Jurisdiction and Venue Clarification Act of 2011,³⁷ the codification of the removal statute was as follows:

The notice of removal of a civil action or proceeding *shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.*

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.³⁸

As the language of the former statute suggests, there is ambiguity in determining how this statute would apply when there are multiple defendants.³⁹ Should the thirty-day countdown that

36. Ressler, *supra* note 32, at 1402 (“The unanimity rule complicated the calculation of the thirty-day requirement when there were multiple defendants, because there were no directives as to when the removal clock began The absence of clear congressional guidelines created tremendous procedural difficulty for the judiciary. Judges expressed concern that the rules ‘force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation.’” (quoting H.R. Rep. No. 112-10, at 4)).

37. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended at 28 U.S.C. § 1446).

38. 28 U.S.C. § 1446(b) (2006) (emphasis added).

39. See Bassett & Perschbacher, *supra* note 15, at 8 (“The removal statutes are silent as to how to reconcile the thirty-day time limit with differences in the timing of service of multiple defendants.”).

allows for a notice of removal start when the first defendant is served with the complaint? Or should the countdown begin when the final defendant is served with the complaint? Or should some other interpretation prevail?

In order to help resolve this ambiguity, the courts developed three different rules for interpreting how to comply with the statute: (1) the first-served defendant rule, (2) the intermediate rule, and (3) the last-served defendant rule.⁴⁰ “The significance of these rules stems from their connection to still another judicially created rule—the rule of unanimity.”⁴¹

a. The First-Served Defendant Rule

Under the first-served defendant rule, the time frame for allowing a defendant to file a motion to remove to federal court begins the day that the first defendant is served and continues for thirty days thereafter.⁴² Therefore, any subsequent defendant served with a complaint *after* the first-served defendant has the same amount of time remaining to file a motion to remove as the first-served defendant, which would ultimately be less than thirty days.⁴³

The theory of the first-served defendant rule has been met with some criticism.⁴⁴ Under the first-served defendant rule, subsequent defendants may not have the opportunity to convince the first-served defendant that removal is the proper course of action.⁴⁵ Additionally, plaintiffs may intentionally wait to serve the

40. See *id.*; Ressler, *supra* note 32, at 1402–03.

41. Bassett & Perschbacher, *supra* note 15, at 8 (citing Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 648–49 (2004)).

42. See WRIGHT ET AL., *supra* note 3, § 3731; Ressler, *supra* note 32, at 1403.

43. *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) (“The general rule, however, is that ‘[i]f the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal.’” (quoting 1A JAMES W. MOORE, MOORE’S FEDERAL PRACTICE ¶ 0.168, at 586–87 (2d ed. 1985)); see WRIGHT ET AL., *supra* note 3, § 3731 (“[A] failure of the first defendant served in the state court action to file a notice of removal with the district court within 30 days of service will prevent all subsequently served defendants from removing the action.”).

44. See Paul E. Lund, *The Timeliness of Removal and Multiple-Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 66 (2012) (citing *Brown*, 792 F.2d at 482).

45. WRIGHT ET AL., *supra* note 3, § 3731 (“[W]hen some of the defendants are served after the first-served defendant has failed to exercise its removal right

subsequent defendants until the thirty-day window has passed, thus depriving them of any chance at removal.⁴⁶

b. The Intermediate Rule

The Fourth Circuit took a different approach to the timeliness of removal in *McKinney v. Board of Trustees of Mayland Community College*.⁴⁷ In *McKinney*, the Fourth Circuit became the first court to introduce the intermediate rule.⁴⁸ The intermediate rule is similar to the first-served defendant rule in the sense that at the time of the first-served defendant's service, the thirty-day time frame for making a motion to remove commences.⁴⁹ Thus, if the first-served defendant does not file a motion to remove within thirty days of service, subsequently served defendants may not remove the case to federal court.⁵⁰ The significance of the intermediate rule is that it allows subsequently served defendants a full thirty days to *consent* to the first-served defendant's motion to remove, if the first-served defendant makes such a motion.⁵¹

within the statutory period, the subsequently served defendants are deprived of the opportunity to persuade the first defendant to join the notice of removal.”).

46. *See id.* (explaining that a “plaintiff could choose to serve an unsophisticated or poorly-advised defendant,” while intentionally refraining from serving other defendants until the thirty days had passed); *see also* Ressler, *supra* note 32, at 1405 (citing Lund, *supra* note 44, at 78 n.157, 79) (“Indeed, observers lamented the opportunities available to plaintiffs to utilize the removal clock, in conjunction with the requirements of the unanimity rule, to their advantage and to strategically stagger service upon defendants in order to prevent otherwise proper removal.”).

47. 955 F.2d 924 (4th Cir. 1992).

48. *See id.* at 926–28.

49. *See* *Barbour v. Int’l Union*, 640 F.3d 599, 612 (4th Cir. 2011) (“[T]he first-served defendant must file a notice of removal within thirty days of service; later-served defendants have to join the notice within thirty days of service upon them.”); *see also* Lund, *supra* note 44, at 76–77 (citing *Barbour*, 640 F.3d at 612) (“Typically referred to as the intermediate rule, the Fourth Circuit’s approach bears some resemblance to the first-served defendant rule, in that it requires that a notice of removal be filed within thirty days of service on the first-served defendant. If the first-served defendant does not file a notice, the case cannot be removed.”).

50. *Bassett & Perschbacher*, *supra* note 15, at 16 (“Thus, under the so-called intermediate rule, the time for removal expires thirty days after the first defendant is served, without regard to when other defendants are served—the same result required by the first-served defendant rule.”); Lund, *supra* note 44, at 77 (citing *Barbour*, 640 F.3d at 612).

51. *See Barbour*, 640 F.3d at 612.

Similar to the first-served defendant rule, the intermediate rule has been criticized as enabling plaintiffs to manipulate the proceedings.⁵² For example, under the intermediate rule, a plaintiff may still simply wait until the first-served defendant's thirty-day window has passed to serve a subsequent defendant, even if the first-served defendant makes a motion to remove, thus depriving the subsequent defendant of the opportunity to join in the removal.⁵³

c. The Last-Served Defendant Rule

Concern over plaintiffs' unfair tactics in removal actions brought about a new rule for dealing with multiple defendants.⁵⁴ In *Brierly v. Alusuisse Flexible Packaging, Inc.*,⁵⁵ the Sixth Circuit became the first court to apply the last-served defendant rule.⁵⁶ Under the last-served defendant rule, "each defendant [has] thirty days to file a notice of removal from the date of its own personal service, without regard to the date of service on earlier-served defendants in the suit."⁵⁷ Thus, each defendant receives a new thirty days to either consent to removal or make its own motion to remove to federal court.⁵⁸ Two years after the *Brierly* holding, the Eighth

52. Compare Ressler, *supra* note 32, at 1404 ("Both the first-served defendant and the intermediate/McKinney rules were ripe for manipulation by plaintiffs."), with *Barbour*, 640 F.3d at 612 ("It is also worth noting that, under the *McKinney* Intermediate Rule, the later-served defendants are in no worse position than they would have been if the parties in the case were not completely diverse or the first-served defendant (or any other defendant) had opposed removal.").

