A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case

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The plaintiff's counsel continues her closing argument: "Ladies and gentlemen, for the past half hour we've listened to opposing counsel's attempt to defend his client's actions in this case. I'd like to talk for a few moments about the defense counsel's own actions in this case. Think back to evidence which we presented about opposing counsel's destruction of those accounts payable records. Ask yourself: WHY did he stoop to doing that? WHY would he do something so underhanded? Common sense tells you the answer. Counsel permitted those invoices to be shredded because he knew that those records would have shown that his client, the defendant, recognized a debt to my client, Ms. Grant. The likelihood is that those records would have shown in black and white that there was a contract. Counsel destroyed those records for one reason and one reason alone—because they would have proved that the defendant had a contract with Ms. Grant. Those records would have shown that the defendant owes her the money she's suing today to collect."

From the perspective of an individual litigant, a closing argument of this tenor could be potent trial advocacy.¹ In the minds of many jurors, a trial is the modern equivalent of a

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1. In the famous English trial of Robert Wood, the prosecutor "stressed the fact that Wood had attempted to suborn a number of possible witnesses, and in many ways had tried to tamper with potential evidence, and stop evidence reaching the police through normal channels." The "Crown relied on this attempt to suborn witnesses and concoct a false alibi as a clear indication of guilt on Wood's part." Basil Hogarth, Robert Wood 1907, in FAMOUS TRIALS 170, 194-95 (Harry Hodge & James H. Hodge eds., 1986).
morality play, and the advocate must convince the jury that "fundamental justice" is on her client's side.\textsuperscript{2} Jurors view the trial as a "moral arena,"\textsuperscript{3} and they endeavor to decide whether the plaintiff or defendant is on the side of the angels. It is true that the above hypothetical argument focuses on the opposing attorney's misdeed rather than on his client's personal misconduct. However, the attorney is the client's representative in the litigation; and jurors often assess the client, in part, by the conduct of the attorney representing her.\textsuperscript{4}

Permitting this type of argument may also be desirable from the perspective of the litigation system. The very possibility of this type of argument could deter counsel from engaging in pretrial discovery misconduct. The general consensus is that misconduct is widespread during discovery.\textsuperscript{5} Many commentators are of the opinion that deliberate obstructionism is commonplace.\textsuperscript{6} In a survey of litigators conducted by the American Bar Foundation, most respondents indicated that it is a common occurrence for attorneys drafting interrogatory answers to wrongfully withhold relevant, unprivileged information.\textsuperscript{7} Similar misconduct is a regular occurrence during document production.\textsuperscript{8}

Another consensus is now emerging: the defensive strategies designed to curb discovery misconduct have largely failed. As Judge Myron Bright, senior judge of the United States Court of Appeals for the Eighth Circuit, has observed, it does little good to merely order a litigant to do what he should have

\textsuperscript{2} James W. McElhaney, Goals in Opening Statement, LITIGATION, Winter 1990, at 47, 48; see also James W. McElhaney, The Sense of Injustice, LITIGATION, Spring 1988, at 47.
\textsuperscript{3} James W. McElhaney, Qualities of Winners, LITIGATION, Fall 1992, at 51, 52.
\textsuperscript{5} EDWARD IMWINKELRIED & THEODORE BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS § 1:01 (1986).
\textsuperscript{7} Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 AM. B. FOUND. RES. J. 789, 829.
\textsuperscript{8} IMWINKELRIED & BLUMOFF, supra note 5, § 8:27.
done four months before. It is true that many bar organizations have issued new rules of legal ethics, but the issuance of those rules has not stemmed the tide of discovery misconduct. In many, if not most, jurisdictions, the bar disciplinary system is slow and ineffective.

Partly in response to the perceived failure of the bar disciplinary system, Federal Rules of Civil Procedure 11, 16, and 26 were amended in 1983. The thrust of the amendments was to toughen the enforcement of discovery obligations. In particular, the amendments were intended to encourage judges to punish discovery misconduct by imposing sanctions more aggressively. It was hoped that the sanctions "movement" would discourage obstructionism. Although the movement was promising, it now appears doubtful that sanctions alone will provide an adequate solution to the problem of discovery misconduct. To obtain sanctions, the victim of discovery abuse must resort to court which may result in distracting satellite litigation. Litigating a sanctions motion can be time consuming, and becoming embroiled in sanctions litigation is particularly dangerous in jurisdictions with "fast track" calendars. Fast track calendars were implemented in many jurisdictions to reduce delays in litigation. In these

9. Judge Bright made the remark at the National Practice Institute Seminar in San Diego, California on January 22, 1993. The author participated in the same seminar.


