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REDISCOVERING DISCOVERY ETHICS

W. BRADLEY WENDEL*

I. INTRODUCTION

Discovery does not belong to the adversary system. The adversary system occasionally intrudes upon the discovery process, to be sure, but lawyers who adopt unduly tendentious positions on discovery matters will incur the wrath of courts. Lawyers have an ethical duty, which arises out of their duties as "officers of the court," to restrain their partisan zeal when seeking, responding to, and litigating discovery. This paper is concerned with the theoretical basis for the ethical duties that apply to lawyers engaged in civil discovery practice. Lawyers have an obligation to be advocates for their clients, but I argue that this duty does not apply with full force to discovery. The function of discovery within the litigation system requires that lawyers assist the court in adjudicating the dispute on the merits by disclosing the facts necessary for the court to make an informed decision. With limited exceptions, advocacy comes into play only after the facts are fully disclosed. For readers who are not persuaded by this argument, I offer a more modest thesis: Courts are beginning to recognize that the discovery system is designed to facilitate truth-finding, and they are involving lawyers in this search for the truth. They are imposing public duties upon lawyers in discovery that are not merely rhetorical fluff, but have content and carry severe sanctions for their violation.

Section II of this Article first briefly summarizes the competing duties that devolve upon lawyers in litigation. The tension between public and private duties is a familiar one in legal ethics. The lawyer must act as a partisan representative of her client's interests while at the same time

* Associate, Bogle & Gates, PLLC, Seattle, Washington; B.A., Rice University, 1991; J.D., with honors, Duke University, 1994.

serving in a quasi-official role as an assistant to, or deputy of, the court. Discovery practice provides the setting in which these conflicting roles are drawn into the most severe conflict for litigators. Confronting the imperative of loyalty to one's client is the concrete public duty of providing information upon which the judicial system can decide a dispute on its merits. Consequently, the discovery arena provides a microcosm of the entire litigation process which can be examined to learn both how courts balance the competing duties upon lawyers who practice before them and how lawyers ought to behave as a theoretical matter. At the same time, a theory of litigation ethics in discovery practice can be generalized to extend to the litigation system at large.

How does a lawyer answer the questions raised by competing public and private duties? Section II proceeds to argue that the rules of civil procedure governing discovery, for the most part, beg the important ethical questions that a lawyer must raise. The sanctioning provisions of the civil rules proscribe "unreasonable" burdens and "undue" costs and delay, without giving any clues as to how those conclusory terms should be interpreted. Cases interpreting the rules do so in a similarly circular fashion. A court simply labels a distasteful practice "abuse" and sanctions its practitioner for having violated the discovery rules, without explaining what feature of the practice warrants the "abuse" epithet.

The ethical rules—that is, the formal regulations governing professional conduct promulgated by state bar associations—merely replicate this circularity at another level. The Model Code of Professional Responsibility directs lawyers to resolve the ambiguities inherent in legal norms in favor of the client. The Model Code simply loops our hypothetical lawyer directly back into the indeterminacy of rules and cases. The Model Rules of Professional Conduct also reproduce the conclusory language found in the rules of civil procedure and the discovery abuse cases. Thus, in a Model Rules state, the litigator is charged to make a "reasonably diligent" effort to respond to a "legally proper" discovery request, and to avoid making "frivolous" requests herself. These self-defining terms do little to provide ethical or moral guidance where it is most acutely needed.

Section III is concerned with the *morality* of discovery practice: What ought lawyers to do, as an ethical matter, when faced with the possibility that their conduct may breach either their duties of zealous advocacy or their obligations to the judicial system? I hope the previous sections will have established that this *is* a moral question.[1] Unless a lawyer confronted with a public-private conflict of duties simply flips a coin, she must employ some non-arbitrary decision principle to resolve the dilemma one way or the other. Neither procedural rules nor case law construing those rules reveals with sufficient clarity the difference between a sanctionable excess of advocacy on the one hand, and a failure of advocacy on the other. The rules and cases serve only to establish poles—"abuse" and "malpractice"—between which is arrayed the multiplicity of courses of action available to the lawyer.

This Article makes two closely related moral claims. The first is that normative claims about a given practice should be evaluated by reference to the purpose or end of that practice. The end of the practice provides a moral yardstick by which the correctness or suitability of rules are measured. The rules which are judged good are those which enable the practice to realize the ends to which it is constituted. Thus, one must turn to the ends of civil litigation in general, and discovery practice in particular, to determine the content of the rules that apply to lawyers engaged in civil litigation practice.

The second and, I believe, more important claim is that the moral goodness of a professional should be assessed by reference to the *character* of the individual. The second claim is related to the first by the manner in which the character of persons acting within a practice is defined. A good professional is one who is suited to realize the goods or ends to which the practice is directed, just as a good rule is one which promotes the realization of goods within a practice. The second claim belongs to what Professor Levinson terms the "jurisprudence of lawyering,"[2] and is an application to legal ethics of the Aristotelian tradition in moral philosophy of considering the character, or virtue, of moral agents. I hope to use the discovery system in this Article as a

1. I use the term "morality" to refer to a set of normative standards applicable to persons, either acting in their capacity as professionals or as private individuals, whether or not these principles are coextensive with legal directives. I make this distinction not to take sides in the positivism vs. natural law debate, but to clarify that morality is conceptually separate from, but may overlap with, the field of "legal ethics," which is usually understood to refer to positive legal rules established by bar associations or courts. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 101 (2d ed. 1994) (suggesting similar distinction); *see also* LON L. FULLER, THE MORALITY OF LAW 106-10 (Rev'd ed. 1969) (modern positivist theories distinguish law—that is, the enterprise of subjecting human conduct to the governance of rules—from the substantive aims of legal rules).

2. *See* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353, 362 (1987).

model to test my hypothesis that a comprehensive agent-centered jurisprudence of lawyering is a possible solution to the question how a lawyer should balance her competing obligations to the client and the court.

Along with another writer on virtue theory in the legal system, I am sensitive to the perception that explaining lawyers' ethics by resort to Aristotle "may seem quixotic, dilettantish, or both."[3] Nevertheless, I hope that readers who overcome their initial skepticism will acknowledge the difficulty of regulating the behavior of lawyers by laying down rules. Lawyers, after all, are adept at manipulating rules. We endure three years of post-graduate training in the malleability of rules. We are taught that rules are hopelessly vague and indeterminate. We are commanded (ironically and circularly, by *rules* of professional conduct) to discover and exploit uncertainties in the rules to the advantage of our clients. Reformers of the discovery system hope in vain, therefore, for a change in the rules that will end certain categories of discovery abuse.

Merely exhorting lawyers to do good—or, in the case of a virtue-based argument, to *be* good—seems like the height of fanciful, idealistic thinking. After all, what incentives does a lawyer have to be good that are sufficiently weighty to overpower the motivation to do what her clients will pay for? If the rules do not check the zeal of the advocate, what boundaries remain? Thus, in Section IV, I offer the additional argument that courts are enforcing a standard of conduct that cannot be precisely captured by the language of rules, but which nevertheless holds lawyers up to their obligations as officers of the court. In other words, if lawyers do not take their public responsibilities seriously, they may be subject to sanctions for discovery abuse. Courts are beginning to impose these sanctions not just for flagrant violations of the rules, but for the failure of lawyers to conduct discovery in a fair, open, and candid matter.

Finally, Section V explores the practical consequences of a lawyer's virtue or character. This portion of the Article, borrowed from a talk given by Judge William Dwyer of the Western District of Washington, develops the concept of the character of a professional, arguing that lawyers who cultivate unduly partisan, obnoxious personalities are less successful in their practices than their colleagues who strive to be truthful, candid, and honest.

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3. *See* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1426 (1995).

II. KNOWING "ABUSIVE" DISCOVERY WHEN YOU SEE IT

A. *Conflicting Duties*

It is a truism that a lawyer must serve two masters. She is the zealous advocate or friend[4] of her client, representing "the lonely individual facing Leviathan."[5] In this role, the lawyer helps individuals realize their autonomy and capacity for self-government in a democratic society.[6] At the same time, courts have "deputized" lawyers to assist in achieving the just resolution of disputes. In fact, the civil discovery system under the federal rules was conceived as being simultaneously a substitute for court-controlled investigation of facts and an extension of the adversary system, in which the litigants compete to develop the best factual position.[7] This marriage of convenience between public and private goals creates profound structural tension within the discovery system.[8] U.S. District Judge William Schwarzer, a leading critic of the discovery system, recognizes the tension that confronts practicing lawyers:

> The result is that the rules impose on lawyers a heavy burden of having to accommodate conflicting expectations of the litigation process. Judges expect lawyers to implement the purposes of the rules and apply varying degrees of pressure on lawyers to that end. Clients, on the other hand, expect their lawyers to secure for them all of the benefits of the adversary process. It can be difficult to explain to clients that damaging evidence has to be disclosed to the opponent, or that a stipulation eliminating an issue from the case is consistent with zealous representation of her interests.[9]

Put another way, why would a client pay for an advocate whose loyalties

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4. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060 (1976).

5. This metaphor is taken from William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707 (1993).

6. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983): "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits."

7. *See* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989)

8. *See* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 19 (1988) (meaningful discovery reform is not possible since discovery rules were engrafted onto adversary system).

9. Schwarzer, *supra* note 7, at 714.

were divided between the client and the legal system?[10]

A perfectly partisan system, in which lawyers merely acted as "champions," "hired guns," or "mouthpieces"—choose your metaphor—could not create this tension. A true mercenary is not concerned with the justness of her cause. For this reason, Professor Simon has said that the closest analogue to the pure adversary system is prostitution.[11] Conflict arises when lawyers vest themselves with quasi-official responsibilities, which are often denominated "officer of the court" duties by the organized bar and by courts. These duties are said to run to the judicial system as a whole, to the reified notion of "justice," or to the public at large.[12] Professor Gaetke argues that the officer of the court notion is merely an aspirational ideal, empty of real normative content.[13] Since lawyers are understandably unwilling to occupy the same moral ground as prostitutes, the bar has a powerful incentive to hold up its members as dedicated defenders of justice. The snickers from the public that usually accompany this proclamation are evidence that Gaetke's diagnosis is at least partially correct.

The public derision of lawyers is due, at least in part, to the perception that lawyers go too far in pursuit of their clients' ends.[14] As Judge Frankel notes, "[o]ur relatively low regard for truth-seeking is perhaps the chief reason for the dubious esteem in which the legal

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10. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1056 (1975).

11. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108.

12. *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 43 (1989). I use the terms "officer of the court" duties and "public" duties interchangeably. Judge Frankel similarly distinguishes between public or officer-of-the-court duties on the one hand, and private duties on the other. *See* Frankel, *supra* note 10, at 1059. *Cf.* Van Berkel v. Fox Farm & Road Machinery, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (referring to lawyer's "duty to the public").

13. *See* Gaetke, *supra* note 12, at 39.

14. An illuminating example is the debate surrounding the decision by the O.J. Simpson defense team to "play the race card" and attempt to focus the jury's attention on misconduct by the Los Angeles Police Department, for example, by playing tapes of Detective Mark Fuhrman repeatedly uttering a racial slur. *See, e.g.*, Adam Pertman, *Simpson Case Heats Up Ethics Debate; As Tapes Become Issue, Have Lawyers Done The Right Thing?*, BOSTON GLOBE, Aug. 20, 1995, at 18. Some commentators in the popular press argued that Simpson's lawyers "bent ethics too far" in their defense efforts. *See, e.g.*, *Bizarre Twist in O.J. Trial Sidetracks Pursuit of Truth*, USA TODAY, Aug. 16, 1995, at 10A. However, the discussion seemed devoid of guidelines for deciding when vigorous advocacy becomes unethical advocacy. For example, if broader considerations of justice—such as the harassment of African-Americans by police officers—may be relevant to the jury's decision to nullify the prosecution, and if jury nullification is permitted, then are not defense lawyers ethically justified in seeking nullification?

profession is held."[15] How, then, is a lawyer to know how far is "too far"? In the context of discovery, Judge Schwarzer is surely correct to point out that "abuse" results from allowing the process to be lawyer-controlled while not providing clearly defined standards of conduct.[16] If that is the case, how does one respect Judge Frankel's suggestion that one pay more attention to truth-seeking, while simultaneously providing service to one's client which, after all, is what the client is paying for?

B. *Discovery Rules and Case Law*

1. The Rules and Discovery Abuse

One of the most persistent criticisms of the federal rules is that the discovery provisions do not sufficiently rein in the pervasive abuse of discovery procedures engaged in by litigants. Several active judges[17] along with a parade of legal scholars[18] and practicing lawyers[19] have made pleas in print for reform of the discovery process. This complained-about abuse, or "predatory" discovery,[20] takes many forms. The first is over-discovery, or the use by the requesting party of a blizzard of document requests, interrogatories, and deposition notices. The responding party, in turn, may attempt to bury her opponent in boxes of documents. Both gambits allow a litigant to externalize the costs of discovery by forcing her opponent to bear a disproportionate

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15. Frankel, *supra* note 10, at 1040.

16. Schwarzer, *supra* note 7, at 711.

17. *See* Schwarzer, *supra* note 7; Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983); Wayne D. Brazil, *Civil Discovery: Lawyers' View of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789; Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1979).

18. *See, e.g.*, Wolfson, *supra* note 8; Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189 (1992); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Time Again For Reform?*, 138 F.R.D. 155 (1991); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982) [hereinafter "Yale Note"]; David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

19. *See, e.g.*, Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIG. 71 (1981); Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79.

20. This term comes from Judge Posner's opinion in *Marrese v. Amer. Academy of Orthopedic Surgeons*, 726 F.2d 1150, 1162 (7th Cir. 1984). Predatory discovery, by definition, is "sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opponent to settle regardless of the merits. . . ." *Id.* at 1161.

share of the expense.[21] Over-discovery is not difficult for courts to control. Many federal district courts have adopted, by local rule, limitations on the number of interrogatories and requests for production that are allowed in a case. Rule 30 limits to ten the number of depositions that may be taken by a party without leave of the court.[22] Federal judges are empowered to establish a case management schedule and issue orders to "discourage wasteful pretrial activities."[23] Rule 26 provides explicit case management authority for district judges to limit the scope of discovery.[24] In short, "managerial judging"[25] has the potential to ameliorate over-discovery to a significant extent.

The second category of discovery abuse is downright obstreperousness. An astonishing number of litigants flatly refuse to comply with court orders.[26] Courts severely sanction such behavior by entering

21. *See* Yale Note, *supra* note 18, at 357. This ploy cannot be eliminated merely by imposing sanctions, unless the sanction is greater than the economic benefit of externalizing discovery costs. *See* Wolfson, *supra* note 8, at 45 ("[i]mposing sanctions on egregious behavior simply adds another factor to be considered in the cost-benefit calculation often indulged in by attorneys and their clients."). Additionally, courts must bear some share of the cost of the motions practice that is inevitably spawned by over-discovery; these costs cannot be shifted to the parties. *See* J.W. Cleminshaw Co. v. Norwich, 93 F.R.D. 338 (D. Conn. 1981).