53. See Ressler, *supra* note 32, at 1404 (explaining that a plaintiff could wait until the thirty-day window had passed "and then serve additional defendants").

54. See Lund, *supra* note 44, at 69; see also WRIGHT ET AL., *supra* note 3, § 3731 ("Because the first-served defendant rule deprives subsequently served defendants of the opportunity to remove, the Sixth Circuit held in *Brierly v. Alusuisse Flexible Packaging, Inc.* that the last-served defendant should be allowed a full 30 days to remove after being served.").

55. 184 F.3d 527 (6th Cir. 1999).

56. See *id.* at 533 ("[W]e hold that a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants."); Lund, *supra* note 44, at 70.

57. Ressler, *supra* note 32, at 1404–05 (citing *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1208–09 (11th Cir. 2008)). Ressler further explains that courts adopted the rule because it was "more consistent with the statutory removal language." *Id.* at 1405.

58. See *Brierly*, 184 F.3d at 533 (holding that a subsequently served defendant "has 30 days from the date of service to remove a case to federal district court, with

Circuit adopted this last-served defendant rule in *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*⁵⁹ Specifically, the Eighth Circuit held that “the later-served defendants in this case had thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants, even though the first-served co-defendants did not file a notice of removal within thirty days of service on them.”⁶⁰ In recent years, courts have shifted toward the adoption of the last-served defendant rule.⁶¹ The recent enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 expressly codified this rule.⁶²

C. *History of the Circuit Courts as It Relates to Giving Consent to Removal*

Importantly, this note now turns to the history of the consent requirement needed to satisfy the rule of unanimity⁶³ prior to the enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which was the Act on which the *Griffioen* court partially based its holding.⁶⁴ In other words, this section details the *form* of consent needed to properly join a removal.

the consent of the remaining defendants”).

59. 254 F.3d 753, 756 (8th Cir. 2001) (“We conclude that, if faced with the issue before us today, the Court would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when—or if—previously served defendants had filed such notices.”); Lund, *supra* note 44, at 70.

60. *Marano*, 254 F.3d at 757.

61. *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011) (“The trend in recent case law favors the later-served defendant rule.”); Ressler, *supra* note 32, at 1404 (“Recently, courts moved toward adoption of the ‘last-served defendant’ rule.”).

62. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758, 760 (codified as amended at 28 U.S.C. § 1446(b)(2)); see also H.R. REP. NO. 112-10, at 14 (2011) (“New subparagraph 1446(b)(2)(B) provides that each defendant will have 30 days from his or her own date of service (or receipt of initial pleading) to seek removal.”); Elizabeth L. Alvine, Note, *Jurisdictional Remix: The Federal Courts Jurisdiction and Venue Clarification Act Presents New Challenges to Federal Litigation*, 89 N.D. L. REV. 163, 171 (2013).

63. See 28 U.S.C. § 1446(b)(2)(A) (2012). The rule of unanimity requires all defendants to join in or consent to removal from a state court on any civil action.

64. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1187 (8th Cir. 2015) (“So also here, we are once again disinclined to adopt a hard-line requirement, particularly in light of the new language of § 1446. The 2011 amendments to § 1446 that codified the rule of unanimity did not describe the

Historically, circuit courts have been at odds with each other in determining whether the consent requirement of the rule of unanimity has been met.⁶⁵ Courts have wrestled with whether a sole defendant may consent for his codefendants, or whether each defendant needs to individually give some form of written consent.⁶⁶

1. A Sole Defendant Can “Vouch” for the Consent of Its Codefendants in a Motion to Remove to Federal Court

Prior to the Federal Courts Jurisdiction and Venue Clarification Act of 2011, several circuit courts held that a sole defendant may give consent for its codefendants in a motion to remove to federal court.⁶⁷ This theory is sometimes called the “vouching rule.”⁶⁸ The majority of these decisions looked at the statutory language;⁶⁹ specifically, the courts pointed out that 28 U.S.C. § 1446, the removal statute, required consent of the parties to be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.⁷⁰ Accordingly, these courts subsequently explained that under Rule 11, only one attorney of record needs to certify that the

form of or time frame for consent when multiple defendants are involved.”).

65. See Kathryn A. Kotlik, Note, *Proctor v. Vishay Intertechnology, Inc.: The Ninth Circuit Failed to Follow the Rule of Unanimity When Applying Rule 11 to a Case with Multiple Defendants*, 44 CREIGHTON L. REV. 261, 261 (2010) (“Although the rule of unanimity is well-settled, federal courts have disagreed over the ways defendants may satisfy the rule.”); Prescott, *supra* note 21, at 247 (“Although there is no reason to doubt the future of the unanimity rule itself, federal courts are divided regarding the functional application of the rule in multi-defendant lawsuits.”).

66. See Prescott, *supra* note 21, at 247 (“Some federal courts require each defendant to submit his own consent form, whereas other federal courts allow one defendant to pledge in the notice of removal that all the other defendants have consented.”).

67. See, e.g., *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009) (“[W]e interpret that requirement [of unanimity] as met if, as here, one defendant avers that all defendants consent to removal.”); *Harper v. AutoAlliance Int’l Inc.*, 392 F.3d 195, 201–02 (6th Cir. 2004); see also Prescott, *supra* note 21, at 247–50 (discussing the *Proctor* and *Vishay* holdings).

