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Stupid Lawyer Tricks: An Essay on Discovery Abuse

Charles M. Yablon
Benjamin N. Cardozo School of Law, yablon@yu.edu

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*Charles Yablon**

On May 3, 1995, even the usually unflappable readers of *The Wall Street Journal* undoubtedly were shocked to learn of a new litigation tactic that stretched the already elastic bounds of acceptable advocacy.[1] In a defamation action brought by Philip Morris Company against the American Broadcasting Company, lawyers for ABC alleged Philip Morris had produced twenty-five boxes containing approximately one million documents. These were the "critically sensitive flavoring documents"[2] relating to ABC's charge that Philip Morris spiked its cigarettes with nicotine. The documents had been transferred onto a special dark red paper with squiggly lines, which made them hard to read and impossible to photocopy. ABC's lawyers alleged that the paper gave off noxious fumes that made it "difficult to work with the altered copies for extended periods of time."[3] The smelly paper was reported to have nauseated one partner and given someone else a headache. The extent to which these documents were truly nauseating (that is, more nauseating than any other million documents that have to be reviewed) remains in dispute.[4] Nonetheless, counsel for Philip Morris, New York's Wachtell, Lipton, Rosen &

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* Professor of Law, Benjamin N. Cardozo School of Law. I want to thank my colleagues and casebook co-authors, A. Leo Levin and Philip Shuchman, for their advice, insight and wisdom on all aspects of Civil Procedure. All of the opinions, irascibility and impudence expressed in this Essay are entirely my own. Most of the jokes, however, are stolen.

1. See Suein L. Hwang, Sniffing Out Evidence Would Be Quite Easy With This Paper Trail, Wall St. J., May 3, 1995, at B1; see also Benjamin Wittes, Quite a Discovery: Philip Morris' Papers In ABC Libel Case Leave Foes Fuming, Legal Times, May 1, 1995, at 1 (reporting the consequences arising from Philip Morris' delivery of discovery documents).

2. Sanctions Denied Against Philip Morris Over Document Production, 9 Mealey's Litig. Rep. (Tobacco) 2, May 22, 1995, available in Westlaw, Legal Newsletter Database.

3. Wittes, supra note 1, at 22; see also Alison Frankel, Blowing Smoke, Am. Law., July/Aug. 1995, at 68, 75–76 (noting that Philip Morris produced twenty-five boxes of key documents on unphotocopiable paper).

4. The right to produce sensitive documents on paper that cannot be photocopied or optically scanned, however, appears to be clearly established, at least in the Circuit Court for the City of Richmond. In his order denying ABC's motion for sanctions, Judge Markow, who had viewed samples of the documents, found "that reading from this material is not as comfortable as from the usual black writing on white paper format, but is not unduly difficult." Opinion Denying Sanctions, Philip Morris Co. v. American Broadcasting Co., No. LX-816-3, 1995 WL 348375, at *1 (Cir. Ct. Va. May 5, 1995) (finding that Philip Morris complied with discovery rules) (on file with the Columbia Law Review). He also stated that he "did not observe" any unpleasant odor. Id. Accordingly, the judge concluded that the material had been provided in "reasonably usable form" and did not violate his court's discovery rules. Id. at *3.

Katz and Richmond's Hunton & Williams, agreed to produce some of the documents on non-odiferous paper.[5]

This pungent story has done nothing to clear the air regarding the vexing problem of discovery abuse. Responses to the stinky paper ploy revealed a difference of opinion about such tactics among the practicing bar. Some litigators, while not excusing counsels' actions, sought to explain such excesses as an inevitable result of the current litigation climate, where over-aggressiveness is equated with zealous advocacy, and attorneys are expected to win at all costs. Other lawyers had a completely different reaction: they just wanted to know where they could buy some of that smelly paper.

Am I being flippant about a serious problem that threatens the integrity of our entire system of civil justice? You bet. But I submit that discovery abuse has not been addressed with the flippancy and irreverence that it deserves. Instead, we get moralistic sermons about the breakdown of civility in the legal profession and nostalgic yearning for the good old days when lawyers acted like gentlemen and O.J. Simpson was still selling rental cars. On this view, discovery abuse is just a symptom of a general decline in values and coarsening of American society, a problem so severe that it can be cured only by bedtime stories from William Bennett.

This Essay seeks to transcend this simplistic and boring debate and engage in another that, while equally boring, will be far more complicated. In the grand tradition of contemporary law review writing, this piece provides a perspective on discovery abuse so creative and innovative so as to be completely preposterous.[6] While my unique approach to discovery abuse draws extensively on ethical theory and sociology, the keys to this analysis are the long car trips I took with my kids when they were five and eight years old. From these trips I developed the fundamental insight about discovery abuse which I now share so that, as with most law review articles, you will not miss anything important when you stop reading after the first three pages.

I submit that the best solution for lawyer misconduct in discovery proceedings is the same one parents use when their kids act up on long car trips—tell them to "shut up and knock it off," preferably in a really loud voice. I know this solution does not sound much like cutting edge legal theory, but give it a chance. After I have jazzed up this straightforward advice with lots of references to obscure cases, theoretical debates, books and articles you have never read (and I have only skimmed), it will sound a lot more clever.

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5. Wittes, supra note 1, at 22 (quoting a Philip Morris lawyer's statement: "We thought that if there was a one-in-a-trillion chance that someone was getting even a whiff of nausea that we would send it on regular paper."). The court's opinion, however, states: "After much discussion and negotiation, Philip Morris has agreed to produce some of the material on white reproducible paper." *Philip Morris Co.*, 1995 WL 348375, at *2.

6. This ensures that it will not be taken seriously enough by judges and legislators to cause any real damage.

Hidden in the apparently simple legal directive to "shut up and knock it off" are positions on some of the major issues of contemporary legal theory. In recommending such an order, I assert that discovery abuse is a problem of moral education that can be ameliorated, rather than a prisoners' dilemma in which lawyers maximize value by being nasty, brutish and short with each other. Telling lawyers to "knock it off" also recognizes a distinction between bad actions and bad lawyers. One problem with current law is that many judges are reluctant to pull out the big strap of discovery sanctions except when convinced that the lawyers involved are so utterly recalcitrant that they deserve a serious whupping. This piece suggests that a major improvement in the moral education of litigators would be effected by increased sanctioning of smaller, more annoying discovery abuses with smaller, more annoying punishments.

In the pages that follow, I elaborate on these ideas in nauseating detail. (The pages themselves, however, should smell just fine.) Part I sets forth a theoretical framework. Part II then examines actual cases in an attempt to reveal the underlying norms and bizarre social customs of lawyers who engage in discovery abuse. Part III follows immediately upon the end of Part II. It will make you smarter and better looking, and give your hair a lustrous shine. It also will contain some suggestions about how to fix lawyers who abuse the discovery process.

I. LITIGATION NASTINESS: MACHIAVELLIAN OR MERELY DUMB?

This Part tries to answer that perennial question: Are lawyers truly bad, or do they just do bad things? Rather than seek a definition of the amorphous mass of misconduct the courts have labeled discovery abuse, it examines the pressures, incentives and attitudes of lawyers engaged in the litigation process, i.e., litigators,[7] to understand what gets them into trouble in the first place. It concludes that while there are more than a few sleazeballs out there, and some situations in which perfectly nice lawyers are constrained to act like sleazeballs, much discovery abuse consists of lawyers trying to engage in the kind of aggressive, zealous advocacy required to make our adversarial system function properly, *but who have not learned when to stop.* If this assessment is accurate, then telling them to "shut up and knock it off" represents a legal innovation of the first order.

A. *Why Do Lawyers Fail Moral Education?*

Consider one of my favorite cases of discovery abuse, *Blank v. Ronson.*[8] In that fairly routine securities class action, the judge, in ruling on a motion to quash the deposition notice of the class representative,

7. The term "litigator" is a combination of the Latin *litigare*, "to dispute," and the American *gator*, "to chomp down hard with sharp teeth." Litigators are lawyers who engage ferociously in all aspects of the pretrial process, and then settle.

8. 97 F.R.D. 744 (S.D.N.Y. 1983).

was required to actually read the discovery papers previously served. This exercise naturally caused the judge to blow his stack:

> Although we have before us two highly competent law firms, there is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine's memory of prior litigation. . . .
>
> Accordingly, the Court, on its own motion, strikes both the interrogatories and the purported answers. To the extent that they may have already been filed, we direct the Clerk to return them to the respective parties. The parties are, furthermore, ordered never to refer to them again in this litigation.[9]

The significance of *Blank v. Ronson*, I submit, lies not in the fact that the judge is angry,[10] but that he is surprised that this was the way "two highly competent law firms" would conduct discovery. I suspect that the lawyers were surprised at the judge's surprise. From their perspective, these tactics were perfectly reasonable. After all, the whole point of putting burdensome boilerplate interrogatories in your word processor is to spit them out quickly in case after case. Plaintiff's counsel had developed one-size-fits-all interrogatory objections as a countermeasure to one-size-fits-all interrogatories. Nobody except the judge was complaining about it. All the lawyers wanted from the judge was a nice little ruling about whether the plaintiff's deposition should go forward. They did not expect to get yelled at for being lazy and incompetent. This strange disparity between the way lawyers act and the way judges supervising the process expect them to act is the fundamental fact about discovery abuse which requires an explanation. Ordinarily, we expect lawyers to be rather good at ascertaining judicial expectations and conforming their conduct to the judge's normative perspectives.