22. FED. R. CIV. P. 30(a)(2)(A).

23. *See* FED. R. CIV. P. 16(a)(3).

24. *See* FED. R. CIV. P. 26(b) ("Unless otherwise ordered by the court. . . ."). This provision is intended "to deal with the problem of over-discovery," recognizing that greater judicial involvement is needed, since the adversary system and self-regulating discovery may be mutually incompatible. *See* FED. R. CIV. P. 26 Advisory Committee Notes to 1983 Amendment. Additionally, the protective order provisions of Rule 26 allow the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

25. *See generally* Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

26. *See, e.g.*, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (district court did not abuse its discretion by imposing sanction of default after warning plaintiffs that continued noncompliance with order to answer interrogatories would result in imposition of sanctions under Rule 37). The federal rules provide explicit sanctioning authority when a party fails to obey the district court's discovery order. *See* FED. R. CIV. P. 37(b)(2). Of a staggering number of reported federal cases in which a party failed to comply with an order compelling discovery, the most egregious include Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990) (defendants refused to produce documents even though there had been *nine* court orders to do so *and* the district court had held that the defendants had waived their privilege over them; court of appeals affirmed entry of default judgment of $25 million in favor of plaintiffs as Rule 37 sanction); John B. Hull, Inc. v. Waterbury Petroleum Prod., 845 F.2d 1172, 1177 (2d Cir. 1988) (affirming sanction of dismissal of third-party plaintiff's complaint and award of attorney's fees and costs, where the sanctioned party offered no explanation for its "flagrant disregard of court orders"); C.T. Bedwell and Sons v. International Fidelity Ins. Co., 843 F.2d 683 (3d Cir. 1988) (upholding dismissal of complaint, finding of liability against plaintiff on counterclaim, and awarding of $616,505 to defendants without hearing on amount of sanction).

default judgments,[27] dismissing actions,[28] striking pleadings or claims,[29] precluding evidence,[30] shifting attorneys' fees,[31] and levying monetary fines.[32] Given the broad panoply of sanctions available to courts under Rule 37, it is difficult to conceive of a stronger remedy for the outright refusal of a party to cooperate.

A related form of abusive litigation is obnoxious behavior: Most practicing lawyers are all too familiar with incivility, personal attacks, and

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27. *See, e.g.*, Lothschuetz v. Carpenter, 898 F.2d 1200, 1204 (6th Cir. 1990) (affirming entry of default judgment where defendants failed to comply with several court orders); Morgan v. Hatch, 118 F.R.D. 6 (D. Me. 1987).

28. *See, e.g.*, Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1031-32 (5th Cir. 1990) (affirming dismissal of action where plaintiff ignored discovery orders, including an order to pay sanctions for previous violation); Powers v. Chicago Transit Authority, 890 F.2d 1355, 1361 (7th Cir. 1989) (dismissal appropriate where there is record of "contumacious conduct"). Some courts hold that a sanction of dismissal must be supported by a showing of both noncompliance with a court order and bad faith. *See, e.g.*, Farm Const. Servs., Inc. v. Fudge, 831 F.2d 18, 20 (1st Cir. 1987); Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 285 (7th Cir. 1988).

29. *See, e.g.*, United States v. Kahaluu Constr. Co., 857 F.2d 600, 604-05 (9th Cir. 1988) (affirming dismissal of defendant's counterclaim for failing to comply with pretrial scheduling order).

30. *See, e.g.*, Mraovic v. Elgin, Joliet & Eastern Ry. Co., 897 F.2d 268, 271 (7th Cir. 1990) (plaintiff precluded from presenting expert testimony as sanction for failure to attend independent medical examination); Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67, 71 (2d Cir. 1988) (defendants precluded from presenting evidence on damages where they had failed to comply with magistrate's orders); Hull v. Eaton Corp., 825 F.2d 448, 452 (D.C. Cir. 1987) (affirming preclusion of expert testimony and subsequent summary judgment where plaintiffs ignored magistrate's order compelling them to identify expert).

31. *See, e.g.*, Magnus Elecs. v. Masco Corp., 871 F.2d 626, 631 (7th Cir. 1989) (awarding attorneys' fees against plaintiff who failed to comply with magistrate's order); Goldman v. Alhadeff, 131 F.R.D. 188 (W.D. Wash. 1990).

32. *See, e.g.*, Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 526-27 (2d Cir. 1990) (plaintiff and lawyer jointly and severally liable for monetary fine); Fashion House, Inc. v. K-Mart Corp., 124 F.R.D. 15 (D.R.I. 1988).

In 1995, a federal district court in Georgia fined a chemical manufacturer over $114 million for discovery abuse in a massive product liability defense effort. *See* In re E.I. du Pont de Nemours and Co. Benlate Litigation, 1995 WL 814579 (M.D. Ga. 1995). According to the court, DuPont concealed documents from which a jury could have concluded that a DuPont fungicide was contaminated. Given the nationwide scope of the litigation, DuPont's decision to produce the documents would have had far-reaching financial consequences. For not producing the documents, however, the company was lambasted by the court:

> Put in layperson's terms, DuPont cheated. And it cheated consciously, deliberately and with purpose. DuPont has committed a fraud on this Court, and this Court concludes that DuPont should be, indeed must be, severely sanctioned if the integrity of the Court system is to be preserved.

Id. at *37. Although the court seemed to concede that DuPont faced a difficult decision on the eve of the first trial in the Benlate litigation, DuPont did not actually have a decision to make. It was obligated by the discovery rules and the court's orders to produce the damaging reports.

in-your-face litigation tactics. One of the most successful trial lawyers in Texas was castigated by the Delaware Supreme Court for his conduct during several depositions:

MR. JOHNSTON: Do you have any idea why Mr. Oresman was calling that material to your attention?
MR. JAMAIL: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.
MR. JOHNSTON: No, Joe —
MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
MR. JOHNSTON: No. Joe, Joe —
MR. JAMAIL: Don't "Joe" me, a__. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.
MR. JOHNSTON: Let's just take it easy.
MR. JAMAIL: No, we're not going to take it easy. Get done with this.[33]

The Court responded with a sharply worded rebuke, but since Mr. Jamail's conduct was apparently not prejudicial to any of the parties, the Court was powerless to impose a stronger sanction.[34]

The massive libel action brought by Philip Morris against ABC News[35] inspired similar playground disputes in depositions,[36] as well as

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33. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 53-54 (Del. 1994). Judge Schwarzer relates another example of offensive behavior during a deposition involving "two experienced lawyers from leading law firms":

Mr. B: I want to finish this deposition now. . . . Are you prepared to keep Mr. _____ past four o'clock today?
Mr. A: I want you to call the judge, and talk to the judge, Sonny.
Mr. B: What did you call me?
Mr. A: Sonny. That's what you're acting like.
Mr. B: You are the most boorish adult —
Mr. A: Call him.
Mr. B: — that I have met in a long time.

See Schwarzer, *supra* note 7, at 710 n. 27.

34. *Paramount*, 637 A.2d at 55 ("the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions.").

35. This account of the discovery in the matter is taken from Steve Weinberg, *Hardball Discovery*, A.B.A. J., Nov. 1995, at 66.

36. *See id.* at 70. The *ad hominem* attacks included one lawyer calling another "profoundly obnoxious," while the allegedly obnoxious lawyer complained, at another point, that an opposing lawyer was "smirking or giggling or laughing" at him. Depositions seem to

allegations of some bizarre tactics to frustrate discovery. Philip Morris allegedly delivered 25 boxes of documents on dark paper that was difficult to photocopy.[37] According to ABC lawyers, the paper was also treated with a substance that emitted foul odors. The judge, however, declined to sanction Philip Morris, finding that the documents could be copied without undue difficulty and did not give off noxious fumes.[38]

Incivility may come in the form of written responses to discovery. Lawyers, fearful of waiving any conceivable objection to a discovery request, respond to simple interrogatories with a torrent of boilerplate objections and mindless pettifoggery. The Washington Supreme Court imposed sanctions on a law firm for discovery abuse; the court used this interrogatory response as an example of the responses given by the firm to the plaintiff's discovery requests:

> INTERROGATORY NO. 2: Can theophylline cause brain damage in humans?
> ANSWER: See general objections attached hereto as Exhibit A and incorporated herein by reference. This interrogatory calls for an expert opinion beyond the scope of Civil Rule 26(b)(4), and is, in any event, premature. Furthermore, this interrogatory appears to call for an opinion based on medical knowledge after January 18, 1986, whereas the relevant time frame is on or before January 18, 1986. In addition, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence under CR 26(b)(1). This interrogatory is also vague, ambiguous and overbroad. For example, the term "cause" is vague and ambiguous in that it does not specify whether it includes indirect, as opposed to direct, causes. The term "brain damage" is similarly vague and ambiguous and is overbroad as to time and scope. For example, it is unclear whether the term "brain" includes the entire central nervous system; it is further unclear whether the

bring out the inner child in lawyers, as many courts recognize. *See, e.g.*, Van Pilsum v. Iowa State Univ., 152 F.R.D. 179, 181 (S.D. Iowa 1993) ("the acrimony which exists between these counsel does not serve their clients or the justice system. It necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision."); *see also* Castillo v. St. Paul Fire & Marine Ins. Co., 828 F. Supp. 594, 597 (C.D. Ill. 1992) (after lawyer suggested a telephone conference with the judge to resolve a deposition impasse, opposing counsel threatened to "take care of that in the way one does who has possessory rights").

37. Weinberg, *supra* note 35, at 103.

38. *Id.*

> term "brain damage" includes temporary as well as permanent damage.[39]

The continuing mean-spiritedness of much of litigation has inspired a judicial backlash.[40] Numerous judicial conferences have been convened to address the problem of lawyer incivility.[41] However, incivility, whether in the form of boorish behavior at depositions or copies of documents produced on smelly paper, is a lesser concern for the purposes of this Article than the attempt to conceal relevant information from one's opponent.

Many lawyers seem to reason backwards from the damaging nature of evidence — "it hurts our case, therefore it cannot be discoverable." As I will argue, ends-based reasoning is appropriate in discovery; courts and practitioners should consider the goal to which any activity is constituted. However, hide-the-ball practitioners consider the wrong end. The purpose of civil discovery is to allow the exchange of sufficient information to allow the court or jury to decide the dispute on its merits. Is this conclusion apparent from the discovery rules and cases construing them?

Although reported cases are legion in which a federal court sanctions one of the parties for discovery abuse, decisions on discovery issues are generally not useful markers for a lawyer trying to navigate her way through the narrow channel between "advocate" and "officer of the court" duties. Cases arising out of one party's failure to comply with a court order do not implicate the conflict between an attorney's public and private duties, since an attorney has an absolute duty to obey the directive of a court that may not be overcome by her obligation of zealous advocacy. Moreover, cases involving express disobedience of a court order are inapposite in situations in which no order has been

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39. *See* Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1079 n.86 (Wash. 1993). One of my colleagues brilliantly analogized this kind of discovery response to a scene in Woody Allen's "Take the Money and Run." The bank robber, played by Allen, hands over a note to the teller, which reads "Please put $50,000 in this bag and act natural, because I'm pointing a gun at you." Puzzled, the teller points to the note and responds, "That looks like gub. That's gub. That's a *b*." "No, that's an *n*," responds Allen, but he is referred to the bank's vice president to have the note initialled, drawing a gaggle of bank employees to argue over whether Allen has a gun or a gub. *See* TAKE THE MONEY AND RUN (Palomar Pictures 1969).

40. *See generally* Kelly P. Corr & Patrick M. Madden, *Goodbye, Rambo—Hello, Mr. Rogers?*, FOR THE DEFENSE, Dec. 1995, at 8.

41. *See, e.g.*, TENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 146 F.R.D. 205 (1992); INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371 (1991).

issued.[42] Other reported cases involve "spoliation" or intentional destruction of material evidence.[43] In most of these cases, the wrongfulness of the lawyer's conduct is often clear and the only task remaining for the court is to determine the severity of the sanction to be applied.[44] An attorney may take little guidance from cases in which one of the litigants has essentially thumbed its nose at the court, since direction is needed most in marginal cases, which are usually distinguishable from the flagrant instances of abuse.

2. Good Faith, Public Duties, and Discovery Abuse

Although courts have done a fairly poor job establishing rules to guide discovery practice, they have succeeded in enforcing *standards* of conduct to which attorneys must measure up, at their peril.[45] This passage of Kennedy's describes the discovery system well:

> One characteristic mode of ordering a subject matter area including a vast number of possible situations is through the combination of a standard with an ever increasing group of particular rules [narrower in scope than the standard]. The generality of the standard means that there are no gaps: it is possible to find out something about how judges will dispose of cases that have not yet arisen. But no attempt is made to formulate a formally realizable general rule. Rather, case law gradually fills in the area with rules so closely bound to particular facts that they have little or no precedential value.[46]

My contention is that the subject matter of discovery is regulated through a broad standard: the attorney's duties as an officer of the court. Particular rules can and do arise, but to find out how judges will

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42. *See, e.g.*, J.M. Cleminshaw Co. v. Norwich, 93 F.R.D. 338, 345 n.2 (D. Conn. 1981).

43. *See, e.g.*, National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 546 (N.D. Cal. 1987) (defendant destroyed documents it knew were discoverable in pending litigation); Wm. T. Thompson Co. v. General Nutrition Corp, 104 F.R.D. 119, 121 (C.D. Cal. 1985) (violation of court order is not necessary for district court to impose sanctions under its inherent power for destruction of relevant documents); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 488 (S.D. Fla. 1984), *aff'd*, 775 F.2d 1440 (11th Cir. 1985) (entry of default appropriate where defendant destroyed documents).

44. *See, e.g.*, Schmid v. Milwaukee Elec. Tool Co., 13 F.3d 76, 79 (3d Cir. 1994) (district court's sanction too severe where product was not destroyed); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 268 (8th Cir. 1993) (exclusion of plaintiffs' expert's testimony was appropriate sanction in product liability case where the expert had ordered the product destroyed).

45. *See generally*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

46. *Id.* at 1690.

deal with cases that have not yet arisen, an attorney must understand the contours of her public duties in the same way that they are understood by judges.