68. See, e.g., Prescott, *supra* note 21, at 247.

69. See, e.g., *Proctor*, 584 F.3d at 1225.

70. See 28 U.S.C. § 1446(a) (2012) (“A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure . . .”).

contentions have factual support.⁷¹ Thus, the courts concluded that a single attorney may give consent for a party's codefendants.⁷² This was the conclusion reached in *Harper v. AutoAlliance International, Inc.*⁷³

In *Harper*, the plaintiff brought suit against three different defendants alleging retaliatory discharge after he filed with the Equal Employment Opportunity Commission.⁷⁴ Asserting that the allegations were based on federal subject matter jurisdiction, AutoAlliance and Childress, two of the three defendants, jointly filed a notice of removal to the federal courts.⁷⁵ Kelly, the third defendant, did not sign the notice of removal submitted by his codefendants.⁷⁶ However, similar to the defendants in *Griffioen*,⁷⁷ AutoAlliance and Childress' notice of removal stated, "Counsel for AutoAlliance, AAI and Childress has obtained concurrence from counsel for the UAW, who represents defendant Jeffrey Kelly, in removing this matter."⁷⁸ Reasoning that Rule 11 requires only one attorney of record to certify the contentions have factual support,⁷⁹ the *Harper* court held that "[n]othing in Rule 11 . . . required Kelly or his attorney to submit a pleading, written motion, or other paper directly expressing that concurrence or prohibited counsel for the

71. See *Proctor*, 584 F.3d at 1225; *Harper*, 392 F.3d at 201 (pointing out that under Rule 11, any pleading needs to be signed "by at least one attorney of record" (quoting FED. R. CIV. P. 11(a))).

72. See *Proctor*, 584 F.3d at 1225 ("Applying these general principles, we conclude that the filing of a notice of removal can be effective without individual consent documents on behalf of each defendant."); *Harper*, 392 F.3d at 201-02 (noting that in the event a notice of removal misrepresented a defendant's assent to the removal, "no doubt [that defendant] would have brought this misrepresentation to the court's attention and [the court could] . . . have impose[d] appropriate sanctions").

73. See *Harper*, 392 F.3d at 201.

74. See *id.* at 198 ("On June 28, 2002, Harper, an African-American, filed a complaint in Wayne County Circuit Court against Defendants AutoAlliance, AAI, Kelly, and Allen Childress, a supervisor at AutoAlliance's facility in Flat Rock, Michigan. Harper alleged that Childress gave preferential treatment to non-minority staff, and . . . Harper filed a grievance and then a charge with the Equal Employment Opportunity Commission . . .").

75. See *id.* at 199.

76. *Id.*

77. See *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1185 (8th Cir. 2015) (explaining that one defendant's notice for removal expressly stated that its codefendants had given consent to the removal).

78. *Harper*, 392 F.3d at 199.

79. See FED. R. CIV. P. 11.

other defendants from making such a representation on Kelly's behalf."⁸⁰ The court subtly added another minor policy reason for allowing a sole defendant to consent for its codefendants. Specifically, the court pointed out that the defendant who did not expressly join in consenting to the removal would have brought the courts attention to the issue if the defendant wished for the case to remain in state court or if the codefendant claiming all parties consented did so through misrepresentation.⁸¹

2. *A Single Defendant Cannot Give Consent for Its Codefendants in a Motion to Remove to Federal Court*

Prior to the Federal Courts Jurisdiction and Venue Clarification Act of 2011, in opposition to allowing a single defendant to consent for its codefendants, some courts required that each defendant individually express his or her consent for removal.⁸² By requiring all defendants to individually express their consent, some courts have coined this requirement as the "independent-and-unambiguous consent requirement."⁸³ Courts that have applied the independent-and-unambiguous consent requirement have a different interpretation of Rule 11.⁸⁴ Courts applying this rule believe that each defendant's attorney must file an independent consent.⁸⁵

80. *Harper*, 392 F.3d at 201–02.

81. *See id.* at 202 ("Had counsel for AutoAlliance, AAI and Childress misrepresented Kelly's concurrence in the removal, no doubt Kelly would have brought this misrepresentation to the court's attention and it would have been within the district court's power to impose appropriate sanctions, including a remand to state court.").

82. Kotlik, *supra* note 65, at 261–62; *see Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008) (stating that there must "be some timely filed written indication from each served defendant" (quoting *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1261 n.11 (5th Cir. 1988))); *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994) ("To 'join' a motion is to support it in writing, which the other defendants here did not."), *abrogated by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

83. Prescott, *supra* note 21, at 252.

84. *Compare Harper*, 392 F.3d at 201 (pointing out that, under rule 11, any pleading needs to be signed "by at least one attorney of record"), *with Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508 (E.D. Va. 1992) ("Rule 11 does not authorize one party to make representations or file pleadings on behalf of another.").

85. *See Creekmore*, 797 F. Supp. at 508 ("Both Stanley Works and Carolina Door are represented by counsel and clearly are 'movants' subject to the

Advocates of the independent-and-unambiguous consent requirement argue that requiring individual consent from each defendant serves the interests of both the plaintiffs and the defendants.⁸⁶ Specifically, a plaintiff stands to gain from requiring each defendant to individually consent to removal because under the voucher rule, a plaintiff's original decision to file in state court could be disrupted by a single defendant erroneously vouching for consent of its codefendants.⁸⁷ The independent-and-unambiguous rule also benefits the defendants.⁸⁸ For example, a defendant could intentionally misrepresent that its codefendants consent to removal, without providing the codefendants notice that it has done so.⁸⁹ In such a situation, the non-consenting defendants "are now stuck in federal court unless and until they move to have the case remanded—assuming there is no jurisdictional flaw that prompts the court to remand the case sua sponte."⁹⁰

requirements of Rule 11. They must file their own signed pleadings.”).

86. See *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009) (“The requirement of unanimity serves the interests of plaintiffs, defendants and the judiciary.”); *Sansone v. Morton Mach. Works, Inc.*, 188 F. Supp. 2d 182, 184 (D.R.I. 2002) (“One of the purposes of this ‘rule of unanimity’ is to prevent the defendants from gaining an unfair tactical advantage by splitting the litigation and requiring the plaintiff to pursue the case in two fora simultaneously”); *Martin Oil Co. v. Phila. Life Ins. Co.*, 827 F. Supp. 1236, 1238 (N.D. W. Va. 1993) (explaining that “requiring each defendant to either sign the notice of removal, file its own notice of removal, or file a written consent or written joinder to the original notice of removal” ensures that unanimity has been achieved).

87. *Prescott*, *supra* note 21, at 269–70 (“It also better protects the plaintiff’s forum choice: when there is doubt in the removal procedure, which occurs when one defendant vouches for the other’s consent rather than each defendant individually expressing consent, an approach that creates exceptions for defendants and lowers the requirements for removal facilitates a defendant’s ability to disrupt the plaintiff’s original decision to litigate in state court.”).

88. See *Esposito*, 590 F.3d at 75; *Prescott*, *supra* note 21, at 274 (“[T]he independent consent requirement ensures that all nonmoving defendants are afforded proper notice before being haled into federal court, as due process requires. If every federal court adopts the independent-and-unambiguous consent requirement, all parties to a lawsuit—both plaintiffs and defendants—will immediately benefit from the efficiency and simplicity of the rule.”).