But the discovery process is not the only place where people operating in close proximity and in related but hierarchically distinct roles exhibit very different normative perspectives. This should be obvious to anybody who has ever driven an automobile with related, but hierarchically distinct, five and eight year-olds in close proximity in the back seat. The dominant normative perspective from the front seat (often clearly stated at the beginnmg of the car trip) is to enjoy the lovely scenery in an atmosphere of peace and quiet. While an inhabitant of the back seat may recognize those parental concerns at a theoretical level, her dominant normative goal is to prevent her mean, horrible, older brother from carrying out his threat to throw her Barbie's head out the window. The most effective way to accomplish this, of course, involves screaming like a banshee. While such conduct will undoubtedly cause her parents to yell at

9. Id. at 745.

10. "Angry" is one of the two most frequent attitudes with which judges hear discovery motions. The other is "asleep."

the inhabitants of the back seat, it will also get them to turn around, and will therefore likely result ultimately in the return of Barbie's head to her rightful owner.

From the parents' perspective, such behavior seems like a failure of moral education. Their kids simply have not yet learned how to behave on long car trips. The kids, however, live in a different, more complex moral universe in which the avoidance of parental anger must be weighed against conflicting values like the potential loss of property rights in Barbie's head or the reputational damage that will result from having been gotten last in a game of "Got You Last." Both normative perspectives have some validity, but perhaps not equal amounts.

Similarly, in *Blank v. Ronson*, from the judge's perspective the lawyers have wasted a lot of time and energy on useless papers and have gotten yelled at in the process. But from plaintiff's counsel's perspective, plaintiff's deposition got postponed for at least two months while the lawyers drafted and served new interrogatories and answers, and that obviously *felt* like a victory, even if it had little impact on the ultimate outcome of the case. Defendant's counsel may even feel that they lost, and be looking for a way to even the score. These lawyers also inhabit a complex moral universe in which using a word processor to spit out burdensome, boilerplate interrogatories and thoughtless objections may seem like a good way to litigate aggressively and cheaply, and to avoid being gotten last in their own grown-up version of "Got You Last." Here too, both the court's and counsels' perspectives have some validity, but perhaps not equal amounts.[11]

It would be a mistake to view the lawyers' actions in *Blank v. Ronson* as a childish game. Contemporary social and economic theory has taught us that games are serious business. If written about with sufficient obscurity and a little calculus, they can even get you tenure. One might portray abusive litigation tactics as a prisoners' dilemma, in which each lawyer perceives that her opponent's optimal strategy is to engage in nasty and

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11. Some might argue that the child shows greater rationality in the above hypothetical than do the lawyers in *Blank v. Ronson*. After all, she has chosen an effective way to achieve her goal—preserving Barbie's head—while the lawyers have simply gotten the judge angry at them and have achieved no strategic advantage in the case.

I would argue, however, that the two cases are closely analogous. Both the child and the lawyers exhibit perfectly competent end-means rationality, but in support of questionable and shortsighted ends. The child preserves the doll's head at the expense of peace, quiet and a pleasant afternoon drive—things which she does not value as highly as do her parents. We assume that as she matures she will learn to value quiet more and dolls less, and will change her priorities accordingly. The lawyers got to postpone the deposition and show each other how tough they were, at the expense of annoying the judge and possibly injuring their long-term litigation prospects. The interesting fact is that while most lawyers will say that these long-term goals are most important, they often act as if they are really more interested in scoring points on opposing counsel. It is not clear that these priorities will change as the lawyers mature.

wasteful discovery.[12] The nasty and wasteful discovery of both sides then cancels each other out, resulting in a nasty and wasteful, but stable, equilibrium.[13] Many litigators describe their world in just such terms, explaining how they are driven to questionable tactics by the truly horrific behavior their adversaries have taken, are about to take, or might possibly take in the future.

It would be silly to deny that such situations do sometimes exist—and I have been warned not to make this Essay any sillier than is absolutely necessary. Yet, we legitimately may question whether such incentives are present in all or even most instances of discovery abuse. Critical to the "prisoners' dilemma" explanation for discovery abuse is the litigator's perception that if her opponent engages in abusive discovery practices and she does not, she or her client will be worse off. There is much reason to question both whether that is indeed the case, and whether that is what litigators really believe. Many forms of discovery abuse, such as overbroad discovery requests and frivolous claims of privilege, do not provide any obvious benefit to the party on whose behalf they are made. Other forms of abuse, such as hiding key documents or disrupting depositions, might provide a litigation advantage, but only if the other side does not find out or does not do anything about it. A lawyer contemplating such tactics in a rational, profit-maximizing mode, must weigh any benefit they might provide against the likelihood that opposing counsel will have an effective non-abusive response which will destroy any advantage the tactic might provide, make the abusive lawyer look like a jerk and might even result in court-ordered sanctions.[14] Given that litigators are

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12. See, e.g., Thomas D. Rowe Jr., American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper, 1989 Duke L.J. 824, 872 n.160 (1989) ("Lawyers, unfortunately, are somewhat in the position of the jailers in their clients' Prisoners' Dilemma"); John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 B.U. L. Rev. 569 (1989) (applying nuclear strategic game theory to discovery abuse); Peter Huber, Book Note, Competition, Conglomerates, and the Evolution of Cooperation, 93 Yale L.J. 1147, 1148–49 (1984) (discussing how corporate egotism is not inconsistent with cooperation despite obvious "prisoner's dilemma" problems existing in laissez-faire capitalism (citing Robert Axelrod, The Evolution of Cooperation 3 (1984))).

13. Most law professors can now draw some version of the following decision matrix in their sleep:

		Lawyer Two: Nice	Lawyer Two: Nasty
Lawyer One	Nice	3, 3	-5, 5
	Nasty	5, -5	-1, -1

The point is that whichever side goes first, and whether or not they have knowledge of the other's actions, each side will be driven by the nature of the payoff matrix to choose nastiness as a strategy.

14. Many of the game theory models assume that discovery abuse benefits one side by raising the discovery costs of the other. The other side then responds by abusively raising

pretty good at detecting and informing judges of their adversaries' sleazy tactics, it is not at all clear that such tactics are the most beneficial strategy against an opponent who refuses to fight dirty.

The more cynical might protest that even though discovery abuse may provide little benefit to clients, it provides extrinsic benefits to lawyers, either in the form of additional fees[15] or in the reputational value of being known as mean, vicious and nasty. The fee explanation seems dubious.[16] It would imply, for example, that we should see less discovery abuse among plaintiffs' counsel operating on a contingency fee than among other counsel.[17] Nobody I know of (other than contingency fee lawyers) has yet noted such a disparity.[18] Moreover, to simply assert that

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costs for its opponent, and a prisoners' dilemma ensues. Unless discovery abuse is defined as *any* action which raises litigation costs to the other side, which some of these models seem to do, it seems likely that litigators can raise costs (and anxiety levels) of their opponents more effectively with a well-drafted set of objections, a motion for a protective order, or a motion for sanctions, than they can with an abusive response.

There remains the possibility that lawyers mistakenly believe that abusive discovery maximizes benefits in most litigation situations. If we reject this possibility—on the ground that, as noted above, rational evaluation of an opponent's potential responses will show that the downside risk of such a strategy is generally greater than the potential benefit—we are left to question why lawyers *say* their abusive discovery is designed to benefit the client. The answer is complex and will take up much of Part III of this Essay. The short answer, however, is that the economic distinction between "rational" and "irrational" behavior is simply too crude to capture the psychology of discovery-abusing lawyers, whose post hoc justifications for their actions may be quite different from their actual motivations.

Imagine (or perhaps you have had experience with) a boss with a terrible temper, who flies off the handle and mercilessly berates employees. Although his employees frequently leave, and nicer bosses get better performance, the abusive boss continues to assert that such "toughness" is beneficial; a rational strategy to improve the business or maximize employee performance. Does the boss really believe such actions are benefit-maximizing? I would suggest not, yet such a boss is not simply lying either. Rather, as we will see, the boss is engaging in a form of *akratic* behavior. See infra text accompanying notes 37–38.

15. Among those who have argued that hourly billing fuels discovery abuse are Wayne D. Brazil, Introduction, Ethical Perspectives on Discovery Reform, 3 Rev. Litig. 51, 76–78 (1982); Frank F. Flegal, Discovery Abuse: Causes, Effects and Reform, 3 Rev. Litig. 1, 29–31 (1982); Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 Clev. St. L. Rev. 17, 46 (1988).

16. While discovery abuse is often found in big commercial litigations where corporate clients can afford to pay big fees, such clients generally have their own internal staff of lawyers, one of whose jobs is to keep down litigation costs.

17. Contingency fee lawyers could benefit from wasteful discovery if it allowed them credibly to threaten to raise litigation costs relative to settlement costs, and thereby create incentives to settle. See Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Legal Stud. 435, 444–45 (1994). Such a strategy would seem to be effective only in nuisance suits, where defendants' fear of an adverse verdict is small and saving court costs provides the major incentive to settle. Moreover, there is some empirical evidence that defendants tend not to offer any money in suits they view as nuisance suits. See Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 358–59 (1991).