To illustrate the nature of judicial reasoning in discovery cases, I will consider in detail examples from three different courts—the U.S. Supreme Court, a federal court of appeals, and a state court of last resort. In each case, the court's decision turned upon an attorney's violation of her public duties, rather than the transgression of a clear legal rule.

a. Chambers

Sanctions for "abusive" litigation can be imposed even when one of the sanctioning provisions of the rules is not triggered. The United States Supreme Court has said that explicit textual authority is not a prerequisite to a district court's award of sanctions for litigation abuse.[47] The Court upheld an award of attorneys' fees of nearly $1 million levied against the defendant, who had engaged in some truly astonishing litigation abuse.[48] The plaintiff moved for sanctions in the district court, citing FED. R. CIV. P. 11,[49] 28 U.S.C. § 1927,[50] and the court's inherent

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47. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

48. The underlying action was for specific performance of a contract for sale of a television station. *See* 501 U.S. at 35. After receiving notice that the plaintiff would seek a temporary restraining order, the defendant placed the property at issue beyond the district court's jurisdiction and failed to inform the court of this gambit, despite the court's questioning. *Id.* at 37. The defendant was later fined $25,000 for contempt after refusing to allow the plaintiff to inspect corporate records. *Id.* at 38. Litigation was characterized by "a series of meritless motions and pleadings and delaying actions." *Id.* The defendant also antagonized the Fifth Circuit, which ruled his appeal was frivolous and awarded attorneys' fees and double costs to the plaintiff, pursuant to FED. R. APP. P. 38. *Id.* at 40 (citing NASCO, Inc. v. Calcasieu Television & Radio, Inc., 797 F.2d 975 (5th Cir. 1986) (unpublished *per curiam* order)). More detail on the defendant's conduct may be found in district court opinions in the action. *See* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 583 F. Supp. 115 (W.D. La. 1984); 623 F. Supp. 1372 (W.D. La. 1985); 124 F.R.D. 120 (W.D. La. 1989).

49. Rule 11 imposes a requirement that an attorney submitting a pleading certifies, by her signature, that the pleading is not presented for an improper purpose, and that the claims and defenses are well grounded in fact and law. It is intended to deter baseless filings in the court. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). The voluminous Rule 11 commentary and hundreds of reported cases are beyond the scope of this Article, particularly since the 1993 amendments to Rule 11 "de-linked" it from discovery, leaving the sanctioning of discovery abuse to Rules 26 and 37. *See* FED. R. CIV. P. 11(d) and advisory committee's note to 1993 amendment.

50. The statute provides: Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. 28 U.S.C. § 1927 (1994). This section has been construed in parallel with Rule 11, and a similar

power. The district court rejected the rule and statute as a basis for sanctions. It said that Rule 11 was insufficient to punish much of the abusive conduct since it did not reach pleadings that were found to be frivolous only after a trial on the merits.[51] Section 1927 did not allow the court to sanction the defendant personally, whom the court thought was the "strategist" behind the scheme to "reduce [plaintiff] to a condition of exhausted compliance."[52] Thus, the court reached into its bag of sanctioning tools and pulled out the ultimate cudgel—its inherent power. "The wielding of that inherent power," said the court, "is particularly appropriate where the offending parties have practiced a fraud upon the court."[53] The Court of Appeals affirmed, holding that the court's inherent power to sanction bad-faith conduct is not limited by Rule 11 or Section 1927.[54]

The Supreme Court affirmed, finding no abuse of discretion in the district court's use of its inherent power.[55] "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates,"[56] the Court said. The inherent power of the federal courts includes the authority to discipline attorneys admitted to the bar,[57] punish contempt,[58] vacate a judgment if it was obtained by fraud,[59] and dismiss on the ground of forum non conveniens.[60] Does inherent power encompass the ability to award attorneys' fees to the opponent of a party who has engaged in litigation abuse? The majority answered in the affirmative, holding that the so-called

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objective bad faith standard is imposed. *See, e.g.*, Cruz v. Savage, 896 F.2d 626, 631 (1st Cir. 1990); McMahon v. Shearson/American Express, Inc., 896 F.2d 17, 23 (2d Cir. 1990); Wielgos v. Commonwealth Edison Co., 123 F.R.D. 299, 304 (N.D. Ill. 1988); *contra* Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990) (subjective bad faith standard). The statute is somewhat broader than Rule 11, however, since it is not limited to pleadings or other papers signed by an attorney. *See* West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990); Samuels v. Wilder, 906 F.2d 272, 275 (7th Cir. 1990).

51. NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138-39 (W.D. La. 1989).

52. *Id.* at 136, 139.

53. *Id.* at 139.

54. NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696 (5th Cir. 1990).

55. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

56. *Id.* at 43, (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

57. *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

58. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).

59. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944).

60. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947).

"American Rule"[61] may be abrogated "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[62] Federal courts must have inherent power to sanction bad faith litigation, reasoned the Court, lest "'the very temple of justice [be] defiled.'"[63] This power "extends to a full range of litigation abuses," not merely violations of procedural rules or statutes.[64] Additionally, a federal court is not limited in the use of its inherent power by the existence of statutory or rules-based remedies for sanctionable conduct, although a court "ordinarily should rely on the Rules rather than the inherent power."[65]

The majority's holding provoked a strong dissent by Justice Kennedy. While conceding that the defendant richly deserved sanctions under applicable rules and statutes, Justice Kennedy was sharply critical of the majority's approval of the foundation of the district court's sanctions award on its inherent power, which was cabined only by the necessity of making a finding of bad faith.[66] Litigants are entitled to specific guidelines from courts that indicate the circumstances in which sanctions will be applied, Justice Kennedy argued.[67] The majority admitted that procedural due process limited federal courts in the use of their inherent powers;[68] seizing on this concession, Justice Kennedy correctly pointed out that a fundamental aspect of due process is *notice* of what conduct is prohibited.[69] The "talismanic recitation" of the finding that a litigant acted with bad faith not only fails to provide standards for appellate review for abuse of discretion, but leaves future litigants uncertain as to exactly what behavior warranted the sanction.[70] While Justice Kennedy did allow a role for inherent power sanctions "to preserve the authority of the court," he insisted that they be deployed only where specific

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61. The American Rule prohibits "substantive" fee shifting—that is, awarding attorneys' fees to the prevailing party on the merits—in most cases. *See* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). "Procedural" fee shifting as a sanction for litigation abuse must be predicated upon a finding of bad faith. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).

62. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991)(citations omitted).

63. *Id.* at 46.

64. *Id.*

65. *Id.* at 50.

66. *See id.* at 68 (Kennedy, J., dissenting).

67. *Id.*

68. *Id.* at 50.

69. *Id.* at 68 (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (Kennedy, J., dissenting)).

70. *Id.* at 69.

textual authority was lacking for rule or statute-based sanctions.[71]

A Fourth Circuit opinion followed the Supreme Court's holding in *Chambers* that courts have the inherent power to preserve the integrity of the judicial system and that attorneys, as officers of the court, have an absolute duty to assist the court in this end.[72] The deception that so angered the court involved an EPA cleanup coordinator's misrepresentation of his academic credentials and the Government attorneys' efforts to thwart the defendant's attempt to uncover the falsified credentials. The court's rhetoric resoundingly rejected the adversary system as a justification for any attempt to play games with the truth. Heeding Judge Frankel's admonition to give truth-finding a greater role in the judicial system, the court said:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice.
>
> . . .
>
> Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.
>
> . . .
>
> Each lawyer undoubtedly has an important duty of confidentiality to his client and must surely advocate his client's position vigorously, but *only if it is truth which the client seeks to advance.*[73]

Significantly, neither the district court nor the court of appeals limited itself to duties of candor that were derived from rules, statutes, or professionalism codes.[74] The appellate court stated that "a general duty of candor to the court exists in connection with an attorney's role as an officer of the court."[75] The court was quite explicit in deriving this duty from the purpose of the judicial system: "The general duty of

71. *Id.* at 64 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

72. U.S. v. Shaffer Equip. Co., 11 F.3d 450 (4th Cir. 1993).

73. *Id.* at 457 (emphasis supplied); *cf.* Frankel, *supra* note 10, at 1053-59 (paramount consideration of counsel concerning matters of fact should be the discovery of truth, rather than the advancement of the client's interest).

74. *See Shaffer*, 11 F.3d at 458 ("neither [Model Rules 3.3 and 3.4] nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process.") (citing Chambers v. NASCO, Inc., 501 U.S. 32 (1991)).

75. *Shaffer*, 11 F.3d at 457.

truth and candor thus takes its shape from the larger object of preserving the integrity of the judicial system."[76]

b. Asea

A Ninth Circuit case provides an example of the absence of reliable roadmaps in the discovery rules and their associated precedent.[77] The court upheld the trial court's decision, which deemed admitted an answer to a request for admission where the answering party claimed insufficient information to enable it to admit or deny the request. The defendants had offered the same boilerplate response to eighteen of the plaintiff's requests for admission:

> Answering party cannot admit or deny. Said party has made reasonable inquiry. Information known or readily obtainable to this date is not complete. Investigation continues.[78]

This language directly tracked the text of the federal rule governing requests for admission:

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.[79]

The court of appeals concluded that Rule 36 empowered the district court to deem admitted the matter covered by the requests, rather than merely awarding as a post-trial sanction the expenses occasioned by the answering party's failure to admit or deny.[80] The answering party stated that it had made a reasonable inquiry; the court, however, noted that there was evidence in the record suggesting that the defendants had sufficient information to enable them to truthfully admit or deny the requests.[81] Concluding that the trial court had discretion to deem the matter admitted, the court of appeals remanded to the trial court the limited task of making findings of fact as a basis for the sanction.[82]

This holding, as the court recognized, was directly contrary to the

76. *Id.* at 458 (citing Tiverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238, 240 (1985) (counsel have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of litigation)).

77. Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242 (9th Cir. 1981).

78. *Id.* at 1244.

79. *See* FED. R. CIV. P. 36(a).

80. *Asea*, 669 F.2d at 1245.

81. *Id.* at 1247.

82. *Id.*

Advisory Committee's Note to Rule 36, which limited the scope of sanctions available for a violation of the Rule:

> Rule 36 requires only that the party state that he has taken these steps [to make a reasonable inquiry]. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).[83]

The text of the rule also states that a court may order a matter admitted only if "an answer does not comply with the requirements of this rule"; the requirements of the rule are simply that an answering party must state that it has made a reasonable inquiry.[84] The court also candidly admitted that it had no authority for its conclusion that the sanction was within the discretion of the district court:

> We have not been cited to, nor has our review uncovered, any case holding that a response which includes the statement required by Rule 36(a) may nonetheless be deemed an admission.[85]

Nevertheless, it justified its conclusion by reference to the purpose of the pretrial discovery system:

> In our view, permitting a party to avoid admitting or denying a proper request for admission simply by tracking the language of Rule 36(a) would *encourage additional abuse* of the discovery process.[86]

In other words, the court's decision was driven by its recognition that "[t]he discovery process is subject to the overriding limitation of good faith."[87] In this case, where the text of Rule 36, the Advisory Committee Note, and case law were devoid of support for the sanction imposed, "good faith" was the entire basis for the court's holding. It is fair to say that good faith, as relied upon by the court in *Asea*, is the functional equivalent of an attorney's "officer of the court" duties. Since these duties are not derived directly from the discovery rules or from precedent, it is difficult to see how an attorney could learn their precise contours. However, the *Asea* case does show that courts will not hesitate to enforce indistinct standards where rules do not provide a sufficient ground for disciplining lawyers who try to play fast and loose with the rules.

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83. *See id.* at 1246 (quoting FED. R. CIV. P. 36(a) Advisory Committee's Note, 48 F.R.D. 531, 533 (1970)).
84. FED. R. CIV. P. 36(a).
85. *Asea*, 669 F.2d at 1246.
86. *Id.* (emphasis added).
87. *Id.*

Gaetke asserts that courts resort to "officer of the court" arguments in the nondisciplinary context only in the most extreme cases.[88] He also contends that public duties are invoked by courts only to backstop existing obligations imposed by disciplinary or procedural rules:

> [W]hen a court concludes that a lawyer has an obligation to reveal a fact relevant to a civil case, it may declare that the duty arises out of the lawyer's duty as an officer of the court, even though ethical provisions specifically require disclosure by lawyers and even though certain rules of civil procedure require disclosure by laymen as well.[89]

In *Asea*, however, the court stated explicitly that no procedural rule empowered the district court to deem the answer admitted. Moreover, the sanction could not have been derived from the ethics rules, since both the Model Code of Professional Responsibility[90] and the Model Rules of Professional Conduct[91] circumscribe a lawyer's advocacy only by legal norms, which presumably include applicable case law and procedural rules, neither of which were relied upon by the *Asea* court. In the mirror-image *Chambers* case, the Supreme Court placed similar reliance on the concept of bad faith.[92] With respect to these two cases, therefore, Gaetke is incorrect to assert that an attorney's duty as an officer of the court has no content independent of procedural and disciplinary rules.

c. Fisons

A true watershed decision on an attorney's public duties in civil discovery practice was rendered in 1993 by the Supreme Court of Washington.[93] As Professor Gillers said in his column on legal ethics, "[t]he continuing debate over the amendments to the federal discovery

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88. *See* Gaetke, *supra* note 12, at 75-76.

89. *Id.* at 76.

90. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) ("A lawyer should represent his [or her] client zealously within the bounds of the law").

91. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous"). Rule 3.2 does not apply to the defendant's conduct in the *Asea* case, since the Rule prohibits making false statements to the tribunal. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2(a)(1),(2) (1983). Responses to requests for admission under FED. R. CIV. P. 36 are served on the requesting party, but not filed with the court.

92. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

93. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993).

rules pales alongside *Fisons*. That debate is about words. *Fisons* is about enforcement."[94]

The discovery dispute in *Fisons* arose out of a product liability action against Fisons Corporation, a pharmaceutical manufacturer. The litigation established that the child's injury was caused by a toxic dose of theophylline, the active ingredient in Somophyllin Oral Liquid. The toxicity of the theophylline was, in turn, caused by taking the drug while fighting a viral infection. After three years of discovery, the doctor settled with the family. About one year later, the doctor's lawyer received anonymously a copy of a "Dear Doctor" letter sent to selected physicians by the manager of marketing and medical communications at Fisons, warning the recipients of the danger of "life-threatening theophylline toxicity" when children contract viral infections while taking theophylline-based drugs.[95] The letter warned ominously that theophylline could be a "capricious drug."[96] After receiving this document, the doctor's lawyer moved for sanctions against Fisons. Their motion was heard by a special master, who ordered the company to produce all documents relating to theophylline.[97] The next day, an internal company memorandum was produced along with reams of other documents. The memo reported an increase in theophylline toxicity, and said that physicians might not be aware of the "alarming increase in adverse reactions such as seizures, permanent brain damage, and death."[98]

The law firm representing Fisons thought one additional fact was significant: Fisons kept the memo and letter in files related to Intal, another Fisons-manufactured drug which was marketed as an alternative to Somophyllin Oral Liquid.[99] Intal's active ingredient was cromolyn

94. Stephen Gillers, *Truth or Consequences*, A.B.A. J., Feb. 1994, at 103. The landmark nature of the *Fisons* case is demonstrated by the rash of commentary, mostly approving, that followed publication of the decision. *See, e.g.*, Barbara J. Gorham, Note, *Fisons: Will it Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765 (1994); Brian J. Beck, Note, *Rediscovering Discovery: Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 18 SEATTLE U. L. REV. 129 (1994); Bryan P. Harnetiaux, et al., *Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After* Physicians Insurance Exchange & Ass'n v. Fisons Corporation, 29 GONZ. L. REV. 499 (1993-94). In addition to the law reviews, the AMERICAN LAWYER weighed in with its customary tact and restraint. *See* Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, at 5.