89. See *Prescott*, *supra* note 21, at 264 (“[T]he court assumes that given the moving defendant’s vouching of consent and the nonmoving defendant’s lack of resistance, the nonmoving defendant is aware that he is an official party to a lawsuit in federal court. The nonmoving defendant, however, is not guaranteed such notice.”).

90. *Id.* at 265.

Prior to the codification of the rule of unanimity—and prior to the *Griffioen* holding—the Eighth Circuit believed the independent-and-unambiguous consent rule was the proper way to analyze § 1446.⁹¹ Specifically, in *Pritchett v. Cottrell, Inc.*, Pritchett and other plaintiffs filed a products liability action against Cottrell and other defendants.⁹² After the complaint had been filed, Cottrell filed a motion to move to federal court, to which all but one defendant had expressly consented.⁹³ Accordingly, the plaintiffs sought to remand the action to state court, arguing that unanimous consent had been improper.⁹⁴ The court was thus tasked with determining whether consent to the removal had been met.⁹⁵

In its holding, the court points out that each defendant does not need to ultimately sign the notice of removal,⁹⁶ which the court in *Griffioen* also alludes to in its holding.⁹⁷ However, in *Pritchett*, the Eighth Circuit expressly stated, “[t]here must, however, ‘be some timely filed written indication from each served defendant,’ or from some person with authority to act on the defendant’s behalf, indicating that the defendant ‘has actually consented’ to the removal.”⁹⁸ Thus, prior to the enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the Eighth Circuit advocated for the independent-and-unambiguous consent rule.⁹⁹ The splitting approaches to the consent requirement of the rule of unanimity were the focal point of *Griffioen*.¹⁰⁰

91. See *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008); see also Kotlik, *supra* note 65, at 271 (explaining that the Eighth Circuit required “each defendant [to] submit written indication of its consent to the removal”).

92. 512 F.3d at 1058–59. Pritchett, Scott, and Fix filed a claim alleging that they had sustained injuries due to a faulty ratchet system designed by one of the defendants, Cottrell. *Id.*

93. *Id.* at 1061 (“Cottrell filed a Notice of Removal of Civil Action in federal court with the consent of every defendant except JCT. The written consents were attached to the Notice of Removal as an exhibit.”).

94. *Id.*

95. See *id.* at 1062.

96. *Id.* (“While the failure of one defendant to consent renders the removal defective, each defendant need not necessarily sign the notice of removal.”).

97. See *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1187 (8th Cir. 2015).

98. *Pritchett*, 512 F.3d at 1062 (quoting *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1261 n.11 (5th Cir. 1988)).

99. See *id.* at 1062; Kotlik, *supra* note 65, at 271.

100. See *Griffioen*, 785 F.3d at 1186–87 (explaining that neither the Supreme Court nor Congress have directly addressed what form consent must take, and

III. CASE DESCRIPTIONS

A. *Facts, Procedure, and Holding of the Splitting Seventh Circuit*

In *Roe v. O'Donohue*,¹⁰¹ the Seventh Circuit took a different approach than the Eighth Circuit's holding in *Griffioen* concerning the consent requirement of the rule of unanimity. In *Roe*, the plaintiff (Roe) underwent a medical procedure in 1984.¹⁰² During his procedure, Roe was given a transfusion of cryoprecipitate AHF, which is a type of blood product.¹⁰³ Following the procedure, Roe was diagnosed with the HIV disease.¹⁰⁴ It was Roe's belief that he contracted HIV as a result of receiving the cryoprecipitate.¹⁰⁵ Roe brought suit against three different defendants: (1) the American Red Cross; (2) the doctor who recommended the surgery, including the hospital where it was performed; and (3) the doctors who actually performed the surgery.¹⁰⁶ Roe initially filed his lawsuit in state court.¹⁰⁷ Similar to Union Pacific in *Griffioen*, the Red Cross defendants "removed the case to federal court, representing that the other defendants 'do not object to the removal of this action to federal court.'"¹⁰⁸ Thus, the facts are similar to those of *Griffioen* in the sense that one defendant sought to satisfy the rule of unanimity by stating the codefendants do not object to the removal.¹⁰⁹

The Seventh Circuit pointed to the Red Cross defendant's statement that "[a]ll other defendants who have been served with

therefore the circuit courts are split).

101. 38 F.3d 298 (7th Cir. 1994), *abrogated by* *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

102. *Id.* at 300.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* The Red Cross was responsible for collecting and distributing the cryoprecipitate. *Id.* Roe alleged that the Red Cross was "negligent in collecting and distributing blood containing the virus." *Id.* He alleged that the recommending doctor and hospital were "negligent in recommending the operation and failing to warn about the risks of using cryoprecipitate." *Id.* He also alleged that the doctors performed the surgery negligently. *Id.*

107. *Id.*

108. *Id.* The Red Cross' basis for removal was 36 U.S.C. § 300105(a)(5) (2012), which states that the Red Cross may "sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Id.*

109. *See* *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1185 (8th Cir. 2015); *Roe*, 38 F.3d at 300.

summons in this action have stated that they do not object to the removal of this action to federal court,” and held that “[u]nder ordinary standards, this is deficient.”¹¹⁰ The court went on to say, “To ‘join’ a motion is to support it in writing, which the other defendants here did not.”¹¹¹ Accordingly, the Seventh Circuit differs from the Eight Circuit when dealing with the consent requirement of the rule of unanimity.¹¹²

B. Facts, Procedure, and Holding of Griffioen

Mark Griffioen, Mike and Joyce Ludvicek, Sandra Skelton, and Brian Vanous (Griffioen Group) were injured when the Cedar River flooded in 2008.¹¹³ The Griffioen Group owned various plots of land throughout Cedar Rapids, Iowa.¹¹⁴ At varying points of the river, the defendants, (collectively, the Rail Group) owned and maintained various railway bridges that spanned the width of the river.¹¹⁵ In June 2008, the Cedar River crested at its highest point in recorded history.¹¹⁶ To combat the potential flooding, the Rail Group placed railcars filled with rocks or other heaving materials along some of the bridges that spanned the river.¹¹⁷ The Griffioen Group alleged that because of the Rail Group’s actions—weighing down the railroad cars—the bridge became unstable.¹¹⁸ Sometime in late June, some of the Rail Group owned railway bridges along the Cedar River collapsed, which caused the river to dam.¹¹⁹ Because of the bridges’ collapse, the Griffioen Group maintains

110. *Roe*, 38 F.3d at 301.