18. Lawyers tend to blame discovery abuse on the fact that their opponents act like jerks, irrespective of the way they are compensated. A fairly recent study of lawyers'

lawyers benefit from a nasty reputation assumes the answer to the very issue here raised: To what extent does having such a reputation really benefit its possessor?

Do not get me wrong. I do not deny that there is an advantage to a litigator (and to her client) in being aggressive and resourceful. But the discovery process is premised on the notion that at some point aggressive litigation can be taken too far and become discovery abuse. Granted, commentators have recognized that a tension exists between the cooperative nature of discovery and the adversarial nature of the overall litigation system.[19] Moreover, the line between appropriate and inappropriate conduct is often unclear. Nonetheless, judges do police that line, and can be persuaded to impose severe sanctions for serious violations of the discovery rules.[20] Accordingly, getting nasty often causes more discernible cost than benefit to lawyers or their clients, and so economic theory fails to explain the persistence of the practice. To develop a theory of why some lawyers keep acting like jerks, we must turn instead to that oft-invoked authority on moral failings—Aristotle.

B. *Discovery Abuse in Classical Thought*

This has been a very good period for Aristotle in legal scholarship.[21] Whether tackling a complex problem in contemporary torts,[22] con-

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attitudes toward discovery in state courts found "near unanimity in the attorneys' opinions concerning what factors in cases tend to lead to problems in the discovery process." Susan Keilitz et al., Attorneys' Views of Civil Discovery, Judges' J., Spring 1993, at 2. State court practitioners in Boston, Kansas City, New Haven and Seattle all agreed that the factors most likely to predict discovery problems were: (1) personality or style of the opposing attorney, (2) inexperience of the opposing attorney, (3) animosity between the parties, and (4) a large monetary claim. See id. at 35. One scholar criticizes much purportedly empirical work on discovery abuse as simply parroting the attitudes of lawyers who tend to blame their opponents for the problems. See Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1415 (1994) (characterizing one study as demonstrating "that the discovery abuse debate was in fact nothing more than a finger-pointing contest.").

19. See Maurice Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 481, 484–86 (1968); Wolfson, supra note 15, at 19–20.

20. Even if, as we will see, judges rarely utilize the most stringent discovery sanctions, the uncertainty of their application should make them more of a deterrent. For example, for an abusive action which creates a 20% chance of a $500,000 sanction to be worth doing, it would have to provide more than $100,000 of benefit.

21. If you go to the "LAWREV" library on Lexis and search for "Aristotle," your search will be interrupted as likely to retrieve more than 1000 documents. If you try "Aristotle and ethics" or "Aristotle and philosophy" you still get over 1000. Even searching "Nicomachean Ethics" gets you 297 documents. Now you know how I did the research for this Essay. Search of LEXIS, Lawrev Library, Allrev File (Sept. 12, 1996).

22. See, e.g., Jules Coleman, Corrective Justice and Wrongful Gain, 11 J. Legal Stud. 421, 433–36 (1982) (applying Aristotle's principle of corrective justice as theory of tort liability and recovery); Robert Cooter, Torts as the Union of Liberty and Efficiency: An Essay on Causation, 63 Chi.-Kent L. Rev. 523, 546–47 (1987) (discussing conflict between Aristotle's theory of corrective justice and cost-benefit justification for tort compensation).

tracts,[23] criminal law,[24] constitutional theory[25] or clinical education,[26] many scholars turn first to the lecture notes of a 2300 year old Stigirite pedant who toadied to the Macedonians and whose only known legal training was listening to Plato talk about who to keep out of the Republic.[27] Aristotle's insights are frequently invoked in law reviews on such topics as the necessity of following rules,[28] the necessity of not fol-

23. See, e.g., James Gordley, Enforcing Promises, 83 Cal. L. Rev. 547, 548–51 (1995) (demonstrating correlations between Aristotle's theories of commutative justice and liberality and American courts' concerns with transfer of wealth, as represented by doctrines of consideration, promissory reliance and offer and acceptance); James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587, 1588–90 (1981) (discussing origins of doctrine of equality in exchange in Aristotle's Nichomachean Ethics).

24. See, e.g., Kyron Huigens, Virtue and Inculpation, 108 Harv. L. Rev. 1423, 1444–56 (1995) (showing derivation of doctrine of inculpation from Aristotle's theory of virtue in Nichomachean Ethics); Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. Cal. L. Rev. 777, 782 (1985) (correlating insanity defense and Aristotelian notions of responsibility); Benjamin B. Sendor, Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime, 74 Geo. L.J. 1371, 1372–73 (1986) (tracing "framework of Anglo-American analysis of exams" to Aristotle).

25. See, e.g., Ronald Beiner, The Liberal Regime, 66 Chi.-Kent L. Rev. 73 *passim* (1990) (using Aristotelian ethical theory to support claim that classical moral and political categories are not rendered obsolete by liberal theory).

26. See, e.g., Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1662–67 (1991) (employing Aristotelian ideas to support argument that clinical method is best way to teach professional ethics); David Luban, Epistemology and Moral Education, 33 J. Legal Educ. 636, 637, 650–61 (1983) (defending Aristotelian argument for clinical moral education).

27. This sort of thing can get vicious. A few years ago in the *Harvard Law Review*, one distinguished legal scholar, reviewing a book by another distinguished legal scholar, accused the latter of being "indifferent to the Aristotelian tradition" and further complained that the author "does not seem to be at all concerned about whether he is departing from several key premises in the *Nicomachean Ethics*." George P. Fletcher, Corrective Justice for Moderns, 106 Harv. L. Rev. 1658, 1667 (1993) (citation omitted) (reviewing Jules Coleman, Risks and Wrongs (1992)).

28. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). In that article, Justice Scalia announces that "I stand with Aristotle." Id. This would be difficult for most people, but Justice Scalia might pull it off.

lowing rules,[29] corrective justice,[30] incorrective justice,[31] friendship,[32] love[33] and how to run a law firm.[34] Not only that, but he pretty much has the market cornered on virtue.[35]

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29. See, e.g., Roger A. Shiner, Aristotle's Theory of Equity, 27 Loy. L.A. L. Rev. 1245, 1251–53 (1994) (using Aristotle's theory of equity to support exercise of individualized judgments); Andrew C. Spiropoulos, Aristotle and the Dilemmas of Feminism, 18 Okla. City U. L. Rev. 1, 8, 56 (1993) (discussing how Aristotelian thought proposes case sensitive political solutions that are not bound by one rule of approach).

30. See, e.g., Ernest J. Weinrib, The Gains and Losses of Corrective Justice, 44 Duke L.J. 277, 277–79 (1994) (recasting Aristotle's theory of correlativity of gain and loss in order to apply corrective justice to modern private law). Professor Weinrib gets the prize for most committed Aristotelian legal scholar. He does his own translations. See also Peter Benson, The Basis of Corrective Justice and Its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 529–32 (1992) (contrasting widely accepted understanding of corrective justice with Aristotelian conception); Kathryn R. Heidt, Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?, 47 Wash. & Lee L. Rev. 347, 347–55 (1990) (using Aristotle's scheme to explore modern concept of corrective justice and its application); Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403, 425 (1992) (defending importance of Aristotelian concept of corrective justice to understanding of private law relationships).

31. See John Lawrence Hill, Exploitation, 79 Cornell L. Rev. 631, 655–57 (1994). Professor Hill attributes to Aristotle the "intellectual roots of the traditional moral-psychological paradigm underlying the theory of excuse in Anglo-American law." Id. at 655 (citation omitted); see also Stephen A. Siegel, The Aristotelian Basis of English Law 1450–1800, 56 N.Y.U. L. Rev. 18, 40 (1981) (arguing that, according to Aristotle, justice is a variable, relative notion).

32. See Michael J. Kaufman, The Value of Friendship in Law and Literature, 60 Fordham L. Rev. 645, 660–61, 665–66 (1992) (reinvigorating Aristotle's ideal of friendship in legal, literary, and philosophical discourses); Anthony Kronman, Aristotle's Idea of Political Fraternity, 24 Am. J. Juris. 114, 125–38 (1979) (analyzing Aristotle's ideal of friendship as a necessary condition for lasting political association).

33. See John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049, 1061–63 (1994) (critiquing Nussbaum's characterization of Aristotle as tolerant of homosexuals); Martha C. Nussbaum, Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies, 80 Va. L. Rev. 1515, 1553–54, 1581–83, 1603–04 (1994) (using Greek philosophical attitudes toward same-sex relationships to highlight current assumptions).

34. See Jack L. Sammons, Jr. & Linda H. Edwards, Honoring the Law in Communities of Force: Terrell and Wildman's Teleology of Practice, 41 Emory L.J. 489, 492 n.6, 510 n.50 (1992) (using Aristotle's theories of humor and friendship to argue for law firms as communities of friends); see also Anthony T. Kronman, The Lost Lawyer 132–33 (1993) (describing ideal lawyer-client relationship in Aristotelian terms).