95. *Fisons*, 858 P.2d at 1058.

96. *Id.*

97. *Id.* at 1058-59.

98. *Id.* at 1059.

99. *See id.* at 1080.

sodium, not theophylline, so it was suitable for use in cases where theophylline-based products were contraindicated (although cromolyn sodium products were not as effective at opening bronchial passages as was theophylline). The manager of medical communications at the company maintained a file related to the dangers of theophylline, and used this information to market Intal.

Should the discovery requests issued to Fisons have unearthed the two "smoking gun" documents?[100] The company's response to the child's lawyer's first set of discovery requests included an objection that purported to be directed to the scope of plaintiff's discovery requests:

> *Requests Regarding Fisons Products Other Than Somophyllin Oral Liquid.* Fisons objects to all discovery requests regarding Fisons products other than Somophyllin Oral Liquid as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence.[101]

Did this objection put the plaintiff on notice that other responsive documents were being withheld, especially given the plaintiff's definition of "product" above? Were the documents in the Intal files now outside the bounds of discovery in the case?

Consider one of the doctor's requests for production:

> Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children.[102]

The June 1981 "Dear Doctor" letter is a responsive document, right? In a crucial moment of legerdemain, Fisons responded:

> Such letters, *if any, regarding Somophyllin Oral Liquid* will be produced at a reasonable time and place convenient to Fisons and its counsel of record.[103]

The law firm would later contend that this response was not legal hocus-pocus after all, but rather that opposing counsel was fairly apprised that only documents "regarding Somophyllin Oral Liquid" were fair game in discovery. Of course, for this gambit to succeed, the phrase "regarding"

100. It is probably an overstatement to call these two documents "smoking guns" in light of the volume of information produced by Fisons to the plaintiffs concerning its knowledge of the dangers of theophylline. Despite settled knowledge within the medical community of theophylline's side-effects, the company warned practitioners of these dangers, particularly through the package insert. Nevertheless, the fact remains that these documents were not produced in response to discovery requests that were at least arguably on point. For the purposes of this Article, it is the Washington Supreme Court's treatment of this issue, not the merits of plaintiffs' failure-to-warn claim that is important.

101. *Id.*

102. *Id.* at 1081.

103. *Id.* (emphasis added).

Somophyllin would have to be defined as excluding documents warning of dangers associated with theophylline — the active ingredient in Somophyllin.

The company took a similar tack with respect to the child's requests for production:

> *REQUEST FOR PRODUCTION NO. 12*: All documents pertaining to any warning letters including "Dear Doctor letters" or warning correspondence to the medical professions *regarding the use of the drug Somophyllin Oral Liquid.*
> *RESPONSE*: Fisons objects to this request as overbroad in time and scope . . . . Without waiver of these objections and subject to these limitations, Fisons will produce *documents responsive to this request* at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.[104]

The June 1981 "Dear Doctor" letter was not produced in response to this request, since the company had decided, and (in its view) communicated to plaintiffs, that materials in the company's non-Somophyllin files were not responsive to discovery requests involving Somophyllin.[105]

After the 1985 memo was revealed, Fisons settled with the child's family for $6.9 million.[106] The doctor went to trial on his contribution and indemnity claims against the company. After a month-long trial, the jury returned a verdict in the doctor's favor. The trial court, however, denied the doctor's motion for discovery sanctions.[107] Fisons appealed on various substantive issues; the doctor cross-appealed the denial of sanctions. Fisons argued that the company was not only ethically justified in construing the plaintiffs' discovery requests narrowly, but was ethically *compelled* to avoid producing the harmful documents.[108] The court, however, found that the lawyers for Fisons had essentially outsmarted themselves: "It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered

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104. *Id.* (emphasis added).

105. *Cf. id.* at 1083: "There was no clear indication from the drug company that it was limiting all discovery *regarding* Somophyllin Oral Liquid to material from that product's files." (Emphasis in original.)

106. *Id.* at 1059.

107. *Id.* at 1075.

108. *See Id.* at 1083. A similar argument by a law firm appealing an award of sanctions was rejected by the Second Circuit:

> While we of course are mindful of an attorney's ethical duties under the Canons of the Code of Professional Responsibility, we emphatically reject [the attorney's] contention that its vexatious and dilatory tactics were required by such duties.

Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 528 (2d Cir. 1990).

the relevant documents,"[109] wrote the court. It reasoned backwards from the difficulty encountered by the plaintiffs in obtaining relevant information to the conclusion that the law firm must have done something wrong. The Court therefore held that it was an abuse of discretion not to impose sanctions on the law firm.

A careful reader of the court's opinion will notice the company's argument from zealous advocacy is doomed when she observes the court state "[t]hese responses did not comply with either the *spirit* or letter of the discovery rules and thus were signed in violation of the certification requirement."[110] Wait a minute, the reader asks, what is the spirit of the discovery rules and why is it relevant here? In response, the court makes a crucial argumentative move: "If the discovery rules are to be effective, then the drug company's arguments must be rejected."[111] This argument echoes the U.S. Supreme Court's reasoning in *Chambers*: If a court finds that the temple of justice has been defiled, it may assess attorneys' fees against the responsible party.[112]

C. *Disciplinary Rules*

The Model Rules provide little or no guidance for an attorney who is concerned to balance her competing obligations in discovery practice. Rule 3.4 provides that:

> A lawyer shall not
>
> . . .
>
> (d) In pretrial procedure, make a *frivolous* discovery request or fail to make a *reasonably diligent* effort to comply with a legally proper discovery request by an opposing party.[113]

This rule is a more specific amplification of the general duties to advance

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109. *See Fisons*, 858 P.2d at 1083. *See also* In re E.I. du Pont de Nemours and Co. Benlate Litigation, 1995 WL 814579 at *27-29 (M.D. Ga. 1995) (rejecting DuPont"s "they didn't ask for it" defense).

110. *See Fisons*, 858 P.2d at 1083 (emphasis added).

111. *Id.* Professor Wolfson identifies this moving-target game as one of the effects of allowing the discovery process to become entwined with the adversary system:

> [O]ne aspect of the discovery process immediately strikes the observer as unnecessarily adversarial. That aspect is the necessity for one party to ask the other for information in a way that is supposed to leave no doubt as to what is being asked for and all too often allows the opposing party to freely employ their adversarial skills of interpretation, avoidance and delay.

Wolfson, *supra* note 8, at 54.

112. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991). This reasoning was roundly criticized by the dissent: "We are bound, however, by the Rules themselves, not their 'aim' . . . ." Id. at 69 (Kennedy, J., dissenting).

113. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983) (emphasis added).

only meritorious claims[114] and to make reasonable efforts to expedite litigation[115] recognized by the Model Rules. The inquiry is further complicated by the general duty imposed by the Rules to represent one's client with "reasonable diligence" or zeal.[116]

Thus, the tension between a lawyer's public and private duties is replicated within the Model Rules. Commentators seem to have realized this, and have avoided taking positions on how a lawyer ought to proceed. After devoting considerable attention to the law that has developed around Rule 11, the authors of a leading treatise on legal ethics under the Model Rules decline to resolve the competing duties imposed upon lawyers in discovery practice:

> Detailed analysis of the new civil discovery rules is plainly beyond the scope of this book. It is clear, however, that these rules now form part of a modified universe in which litigating lawyers must operate. As a matter of discipline under Rules 3.4(d) and 3.4(c), lawyers must make good faith efforts to abide by these rules—or at least to challenge them openly.[117]

Merely admonishing lawyers to make a "good faith" effort to comply with the discovery rules begs the question: To what source should lawyers look for direction if neither the discovery rules nor the Rules of Professional Conduct are reliable guides? The Model Code avoids this tension by explicitly directing lawyers to resolve doubtful cases in favor of their clients: "While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law."[118] The Code thus essentially licenses pure partisanship except in the most extreme cases, where advocacy blatantly transgresses an unambiguous legal norm and zealous representation goes beyond the "bounds of the law":

> The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may

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114. *Id.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).
115. *Id.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983).
116. *Id.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).
117. 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.4:501 at 642 (2d ed. 1994). Professors Hazard and Hodes mention in particular the disclosure or "lay down" amendments to Rule 26, consideration of which would indeed be daunting. *See infra* note 189 and accompanying text. Nevertheless, given the importance of discovery practice as an arena in which a lawyer's duties are drawn into sharp conflict, one would expect the authors of this treatise to rise to the challenge of balancing them.
118. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1980).

> be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas with no precedent.[119]

The Model Code's ethical dodge, instructing lawyers to resolve all close cases in favor of partisanship, at least has the advantage of simplicity. Unfortunately, it overstates the legal realist position. David Wilkins argues that legal rules are not radically indeterminate when viewed from the perspective of practicing lawyers.[120] Wilkins first perceptively reveals the potential destructive power of legal realism for critics of the Model Code. If legal rules are designed to strike the proper balance between the client's ends and the interests of the social order as a whole, a lawyer is justified in resolving doubtful cases in favor of the client, since the system of rules will insure against socially unjust outcomes.[121] If the realist claim is correct, however, a lawyer may not take comfort in "the law," since there exists no objective, formally correct "legal" answer to any given question of substantive law.[122] Indeed, taking the argument to a level once more removed, there is no right "legal" answer to any quandary about professional conduct, since a lawyer may, with equal justification, believe (1) she should endorse and advocate her client's position and (2) she should not be the judge of her own client's case.[123] Llewellyn also recognized that although the tension between an attorney's public and private duties results from the indeterminacy of legal rules, the corresponding indeterminacy of the

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119. *Id.* at EC 7-2. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980). A lawyer's obligation under this rule to disclose adverse authority is limited to cases in which the authority in the controlling jurisdiction is *directly* adverse to her client's position. Given the admonition of EC 7-2 that judicial opinions may be uncertain as applied to particular situations, a lawyer's obligation to disclose authority applies only to a small fraction of decisions that are arguably adverse. Moreover, the rule explicitly provides that a non-binding case need not be disclosed, even if the lawyer knows that the court would find it persuasive.

120. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 496-99 (1990).

121. *See id.* at 474 ("This claim is persuasive only if the substance of the boundary—'the law' (including the law of professional ethics)—can fulfill the normative promises implicitly made on its behalf.")

122. *Id.* David Luban criticizes the "adversary system excuse"—that is, the attempt by lawyers to shift all moral praise or blame to the legal system. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

123. Wilkins, *supra* note 120, at 479 (citing KARL N. LLEWELLYN, BRAMBLE BUSH 178-80 (1930)).

rules of professional conduct enables a self-interested lawyer to collapse the competing public and private duties into the one that best accommodates the lawyer's interests at that moment.[124]

The realist critique implies a public duty; lawyers cannot avoid personal moral responsibility merely by appealing to purportedly amoral norms.[125] However, as Wilkins realizes, practicing lawyers do experience legal rules as objective constraints. Some arguments simply to not pass the "straight face" test, even though they may be formally plausible. The Model Code errs by assuming that legal rules are more often than not ambiguous from the lawyer's perspective and that, therefore, a lawyer is justified in favoring her private duties over her obligations as an officer of the court in the majority of cases. More importantly, the Code's direction to resolve only uncertain cases in the favor of one's client is, itself, circular. The principle that it is to the client's advantage to create uncertainty in the legal rules may not be justified by pointing to the uncertainty in the rules. Thus, the maxim that lawyers should favor their private duties in litigation also stands in need of justification. This circularity is unavoidable, as long as the interpretation both of substantive rules and of meta-rules (those governing the interpretation of substantive rules) is carried on in a vacuum, without regard to the purpose for which the normative system is constituted in the first place. Wilkins is correct in his assertion that legal norms are not *radically* indeterminate. Nevertheless, in a great many difficult cases, it will be impossible for a lawyer to discern sufficient boundaries in the law.

III. THE MORALITY OF DISCOVERY PRACTICE

After eliminating uniquely legal consideration — rules, statutes, codes of conduct, and the like — from the set of reasons a lawyer may give for choosing one course of action over another, what remains as a ground for normative decisions in discovery practice? A lawyer may still refer to reasons of expedience, either her own or her client's. For example, self-interest for a corporate or insurance-defense lawyer may dictate a protracted and bitterly-fought course of discovery, since the lawyer is probably billing by the hour. On the other hand, the client's self-interest may dictate stonewalling and refusal to cooperate if the client possesses damaging evidence. Since the lawyer is duty-bound to be an advocate, this interest is one she will consequently be urged to share as her own.

124. *Id.*
125. Wilkins, *supra* note 120, at 514.

It is also prudent for the lawyer to avoid court-imposed sanctions, both to preserve her client's interests in successful litigation outcomes and her own interest in maintaining her financial health and reputation in the community. None of these considerations, however, make reference to what is *right*, or to whether or not the lawyer is a *good* person. To be sure, prudential arguments are powerful. This Article offers practical, as well as theoretical, arguments for ethical litigation practices. However, reasons of expedience do not belong to the province of morality, as such.[126] Moral arguments, instead, proceed in terms of evaluative judgments about goodness or rightness. This section of the Article attempts to resolve conflicting legal and practical norms by appealing to a moral argument about what lawyers ought to do and who they ought to be.[127]

As a brief aside, it is worth noting the distinction between systems of ethics that focus on the character of actions and moral systems that are concerned with the character of persons. Morality has been conceived historically as either (1) the following of certain principles or (2) the cultivation of certain dispositions.[128] The first system may be called act-centered ethics.[129] In the hypothetical situations familiar to philosophy students, an actor is faced with some knotty problem and asked to create a rational justification for her decision to do A or B. For instance, in Kant's classic example, a murderer asks for the location of his intended victim's hideout, which is known to the person questioned. Does the actor lie and take the murderer off the trail? Or is the prohibition on telling lies an absolute duty that must not be violated, even where powerful countervailing reasons favor dissembling? The second inquiry is concerned, on the other hand, with the agent's

126. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 11 (1985) (it is a "platitude" that considerations relating only to the advantage of the agent are not ethical considerations).

127. I am mindful of Judge Posner's warning that lawyers without graduate training in philosophy generally produce work that is inferior to that of professional philosophers. *See* Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1655-57 (1993). I offer this argument, however, not to break new ground in moral philosophy, which I am certainly not qualified to do, but to suggest ways in which the study of theoretical ethics can enrich lawyers' thinking about legal ethics. While these philosophical musings may lack some of the precision and rigor that are the hallmark of serious writing in that discipline, this defect may be offset by increased accessibility to the nonspecialist.