111. *Id.*

112. *Compare Griffioen*, 785 F.3d at 1185 (granting the notion that a single defendant can satisfy the rule of unanimity requirement mandating all defendants to consent to removal), *with Roe*, 38 F.3d at 300 (denying the notion that a single defendant can give consent for its codefendants, absent express written consent from the codefendants).

113. *Griffioen*, 785 F.3d at 1185.

114. Appellant Brief at 5, *Griffioen*, 785 F.3d 1182 (No. 13-3170), 2013 WL 6729371, at *5.

115. *See id.*; Brief of Defendants-Appellees Union Pacific Railroad Co. & Union Pacific Corp. at 2, *Griffioen*, 785 F.3d 1182 (No. 13-3170), 2014 WL 586958, at *2.

116. *See, e.g.*, Brief of Defendants-Appellees Union Pacific Railroad Co. & Union Pacific Corp., *supra* note 115, at 2.

117. *See id.*

118. *Griffioen*, 785 F.3d at 1185.

119. *Id.*

that the water from the Cedar River was diverted onto their land, thus causing them damage.¹²⁰

The Griffioen Group brought suit in Iowa state court against Union Pacific Railway Company and Union Pacific Corporation (collectively, Union Pacific), Cedar Rapids and Iowa City Railway, and Alliant Energy Corporation (collectively, CRANDIC), and ten additional defendants (collectively, the Stickle Defendants).¹²¹ On June 7, 2013, the Griffioen Group served the CRANDIC defendants with their complaint.¹²² The following day, the Stickle Defendants were served with the complaint.¹²³ Two days later, on June 10, 2013, Union Pacific was served with the complaint.¹²⁴ In their complaint, the Griffioen Group claimed that the Rail Group neglected to adequately build and maintain railroad bridges over the Cedar River.¹²⁵

Union Pacific filed a notice of removal based on federal question jurisdiction on July 2, 2013.¹²⁶ In its notice, Union Pacific stated, “Undersigned counsel . . . have contacted attorneys for the other named co-defendants in this matter, and there is no objection to removal.”¹²⁷ Along with this notice was a signed local rule certification stating, “The co-defendants have given their consent to the removal of this action.”¹²⁸ Union Pacific’s notice of removal was within the thirty-day time frame of § 1446.¹²⁹ On July 10, 2013, the thirtieth day for filing a notice of removal, CRANDIC filed a written consent to the removal.¹³⁰ On July 31, 2013, which is outside of the thirty-day window allowing a party to consent to removal,¹³¹ the Stickle Defendants filed consent to the removal.¹³²

120. *See id.*

121. *Id.* Union Pacific filed a motion for judgment on the pleadings, which the district court granted. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* Specifically, the alleged claims were based on the theories of negligence, strict liability for dangerous or ultra-hazardous activity, and strict liability based on Iowa Code sections 468.148 and 327F.2. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.*; *see also* 28 U.S.C. § 1446(b) (2012).

130. Brief of Defendants-Appellees Union Pacific Railroad Co. & Union Pacific Corp., *supra* note 115, at 2.

131. *See* WRIGHT ET AL., *supra* note 3, § 3731; *see also* 28 U.S.C. § 1446(b).

132. *Griffioen*, 785 F.3d at 1185. The Griffioen Group had already filed a

The question before the court was whether, based on the consent of a single defendant that stated all codefendants consent to the removal, the rule of unanimity had been satisfied.¹³³ The court correctly pointed out that “removal based on a federal question requires the unanimous consent of all defendants.”¹³⁴ However, this was the first time that the Eighth Circuit had been presented with “the question [of] whether a representation in a removing defendant’s notice stating that its codefendants consent can satisfy § 1446’s unanimity requirement.”¹³⁵

Ultimately, the Eighth Circuit concluded that a single defendant can satisfy the unanimous consent requirement of § 1446.¹³⁶ The court pointed out that its own holding in *Pritchett v. Cottrell*¹³⁷ “left open the possibility that the unanimity requirement could be met when the removing defendant gives notice of its codefendants’ consent.”¹³⁸ The Eighth Circuit pointed to the new language of § 1146—the rule of unanimity statute—which does not prescribe the particular form or time frame for cases involving multiple defendants.¹³⁹ Thus, the court concluded that without a bright-line form of consent codified in statute, the court was unwilling to adopt a rule that “places form over substance.”¹⁴⁰

motion to remand, arguing that because not all of the defendants had consented within the thirty-day time frame, removal was improper.

133. *See id.* at 1186–87.

134. *Id.* at 1186; *see also* Ressler, *supra* note 32, at 1396 (“[A]ll defendants in a removable action must agree to removal or the case remains in state court.”).

135. *Griffioen*, 785 F.3d at 1187.

136. *See id.* at 1188 (“We therefore hold that a defendant’s timely removal notice indicating consent on behalf of a codefendant, signed and certified pursuant to Rule 11 and followed by the filing of a notice of consent from the codefendant itself, sufficiently establishes that codefendant’s consent to removal.”).

137. 512 F.3d 1057, 1062 (8th Cir. 2008).

138. *Griffioen*, 785 F.3d at 1187; *see also* *Pritchett*, 512 F.3d at 1062 (“While the failure of one defendant to consent renders the removal defective, each defendant need not necessarily sign the notice of removal.”). *But see* *Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927, 933 (8th Cir. 2012) (“We also emphasize that non-removing defendants who wish to evince consent to removal should either sign the notice of removal or file a timely and unequivocal consent to such course of conduct.”).

139. *See* 28 U.S.C. § 1446 (2012); *Griffioen*, 785 F.3d at 1187 (“Congress could have defined with equal specificity the form of or time for consent but chose not to do so.”).

140. *Griffioen*, 785 F.3d at 1187.

Importantly, the Eighth Circuit court also pointed to policy considerations that supported the notion of a single defendant consenting for its codefendants.¹⁴¹ In particular, the court reasoned that when a defendant gives consent for its codefendants in a removal action, accompanied by a local rule certification, the moving defendant subjects himself to Rule 11 sanctions.¹⁴² This subjection to sanctions provides opportunities for codefendants “to alert the court to any falsities in the removing defendant’s notice serve as safeguards to prevent removing defendants from making false representations of unanimous consent and forcing codefendants into a federal forum against their will.”¹⁴³

IV. ANALYSIS

The court in *Griffioen* correctly decided the question of whether, under § 1446, a single defendant can give consent for all defendants in a multi-defendant action.¹⁴⁴ However, the court in *Griffioen* neglected to delve deep enough into the underlying reasons for allowing a sole defendant to give consent. Using statutory interpretation to a greater extent than the court in *Griffioen*, § 1446 does not require all defendants to individually express their consent to removal.¹⁴⁵ Perhaps most importantly, this analysis will address the ethical considerations that an attorney is subjected to under the Model Rules of Professional Conduct that the court could have used to further support its holding.¹⁴⁶

A. *Statutory Interpretation*

Prior to the enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, § 1446 did not codify the rule of unanimity set forth in *Chicago Rock Island*.¹⁴⁷ Instead, the language

141. *See id.* (“Furthermore, we believe that policy considerations support the validity of the consent in the circumstances of this case.”).