35. See, e.g., Donald F. Brosnan, Virtue Ethics in a Perfectionist Theory of Law and Justice, 11 Cardozo L. Rev. 335, 341–49 (1989) (relying on Aristotle to support thesis that law should strive to make citizens virtuous); Marlena G. Corcoran, Aristotle's Poetic Justice, 77 Iowa L. Rev. 837, 842–43 (1992) (exploring Aristotle's conception of equity as conception of corrective justice); Miriam Galston, Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy, 82 Cal. L. Rev. 329, 372–78 (1994) (arguing for a return to Aristotelian moral education and deliberative politics); Steven J. Heyman, Aristotle on Political Justice, 77 Iowa L. Rev. 851, 857–59 (1992) (criticizing simple use of Aristotelian corrective justice to support formalist theory of private law); Linda R. Hirshman, The Book of "A," 70 Tex. L. Rev. 971, 986–87 (1992) (describing how feminism can learn from Aristotle); Lawrence B. Solum, Virtues

Why does Aristotle command such attention and respect? In the old pre-post modern era, we would simply have been told that Aristotle was a Great Man. These days, of course, the canons have been silenced, and we no longer accept an immutable, noncontextually-based concept of the "Great." (The concept of "Man" is not doing so hot either.) If we have done away with greatness, however, we certainly have retained the concept of celebrity, and there is no doubt that Aristotle is hot right now. Perhaps it is because, like Madonna and Elvis, he only needs *one name.* Also like Madonna and Elvis, Aristotle's biggest hits keep getting played over and over, frequently performed by younger artists.

Our interest here is in one of Aristotle's oldies but goodies, "Moral Education."[36] Aristotle discovered and categorized a whole bunch of moral failings that people before then did not even know they had. One of his most interesting discoveries is *akrasia,* rendered in one of the standard translations as "incontinence" and in another as "moral weakness."[37] Aristotle tells us not to confuse the akratic or incontinent person with the "self-indulgent" person. The self-indulgent person is doing what she wants to do. She overindulges in pleasures because she believes, wrongly, that pleasure is the best goal to pursue. The akratic or incontinent person, in contrast, has better moral understanding but evidences a certain moral weakness or lack of self control. She overindulges in pleasures even though she knows that nobility and goodness, not pleasure alone, are the best goals.[38] Following Aristotle, we may distinguish between the lawyer who believes, rightly or wrongly, that it will be beneficial in a certain litigation situation to engage in abusive discovery tactics, and the lawyer who knows that to do so is unlikely to be beneficial, but engages in them anyway out of a lack of self-control.

Some may protest that engaging in abusive, overly aggressive litigation is hardly an excessive pleasure. But Aristotle knew how much fun it could be to fly off the handle. He called it a special form of *akrasia*: "incontinence with respect to anger." It is one of the least disgraceful

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and Voices, 66 Chi.-Kent L. Rev. 111, 114–29 (1990) (reconciling Aristotelian notion of virtue with modern democratic urge to inclusion).

36. Aristotle believed that virtue was acquired, not innate. He thought it could be learned, not by exhortation and not by the study of ethical rules, but by the performance of virtuous acts. See Aristotle, *Ethica Nicomachea,* Book III, ¶ 1103 a–1103 b (W.D. Ross trans.) *in* 9 The Works of Aristotle (W.D. Ross ed. & trans., Oxford-Clarendon Press, 1925) [hereinafter Nichomachean Ethics]. He also believed that many virtues, but not all, involved the avoidance of extremes and the pursuit of moderation. Id., ¶ 1107 b–1108 a. All of these are interesting ideas, and may even be true. I consider their usefulness in combating discovery abuse in Part III of this Essay.

37. Compare Aristotle, Nicomachean Ethics, supra note 36, ¶ 1145 a (Ross trans. 1925) with Aristotle, Nicomachean Ethics ¶ 1145 a (Martin Ostwald trans., 1962). In this Essay, I will generally translate *akrasia* as "incontinence" because (1) it better captures the concept of loss of self-control; and (2) it's more in keeping with the poor taste that is a theme of this Essay.

38. See Nicomachean Ethics, supra note 36, ¶ 1146 b.

forms of *akrasia*—far better, Aristotle explains, than being incontinent with respect to appetite:

> For argument or imagination informs us that we have been insulted or slighted, and anger, reasoning as it were that anything like this must be fought against, boils up straightway; while appetite, if argument or perception merely says that an object is pleasant, springs to the enjoyment of it. Therefore anger obeys the argument in a sense, but appetite does not. It is therefore more disgraceful; for the man who is incontinent in respect of anger is in a sense conquered by argument, while the other is conquered by appetite and not by argument.[39]

Such a person is "conquered by argument" because she has enough moral sense to know that slights and wrongs must be fought against, but does not have enough self-control to oppose such slights in the most beneficial way. Aristotle reminds us that virtue is a matter of both reason and emotion. It may be possible for her to understand intellectually that what she is doing is not the most beneficial thing, for either her or her client, but she still may have a powerful impulse to buy some of that smelly paper.

Judges writing about discovery abuse often express puzzlement over the way that certain cases deteriorate into wasteful, counterproductive nastiness that seems to do nobody any good.[40] Unlike the standard prisoners' dilemma, in these cases engaging in unilateral acts of civility or even acting just a little better than your opponent would seem to be excellent strategies for the lawyers involved.[41] Yet they continue sniping and snarling at one another. These akratic lawyers are so involved in fighting with one another that they have been "conquered by argument." Showing contempt for the other side has become more important even

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39. Id., ¶ 1149 a–1149 b.

40. Justice O'Connor noted the counterproductive nature of such contumacious conduct in a speech to an American Bar Association group: "In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars per hour, and energy that is better spent working on the case than working over the opponent." Justice Sandra Day O'Connor, Address to the American Bar Association Group on Civil Justice Improvements 5 (Dec. 14, 1993) (quoted in Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 52 n.24 (Del. 1993)).

Such a downward spiral of incivility was noted by Judge Weiner in *Vinson v. City of Philadelphia* when he stated: "The activities of the attorneys litigating this matter have fallen into an unfortunate pattern. Each has failed to extend to the other the courtesies expected of the legal profession, or to conduct themselves in an adult manner. The conduct of the Assistant City Solicitor has been particularly egregious." No. 91-1703, 1991 U.S. Dist. LEXIS 12081, at *3 (E.D. Pa. Aug. 30, 1991).

41. See Lawrence M. Frankel, Disclosure in the Federal Courts: A Cure for Discovery Ills?, 25 Ariz. St. L.J. 249, 263 (1993) (explaining that overemphasis on zealous advocacy and game playing may result in parties pushing discovery to inefficient level despite fact that both sides would be better off with less rather than more discovery); Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 875–76 (1990) (explaining that certain litigation strategies can result in dead weight loss contrary to all parties' interests in obtaining socially optimal result).

than ultimately winning the case. Akratic lawyers may tell themselves they are simply litigating vigorously, much as Aristotle's akratic warrior might claim merely to be defending his honor. Yet these lawyers could adopt better, more effective strategies to achieve better, more desirable goals. The akratic individual, however, has not attained that higher rationality, and just cannot bring herself to stop fighting with the other kids in the back seat.

In the cases that follow, we will try to observe the process by which lawyers devolve from forceful advocates to contumacious jerks. The cases will show, first, that the line between acceptable and unacceptable behavior in discovery cases is often rather indistinct. Lawyers lacking proper guidance, either from internal norms or external judges, can easily cross it. The cases also will show that much discovery abuse is counterproductive feuding among counsel which seems more consistent with akratic incontinence than rational strategizing. Finally, the cases will show that lawyers do an awful lot of sleazy stuff.

II. THE RAW AND THE CROOKED: A STUDY OF LITIGATORS IN THEIR UNNATURAL HABITAT

It is a common belief among laypersons that lawyers are not constrained by moral principles. This belief has caused considerable distress within the profession, and provided a lot of good material for Jay Leno and David Letterman. The truth, as always, is more complex than common folklore reveals. Lawyers *do* have moral principles, they are just somewhat *different* moral principles. In the hotly contested environment of high stakes litigation, conduct that might be frowned upon in ordinary social relations can become acceptable. There is, then, a danger that lawyers in the heat of conflict will employ some of these behaviors too aggressively, or incontinently (as Aristotle might put it), without knowing when to stop. In this Part, we will look at three such morally equivocal behaviors commonly engaged in by practicing lawyers: lying, stealing and name-calling.

A. *Why Truth Is Not Always a Defense*

Everyone is familiar with the oath that witnesses take before testifying. They swear to tell "the truth, the whole truth, and nothing but the truth." To laypeople operating under crude epistemological categories, such phraseology appears redundant. To the trained legal mind, however, these phrases represent three quite different levels of veracity. No self-respecting lawyer would provide "the whole truth" when only "the truth" was being requested. "Nothing but the truth" is a juridical category of discourse so uncommon that most lawyers confuse it with other rarities like "declarations against interest."