128. *See generally*, WILLIAM FRANKENA, ETHICS 62-70 (2d ed. 1973).

129. One philosopher has used the term "quandary" ethics, in a somewhat pejorative manner, to emphasize the puzzle-solving nature of this kind of ethical inquiry. *See* EDMUND L. PINCOFFS, QUANDARIES AND VIRTUES 13-20 (1986).

character as a person. Agent-centered morality involves the praise, blame, guilt, culpability, or honor, that attaches to a person in light of her intentions or motives. The line between agent-centered and act-centered ethics is not a sharp one. For example, Kant argues that only actions chosen for the sake of duty possess moral worth.[130] In fact, the moral argument ultimately advanced by this paper partakes of both traditions by holding that a lawyer ought to *do* certain things in accordance with the ends of legal practice and also *be* a certain kind of professional in order to achieve those ends.

A. Aristotle: Arguments from Ends

Aristotle takes as his starting point the proposition that every activity is directed toward some end or good—the *telos* of that practice.[131] The good which is the end or goal of the practice is defined in terms of the characteristics of the practice in general. If anything has a function, the good for that thing may be determined by looking to the function. A carpenter may be deemed "good" if she has skill at doing what carpenters do, which is creating useful objects from wood. A watch is a "good" watch if it keeps accurate time and can be worn on one's wrist.

Aristotle's arguments in the *Nicomachean Ethics* are concerned with the good for humankind as a species.[132] Humans, having certain qualities as a species, must by virtue of these characteristics have a *telos*—a single highest goal or purpose to which their existence is directed.[133] Out of a potential multiplicity of ends-in-themselves, Aristotle identifies the *telos* of human existence with *eudaimonia*, or a particular kind of flourishing or blessedness in which a person is well and does well.[134]

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130. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS Ak. 400 (James W. Ellington, trans., 1980). For Kant, an action is done for the sake of duty if it is performed out of respect for the moral law.

131. *See* NICOMACHEAN ETHICS, Book I, Ch. 1 at 1094a1-5 (W.D. Ross and J.O. Urmson trans. 1984) [hereinafter NIC. ETH.]. Citations to Aristotle's works are the standard numbering system printed with most translations, along with references to the book and chapter to which the reference relates.

132. *See id.* at Book I, Ch. 7, 1097b20-1098a ("For just as for a flute-player, a sculptor, or an artist, and, in general, for all things that have a function or activity, the good or 'well' is thought to reside in the function, so it would seem to be for man, if he has a function.").

133. *See id.* at Book I, Ch. 7, 1097a25-30 ("Since there are evidently more than one end, and we choose some of these . . . for the sake of something else, clearly not all ends are complete ends; but the chief good is evidently something complete.").

134. The translation of *eudaimonia* is problematic. Huigens argues that "the best possible life," considered against the attainment of distinctively human purposes, best captures Aristotle's meaning. *See* Huigens, *supra* note 3, at 1449-51. *Eudaimonia* is, quite simply, "the

The appeal of Aristotle's analysis lies in its potential to serve as a bridge across the is-ought gap that bedevils modern moral philosophy. The classic statement of this problem is from Hume's *Treatise*. Hume describes the attempt to determine the truth or falsity of moral propositions by reference to something external to the agent (objective) in the natural world:

> If the thought and understanding were alone capable of fixing the boundaries of right and wrong, the character of virtuous and vicious must lie in some relations of objects, or must be a matter of fact which is discovered by our reasoning.[135]

Unless the relationship between the natural world and any rational creature is identical, said Hume, moral propositions—which must be eternally and immutably true—cannot be justified by the relation between external objects and the internal mental states of moral agents.[136] As he pointed out, however, one will look long and hard for some observable object in the external world called "virtue" or "viciousness." In his famous illustration, the only matters of real existence inherent in the act of willful murder are passions. The only way to discover a fact about murder upon which a moral judgment can be grounded is to "turn your reflection into your own breast, and find a sentiment of disapprobation, which arises in you towards this action."[137] While one's emotions are certainly "real" in the sense that they are objects of concern,[138] they are not the kind of hard, empirical facts that philosophers before Hume had hoped to discover as a ground for moral propositions.

Transcending the is-ought problem, Aristotle holds that a normative statement concerning any activity can be derived from an empirical

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best we can have." *Id.* (citing TERENCE H. IRWIN, ARISTOTLE'S FIRST PRINCIPLES § 241, at 447-48 (1988)).

135. DAVID HUME, A TREATISE OF HUMAN NATURE, Book III § I (1st ed. 1740).

136. *Id.* at 174. ("In order, therefore, to prove that the measures of right and wrong are eternal laws, *obligatory* on every rational mind, it is not sufficient to show the relations upon which they are founded: we must also point out the connection betwixt the relations and the will; and must prove that this connection is so necessary, that in every well-disposed mind, it must take place and have its influence; though the difference betwixt these minds be in other respects immense and infinite.")

137. *Id.*; *see also* Book III § II, at 178 ("Morality, therefore, is more properly felt than judged of; . . ." humans "must pronounce the impression arising from virtue, to be agreeable, and that proceeding from vice to be uneasy.").

138. *See id.* at Book III § I, at 177 ("Nothing can be more real, or concern us more, than our own sentiments of pleasure and uneasiness; and if they be favourable to virtue, and unfavourable to vice, no more can be requisite to the regulation of our conduct and behaviour.").

description of the ends of that activity, upon which all observers should be able to agree. So the observed fact that a carpenter's products do not hold together leads to the evaluative conclusion that she is not a good carpenter. At this point, an objection to Aristotle's system becomes obvious. Many evaluative judgments are not based on uncontroversial empirical observations. For example, one might offer an aesthetic judgment that Carpenter A's furniture is more attractive and elegant than Carpenter B's. Of two watches, both of which keep accurate time, one might be more stylish and fashionable.[139] Hume's insight applies to aesthetic propositions as well: What other than a "sentiment of disapprobation" exists when an observer encounters an ugly object?

Thomas Nagel identifies a related problem with teleological reasoning: Aristotle unwittingly allows normative judgments to creep into his function-of-man argument.[140] His conclusion that human activity is directed toward *eudaimonia* is an evaluative judgment, not an unmediated empirical observation. To illustrate this point, Nagel invites the reader to imagine an object—a combination corkscrew and bottle opener—whose function is to be determined. Is the object directed at removing corks, opening bottles, or both? If it removes corks better than another tool, but is deficient in its bottle opening ability, is it better or worse than another combination corkscrew-bottle opener with the opposite attributes? This rather silly example illustrates a more profound point. Given the potentially infinite range of human activities, Aristotle must offer an argument for privileging one end over the rest. If Aristotle's arguments are applied to the legal system, the proponent of an ends-oriented argument must similarly offer a justification for favoring one end over another.

B. *MacIntyre: The End of Institutions*

For Aristotle, virtues belong to humans *qua* humans. It is the *telos* of humankind as a species that determines which human characteristics are to be counted as virtues. The neo-Aristotelian philosopher Alasdair MacIntyre provides an account of virtues with respect to particular social

139. Alternatively, the end of the activity can be stated so broadly that it fails to specify criteria for the evaluation of the activity. For example, Lon Fuller identifies law as "the enterprise of subjecting human conduct to the governance of rules." FULLER, *supra* note 1, at 96. He does explain eight ways in which the enterprise of law-making may fail, using the famous example of the bungling lawgiver King Rex, but his derivation of these eight criteria from the "natural law of law" is far from uncontroversial. *See id.* at 33-41.

140. Thomas Nagel, *Aristotle on Eudaimonia*, 17 PHRONESIS 252, 255 (1972).

institutions or practices.[141] MacIntyre's focus on institutional virtues obviates some of the difficulties with Aristotle's account of the good for humankind. It is a far simpler matter to produce an uncontroversial account of the end for a practice than of the good for humans generally.[142] For one thing, humans identify themselves in connection with a wide variety of institutions, and the good that may be realized in one context may be absent in another. Generalizing from a set of institutional ends to a universally applicable *telos* for humankind requires some inferential steps upon which all observers may not agree. With respect to a particular practice, however, it may be possible to reach general agreement on the ends of that practice.

A practitioner may be good (in the moral sense) with respect to a practice. On the other hand she may merely do well. Practices carry with them standards of excellence and obedience to rules of the practice, as well as the realization of goods that are specific—"internal" goods, as MacIntyre calls them—to that practice.[143] In addition, some goods are contingently attached to the practice; these goods may be achieved either by excellence at the practice or by engaging in some other kind of activity. MacIntyre labels these "external" goods.[144] He offers an example to illustrate this distinction: Suppose one teaches a highly intelligent seven-year-old child to play chess. In order to bribe the child into playing (she has no desire to play chess), the child's opponent pays her 50 cents worth of candy per game. In addition, the child receives 50 cents worth of candy if she wins the game.

> Notice however that, so long as it is the candy alone which provides the child with a good reason for playing chess, the child has no reason not to cheat and every reason to cheat, provided he or she can do so successfully. But, so we may hope, there will

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141. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 186-203 (2d ed. 1984). MacIntyre's definition of a practice applies to the legal system in general, and civil litigation in particular:

> By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

Id. at 187.

142. As one of MacIntyre's critics recognized, practices themselves stand in need of justification, and the use of practices to define the teleology of persons runs the risk of circularity and moral relativism if the practices themselves are justified by references to ends. *See* Robert Wachbroit, *A Genealogy of Virtues*, 92 YALE L.J. 564, 572 (1983) (book review).

143. *See* MACINTYRE, *supra* note 141, at 190.

144. *Id.* at 188.

> come a time when the child will find in those goods specific to chess, in the achievement of a certain highly particular kind of analytical skill, strategic imagination and competitive intensity, a new set of reasons, reasons now not just for winning on a particular occasion, but for trying to excel in whatever way the game of chess demands. Now if the child cheats, he or she will be defeating not me, but himself or herself.[145]

The excellence for a practice that MacIntyre identifies with the goal of those who engage in the practice should be, if the practitioner is concerned about moral goodness and virtue, the realization of internal goods. There are means for the child to obtain candy other than playing chess, but there is only one way to achieve excellence at whatever the game of chess demands.[146]

The best account of excellence for the particular case of legal practice is offered by Yale Law School Dean Anthony Kronman, in his powerful book *The Lost Lawyer*.[147] For Kronman, an excellent lawyer—a statesman, in his terminology—possesses great practical wisdom, which Kronman defines as the ability to deliberate with a unique combination of sympathy and detachment about the ends pursued by the client.[148] This kind of excellence is sharply distinguished from mere technocratic or instrumental skill.[149] For one thing, technical mastery alone does not enable a lawyer to make a wise decision from among competing considerations that cannot be weighed rationally, one against the others.[150] Moreover, the practical wisdom contemplated by Kronman

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145. *Id.*

146. Compare this argument with Fuller's distinction between the morality of duty and the morality of aspiration. *See* FULLER, *supra* note 1, at 9-19. Duty represents a floor, below which a person has simply failed in her obligations as a moral agent. Merely complying with one's duty is not enough to entitle a person to claim "excellence," however. Beyond the minimum conception of duty lies a calling to achieve perfection in activities narrowly and in human life broadly. Similarly, MacIntyre is hopeful that his chess-prodigy child will eventually aspire to excel at chess *qua* chess, rather than merely to seek external rewards by achieving some minimum standards of success at acquiring candy.

147. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

148. *Id.* at 128-34.

149. *Id.* at 286-89 (large law firms tend to emphasize providing highly specialized skills to clients with predetermined ends, rather than helping clients decide what their ends ought to be).

150. *Id.* at 56-61. Compare this insight with MacIntyre's account of the incommensurability of the concepts that form the groundwork for ethical discourse. *See* MACINTYRE, *supra* note 141, at 6-10. "[T]he rival premises are such that we possess no rational way of weighing the claims of one as against another." *Id.* at 8. For instance, equality is matched against liberty, or rights (which are inherently particular) are opposed to claims of

cannot be reduced to a formula or cookbook for deliberating wisely about ends. True practical wisdom can only be realized by cultivating certain dispositions that allow the lawyer to maintain the delicate mental balance between sympathy and detachment.[151]

Significantly, the central requirement of true practical wisdom—that the lawyer simultaneously identify with and critique objectively her clients problems—implies that the lawyer cannot act as an uncritical mouthpiece or champion.[152] Kronman acknowledges that it is tempting for lawyers always to privilege their clients' self-interests over the well-being of the law; after all, clients are not often paying to be told that their ends are not suitable for them in view of the needs of the law.[153] However, Kronman urges lawyers to have the courage to resist this temptation, and offers encouragement that continued awareness of the law's well-being will strengthen lawyers' resolve in meeting their moral responsibilities.[154]

MacIntyre seeks to expand his account of the good practitioner to a theory of the good for persons generally. In doing so he recognizes the difficulty created by the partitioning of human lives into a variety of social roles—work and leisure, for instance.[155] Virtue, for persons generally, "is not a disposition that makes for success only in some one particular type of situation."[156] A genuinely virtuous person possesses qualities that are manifest in a variety of different situations across the social roles in which persons express themselves. It is important for MacIntyre, therefore, to provide an account of the self that transcends social roles, even though that self cannot readily characterize itself apart from being a member of a particular community, profession, or practice.[157] A failure of this step in MacIntyre's project would leave nothing more than persons isolated from one another by their roles. The discontinuity between these partially realized persons would plunge MacIntyre back into the dysfunctional moral discourse he set out to repair.

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universalizability. Any choice between the competing premises is bound to be arbitrary and, thus, moral arguments founded on these premises are bound to be interminable.

151. *See* KRONMAN, *supra* note 147, at 98-101.

152. *Id.* at 144-46.

153. *Id.* at 145. Kronman's notion of fidelity to the well-being of the law is an excellent way of describing the kind of public duties that I identify with the lawyer's station as an officer of the court.

154. *Id.* at 146.

155. *See* MACINTYRE, *supra* note 141, at 204-05.

156. *Id.* at 205.

157. *See also id.* at 220-21.

Fortunately, I am content to follow Kronman, borrowing part of MacIntyre's argument and expressing no opinion on the final success of MacIntyre's undertaking. Although MacIntyre wishes ultimately to transcend an ethics of roles and practices, he provides an excellent account of an agent-centered ethics where the moral agents are participants in a definable practice. While truncating his analysis in this manner eliminates some of his most challenging arguments, it focuses the inquiry appropriately on the practice of lawyering. As Kronman recognized, the success of this argument must depend directly upon the vitality of the practice of lawyering.[158] MacIntyre's general account of virtue depends on a thick sense of community, without which agreement on moral questions may not be possible. Community-based arguments about the good for a specified practice *a fortiori* presupposes a strong sense of identification of practitioners with the ends of that social enterprise.

C. *The End of the Discovery System*

Let us define an argument about a lawyer's ethical duties in discovery practice. Call it the "old school" argument. It proceeds along these lines:

(1) The lawyer's obligation to zealously represent her client must be given primacy within the partisan model of litigation over the lawyer's duties as "officer of the court."