142. *Id.* at 1187–88; *see* FED. R. CIV. P. 11.

143. *Griffioen*, 785 F.3d at 1187.

144. *See id.* at 1188 (“We therefore hold that a defendant’s timely removal notice indicating consent on behalf of a codefendant, signed and certified pursuant to Rule 11 and followed by the filing of a notice of consent from the codefendant itself, sufficiently establishes that codefendant’s consent to removal.”).

145. *See infra* Section IV.A.

146. *See infra* Section IV.B.

147. *See* H.R. REP. NO. 112-10, at 13 (2011) (“New subparagraph (b)(2)(A)

of the former § 1446 simply stated that “[a] defendant or defendants desiring to remove any civil action” must file a “notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.”¹⁴⁸ Thus, there was no statutory language that addressed the requirement that all defendants must consent to removal.¹⁴⁹ Conversely, the current statute expressly codifies the rule of unanimity, as the court correctly points out.¹⁵⁰ By applying statutory interpretation to the new § 1446, it is clear that the Eighth Circuit court in *Griffioen* decided correctly.

In general, “[s]tatutory interpretation is the process of determining the meaning of a legislative act called a statute.”¹⁵¹ To help interpret a statute, courts have developed numerous “canons of construction” to resolve ambiguities.¹⁵² “An advantage of the canons of construction is that they provide some convenient and fairly uniform approaches for interpreting words.”¹⁵³

As a general starting point of statutory interpretation, courts look at the *plain meaning* of the words in a statute.¹⁵⁴ The plain

codifies the well-established ‘rule of unanimity’ for cases involving multiple defendants. Under that rule, which is generally traced to the Supreme Court decision in *Chicago, Rock Island & Pacific Railway v. Martin*, 178 U.S. 245, 251 (1900), all defendants who have been properly joined and served must join in or consent to removal.”); Kotlik, *supra* note 65, at 261 (“The rule of unanimity is a *common-law rule* that requires all defendants join in the removal of the action.” (emphasis added)).

148. 28 U.S.C. § 1446(a) (2006).

149. *See id.*; *supra* notes 32–35 and accompanying text.

150. *See* 28 U.S.C. § 1446(b)(2)(A) (2012); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1187 (8th Cir. 2015).

151. LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 4 (2d ed. 2013); *see also* RONALD B. BROWN & SHARON J. BROWN, *STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT* 4 (2d ed. 2011) (“Interpreting the statute is the process of figuring out what the statute means.”).

152. *See* *Vaidyanathan v. Seagate U.S. LLC*, 691 F.3d 972, 977 (8th Cir. 2012) (“But if the statute is ambiguous—that is, if it is susceptible to more than one reasonable interpretation—we apply canons of construction to discern the legislature’s intent.” (citing *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010))); David Kurzweil, *Criminal and Civil Rico: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 47–48 (1996) (“[V]arious canons of construction have evolved that help judges to resolve ambiguities in the countless statutes that are plagued by poor draftsmanship and oversight or that intentionally avoid thorny issues.”).

153. K.K. DuVivier, *The Volley of Canons*, 26 COLO. LAW. 59, 59 (1997).

154. *See* *Reves v. Ersnt & Young*, 507 U.S. 170, 177 (1993) (“In determining the scope of a statute, we look first to its language. If the statutory language is

meaning canon of construction is a judge-made theory of interpreting a statute that asks the court to “ignore legislative history if the meaning of a statute is plain on its face.”¹⁵⁵ In other words, the court determines if the statute can be read unambiguously by looking at the actual language of the statute.¹⁵⁶ Dictionaries are a common tool for aiding in the determination of the plain meaning of a word in a statute.¹⁵⁷ Applying this tool to the case in *Griffioen*,¹⁵⁸ the court could have looked at the plain meaning of the word “join” found in § 1446.¹⁵⁹ “Join” is defined as “put[ting] or bring[ing] together so as to form a unit.”¹⁶⁰ Albeit a weaker argument, an argument could nonetheless be made that, by Union Pacific vouching for the Stickle defendants’ consent, Union Pacific effectively “put” the Stickle defendants in the consenting unit. However, it is unlikely that the court would have decided this way, as “join” may still be seen as ambiguous.

As an alternative to using the plain meaning canon of construction or other canons to determine the legislature’s intent in enacting a particular statute, the purpose approach is a common tool.¹⁶¹ Under the purpose approach, the court first looks at the type of problem that the enacted legislation sought to remedy.¹⁶² Once the problem has been identified, the next step is to

unambiguous, in the absence of ‘a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.’” (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981))).

155. Bradley C. Karkkainen, “Plain Meaning”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401, 433 (1994).

156. *CBS Inc. v. Prime Time 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001).

157. See JELLUM, *supra* note 151, at 82 (“Most commonly today judges turn to their own understanding of a word’s meaning or to dictionaries.”); see also *Ziperstein v. Tax Comm’r*, 423 A.2d 129, 133 (Conn. 1979) (“Where a statute or regulation does not define a term, it is appropriate to focus upon its common understanding as expressed in the law and upon its dictionary meaning.” (citing *Hearst Corp. v. State Dep’t of Assessments & Taxation*, 308 A.2d 679 (Md. 1973))).

158. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182 (8th Cir. 2015).

159. 28 U.S.C. § 1446(b)(2)(A) (2012) (“When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must *join* in or consent to the removal of the action.” (emphasis added)).

160. *Join*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2004).

161. BROWN & BROWN, *supra* note 151, at 47 (“The purpose approach is currently one of the most popular approaches to statutory interpretation.”).

162. See *id.* at 47–48.

determine which interpretation best accomplishes the legislature's goals.¹⁶³ Applied to the *Griffioen* case, the problem that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 remedied in § 1446 was the codification of the long-standing common law rule of unanimity.¹⁶⁴ Accordingly, the courts should interpret the language of § 1446's consent requirement as broadly as possible because a narrow reading of this requirement would restrict the end result of unanimity, which is what the Federal Courts Jurisdiction and Venue Clarification Act of 2011 sought to avoid.¹⁶⁵ Therefore, under the purpose approach, the consent requirement should be read to allow a single defendant to vouch for another defendant's consent in order to satisfy the rule of unanimity.