As the following case law demonstrates, many problems of discovery abuse derive from uncertainty and confusion as to the appropriate epistemological standard to apply. In *Chrysler Corp. v. Blackmon*, for example,

the Supreme Court of Texas vacated a trial court order which had granted a default judgment based on Chrysler's alleged discovery abuse.[42] The trial court had found that "Chrysler made false and misleading representations to the Court and to opposing counsel indicating that it had made full production of documents and was in full compliance with said Order, when it was not."[43]

At one of numerous discovery hearings, Chrysler represented that "it had produced everything that it was able to produce," including all relevant information about Chrysler's crash tests.[44] Chrysler subsequently produced an additional 11,000 documents, albeit in response to additional court orders and discovery requests, including further information about crash tests.[45] It appears that when it said "we have produced everything," Chrysler had not produced side or rear-impact crash tests, which its lawyer did not consider required, because this case involved a front-end crash.[46] It had not produced crash test files that had been produced by Chrysler in other litigation because, its lawyer asserted, "Chrysler had no way to locate all of the crash tests produced at other times in other lawsuits." (Most of the crash test files held by Chrysler in the ordinary course of business had been destroyed pursuant to Chrysler's "document retention policy.")[47]

The Texas Supreme Court, in vacating the lower court's judgment for the plaintiff, held that Chrysler's misrepresentation did not warrant the drastic sanction of default judgment. It found that there was no "evidence in the record of flagrant bad faith or counsel's callous disregard for the obligations of discovery."[48] In other words, this was just ordinary lying, not the vicious kind of lying that would justify major discovery sanctions.[49]

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42. 841 S.W.2d 844 (Tex. 1992). Technically, the Texas Supreme Court did not grant the mandamus immediately, but provided for a conditional mandamus that would only take effect if the trial court did not "voluntarily" vacate its order. Id. at 853. I "voluntarily" pay my income taxes under similar incentives from the IRS.

43. Id. at 851 n.13.

44. Id. at 846. A major area of dispute in this case was the crashworthiness of the Chrysler M-body car. When plaintiff complained, at a hearing on February 15, 1991, about Chrysler's failure to provide crash test files, Chrysler's attorney stated that it had already produced "approximately 250 or 300." Chrysler later revised that number to "some 100 crash test files." Id. at 846 & n.4.

45. See id. at 848 n.10.

46. See id. at 847.

47. See id. at 847. "Document retention policy" is one of the great Orwellian misnomers of moderu litigation practice. It invariably refers to a policy requiring periodic destruction of documents.

48. Id. at 850.

49. See also Albert Trostel & Sons Co. v. Vanlente, No. 1-93-CV-108, 1993 U.S. Dist. LEXIS 16184 (W.D. Mich. Sept. 15, 1993), in which sanctions were sought for a series of allegedly false statements made by representatives of the plaintiff. One claim involved a statement by a witness for the plaintiff that he had "evaluated" an article written by the defendant. See id. at *10. At the witness's deposition, it turned out that "he had not read the article himself, but he was told about it and he read a synopsis of it." Id. The court

Further enlightenment on the various categories of legal lies comes from the Court of Appeals of New Mexico in *Bustillos v. Construction Contracting*.[50] In *Bustillos*, the party seeking workers' compensation had apparently sworn at his deposition that he was unable to perform certain physical activities in which defendants had videotaped him engaging. The opinion distinguishes between lies that are "direct assertions of material elements of a claim or defense" and those that are not.[51] Because the worker's physical condition was such a "material element," lying about it did not constitute discovery abuse. It did not prejudice trial preparation, but merely "served the purpose of informing the interrogating party of contentions it needed to prepare to meet at trial."[52]

The *Bustillos* decision reminds us that every time a judge or jury resolves a disputed factual issue, she is or they are implicitly rejecting one side's version of the facts. That version may not have been a lie, but it was probably not "the whole truth, and nothing but the truth." *Bustillos* leads to the surprising but perfectly logical conclusion that it is okay to lie about the major issues in the lawsuit, such as whether you were injured, but not about minor issues, for example, whether you have produced all relevant documents. One might distinguish the acceptable lies in *Bustillos* as involving substance rather than procedure, arguing that only procedural lies distort the fact finding process. One might argue that permitting false testimony is less egregious than direct lying by the attorney. The real point is that lawyers and judges have a sense of what constitutes acceptable lying—the kind of lying lawyers do as part of their job of presenting disputed factual issues in the best possible light for their clients.

Nitpickers will point out correctly that *Bustillos* does not say it is okay to lie about major issues, it simply states that such lies will not justify dismissal for discovery abuse. It is theoretically possible, although practically unheard of, for a civil litigant who exaggerates his injuries under oath to be prosecuted by the District Attorney for perjury, and his lawyer could be brought before a disciplinary committee for suborning perjury.

This ordinary, everyday lying can easily become self-defeating, as it did in *C & F Packing Co. v. Doskocil Cos.*,[53] a veritable cornucopia of prevarication. The case involved alleged misuse of trade secrets and confidential information with respect to a "unique extruded sausage product" utilized as a pizza topping by the Pizza Hut chain.[54] Judge Rovner noted

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concluded that "[w]hile I agree that the use of the verbs 'evaluate' and 'review' are a little misleading in this context, I do not believe that the statements made in affidavit are false or not grounded in fact." Id.

50. 866 P.2d 401 (N.M. Ct. App. 1993).

51. Id. at 404.

52. Id. at 405 (quoting Sandoval v. Martinez, 780 P.2d 1152, 1158 (N.M. Ct. App. 1989).

53. 126 F.R.D. 662 (N.D. Ill. 1989) (Rovner, J.).

54. Id. at 665.

that the case had "mushroomed [into] an all-out war peppered with serious allegations of attorney misconduct."[55]

The issues turned on a series of trivial disputes regarding who was lying about who said what to whom.[56] The Judge recognized that both parties were shading the truth, but after reading between the lines of the contradictory affidavits, she concluded that Doskocil's version was closer to veracity. Accordingly, she ruled against the bigger liar.[57] The opinion goes on to consider many charges and countercharges of astonishing pettiness,[58] most involving counsel accusing each other of lying.[59] The question is not which side should win, but why both sides wasted so much time litigating misunderstandings which could have been cleared up in one straightforward telephone call. The minor discovery advantages are almost certainly not worth the risks, time and expense. And they obviously annoyed this judge. Yet it also is easy to see the akratic principle at work, as the opposing counsels' feud becomes an end in itself.[60] Sometimes, this same incontinence is directed at the judge rather than merely at opposing counsel. Lawyers can go off the deep end in their dealings with judges, with unfortunate results for themselves and their clients.[61]

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55. Id. at 664. Judge Rovner is obviously a sagacious and careful jurist, but I respectfully suggest that she leave the comedy to the professionals.

56. For example, C & F's counsel claimed he had "understood" that a witness for Doskocil would be available only in the morning (and had therefore scheduled a third party deposition for the afternoon). Doskocil's counsel claimed that the deposition initially had been scheduled for the morning, but that Doskocil subsequently had agreed to make the witness available for a full day. Id. at 668.

57. See id. at 674.

58. For example, Doskocil's counsel also claimed that he had never been informed that the third party deposition was to take place at the Holiday Inn. See id. at 676. Both of C & F's lawyers said he had been told of the location at that morning's deposition. See id. at 675. They even provided an affidavit by the court reporter. See id. Judge Rovner, however, displaying subtlety worthy of Solomon, concluded:

> [I]f Morse [Doskocil's counsel] had actually known that the deposition was to take place at the Holiday Inn, it is unlikely that instead of representing simply that he did not know the location, he would have offered his belief that the location could be any of three places, including the Holiday Inn.

Id. at 677. She also didn't think much of the court reporter, whose "transcript makes no mention of the Holiday Inn." Id.

59. My favorite was in a counter-motion for sanctions, where C & F's lawyers claimed that Doskocil's lawyer had lied by denying that he had called one of C & F's lawyers a "liar." By this time, even Judge Rovner was losing patience. In a nice display of ambiguity, she concludes, "[w]hile [Doskocil's lawyer's] statements concerning whether C & F's counsel were liars may not have exhibited the height of professionalism, the Court finds no basis for concluding that [Doskocil's lawyer] is guilty of misrepresentation on this issue." Id. at 682.

60. Fans of postmodern legal theory will note that this analysis is all perfectly consistent with the Luhmannian concept of "autopoietic law," in which the legal system generates its own internal norms based on the reciprocal expectations of the participants in the system. See Autopoietic Law: A New Approach to Law and Society 3 (Gunther Teubner ed., 1988).