(2) Civil discovery procedures are part and parcel of the adversary system of litigation, which is justified as the best system for securing both just outcomes of cases and individual liberty.

(3) (Derived from (1) and (2)) It would be a breach of the duty of zealous advocacy to volunteer more information in discovery than the opposing party is seeking. Because of the nature of the adversary system, the opposing party's requests are to be strictly construed and all doubts resolved in favor of nondisclosure.

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158. KRONMAN, *supra* note 147, at 93-98. Kronman identifies a political fraternity as a special type of community, not as closely knit as a family or religious sect, but more closely aligned "by bonds of sympathy" than the polity at large, which may be characterized only by toleration, or benign noninterference. Political fraternity requires, in addition to tolerance, that its members "make the positive effort that is required to see [the values of other members] in the best possible light."

The law firm's argument in *Fisons* is a good example of the old school of litigation practice.[159]

I stated previously without argument that much discovery abuse is justified with reference to the *telos* of litigation, only that abusive litigation practitioners had identified the wrong end of their practice. The old school accepts as axiomatic that the purpose of discovery is to prevent one's opponent from acquiring information that may be harmful to one's client's case. The implicit teleological argument lurking here holds that the goal of a lawyer is to maximize her client's position within the legal system, using any technique not explicitly proscribed by legal rules.[160] Justifying this argument depends, in turn, upon a particular characterization of the legal system as a set of minimal constraints that enables individuals in the liberal state to achieve the maximum degree of autonomy without trammelling the legally protected rights of other participants in the system.

In this libertarian vision of the legal system, autonomy itself is presumed to be a good, and the lawyer's job is to facilitate the client's access to legal institutions while doing as little as possible to interfere with her client's moral authority to decide what to do with that access.[161] According to this argument, a lawyer's exercise of her own ethical discretion to limit her client's decisionmaking authority would be a usurpation of the function of other social institutions. The effect would be to replace the minimal, autonomy-respecting institutions of the liberal state with an "oligarchy of lawyers," insulated from the control provided by normal democratic processes.[162] Thus, say the libertarians, lawyers

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159. *See supra* notes 93-111 and accompanying text. Indeed, the hypothetical "old school" argument tracks closely the drug company's argument in *Fisons*. For example, the law firm argued on appeal that sanctions were not appropriate because, *inter alia*, the plaintiffs' lawyer did not specifically ask for the smoking gun documents. Since discovery is an adversarial process, the firm argued, it would have been a breach of its duty of zealous advocacy to volunteer more information that was specifically requested. *See Fisons*, 858 P.2d at 1083. The hapless defendant in *Chambers* made a similar argument, but his conduct was so obviously out of bounds that the Supreme Court's affirmance of sanctions against him cannot be read as a blanket rejection of the old school. *See supra* notes 47-71 and accompanying text.

160. Put another way, the rules themselves are the end of the litigation system. In this regard, the old school treats litigation as a game, privileging strict adherence to the formal boundaries of the system over the purpose for which the system was constituted in the first place.

161. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617.

162. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 11 (1975).

are entitled to make any argument on behalf of their client's cause unless there is a rule, statute, or case that clearly demonstrates that the argument is "frivolous" and the lawyer would be sanctioned for making it. Perhaps the fact that the conclusion of this argument coincides with the financial interests of lawyers helps explain its appeal.

Kennedy makes a similar distinction between libertarian and value-preferring rules and standards. He argues that, in some cases, legal institutions are designed to facilitate private ordering, and are indifferent to alternative courses of action that may be chosen by individuals.[163] The strongest version of the libertarian model of the legal system assumes that the system is comprised solely of formalities and that it never expresses partiality between actors provided, of course, that they do not run afoul of a formal rule.[164] In other instances, however, legal institutions are constituted to deter wrongdoing; in these cases, the system does in fact have a preference between alternative courses of conduct.

The libertarian argument's weakness is that it privileges advocacy over public duties without explaining why this hierarchy is justified.[165] The imperative of partisanship—maximizing client autonomy, as Pepper and Wasserstrom see it—does flow naturally from the attorney's private duties as advocate, counselor, and friend to her client. However, it must be balanced against the public imperatives of candor, honesty, and good faith. The legal system is constituted, like other social institutions, with a view toward some end. At least part of the end of the legal system must be securing the truthful determination of disputed facts and the just resolution of disputed legal principles.[166] If the notion of being an

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163. Kennedy, *supra* note 45, at 1691. Kennedy offers the laws of conveyancing as the classic example of such "formalities."

164. *Cf.* FULLER, *supra* note 1, at 153 (the "internal morality of law" is indifferent to the substantive aims of the law).

165. Certainly some judges think the hierarchy should be reversed:

> Attorneys are officers of the court and their first duty is to the administration of justice. Whenever an attorney's duties to his client conflict with those he owes to the public as an officer of the court, *he must give precedence to his duty to the public.* Any other view would run counter to a principled system of justice.

Van Berkel v. Fox Farm & Road Machinery, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (emphasis added). *See also*, United States v. Shaffer Equip. Co., 11 F.3d 450, 458 (4th Cir. 1993) ("the lawyer's duties to . . . advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit").

166. *See* Frankel, *supra* note 10, at 1033. *See also* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) ("[t]he basic purpose of a trial is the determination of truth . . . ."); Martel v. City of Los Angeles, 56 F.3d 993 (9th Cir. 1995) (Reinhardt, J., dissenting from en banc majority) ("[w]e are here after all . . . to seek truth and justice").

officer of the court has any content at all, lawyers must have duties that flow from the end of the legal system.[167] These duties are just as much part of the role of lawyer as the duty of zealous advocacy.[168] But how is one to do the balancing?[169]

The argument has come full circle. The thesis of this Article is that teleological reasoning provides the only way out of the question-begging created by legal norms and rules of professionalism. Rather than performing some balance between incommensurable public and private duties, the lawyer should inquire whether there is some end of the legal system generally that prescribes her attitude toward her opponent, her client, and the court. To use MacIntyre's language, the lawyer who is concerned with virtue (as opposed to merely contingently realizable goods such as financial success) should aim to achieve the goods internal to the practice of lawyering. And, as MacIntyre and Kronman acknowledge, this achievement is only possible in the context of a community that is in at least minimal agreement about its shared values.

It is tempting to proclaim boldly that the sole end toward which legal practice is constituted is the discovery of truth out of the conflicting stories told by opposing parties. However, even as dedicated a defender of truth as Judge Frankel offers this warning for those who would be so daring:

> It is strongly arguable, in short, that a simplistic preference for the truth may not comport with more fundamental ideals—includ-

167. The Association of Trial Lawyers of America (ATLA) reacted with horror to the increased emphasis on officer of the court duties proposed in the Kutak Commission's draft of the Model Rules:

> The Kutak Commission sees lawyers as ombudsmen, who serve the system as much as they serve clients. This is a collectivist, bureaucratic concept. It is the sort of thinking you get from a commission made up of lawyers who work for instutitional clients, in institutional firms, and who have lost sight of the lawyer's basic function as the citizens' champion against official tyranny.

Gaetke, *supra* note 12, at 61-62 n.116 (quoting Preface to ATLA, AMERICAN LAWYER'S CODE OF CONDUCT). This vaguely Marxist trashing of the Kutak Commission is ironic in hindsight, as the plaintiff's trial bar has been instrumental in urging courts to require greater disclosure in discovery, often from the "institutional clients" of "institutional firms" who, after all, generally possess superior access to information.

168. I have argued elsewhere that lawyers' public duties prevent them from laying all of the blame at their clients' feet for morally repugnant actions. *See* W. Bradley Wendel, *Lawyers & Butlers: The* Remains *of Amoral Ethics*, 9 GEO. J. LEGAL ETHICS 161 (1995).

169. Lawyers, judges, or scholars who are fond of balancing tests should keep in mind MacIntyre's warning about conceptual incommensurability. *See* MACINTYRE, *supra* note 141, at 6-10. How can utterly dissimilar concepts like friendship, loyalty, and respect for the inherent dignity of the individual, on the one hand, and the social interests in just, speedy, fair, and outcomes on the other, be balanced against one another?

> ing notably the ideal that generally values individual freedom and dignity above order and efficiency in government.[170]

Judge Frankel's caution is well taken; truth surely is not the only value that must be respected by the legal system. If it were, the law would have no place for the attorney-client privilege,[171] the work product doctrine,[172] certain rules of evidence which exclude probative information,[173] and the familiar constitutional protections available to criminal defendants.[174] Significantly, however, the ends promoted by these devices are also internal goods with respect to legal practice. The exclusionary rule, for example, is intended to achieve broad societal justice by deterring police misconduct, even though a particular case may not be decided on all the potentially available evidence.[175] Rule 407 is grounded on "a social policy of encouraging people to take . . . steps in furtherance of added safety."[176]

By contrast, the promotion of one's client's interests is aimed at the realization of a purely external good.[177] The legal system recognizes the interest of individuals in being well advised by lawyers. It therefore allows the attorney-client privilege and the work product doctrine to serve as exceptions to the broad duty of parties to disclose relevant information. When these external, public aims are absent from a lawyer's justification for nondisclosure, however, the end of that lawyer's activity is solely private, and not entitled to the same level of respect by the legal system. A community composed of individuals set against one another in a kind of Hobbesian state of nature is not a community at all.

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170. *See* Frankel, *supra* note 10, at 1056.

171. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4 (1980).

172. *See* FED. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).

173. *See, e.g.*, FED. R. EVID. 407 (excluding evidence of subsequent remedial measures to prove liability).

174. Consider, for example, the Fourth Amendment exclusionary rule—Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures is subject to exclusion in state and federal courts)—and the *Miranda* rule. Miranda v. Arizona, 384 U.S. 436 (1966).

175. *See, e.g.*, U.S. v. Leon, 468 U.S. 897 (1984) (evidence obtained in objective good faith need not be excluded, as the deterrence of police misconduct will not be promoted by exclusion in such cases).

176. *See* FED. R. EVID. 407 advisory committee note.

177. It may be the case, of course, that the client's interest happens to coincide with a recognized societal goal. A criminal defendant, against whom the state seeks to introduce illegally seized evidence, is interested in seeing the evidence suppressed. In this example, suppression of evidence is both an internal and an external good; similarly, MacIntyre's intelligent seven-year-old child may appreciate the beauty and challenge of chess, but also enjoy the candy she wins as a result of her prowess.

For this argument to succeed, the legal system must contain some sort of "jurisdictional" principles that determine which goods are, in fact, internal to the system and which are purely private, contingent, and external. A *prima facie* way to identify these principles is through a Yogi Berra-esque tautology: The legal system values what the legal system values. The fact that this statement initially appears empty does not imply that it has no content from the standpoint of participants in the system. For instance, the mental impressions of a lawyer preparing for trial are protected from disclosure to her adversary.[178] Nevertheless, a party may generally discover *facts* known to the other party, even though the facts are contained in a document which is not itself discoverable.[179] Courts have consistently held that the work product doctrine does not shield against discovery of facts that the adverse party's lawyer has learned.[180]

Having acknowledged *Hickman* and the attorney-client privilege, I once again take sides with Judge Frankel. The legal system does not frequently devalue truth to promote other ends in civil litigation. When it does, it seldom interferes with the *discovery* process. Rules of relevancy in evidence, for example, operate only at trial. Information need not be admissible at trial to be discoverable, as long as it appears reasonably calculated to lead to the discovery of admissible evidence.[181] In short, suppressing information that may bear on the resolution of a dispute on its merits represents an internal good for the legal system in

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178. Hickman v. Taylor, 329 U.S. 495, 509 (1947).

179. *See, e.g.*, Eoppolo v. National R.R. Passenger Corp., 108 F.R.D. 292, 294 (E.D. Pa. 1985).

180. *See, e.g.*, Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504 (W.D. La. 1988) (quoting 8 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2023, at 194 (1970)); *see also*, In re ContiCommodity Services, Inc., Securities Litigation, 123 F.R.D. 574, 577 (N.D. Ill. 1988); State of Illinois v. Borg, Inc., 95 F.R.D. 7, 9 (N.D. Ill. 1981). This is not to say that the line between facts and mental impressions is clear. Many courts have struggled with close cases. *See, e.g.*, Phoenix Nat. Corp. v. Bowater United Kingdom Paper Ltd., 98 F.R.D. 669 (N.D. Ga. 1983). The court in that case denied a party's motion to compel an answer to the following question:

> Did [the investigator] ask you anything about Mark Hill?

The court *allowed* the party to ask this question, however:

> Did the investigation of Mark Hill reveal anything wrong with his expense account records?

Id. at 671. The court said that the second question "goes to the witness' knowledge of underlying facts and is permissible." The court said that the first question, however, impermissibly sought to discover the mental impressions of counsel.

181. FED. R. CIV. P. 26(b)(1); *see also* FED. R. CIV. P. 26 Advisory Committee Note to 1946 Amendment.

only a few, discrete, clearly demarcated instances. Despite the claims of strong legal realists, I believe that Wilkins is correct to assert that some legal rules are not absolutely indeterminate.[182]

It is now possible to define a set of counter-principles in opposition to the old school argument.

(A1) With respect to matters of fact, the lawyer's primary obligation is to the discovery of truth rather than to the advancement of the client's interest, unless some clear countervailing interest is recognized.[183]

(A2) The discovery system is not bound up with the adversary system; partisanship comes into play only after all of the facts have been revealed to both sides.

(A3) (Derived from (A1) and (A2)) It is a breach of the lawyer's duty as an officer of the court to fail to disclose information that would assist the tribunal in determining the case on its merits.[184]

These counter-principles apply to discovery practice only. In no way should they be construed as limiting the right and obligation of the

182. *See* Wilkins, *supra* note 120. The possibility remains, though, that in some hard cases a lawyer may simply be stumped. Considering the purpose of legal rules and the end of the litigation system may provide some guidance, especially since courts have shown their willingness to make the same kinds of purposivist judgments when sanctioning lawyers. However, a particular choice may implicate cross-purposes, both of which are recognized internal goods of litigation. In such a case, the only remaining source of authority is one's personal moral character. *See* KRONMAN, *supra* note 147, at 56-61 (lawyers must possess practical wisdom to choose wisely between potentially incommensurable ends). *See also, infra* notes 215-26 and accompanying text for a discussion of Judge Dwyer's virtue-based theory of the ethics of lawyering.

183. This principle is taken almost directly from Judge Frankel's article, proposing that truth rate as the paramount value that our system of justice is meant to serve. *See* Frankel, *supra* note 10, at 1055.