Another approach worth noting is a textualism approach. "Textualism is the treatment of the statutory text as the primary source of determining what the legislature intended. . . . Textualists point out that the legislature voted only on the statutory language; *nothing else was enacted.*"¹⁶⁶ Indeed, textualism is a form of interpretation that parallels very closely the plain meaning rule.¹⁶⁷ Under a textualism approach, the court looks at the words of a statute, and "makes no attempt to discern any underlying intent of the adopting legislature."¹⁶⁸ Accordingly, under a textualism approach, the court that is trying to ascertain the legislative intent concerning the consent requirement of § 1446 cannot place a limit on what is considered proper form for giving consent because *the text* of § 1446 makes no mention about the proper way to give consent.¹⁶⁹ The court in *Griffioen* correctly points out that the legislature had the ability to prescribe the form for giving consent,

163. See *id.* at 48.

164. See H.R. REP. NO. 112-10, at 13 (2011) ("New subparagraph (b)(2)(A) codifies the well-established 'rule of unanimity' for cases involving multiple defendants.").

165. See *id.*

166. BROWN & BROWN, *supra* note 151, at 52-53 (emphasis added).

167. JELLUM, *supra* note 151, at 27 ("Textualism is sometimes called the *plain meaning theory* of interpretation because textualism is based on the *plain meaning canon* of interpretation.").

168. FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 25 (2009); see also JELLUM, *supra* note 151, at 27 ("Only the text goes through this process; thus, textualists believe that looking beyond the enacted text raises constitutional concerns.").

169. See 28 U.S.C. § 1446(b)(2)(A) (2012).

but declined to do so.¹⁷⁰ The textualism approach is thus consistent with the holding in *Griffioen*.

B. Implications of the Model Rules of Professional Conduct

The court in *Griffioen* points out that the possibility of Rule 11 sanctions against the attorney who is asserting that all defendants consent to removal is a policy consideration in favor of allowing a sole defendant to consent for its codefendants.¹⁷¹ As previously discussed, this policy implication is widely used among courts that allow a sole defendant to give consent for all.¹⁷² However, the court in *Griffioen* should have also examined the policy implications brought upon the attorney who gives consent as it relates to the Model Rules of Professional Conduct.

The American Bar Association is tasked with writing and editing the Model Rules of Professional Conduct.¹⁷³ The Model Rules of Professional Conduct serve as an ethical guide to attorneys.¹⁷⁴ Accordingly, an attorney who violates one of the Model Rules of Professional Conduct is subjecting himself or herself to disciplinary action.¹⁷⁵ In the application of the Model Rules of Professional Conduct to the scenario in *Griffioen*, two rules are implicated.

Rule 3.1 requires an attorney to “not bring or defend a proceeding, or assert or controvert *an issue therein*, unless there is a basis in law and *fact for doing so* that is not frivolous”¹⁷⁶ In other words, an attorney is not allowed to file a motion that is frivolous or

170. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1185–87 (8th Cir. 2015) (“Congress could have defined with equal specificity the form of or time for consent but chose not to do so.”).

171. *See id.* at 1187–88 (explaining that Rule 11 prevents defendants from making misrepresentations concerning unanimous consent).

172. *See supra* notes 70–72 and accompanying text.

173. *See* LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 14 (2d ed. 2008).

174. *See* *Baxt v. Liloia*, 714 A.2d 271, 275 (N.J. 1998) (“By this language, the ABA ‘intended to make clear that the purpose of the Model Rules was to regulate lawyer conduct through the disciplinary process, not to serve as a basis for civil liability.’”).

175. *See id.*; LERMAN & SCHRAG, *supra* note 173, at 21 (“[T]he highest court in each state is ultimately responsible for enforcing its rules by disciplining lawyers who violate them.”).

176. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 1983) (emphasis added).

obviously false.¹⁷⁷ In a way, Rule 3.1 mimics Rule 11 in the sense that an attorney is not allowed to bring a claim that is frivolous.¹⁷⁸ However, a violation of Rule 3.1 of the Model Rules of Professional Conduct has different disciplinary consequences.¹⁷⁹ Specifically, violating the Model Rules of Professional Conduct results in a bar disciplinary action, where violating Rule 11 can result in sanctions set forth by a judge.¹⁸⁰ Applied to the *Griffioen* case, there is a policy consideration that the lawyer who asserts that all defendants consent to the action is subjecting him or herself to disciplinary action by the state bar association. Similar to the policy consideration of Rule 11 to which the Eighth Circuit alludes,¹⁸¹ the threat of state bar disciplinary action for violating Rule 3.1 of the Model Rules of Professional Conduct serves as a “safeguard[] to prevent removing defendants from making false representations of unanimous consent and forcing codefendants into a federal forum against their will.”¹⁸²

The second rule that is applicable to the *Griffioen* case is Rule 3.3 of the Model Rules of Professional Conduct.¹⁸³ Rule 3.3 mandates that a lawyer shall not “knowingly *make a false statement of fact* or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”¹⁸⁴ In other words, Rule 3.3 disallows a lawyer from making a false statement to the court.¹⁸⁵ The rule requires the lawyer to make

177. See James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. LEGAL PROF. 231, 231 (1996); Richard P. Mauro, *The Chilling Effect that the Threat of Sanctions Can Have on Effective Representation in Capital Cases*, 36 HOFSTRA L. REV. 417, 427–28 (2007) (explaining that “[a] ‘frivolous’ claim is generally thought to be one which is ‘obviously false on the face of the pleading.’” (quoting Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1171 (2003))).

178. Compare MODEL RULES OF PROF’L CONDUCT 3.1, with FED. R. CIV. P. 11.

179. See LERMAN & SCHRAG, *supra* note 173, at 602.

180. See *id.* (“Violation of Rule 3.1 can result in bar disciplinary action against an attorney. A violation of FRCP 11 is punished not by the state bar but by the judge in the civil action, and it can result in nonmonetary directives or monetary sanctions against a lawyer or a party.”).

181. See *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1187 (8th Cir. 2015).

182. *Id.*

183. MODEL RULES OF PROF’L CONDUCT 3.3.

184. *Id.* (emphasis added).