61. See Ahmed v. Reiss S.S. Co., 761 F.2d 302, 305 (6th Cir. 1985) (attorney held in contempt for falsely stating to two federal judges that he was in the other's courtroom

B. *Why Misappropriation Is Not Always Offensive*

Stealing, unlike lying, is not central to the litigator's role in discovery proceedings. The whole point of discovery is that you do not have to sneak around stealing information because you are entitled to it. Stealing becomes significant, therefore, only with regard to privileged information. There is a slight disagreement among federal courts as to whether your adversary's privilege is waived if you manage to get your hands on her privileged information. Some courts say it is. Others say it is not. Others say it depends.[62]

An instructive case is *Suburban Sew 'N Sweep v. Swiss-Bernina* in which the plaintiff's counsel located some interesting documents by rooting around in the defendant's trash dumpster.[63] The magistrate judge supervising discovery, apparently grossed out by this tactic, ordered all the documents returned and prohibited their use as evidence. This, the district court judge explained, was reversible error because all of the discarded nonprivileged documents "could normally be obtained through discovery anyway."[64] As to the privileged stuff, the court said taking those documents "presents a very close question."[65] The court ultimately held that documents found in the trash were not privileged:

> The likelihood that third parties will have the interest, ingenuity, perseverance and stamina, as well as risk possible criminal and civil sanctions, to search through mounds of garbage in hopes of finding privileged communications, and that they will then be successful, is not sufficiently great to deter open attorney-client communication.[66]

The court also noted that the defendant had solved the problem for the future by buying a paper shredder.[67]

Those of you with advanced legal training may point out that there is a difference between stealing something and finding it in the garbage. It is true that while ancient evidence treatises opined that even "purloined" letters waived the privilege,[68] these days, courts seeking to provide a bal-

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when in fact he was in neither. Attorney's justification was that he "had the screaming itches in the crotch . . . I wasn't here because I would have been scratching my testicles constantly if I had been here.") (Contempt order affirmed).

62. See 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2016.2 (2d ed. 1994).

63. 91 F.R.D. 254 (N.D. Ill. 1981).

64. Id. at 256. The court apparently ignored the possibility that these documents had been thrown in the dumpster in accordance with defendant's "document retention policy."

65. Id. at 260.

66. Id.

67. Id. at 260 n.6.

68. See John H. McCormick et al., McCormick On Evidence § 75 (Edward Cleary et al. eds., rev. 2d ed. 1972); see also 8 John H. Wigmore, Wigmore on Evidence §§ 2325–2326 (McNaughton rev. 1961). The most recent edition of McCormick disapproves of this harsh older rule, argning that in big cases with massive discovery, inadvertent disclosure of privileged documents is almost inevitable. See John H. McCormick, McCormick On Evidence § 93 (John Strong et al. rev., 4th ed. 1992).

anced but flexible legal standard hold that privilege is waived only when disclosure occurs "inadvertently" due to a party's failure to take reasonable precautions to prevent such disclosure. In practice, however, this doctrine can create considerable incentives for lawyers to help the "inadvertent disclosure" along.[69]

By considering the adequacy of precautions along a scale of reasonableness, courts treat stealing (or "misappropriation"), like they treat lying, as a matter of degree.[70] Accordingly, it is relatively easy for a lawyer to step over the line by stepping out with a big pile of documents that does not belong to her. That is what happened in *Lipin v. Bender*.[71] The plaintiff, who was then employed by her attorney as a paralegal, went with him to a court hearing on disputed discovery issues. Taking what she described as her "customary place" at the conference table, she happened to land in front of a stack of the other side's memoranda which included witness interview notes and deposition digests.[72] She took the documents and told her counsel what she had done. Her attorney, after consultation, and perhaps a perusal of some of the case law described above, "concluded that any claim of privilege as to the documents had been lost as a result of [opposing counsel's] careless handling of them."[73] The New York courts disagreed. The trial court dismissed the action based on

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69. Courts generally hold that it is the party who has "inadvertently" disclosed who has the burden of showing that reasonable precautions were taken. Parties frequently fail to meet that burden because they usually have no idea how their production of documents got screwed up. One magistrate judge summed it up this way:

> [T]he opinions of the courts in these cases, after a substantial amount of verbiage, can be reduced to a bottom line to the effect that the precautions were inadequate because they were not effective in preventing the disclosure of privileged documents . . . . Frankly, I do not see this result as a significant advance in jurisprudence.

International Digital Sys. v. Digital Equipment Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) (Collings, Mag. J.). The judge went on to hold that, as far as he was concerned, any disclosure that was inadvertent, in the sense of not being compelled, constituted a waiver. See id. at 450.

It is not enough to show that you carefully separated the privileged documents from the others but that through "some unexplained occurrence" some privileged documents were produced. See Liggett Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207–08 (M.D.N.C. 1986). It is not even enough to say that you think the documents were "misappropriat[ed]" when the other side claims they just turned up anonymously in the mail. United Mine Workers v. Arch Mineral Corp., 145 F.R.D. 3, 6 (D.D.C. 1992).

70. O'Leary v. Purcell Co., 108 F.R.D. 641 (M.D.N.C. 1985), involved defendant's privileged documents which had been taken by a former employee at the time he left the company. Defendant said that the former employee "never sought or received . . . permission to remove documents" from the company. Id. at 645. The former employee stated that he had permission to clean out his office and take files and "that no objection to removal of the documents or concerns regarding confidentiality were raised by anyone although his possession of the documents was well known." Id. The Court held the privilege waived for failure to take reasonable precautions. See id. at 646.

71. 644 N.E.2d 1300 (N.Y. 1994).

72. See id. at 1301.

73. Id.

the conduct of plaintiff and her counsel, calling it "heinous" and "egregious," a threat to the attorney-client privilege, to the concept of civilized, orderly conduct among attorneys, and even to the rule of law.[74] The decision was affirmed.[75]

C. *Why Some Lawyers Are Not Defensive About Being Offensive*

Surprisingly, the case law shows that name-calling tends to result in more severe sanctions than does lying and stealing. This is not necessarily because lying and stealing are considered lesser offenses. I suspect that judges simply are so used to vituperative language in litigation that in order for name-calling to constitute discovery abuse it has to involve truly disgusting maledictions. Some of the language disapproved of by these cases is so egregious it cannot be reprinted in the text of a family law review. (Don't worry—I'll put it in the footnotes.)

These cases—which some commentators have termed "Rambo Litigation"[76]—usually involve disruptive speech or conduct at depositions. The reference to Rambo is clearly misguided, as the tactics deployed rarely involve high explosives. Rather, they are prime examples of Aristotelian incontinence. They involve lawyers sitting for long hours in small rooms with other lawyers whose guts they have come to hate. It is not hard to imagine incontinent lawyers saying things at depositions they are likely to regret later (especially when they read them in sanctions opinions). Moreover, although depositions may be conducive to scurrilous remarks, they are also extremely stupid places to make them, because there is a court reporter in the room *writing them all down.*

Nonetheless, the basic structure of these cases shows that, as with lying and stealing, name-calling is a matter of degree. Some cases recognize that a certain amount of coaching, cajoling and objecting is to be expected in defending a deposition.[77] Yet the case law also contains opinions imposing severe sanctions against lawyers whose objections were

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74. Id. at 1302 (quoting lower court opinion).

75. Id. at 1302. Because *Lipin v. Bender* is a case decided under New York law, and the prior cases discussed in this section were all federal cases, those unfamiliar with local practice might conclude that New York state courts apply more stringent ethical standards than those imposed in federal courts. Those familiar with New York state practice will find this conclusion to be a hoot.

76. E.g., Applied Telematics v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *10 (E.D. Pa. Feb. 22, 1995); Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 181 (S.D. Iowa 1993); see Judicial Conference, Federal Circuit, 146 F.R.D. 205, 216 (1992); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (1992).

77. In *Calgene, Inc. v. Enzo Biochem*, the court refused to impose sanctions for deposition misconduct. It held that "there may have been some improper coaching of the witness on occasion by the defending attorney, but the level of coaching does not rise to sanctionable conduct—bad faith." No. S-93-0195 EJG/GGH, 1993 U.S. Dist. LEXIS 20217, at *9 (E.D. Cal. Aug. 27, 1993).

too frequent, obstreperous or nasty.[78] Often these are lawyers who previously have been warned, or even sanctioned, for similar conduct.[79]

In all of these areas, we see a similar pattern. Lawyers, recognizing that they have a certain amount of leeway to engage in questionable litigation practices, try to get away with more extreme and egregious versions of the same conduct. Eventually the conduct becomes so despicable that it warrants powerful sanctions from the judge. Strangely, this nasty and ultimately counterproductive behavior often looks less like calculated litigation strategy than incontinent tantrums or schoolyard

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78. In *Castillo v. St. Paul Fire & Marine Ins. Co.*, for example, the plaintiff's lawyer was suspended from practice before that court for one year because, among other things, he had "willfully and contumaciously disobeyed the court's order by interfering with the questions posed by defendants' counsel, and by directing the doctor not to respond to certain questions already approved by the court." 828 F. Supp. 594, 596–97 (N.D. Ill. 1992). The court also noted that when opposing counsel sought to use the phone, he was told that if "you step outside this room and touch the telephone, . . . I'll take care of that in the way one does who has possessory rights." Id. at 597. The court was not sure whether this was a threat of "physical violence," but noted that it was at least an example of "professional incivility." Id.

Van Pilsum also involved akratic behavior by the plaintiff's lawyer at the plaintiff's deposition. See 152 F.R.D. at 180. According to the court:

> Mr. Barrett [plaintiff's counsel] consistently interrupted Mr. Young and the witness, interposing "objections" which were thinly veiled instructions to the witness . . . . Mr. Barrett repeatedly objected to the form of Mr. Young's questions. He also engaged in ad hominem attacks on Mr. Young's ethics, litigation experience and honesty. In the course of the 167 page deposition, there are only four segments where five or more pages occur without an interruption from Mr. Barrett (footnote omitted).