184. I deliberately shifted terminology from Judge Frankel's truth-oriented principle (A1) to principle (A3), which asserts that "determination of the case on its merits" is the appropriate end of the legal system. Principle (A3) assumes, along with the Supreme Court, that the legal system is "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." Daubert v. Merrell Dow Pharm., Inc., 113 S. Ct. 2786, 2799 (1993). The formulation in (A3) is circular in some sense, since it does not specify what considerations are relevant to determination of the case on its merits. The circularity may be alleviated, however, by reference to other standards internal to the legal system, which state the conditions under which a dispute is resolved. For example, considerations of burden of proof, admissibility of evidence, and standard of review by an appellate court determine, in large part, whether a dispute is resolved "on its merits." Determination of a case on its merits is a pragmatic kind of "truth," as the Supreme Court recognized in *Daubert*. *Id.* at 2798-99 ("there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory").

lawyer to attempt to put the best "spin" on the facts as they develop. The nature of advocacy is urging the tribunal to give more or less weight to facts. However, advocacy does not extend to suppressing facts that may be damaging unless, of course, there is another internal goal that the legal system is constituted to protect that would be served by nondisclosure.[185]

This bifurcated structure of the civil litigation system, with partisan advocacy confined to post-discovery practice, is not merely an academic proposal. Judges have made similar proposals. Consider one court's explanation of the differing roles of an attorney in discovery and advocacy:

> As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.[186]

The court's argument is a good distillation of the counter-principles above. A lawyer may be creative with arguments of law, but not with the development of facts.[187]

IV. TAKING ONE'S "OFFICER OF THE COURT" DUTY SERIOUSLY

The 1993 amendments to the Federal Rules of Civil Procedure made a small but highly significant change to an often-ignored rule. Henceforth, says Rule 1, the Federal Rules are to be "construed *and adminis-*

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185. The conclusion of this argument is similar to a proposal previously advanced by Michael Wolfson:

> A lawyer's duty to his client would continue to be paramount during trial, but would be subordinated to his duty to the court and the legal system during the pretrial phase of the case .... Then at trial, armed with all relevant information and a realistic appreciation of the strengths and weaknesses of each side's position, the duty of zealous advocacy and fidelity to the client's interests would again become the guiding principle to the end that a fair and just result might emerge from the adversarial process.

See Wolfson, *supra* note 8, at 52.

186. Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that attorney and client do not have an absolute right to confer during deposition).

187. An additional caveat is provided by the *Fisons* opinion, in which the Washington Supreme Court stressed that "fair and reasoned resistance to discovery is not sanctionable." Washington State Phys. Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1079 (Wash. 1993). The court objected to the misleading nature of the defendant's discovery responses, which it interpreted as an attempt to conceal relevant, but damaging information. "Fair and reasoned" resistance can be defined simply as an argument based on recognized goals internal to the legal system, such as the protection of a party from its opponent's "predatory" discovery, or facilitating communication between a party and its lawyers.

tered to secure the just, speedy, and inexpensive determination of every action."[188] The Advisory Committee Note to this amendment makes clear the import of this seemingly minor addition:

> The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. *As officers of the court, attorneys share this responsibility with the judge* to whom the case is assigned.[189]

This two word enhancement of Rule 1 may potentially have greater practical consequence for practicing litigators than even the much-ballyhooed disclosure provisions of Rule 26.[190] If courts actually enforce the "officer of the court" duty imposed by the rules, discovery will be radically transformed.[191] As evidence for this argument, we may look to courts that have sanctioned attorneys for neglecting their public responsibilities in discovery practice. For example, by unequivocally repudiating a law firm's argument from partisanship in a close discovery case, *Fisons* exemplifies the trend in recent judicial opinions toward recognizing the tangible, practical consequences of an attorney's duties as an officer of the court.[192] The amendment to Rule 1, in essence, reminds lawyers that they are joined together as a community

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188. *See* FED. R. CIV. P. 1 (emphasis added).

189. *See id.*, advisory committee's note to 1993 amendment (emphasis added). Compare Judge Frankel's proposal nearly two decades before the amendment to Rule 1 was adopted: "The rules of professional responsibility should compel disclosures of material facts and forbid material omissions rather than merely proscribe positive frauds." Frankel, *supra* note 10, at 1057.

190. *See* FED. R. CIV. P. 26(a)(1). This amendment inspired an outpouring of hyperbolic criticism. *See, e.g.*, Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 685 (1995) (describing "hairpulling and handwringing," of which the author is skeptical); Amendments to the Federal Rules of Civil Procedure, reprinted at 146 F.R.D. 507, 511 (1993) (Scalia, J., dissenting) (amendment "would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side"). Professor Sorenson's article is an excellent analysis of this amendment. *See also*, Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

191. *Cf.* Herbert v. Lando, 441 U.S. 153, 179-80 (1979) (Powell, J., concurring) (urging lower courts to "heed the injunction" of FED. R. CIV. P. 1 to prevent discovery techniques from being exploited to the disadvantage of justice).

192. An earlier example may be found in a Seventh Circuit decision stating that lawyers, as officers of the court, have an obligation to assist the court in policing the constitutional and statutory jurisdiction of the federal courts. Minority Police Officers Ass'n v. South Bend, 721 F.2d 197, 199 (7th Cir. 1983) (Posner, J.).

of officers of the court, and that with that community comes shared values, fidelity to which is a necessary burden of the station of lawyer.

Since the discovery system is intended to be self-executing, the responsibility of lawyers to be candid and forthcoming with all facts, good and bad, is inextricably linked to the purpose and success of the discovery system.[193] Even before the disclosure amendments to Rule 26 were adopted, and in contexts where that rule is inapposite, courts have sometimes expressly recognized an obligation of disclosure on the part of counsel, deriving from their public duties.[194] In many instances, the reasoning of judges is frankly teleological. For example, one court, holding that off-the-record coaching of witnesses at depositions was improper, relied on an argument from the ends of discovery:

> Depositions are the factual battleground where the vast majority of litigation actually takes place. . . . The pretrial tail now wags the trial dog. Thus, it is particularly important that this discovery device not be abused. Counsel should not forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, *counsel are operating as officers of this court.*[195]

Ironically, the court allowed its tail-wagging-dog argument to "wag" its conclusion; the importance of deposition practice seemed to compel the inference that attorneys in depositions should be particularly attentive to their "officer of the court" responsibilities. The importance of the internal good of factually accurate deposition testimony trumped the lawyer's obligation of zealous representation, at least to the extent the lawyer had interpreted that duty as allowing some leeway to coach the witness off the record.

This Section closes with two cases in which courts have severely sanctioned lawyers for failing to live up to their public responsibilities in

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193. *Cf.* Tommy Prud'homme, *The Need for Responsibility Within the Adversary System*, 26 GONZ. L. REV. 443, 470-71 (1990/91) (lawyers are responsible for substantive justice of outcomes, even within the adversary system).

194. *See, e.g.*, Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1546 (11th Cir. 1993) ("The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system."); Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682, 687 (2d Cir. 1989) ("The broad scope of discovery delimited by the Federal Rules of Civil Procedure is designed to achieve disclosure of all the evidence relevant to the merits of a controversy."); Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 32 (S.D.N.Y. 1984) (lawyers have "responsibility to disclose all relevant facts to their adversary").

195. Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (emphasis added).

contexts outside of discovery practice. Professor Gaetke's conclusion that the "officer of the court" characterization is "vacuous and unduly self-laudatory,"[196] is based mostly upon his study of ABA model disciplinary standards and a few cases. In discovery practice, the "officer of the court" duty has substantive content that lawyers ignore at their peril, as the cases previously discussed illustrate. I hope to illustrate that the moral argument of this Article is not merely the product of fuzzy-headed, academic idealism. Rather, courts are empowered to, and do enforce lawyers' duties as officers of the court in litigation, even where these duties are not expressly derived from rules or statutes. Now that the text of Rule 1 specifically permits courts to enforce lawyers' public duties, litigators in discovery can expect courts to be even more willing to require disclosure, and lawyers generally can expect to be held to their responsibilities as officers of the court.[197]

One of the most famous examples of a case where a court imposed a duty of disclosure on counsel is not a discovery case at all.[198] In *Virzi*, the plaintiff's lawyer did not inform defense counsel that the plaintiff had died until after a settlement was reached. The defendant was motivated to settle solely by the fact that the plaintiff would have made an effective witness at trial.[199] The court had the following to say in response to the plaintiff's lawyer's argument that the adversary system justified the nondisclosure:

> Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even

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196. See Gaetke, *supra* note 12, at 39.

197. In addition to broadening the scope of attorneys' public duties, federal courts are enlarging the class of persons who can be considered officers of the court. One federal court of appeals held that the general counsel of the defendant corporation was an officer of the district court, even though the lawyer had not entered an appearance or signed any other documents in the court and, indeed, was not admitted to practice in that court. *See* Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128 (9th Cir. 1995). The court instead maintained that the lawyer's substantial participation in the litigation process was enough to make him an officer of the court. *Id.* at 1130. *See also*, Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 52-56 (Del. 1993) (dicta) (lawyers admitted *pro hac vice* are officers of the Delaware court and, thus, are responsible for ensuring the integrity of deposition proceedings); *contra* McGuire v. Sigma Coatings, Inc., 48 F.3d 902 (5th Cir. 1995) (district court had no jurisdiction to impose sanctions on corporate party's in-house counsel who was not representing party in proceedings, was not member of district court's bar, and did nothing to voluntarily subject himself to the court's jurisdiction).

198. Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983).

199. *Id.* at 508.

> though it might not be in the interest of the client or his estate. The handling of a lawsuit and its progress is not a game. *There is an absolute duty of candor* and fairness on the part of counsel to both the Court and opposing counsel.[200]

The general duty of candor explicated by the court in *Virzi* is inherent in the role of attorney. The court considered disciplinary rules[201] and case law[202] as sources for this duty, but found that they did not apply in this case, since the plaintiff's attorney did not make an affirmative misrepresentation of fact. Instead, the court found that a lawyer has an affirmative duty of frankness and candor toward her adversary that is not outweighed by the duty of zealous advocacy.[203] In a sense, therefore, the consternation surrounding the adoption of the disclosure amendments to Rule 26 is misplaced—the disclosure obligation has been there all along.[204]

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200. *Id.* at 512 (emphasis supplied); *see also*, Kath v. Western Media, Inc., 684 P.2d 98 (Wyo. 1984) (counsel had duty to disclose letter that would have been harmful in settlement negotiations).

201. *See Virzi*, 571 F. Supp. at 509-10, (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 4.1 (1983)).

202. *See Virzi*, 571 F. Supp. at 510-11 (citing Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) (duty to disclose plaintiff's physical condition arose when parties sought court's approval of settlement); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872 (Ohio 1977) (attorney's disbarment justified by failure to inform agency of client's death).

203. *Virzi*, 571 F. Supp. at 512.

204. Similar, but more sophisticated chicanery infuriated a federal district court in New Jersey. *See* Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96 (D.N.J. 1985). The defendant's attorneys were aware that the plaintiff had mistakenly invoked the court's diversity jurisdiction, but they deliberately remained silent concerning this fact until the last possible opportunity, hoping that the case would be dismissed after the statute of limitations had run on the plaintiff's claim. The court sanctioned the defendant's counsel for violating Rules 7, 11, and 26, as well as 28 U.S.C. § 1927. *Id.* at 103. Not satisfied with rule- and statute-based sanctions, however, the court also sanctioned the attorneys $5,000, to be paid to the government, "to vindicate the dignity of the judicial process," and compensate the U.S. Treasury for time consumed by the court in chambers and on the bench. *Id.* at 106.

The court flatly rejected the lawyers' arguments from the adversary system: "The [1983] amendments [to Rules 7, 11, 16, and 26] make it clear that a claim of zealous advocacy will not serve to avoid sanctions for violations of the *standards and norms* established by those rules." *Id.* at 104 (emphasis added). The court relied upon the purpose of the judicial process to locate support for a monetary penalty that is otherwise not grounded in the disciplinary rules: "Courts would soon be laughing-stocks and objects of ridicule if counsel could with impunity toy with them, as defendant's counsel did here, engaging for example in serious arguments addressed to the merits of motions to a court that had no right to hear those arguments." *Id.* at 106.

In a dramatic expansion of a lawyer's liability for violation of her public duties, the New Hampshire Supreme Court has recognized the tort of "malicious defense."[205] Schroeder, a lawyer who represented the seller in a residential real estate transaction, neglected to secure the proper occupancy permits from the Town of Conway. The plaintiffs, who had purchased the condominium, were subsequently sued by the Town for purchasing a condominium without the occupancy permit. After obtaining independent counsel, the plaintiffs counterclaimed against the Town and the seller of the condominium. In pursuit of the defense of the counterclaim, Schroeder allegedly doctored up a file memo which purported to show that the plaintiffs had inquired about procuring the necessary permits, and were reassured by the Town that everything was in order. In fact, Schroeder told the plaintiffs that the sellers had obtained the permits. The trial court found that the memo "was likely prepared after consultation between the defendants and Attorney Schroeder subsequent to the defendants learning of the plaintiffs' position and claims."[206]

The New Hampshire court held that, as a matter of policy, the tort of malicious prosecution should be extended into a cause of action for malicious defense. "Is a plaintiff less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively in asserting a worthless lawsuit for improper purposes?" asked the court.[207] Citing a law review article, the court said that the malicious prosecution action was necessary to "protect the integrity of the judicial process."[208] Presumably the court believed that it could discern sufficient content in the notion of "integrity" to make the following distinction:

> When the lawyer goes beyond the role of counselor and intentionally institutes defensive action that harasses the plaintiff and that the attorney knows or should know is without a credible basis, then the attorney, no less than the client, should be liable.[209]

The dissenting justice noted the elusiveness of the distinction between vigorous advocacy and malice, and worried about the chilling effect on

205. *See* Aranson v. Schroeder, 671 A.2d 1023, 1027 (N.H. 1995).
206. *Id.* at 1026.
207. *Id.* at 1027.
208. *Id.* at 1028 (citing Jonathan K. Van Patten and Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 923 (1984)).
209. *Id.* (citing Van Patten & Willard, *supra* note 208, at 927).

partisan zeal.[210] Just about any meritorious defensive action "harasses" the plaintiff; some defenses to tort actions, such as comparative fault, assumption of risk, or consent, can be downright intrusive.

According to the court, the maliciousness *vel non* of a defensive action is whether it was undertaken "without a credible basis." The tort of malicious defense, therefore, will probably be developed after the pattern of Rule 11, which is designed to "deter baseless filings"[211] by providing authority for judges to impose sanctions unless a pleading is warranted by existing law, supported by the facts known to counsel, and not presented for any improper purpose.[212] The dissenting justice's concerns in *Aranson* about chilling advocacy have been addressed repeatedly by federal courts construing Rule 11,[213] and sanction awards have been reversed when they pose "a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy."[214] The *Aranson* decision, grounded in the "policy" of New Hampshire, represents another recognition of the public duties of lawyers; if the tort of malicious defense is adopted by other jurisdictions, lawyers might find themselves owning up to their officer-of-the-court responsibilities under pain of potential tort liability.