185. LERMAN & SCHRAG, *supra* note 173, at 606 (“Rule 3.3(a)(1) bars false statements to courts by lawyers themselves, as opposed to false testimony by clients

assertions that he or she knows to be true, or believes to be true based on a “diligent inquiry.”¹⁸⁶

Similar to the application of Rule 3.1 of the Model Rules of Professional Conduct, Rule 3.3, if violated, subjects the attorney to discipline by the state bar association.¹⁸⁷ Therefore, allowing an attorney to sign an affidavit which purports to give consent for all codefendants should be allowed under § 1446 because of the threat of discipline from the state bar association under Rule 3.3.¹⁸⁸ Similar to the threat of Rule 11 sanctions under the Federal Rules of Civil Procedure, an attorney is certifying that the allegations set forth in a motion are true and should therefore suffice as consent of all the parties.

C. *The Possibility for Misuse*

Although the Eighth Circuit was correct in its application of § 1446, the doors for misuse have nonetheless been opened as a result of this holding.¹⁸⁹ Under the vouching rule, which the Eighth Circuit effectively adopted with its holding,¹⁹⁰ the potential for forcing a codefendant into federal court is heightened because a sole defendant could intentionally misrepresent to the court that all defendants consented to removal, thereby forcing a codefendant into federal court.¹⁹¹ This is one of the particular problems that the rule of unanimity seeks to redress.¹⁹² It is true

or other witnesses.”).

186. MODEL RULES OF PROF'L CONDUCT 3.3 cmt. 3 (“However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.”).

187. See LERMAN & SCHRAG, *supra* note 173, at 602.

188. See *supra* notes 179–82 and accompanying text.

189. *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 509 (E.D. Va. 1992) (“To allow one party, through counsel, to bind or represent the position of other parties without their express consent to be so bound would have serious adverse repercussions, not only in removal situations but in any incident of litigation.”).

190. See *supra* notes 67–68 and accompanying text.

191. *Prescott*, *supra* note 21, at 265.

192. See *Sansone v. Morton Mach. Works, Inc.*, 188 F. Supp. 2d 182, 184 (D.R.I. 2002) (“Other purposes are to eliminate the risk of inconsistent state and federal adjudications, and to prevent one defendant from imposing his choice of forum upon other unwilling defendants and an unwilling plaintiff.”); *Spillers v. Tillman*, 959 F. Supp. 364, 369 (S.D. Miss. 1997) (explaining that the

that in a situation where an unwilling defendant is forced into federal court because of misrepresentation, the unwilling defendant can seek to have the case remanded to state court.¹⁹³ However, remanding a case to state court can involve problems both with the federal court and the state court.¹⁹⁴ Moreover, the unwilling defendant may decide not to file a motion to remand to state court.¹⁹⁵ This decision could be based on a number of factors, including the probability of success, time constraints, cost of court filings, attorney's fees, or the result of the significant delay associated with remanding an action to state court.¹⁹⁶ Contrary to the vouching rule, the independent-and-unambiguous rule allows a defendant to easily point out that removal to federal court is not appropriate because the non-consenting defendant did not file his or her individual consent to removal.¹⁹⁷

V. CONCLUSION

In *Griffioen*, the court was presented with a difficult question: whether a sole defendant, who files a motion to remove to federal court, may give consent for its codefendants when that sole defendant signs a local rule certification that subjects the sole defendant to Rule 11 sanctions.¹⁹⁸ Since the common law rule of unanimity was first formed in the United States in 1900, the circuit courts have been at odds with each other regarding the proper

“[a]pplication of the unanimity rule to federal question cases . . . prevents one defendant from imposing his choice of forum upon other unwilling defendants”); Prescott, *supra* note 21, at 265.

193. See 28 U.S.C. § 1446(d) (2012); Harper v. AutoAlliance Int'l Inc., 392 F.3d 195, 202 (6th Cir. 2004) (explaining that the non-consenting defendant could remand the case to state court if the defendant did not, in fact, consent to removal in the first place).

194. See Rebecca Martin, *New Problems with Removal and the ALI*, 54 U. KAN. L. REV. 489, 502–05 (2006) (“[I]nitially federal district courts began to assert in dicta and holdings the power to remand entire federal question cases that had been removed from state courts. Later, numerous circuit courts wrote opinions that asserted that they in fact did not have the discretion to remand whole cases that included federal questions to state court. Instead, these courts argued that the discretion to remand cases to state court was limited.”).

195. See Prescott, *supra* note 21, at 265.

196. *Id.*

197. See *id.* at 252.

198. See *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1185–87 (8th Cir. 2015).

form for consenting to removal to federal court.¹⁹⁹ The enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which codified the rule of unanimity,²⁰⁰ makes no mention of the proper way to give consent.²⁰¹ Correctly, the court reasoned that through one of the canons of interpretation—legislative intent—Congress could have specified the form of consent required for a defendant who joins in the removal.²⁰² Analyzing legislative intent—using plain meaning, the purpose approach, and textualism—shows that the court’s analysis was further substantiated. The court in *Griffioen* could have analyzed another policy implication—an attorney’s ethical challenges in terms of the Model Rules of Professional Conduct. The application of the Model Rules of Professional Conduct to the lawyers who sign and certify the notice of removal pursuant to Rule 11 importantly supports the theory that a single defendant may give consent for its codefendants.²⁰³ This is shown by the threat of state bar disciplinary actions imposed on an attorney who violates one of the Model Rules of Professional Conduct.²⁰⁴ In a sense, the threat of bar disciplinary actions mimics the policy implication for allowing a sole defendant to give consent for its codefendants brought about by Rule 11 of the Federal Rules of Civil Procedure.²⁰⁵ Additionally, the policy implications of Rule 11 support the notion that a defendant may vouch for consent of its codefendants, subject to a local rule certification that may implicate sanctions.²⁰⁶

In sum, the Eighth Circuit accurately analyzed § 1446 and the consent requirement. However, the holding in *Griffioen* could nonetheless lead to a misuse of the removal statute in an attempt to force a defendant into federal court.²⁰⁷ Until the exact form of consent is codified in statute, the consent requirement of the rule

199. See *supra* Section II.C.

200. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended at 28 U.S.C. § 1446).

201. See *id.*

202. See *Griffioen*, 785 F.3d at 1187 (“Congress could have defined with equal specificity the form of or time for consent but chose not to do so.”); *supra* notes 168–70 and accompanying text.

203. See *supra* notes 176–88 and accompanying text.

204. See *supra* notes 176–88 and accompanying text.

205. See *supra* note 178 and accompanying text.

206. See *Griffioen*, 785 F.3d at 1187.

207. See *supra* notes 189–96 and accompanying text.

of unanimity will perpetually confound the courts that analyze § 1446 in a context similar to *Griffioen*.