Id. Not only was opposing counsel's motion to compel and for sanctions granted, but the court implied that it approved of opposing counsel's declaration "that scheduling order deadlines would be strictly adhered to (even though this case was not set for trial and extensions are [ordinarily] freely granted)." Id.

Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994), is unusual because of the notoriety of the attorney involved (Joseph Jamail) and the folksy, colorful style of abusive and vituperative language he used in defending the deposition of one of the Paramount directors. ("Don't 'Joe' me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon." Id. at 54.) The Delaware Supreme Court found the conduct "outrageous and unacceptable," id. at 55, and raised the issue *sua sponte* in an addendum to its opinion otherwise addressed to the merits. Id. at 52 & n.23. But because the deposition had taken place in Texas, and Jamail was not admitted to the Delaware bar, even *pro hac vice*, there was little the court could do except note his abusive conduct in one of the most important and widely read corporate law opinions of the last ten years. Most corporations casebooks, however, delete the addendum.

79. See Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991) (sanctionable conduct by plaintiff's counsel occurred at second deposition after first deposition had resulted in award of $6,317.66 against plaintiff and his counsel for discovery abuse); In re Ramunno, 625 A.2d 248, 248–49 (Del. 1993) (counsel, who had previously been privately reprimanded by Delaware Supreme Court in another matter for "uncivil conduct," was publicly censured for referring to opposing counsel by a "crude, but graphic, anal term").

brawls. Have not lawyers outgrown such juvenile behavior? The answer, as we shall see in the next Part, is no.

III. Moral Education for Litigators: Innovation or Oxymoron?

Discerning but grouchy readers may note that this is already the last Part of my Essay and so far I have not actually provided any practical advice for dealing with discovery abuse. All that I have done is make fun of a lot of lawyers and teach you a fancy new Greek word for acting like a jerk.[80] You can relax, however, because in this Part, I am finally going to explain the causes and cures for incontinence among lawyers.

Aristotle himself was a little coy on this subject. Although he spends almost a whole chapter of the *Nicomachean Ethics* describing various aspects of *akrasia*, we never get a straightforward statement as to what causes it or how to fix it.[81] The reason for this omission is unclear. The English philosopher, M.F. Burnyeat, suggests that Aristotle did not need to describe a cause because he considered akratic behavior to reflect a natural but immature state of moral development,[82] like teenagers dying their hair pink or joining the Young Republicans.

Aristotle distinguishes three separate goals of human action: the pleasant, the good and the noble.[83] Most of us develop an affinity for pleasurable activities at a very early age. Learning to get a kick out of performing noble acts, on the other hand, takes more time and training. Only through the continued performance of such acts do we learn the deep emotional satisfaction that comes from helping old ladies to cross the street or from testifying with complete candor before a Senate subcommittee.[84] Ultimately, Aristotle tells us, the fully mature moral person has learned to integrate her appreciation of the pleasant, the good and the noble, and she derives the greatest satisfaction from acting nobly.[85]

Where does Aristotle's theory leave our akratic legal colleagues? Stuck somewhere in the middle of their moral development. They understand that cooperation and reasonableness are the appropriate ways to conduct discovery. Unfortunately, these lawyers have not yet learned to derive as much satisfaction from representing their clients reasonably and cooperatively as they do from disrupting depositions and fighting with opposing counsel. We might say of them, as I say of my kids in the

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80. Actually, it's a very *old* Greek word for acting like a jerk.

81. See Nichomachean Ethics, supra note 36, ¶ 1145 a–1152 a.

82. See M.F. Burnyeat, Aristotle: On Learning to Be Good, *in* Philosophy Through Its Past 51 (Ted Honderich ed. 1984).

83. See Nichomachean Ethics, supra note 36, ¶ 1104 b, 30–35.

84. See id., 5–20.

85. See Burnyeat, supra note 82, at 72–74. Nussbaum agrees that the values represented by these different goals are incommensurable, but choices may be made among them through practical reason. See Martha Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy 294–300 (1986).

back seat, that they have not yet learned the appropriate degree of self-control.

It is not hard to see how litigators can get stuck at a stage of moral development where they derive such satisfaction from acrimony and nastiness that they never learn how to work and play well with others.[86] The litigation process tends to attract people who enjoy a good verbal brawl. Litigators then spend most of their time with other litigators, reinforcing each other's aggressive tendencies.[87] Indeed, the only distinct cultural artifact produced and valued by litigators is the "war story,"[88] an oral epic in which tribal elders recount, for the edification of junior associates, the heroic deeds they performed and the smashing victories they obtained during pretrial discovery in cases which ultimately were settled.[89]

Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they *seem* while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit. Furthermore, as we saw in Part II, all this goes on against a case law background in which the line between tough, aggressive lawyering and abusive conduct is far from clear. Without guidance as to appropriate conduct from their elders, either at the firm or on the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.[90]

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86. Some commentators blame the increased viciousness of litigation culture on the growth of large, impersonal law firms. See Robert G. Bone, The Empirical Turn in Procedural Rule Making: Comment on Walker (1), 23 J. Legal Stud. 595, 603 (1994); Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 Brook. L. Rev. 931, 939–45 (1993); Robert E. Keeton, Times Are Changing for Trials in Court, 21 Fla. St. U. L. Rev. 1, 13 (1993). These commentators tend not to work for large, impersonal law firms.

87. Aristotle expressly tells us that akratic bebavior may be either learned or innate. See Nichomachean Ethics, supra note 36, ¶ 1148a.

88. 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, 1159–62 (1992) (claiming that lawyers love anecdotal evidence, even though generally worthless).

89. See Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712, 720 (1994) ("There is an entire generation of litigators for whom trial remains theoretical."); see also Kevin C. McMunigal, The Costs of Settlements: The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. Rev. 833, 837 (1990) (noting that lack of trial experience may contribute to discovery abuse).

90. There is even some empirical support for this view of litigators, and it comes from studies of their own attitudes. Charles Sorenson, writing about Wayne D. Brazil's study on civil discovery, notes a "fascinating twist suggested by the data." Charles W. Sorenson, Jr., Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?", 46 Hastings L.J. 679, 711 (1995) (commenting on Brazil, Civil Discovery: Lawyer's Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787). He

It is tempting, given the current zeitgeist, to propose we solve discovery abuse through some kind of twelve-step program, a "Discovery Abusers' Anonymous" where frequently sanctioned lawyers meet weekly to talk about their transgressions and resolve never to do it again. I am afraid, however, that few lawyers have the strong desire to change that is necessary for such programs to work. Besides, sitting around and telling war stories about their prior discovery abuses is one of the things that got these lawyers into trouble in the first place.

If therapy is not the answer, what about those old legal standbys, regulation and sanctioning? That, of course, is the current approach, and it has not been a brilliant success. I suggest, however, that educating the morally immature, akratic lawyer to the joys of proper discovery behavior involves a somewhat different approach to regulation and sanctions. Forget both the big, scary sanctions that probably will not get imposed anyway—and forget the moral sermons that generally go with them. The emphasis should be on telling lawyers to shut up and knock it off—loudly, frequently and in the most annoying way possible.[91]

The problem, as we have seen, is that for some litigators the immediate enjoyment they get from abusive conduct is greater than their concerns about the dangers and risks of such conduct. The answer, therefore, is simple: find a way to make discovery abuse *less fun*. This obviously requires greater involvement in the discovery process by judges,[92] magistrate judges and discovery masters. As anyone who has ever gone to a bar

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states that "[w]hile attorneys overall identified evasive or incomplete discovery responses as problems in 60% of their cases, only 14% of the cases were believed to involve bad faith or dishonesty by their opponents." Id. Adding this to Brazil's finding that most lawyers believe the biggest problem with discovery is "inadequate judicial management," Sorenson and Brazil both suggest that "attorneys are compelled by the adversarial culture to engage in activities that they recognize are potentially counterproductive and to seek the assistance of the courts to save them from themselves." Id.

91. Before I explain my new annoying approach to discovery abuse, I just want to mention that even though I *seem* to know a lot about what goes on in the minds of lawyers who abuse the discovery process, it is not because I have any personal familiarity with such abuse, nor have I ever been involved in, inclined toward or tempted to engage in, such conduct. Nor have I been caught at it. I just wanted to make that clear in case any judges out there read this and I ever rnn into them when they have their gavels in hand.

92. The discovery system was designed to be lawyer driven, with judges getting involved only on rare occasions. See Frank F. Flegal & Steven M. Umin, Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 BYU L. Rev. 597, 613 (1981); Maurice Rosenberg & Warren R. King, Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 BYU L. Rev. 579, 581 (1981); Sorenson, supra note 90, at 692 ("there would be minimal involvement of the court in conducting discovery or resolving discovery disputes" (citing Paul R. Connolly et al., Judicial Controls and the Civil Litigative Process: Discovery 9–27 (1978))).

But face it, that conception of discovery has been on the ropes for quite some time. See generally Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Cal. L. Rev. 770 (1981) (discussing expanding role of judges in managing pretrial procedures).

association convention knows, the fun quotient decreases substantially as soon as a judge enters the room.