V. PRAGMATISM AND CHARACTER IN DISCOVERY ETHICS

This twofold argument—from theoretical ethics and from prudence—was inspired in part by a talk that was given by the U.S. District Judge William Dwyer.[215] In the case of litigation ethics, lawyers owe "officer of the court" duties to the public and, like motherhood, it is hard to argue against such lofty obligations.[216] Thus, Judge Dwyer labels the philosophical argument for courtesy and collegiality the "Motherhood Reason." For those attorneys unpersuaded by "Fourth of July speeches," however, Judge Dwyer offers what he calls a "Mundane Reason" for ethical lawyering:

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210. *Id.* at 1032 (Thayer, J., dissenting).

211. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

212. *See* FED. R. CIV. P. 11(b).

213. *See, e.g.*, West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1527 (9th Cir. 1990) ("An award of Rule 11 sanctions raises two competing concerns: the desire to avoid abusive use of the judicial process and to avoid chilling zealous advocacy.").

214. Matter of Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986), *amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied sub nom.* Real v. Yagman, 484 U.S. 963 (1987).

215. *See* William L. Dwyer, *The Practical Value of Ethics*, Address to the Federal Bar Association of the Western District of Washington (Dec. 8, 1993) (transcript on file with author).

216. *Id.* at 2.

> [C]ivility, collegiality, and adherence to the highest ethics make you a more effective lawyer. They help you win. In litigation, you cannot be a first-rate lawyer without them.[217]

Lawyers should not be milquetoasts or doormats in litigation, Judge Dwyer concedes, but they should recognize that the inevitable result of obstreperousness is to create a "not-one-dime-for-that-s.o.b. mentality."[218] The expenses of all parties inevitably increase as the lawyers for each side dig in their heels and litigate with all their might. Settling a case on favorable terms becomes vastly more difficult if ill-will prevails among counsel.[219] Judge Dwyer also cautions that hardball tactics are not welcome—and unlikely to produce good results for the obnoxious lawyer—in his courtroom:

> Fanaticism and obstructionism are very unpopular with judges. A lawyer who obstructs, who breaks or bends the rules, who treats his opponent uncivilly, is sending a message to the judge's subconscious: "Rule against me when you can."[220]

One of the most powerful features of Judge Dwyer's thesis is that it is a truly virtue-based argument; rather than formulating a set of rules for lawyers to follow, he is interested in defining the character of the good lawyer. For example, he contends that candid, forthcoming presentations of facts are more effective tools for persuasion than purely partisan advocacy:

> Our trial system is a quest for the truth. Triers of fact look for truthfulness above all else. They sense when a person is leveling with them, and when not. Discourtesy and extremism repel them.

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217. *Id.*

218. *Id.* at 5.

219. In case the reader suspects that only a judge in a pathologically "nice" city like Seattle could endorse the view that collegiality produces better outcomes in litigation, it should be noted that similar arguments have been advanced by other observers of the legal system. *See, e.g.*, Sayler, *supra* note 19. Robert Sayler, a litigator with Covington & Burling in Washington D.C., argues that hardball is a poor choice of tactics: It is predictable, one dimensional, and simple to counter by a clever opponent. Moreover, a vitriolic litigation style is bound to eat away at a lawyer's health and turn away potential clients who have been advised of the lawyer's reputation as a jerk.

220. *Id.* at 5-6. For additional evidence of how hardball discovery tactics are viewed by judges, see the comments of U.S. District Judge Wayne Alley of the Western District of Oklahoma:

> If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.

Richard P. Holme, *Colorado's New Rules of Civil Procedure, Part II: Rediscovering Discovery*, 23 COLO. LAW. 2711, 2721 n. 10 (Dec. 1994) (quoting Krueger v. Pelican Prod. Co., Order No. 87-2385-A (W.D. Okla. 1989)).

> It's not just that people dislike bad manners; it's that they know that fanaticism is inconsistent with the truth.[221]

This argument is stated in terms of the effect of an obnoxious lawyer's persona upon the trier of fact, not the consequences of breaking one rule or the other. "Truthfulness," "discourtesy," and "extremism" are predicates of character, not behavior. The lawyer who signals, "rule against me whenever you can," is not inviting sanctions for rule-breaking, but has created a personal identity inconsistent with the virtue to which lawyers should aspire. Judges and juries, consciously or unconsciously, respond to a lack of virtue with revulsion, and the lawyer's ability to achieve good results for her client are accordingly diminished.[222]

In Judge Dwyer's view, lawyers should not be overly zealous in their advocacy, lest they alienate their opposing counsel, the judge, and the jury. As a former trial lawyer, however, he also understands that lawyers have an obligation to be an advocate for their clients. Here his argument echoes Aristotle's observation that virtue or excellence always consists of a mean between two equally undesirable extremes.[223] Thus, for Judge Dwyer, a lawyer should be neither a pure partisan nor a truly impartial party, as a judge would be, but should aim for an intermediate state of virtuous advocacy. A story he tells illustrates the pitfalls of single-mindedly emphasizing one party's view of the truth:

> A while back a party to a civil suit in my court was testifying on cross-examination. He was relaxed and candid. He spoke well on the strong points of his case and admitted adverse facts when they should be admitted. The jury, I could sense, was with him. The noon recess arrived and I excused everyone for ninety

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221. Dwyer, *supra* note 215, at 6.

222. Notice that this argument, like Kronman's and MacIntyre's, presupposes a meaningful sense of community, encompassing judges and jurors, as well as practicing lawyers. If all participants in the enterprise of litigation share certain common assumptions, a set of implicitly understood norms may develop whose violation will not be tolerated within the community.

223. *See* NIC. ETH., *supra* note 131, at Book II ch. 6, 7. Aristotle argues:

> [B]oth fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right aim, and in the right way, is both intermediate and best, and this is characteristic of excellence. Similarly with regard to actions also there is excess, defect, and the intermediate .... Therefore excellence is a kind of mean, since it aims at what is intermediate.

Id. at 1106b15-30. Among several examples Aristotle offers courage, which is the mean between rashness and cowardice, and pride, which is an intermediate point on the continuum between arrogance and sniveling. *See id.* at 1107a30-b30.

> minutes. After lunch the cross-examination resumed. The witness now was argumentative and evasive. If the truth was against him he would sidestep and counterpunch without answering the question. The jury's trust in him almost visibly drained away.[224]

Similar stories may be told about a deficiency of zeal. Certainly the complete dereliction of lawyer's duty to advocate her client's position with force and vigor may result in liability for malpractice.[225] The lawyer's job is to find the mean between a strategy of hardball, which is bound to be unsuccessful, and utter failure of advocacy in which the client's interests are not protected. While the anecdotal evidence he adduces certainly must be viewed critically,[226] Judge Dwyer's position represents a novel synthesis of pragmatism and Aristotelian ethics. The virtuous lawyer is more likely to be the successful advocate, provided she is possessed of the practical wisdom required to achieve the excellence of character to which lawyers as professionals should aspire. Neither of the extreme positions—unbridled partisanship or bureaucratic indifference to the client's ends—assures success in the practice of law.

VI. CONCLUSION

The trend exemplified by these cases has emerged only recently in the courts. Only eight years before the Eleventh Circuit admonished lawyers that their primary duty was to the system of justice, the Supreme Court had this to say about a lawyer's ethical duties in discovery practice:

> Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.[227]

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224. Dwyer, *supra* note 215, at 6. This particular argument, of course, has force only with respect to the tiny fraction of cases that do not settle or are otherwise disposed of before trial. However, Judge Dwyer makes the same kind of argument against unmitigated partisanship before the judge, such as would occur during motions practice.

225. *See generally* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.2 (3d ed. 1989).

226. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1159-60 (1992) (lawyers should learn from social scientists to be extremely skeptical of anecdotal evidence).

227. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985) (quoting Henry M. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287-90 (1975)). It is important not to take too much from this language. The Court was not deciding a discovery

The crucial unstated premise, in *Walters* as in the losing argument in *Fisons*, is that discovery is to be conducted in a partisan manner, within the paradigm of the adversary system. Some courts still allow a great deal of litigation abuse to go unpunished in the name of zealous advocacy.[228] I do not suppose that practicing litigators will be convinced that they should care one whit what Aristotle or Alasdair MacIntyre have to say, much less that my application of their philosophy to discovery practice is correct. That discussion was aimed at establishing a theoretical basis for the morality of litigation, and it depends on the judgment of lawyers that they ought to abide by personal moral norms where clear legal directives are lacking.[229] For the unpersuaded or the relentlessly practical-minded, I hope merely to establish that "the times, they are a-changin'" for hardball discovery practitioners. Courts are increasingly likely to impute to litigators a duty to disclose all information that will facilitate trial on the merits of civil actions. Lawyers who attempt to fight their cases in the discovery arena may find themselves subject to sanctions for not taking their "officer of the court" roles seriously.

Perhaps arguments from prudence, such as that suggested by Judge Dwyer, are unduly cynical. Pragmatic arguments in ethics suggest that moral imperatives will not be obeyed unless there is a downside to

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issue, so its quote from Judge Friendly's article does not necessarily imply an endorsement of unbridled partisanship in discovery. Furthermore, the Court had previously announced in the *National Hockey League* case its unwillingness to tolerate discovery abuse. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975); ACF Indus., Inc. v. EEOC, 439 U.S. 1081 (1979) (Powell, Stewart, and Rehnquist, JJ., dissenting from denial of certiorari). Nevertheless, the Court quoted with approval the portion of Judge Friendly's article in which he said that zealous advocacy required "causing delay and sowing confusion" which, after all, are often best accomplished in discovery.

228. *See, e.g.*, Hearst/ABC-Viacom Entertainment Svcs. v. Goodway Marketing, Inc., 145 F.R.D. 59, 61 (E.D. Pa. 1992) (questioning attorney in deposition engaged in name calling and continually asked irrelevant questions designed to annoy deponent; nevertheless, court did not sanction questioner, but sanctioned his *opponent*, who eventually shut down the deposition).

229. Put another way, is it "right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire"? *See* Frankel, *supra* note 10, at 1040 (quoting 6 T. MACAULAY, THE WORKS OF LORD MACAULAY 135, 163 (H. Trevelyan ed. 1900)). This is the problem of role-differentiated morality, which has spawned a sizeable body of literature. Some of the best examples include: William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988); LUBAN, *supra* note 122; Pepper, *supra* note 161; Andrew Kaufman, Book Review, 94 HARV. L. REV. 1504 (1981) (reviewing ALAN H. GOLDMAN, THE MORAL FOUNDATION OF PROFESSIONAL ETHICS (1980)); Fried, *supra* note 4; Wasserstrom, *supra* note 162.

disobedience.[230] Given the avowed willingness of many members of the bar to push the edge of the moral envelope, however, this cynicism is probably warranted.[231] Arguments about the practical value of morality tend to lack a certain conceptual purity. The goal of ethics should be to encourage people to do good *because* it is good, or (in virtue-based theories) to realize the good life that is only attainable through exercise of the virtues. One may question whether a lawyer is behaving "ethically" who is merely conforming her behavior to avoid a threatened sanction.[232]

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230. As a philosophical doctrine, pragmatism requires the rejection of the hope that a moral vocabulary can be discovered and fleshed out in which ethical propositions can be evaluated for their truth or falsity by determining whether they correspond with some pre-linguistic feature of the natural world. *See generally Introduction: Pragmatism and Philosophy* in RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xiii (1982). Pragmatism thus shares a common intellectual heritage with legal realism and critical legal studies. The solutions suggested by pragmatic philosophers such as Rorty—asking about "what works" rather than about "what is"—may avoid some of the regress problems in the law that have been uncovered by critical legal scholars. *Cf.* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 26-29 (1990) (endorsing a pragmatic, instrumental concept of law, whereby legal rules are judged according to whether they advance social welfare).

231. *See, e.g.*, Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1987, at 48. As one practitioner said, "[t]he cases are evenly split, so while there may be a motion to compel, I know I won't get sanctions. And I'm doing what my client wants." A proponent of such in-your-face discovery tactics is not likely to be swayed by arguments from abstract philosophical principles. *See also*, Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 (1980). Some of the attitudes expressed by Chicago-area practitioners toward discovery include:

> Our job is to win for our side. We aren't out to do justice; that's the judge's job.

Id. at 250 n.53.

> Never be candid and never helpful and make [your] opponent fight for everything.

Id. at 250 n.54.

232. The best statement of this problem is still found in Plato: If justice does not pay as well as injustice, why should a rational person be just? *See* PLATO, REPUBLIC, Book I. Thrasymachus, Socrates's interlocutor in the Republic, argues forcefully that rational persons seek only the *appearance* of justice, with its attendant benefits. Thrasymachus would presumably answer Judge Dwyer by saying that it is not ethics that helps a lawyer win in litigation, but the appearance of ethics. I believe Judge Dwyer would have difficulty answering this argument with his "Mundane Reason," since his practical argument is a consequentialist one. Thrasymachus posits a situation in which the salutary consequences of virtue flow to an evil person who has managed to concoct the appearance of virtue. However, Judge Dwyer's other argument—the "Mirror Reason"—does address Thrasymachus's challenge directly. Judge Dwyer understands that lawyers, no less than other persons, must be concerned with their character as persons and as professionals. The ultimate sanction for unethical behavior still comes when the lawyer must face herself in the mirror and confront the character she has created and reinforced by a pattern of unprofessional conduct in litigation.

However, even Aristotle recognized that virtue was a habit or disposition that had to be cultivated through practice and repetition, and state coercion may be necessary to inculcate the correct habits in citizens.[233] If pragmatic arguments and the threat of sanctions by courts convince lawyers to behave ethically, perhaps lawyers will eventually become habituated to virtue. MacIntyre perceptively suggests that the lukewarm reception given to Aristotelian ethics by modern philosophers can be attributed to "the evident fact that the modern state is indeed totally unfitted to act as moral educator of any community."[234] The challenge for lawyers and legal educators[235] is to provide a fit, moral education for the next generation of practitioners.

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233. *See* NIC. ETH., *supra* note 131, Book II, Ch. 1, at 1103a15-1103b5 ("legislators make the citizens good by forming habits in them").

234. MACINTYRE, *supra* note 141, at 195.

235. Law schools, as the first legal institution with which lawyers have sustained professional contact, have a special responsibility to teach lawyers to deliberate about the value judgments inherent in their actions as advocates. *See* Amy Gutmann, *Can Virtue be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1770-71 (1993); *see also*, SEVENTH CIRCUIT REPORT, 143 F.R.D. at 411-12 (suggesting that law schools develop civility curricula). Perhaps owing to his view from the bench, Judge Frankel has a pessimistic view of the success of this project:

> As for the more basic matters of "ethics" and "integrity," only limited achievements may be expected from "courses in advocacy" or other efforts to teach virtue as such. Our ethical rules being what they are, the effective "teaching" of them is not a program of great promise.

Frankel, *supra* note 10, at 1051.