Even more important, however, is a change in the judicial approach to discovery sanctions. These days, as we saw in Part II, only the most disgusting and despicable litigation conduct tends to get sanctioned. By letting the little stuff slide, judges eventually are confronted with conduct so abusive, it requires a really big, dramatic, atomic bomb of a response. Moreover, having dropped the bomb on a particular lawyer, the judge generally feels obligated to justify the severity of the sanctions imposed on the miscreant by writing a blistering opinion excoriating the lawyer's conduct in graphic detail.

This approach to sanctions has a number of unfortunate consequences. Because only the worst abuses get sanctioned, lawyers assume (generally correctly) that they can get away with conduct that is boorish and wasteful so long as it is less repulsive than the stuff they read about in the sanctions opinions. The moralizing tone and emphasis on outrageous conduct which characterize sanctions opinions also give the false impression that only total sleazeballs commit discovery abuses. In fact, we have seen that they are generally committed by partial sleazeballs.

Even worse, most judges have the idea that only truly horrendous conduct warrants discovery sanctions. This is due to the unfortunate judicial habit of following prior opinions.[93] These opinions tend to state that severe sanctions should not be imposed unless the conduct is so egregious it truly shocks the conscience. Most judicial consciences have, by now, developed some pretty good shock absorbers.[94]

The emphasis on moral outrage and sermonizing in these opinions is also counterproductive. As every parent and peripatetic philosopher knows, you do not teach moral conduct by lecturing about morality (required Legal Ethics courses notwithstanding). You teach it by telling people what to do and what to knock off. Telling a lawyer he is despicable is unlikely to improve his conduct. Telling him to shut up and knock it off, frequently and in a very loud voice, just might do the trick.

Some have suggested that it is inappropriate to sanction discovery abuse unless lawyers are given clearly articulated rules delineating precisely what conduct is prohibited. This is much like suggesting that Howard Stern be given a clearly articulated set of things he is not allowed to say on the radio. Greater deterrence is obtained not by telling him precisely what he can get away with, but by leaving him guessing. A legal regime in which lawyers get yelled at every time they do something that

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93. See, e.g., Wilson v. Volkswagen, 561 F.2d 494, 504 (4th Cir. 1977) ("a default judgment should normally not be imposed . . . save in that rare case where the conduct represents such 'flagrant bad faith' and 'callous disregard' of the party's obligations under the Rules" (quoting NHL v. Metro. Hockey Club, 427 U.S. 639, 643 (1967))).

94. See 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, 217–18 (1992) (severe sanctions used only in most extreme cases).

ticks off a judge creates a similar healthy uncertainty and incentive to better conduct. Lawyers would have to reevaluate constantly their sleazy tactics to see how close they are to the stuff that got them yelled at the last time. Some may be troubled by this notion of regulation without explicit rules, where the judges simply decide what is improper as they go along. Others will recognize that it is pretty much what common law judges have been doing for the last thousand years.

What about those lawyers who are so tough, nasty and stupid that they do not mind getting yelled at?—those who think that judicial enmity is a sign of how aggressively they are litigating, but fail to recoguize it is also a sign that they are *probably going to lose*? These folks need the added disincentive of a little sanction. Not a big, scary, virtually unusable sanction, but a less severe, more annoying punishment to deal with less severe, more annoying discovery abuses.

Judges are developing new ways to become more annoying, despite the widespread view in the legal profession that they have already perfected this skill. Many of these new sanctions involve either embarrassing the abusive litigator or wasting her time, preferably in non-billable form. Some have the added benefit that they can be imposed on both sides at once and the costs cannot be passed on to the client. Much work remains to be done, however, if we are to develop a system in which discovery abuse will be no fun at all. Suggestions for more annoying sanctions include the following:

(1) Appoint special discovery masters to attend every deposition and glare at the litigators whenever it looks like they are going to get out of line.[95] The cost of such masters, who bill by the hour, can be allocated among the parties however the court deems appropriate.[96] As first-year law students know, there are few things more annoying than paying for someone to yell at you.

(2) Throw the abusive discovery in the garbage, and make the lawyers do it all over again, just like the judge did in *Blank v. Ronson*.[97] I know this seems a little wasteful and duplicative, but you can't make meatloaf without busting some chops.[98]

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95. See Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 181 (S.D. Iowa 1993) ("all further depositions shall take place in the presence of a discovery master"); Apple Computer v. Microsoft Corp., 779 F. Supp. 133, 136 (N.D. Cal. 1991) ("If counsel are unable to proceed efficiently and professionally with discovery, the court will consider appointment of a discovery master pursuant to F.R.Civ.P. [sic] 53 to monitor discovery *at the parties' expense.*"), aff'd 35 F.3d 1435 (9th Cir. 1994).

96. Cf. Gonzales v. Safeway Stores, 882 P.2d 389, 392 (Alaska 1994) (trial court appointed discovery master and ordered that party losing any dispute pay master's fees).

97. 97 F.R.D. 744, 745–46 (S.D.N.Y. 1983).

98. See Frazier v. SEPTA, 161 F.R.D. 309, 315, 317 n.9 (E.D. Pa. 1995) (deposition ordered retaken where counsel's abuses in defending prior deposition were "numerous" and "blatant." On re-deposition, it was expected that counsel would meet "the high standard of professionalism and personal decorum expected of an attorney.").

(3) I call this one "asymmetric courtesy." Who says scheduling orders, filing deadlines, time extensions and all the other judicial case management rulings must treat both sides equally? I say, if lawyers are abusing the pretrial process, the pretrial process ought to abuse them right back. Give the non-abusive lawyers twice as much time to file papers as the nasty ones, or, less severe but more annoying, make the nice lawyer's papers always due on Friday at noon, and the sleazeball's due on Monday at 9:00 A.M.[99]

(4) Make the abusive lawyers go back and take some remedial law school courses.[100] Sure they will be unprepared and inattentive, but that won't make them any different from regular third-year law students.

(5) Sentence abusive lawyers to community service on the most unimportant, boring bar committees you can find.[101] Do not worry, there will be lots to choose from.

Can such puny sanctions possibly be effective? Obviously the threat of service on the judicial parking lot committee will not deter a lawyer

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99. In *Van Pilsum*, the court imposed a form of asymmetric courtesy in which scheduling deadlines would be strictly enforced against the abusive lawyers. 152 F.R.D. at 181. The other side, presumably, could still get all the extensions and accommodations it wanted.

Such scheduling asymmetries, if ordered in response to attorney misconduct and in furtherance of the orderly administration of justice, would be unlikely to raise due process concerns. After all, claims can actually be dismissed or default judgments awarded for misconduct in pretrial discovery without violating due process, at least where willfulness or bad faith is involved. See NHL v. Metro. Hockey Club, Inc., 427 U.S. 639, 642–43 (1976); Societe Internationale v. Rogers, 357 U.S. 197, 208–212 (1958). In upholding an award of counsel fees for failure to comply with a discovery order, the Supreme Court has noted, "[t]he due process concerns posed hy an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14 (1980). The due process concerns in making lawyers work nights and weekends would seem to be even less compelling than those involved in awarding counsel fees.

100. See Smith v. Our Lady of the Lake Hosp., 135 F.R.D. 139, 155 (M.D. La. 1991), rev'd on other grounds, 960 F.2d 439 (5th Cir. 1992) (requiring attendance at continuing legal education courses); Stevens v. City of Brockton, 676 F. Supp. 26, 27 (D. Mass. 1987) (same); see also *Curran v. Price*, where the judge ordered a lawyer to:

> copy out, legibly, in his own handwriting . . . the text (*i.e., without footnotes*) of section 3722 in 14A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Civil (1985), together with the text of that section's update at page 43 of the 1993 pocket part of volume 14A. . . . Mr. Umbreit will turn in the resulting product to the Clerk of this Court, with a certification that it was made solely by himself and in his own handwriting.

150 F.R.D. 85, 87 (D. Md. 1993).

101. Texas seems to have pioneered the idea of sanctioning lawyers with community service. In Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991), the Supreme Court of Texas refused to criticize the "creative sanction" of ordering a lawyer to perform 10 hours of community service for discovery abuse. It did grant mandamus however, because the trial court's order required the service to be completed before the trial ended, and therefore foreclosed appellate review. Other Texas courts have since ordered similar sanctions to be performed. E.g., Cap Rock Elec. Coop. v. Texas Utils. Elec. Co., 874 S.W.2d 92, 98 (Tex. Ct. App. 1994).

from taking actions she believes will substantially benefit herself or her client. But that is not the kind of conduct we need to dissuade. If, as this Essay suggests, much abusive behavior consists of counterproductive feuds and tantrums, there may be big benefits to making the results of such conduct a little more annoying and less fun.[102]

Finally, there is one other technique which, although risky, offers additional possibilities for annoyance and disruption of current litigation practice. You could try making jokes and snide comments about those abusive lawyers. You could even write law review articles about them. If you get angry letters in response, however, try *not* to smell the paper on which they are written.

102. It may be noted that sanctions like asymmetric courtesy, remedial law courses and community service are not only annoying but hard to pass on to the client in the form of added fees. Another underutilized sanction which is a little too severe to make my list, but certainly has its uses, is kicking an abusive lawyer off the case. Cf. Schmidt v. Ford Motor Co., 112 F.R.D. 216, 220–21 (D. Colo. 1986) (refusing to dismiss for attorney misconduct, but disqualifying counsel from further representation in the case).