15. Id. § 3A(A) (Supp. 1992).


jurisdictions, a litigant may have only a fraction of the time that she previously had between filing a complaint and trial—a period of months rather than years. Under a fast track procedure, a litigant can ill afford to invest weeks or months of precious pretrial time in pressing a sanctions motion.

There is a growing sense among ethical litigators that they need to go on the offensive against discovery misconduct. More specifically, they believe that they need self-help techniques which they can use as offensive weapons against obstructionist opponents. Treating the opponent’s pretrial obstructionism as an “admission by conduct”—illustrated by the hypothetical closing argument quoted earlier—is one potential technique. While the litigator contemplating such an argument might be required to seek judicial approval of the argument,18 this could be done both quickly and informally at the conference typically held between the close of the evidence and the delivery of jury instructions.19 This procedure for obtaining judicial approval would be much more streamlined than that of filing and litigating a sanctions motion. Moreover, to use Judge Bright’s expression, the technique of “admission by conduct” does far more than merely order the opponent to do what he or she should have done four months before; it could make the opponent pay a real price for discovery misconduct if the misconduct incenses the jury and the jury expresses its anger in the verdict.20

In criminal cases, the courts frequently admit testimony about an accused’s pretrial misconduct on the theory that the misconduct evidences the accused’s consciousness of guilt. For instance, if the accused threatens the prosecution’s witnesses or conceals incriminating physical evidence, the prosecution may use this to help prove the accused’s culpability.21 The

18. Many jurisdictions require the attorney to obtain the judge’s approval before making a “missing witness” argument during summation. United States v. Pitts, 918 F.2d 197, 199 (D.C. Cir. 1990).
20. A civil jury’s perception of the litigant may affect the damages award. According to one study, if a civil jury learns that the defendant has a criminal record, the plaintiff can expect to recover a verdict 9% higher than normal. If the civil jury learns that the plaintiff has a record, the plaintiff is likely to recover a verdict 16% below the national average for similar cases. DAVID L. HERBERT & ROGER K. BARRETT, ATTORNEY’S MASTER GUIDE TO COURTROOM PSYCHOLOGY: HOW TO APPLY BEHAVIORAL SCIENCE TECHNIQUES FOR NEW TRIAL SUCCESS 320-21 (1980).
21. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:04
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accused's behavior sometimes takes the form of discovery misconduct such as refusing to submit to a scientific testing procedure. So long as the conduct is the sort of behavior a guilty person might resort to in order to prevent a conviction, there is a permissive inference of consciousness of guilt. The prosecution may both introduce testimony about the behavior and treat the behavior as an admission by conduct during closing argument. By doing so, the prosecutor invites the jury to infer the accused's guilt from the accused's conduct. In effect, by acting in this manner, the accused "admits" his guilt. The criminal courts have even extended this doctrine to situations in which the pretrial misconduct was that of the defense counsel rather than the accused.

(1984). California Evidence Code section 413 explicitly states, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . willful suppression of evidence relating thereto . . . . "). See Bihun v. AT&T Info. Sys., Inc., 16 Cal. Rptr. 2d 787 (Ct. App. 1993); People v. Fitzpatrick, 3 Cal. Rptr. 2d 808 (Ct. App. 1992); cf. P.R. R. EVID. 16.5 (similar to CAL. EVID. CODE § 413).


23. MCCORMICK ON EVIDENCE §§ 263-65 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK]. In truth, testimony about this type of conduct does not fall within the technical definition of hearsay. Under Federal Rule 801(a), evidence amounts to hearsay only if it constitutes an assertive statement or act. The declarant must intend the statement or act to communicate factual information. Thus, it would be hearsay for a declarant to say, "My position in this litigation is weak," or to nod approval when asked, "Is your position in this litigation weak?" The declarant does not subjectively intend to communicate information when she attempts to bribe a witness or suppress a relevant document.

However, there is early common law authority treating nonverbal conduct implying a statement as a hearsay statement. Id. § 250. The terminology "admission by conduct" originated under common law. In light of that authority, the conduct could be considered hearsay; to justify introducing evidence of the conduct, it was necessary to bring the evidence within a recognized hearsay exception or exemption such as the doctrine permitting the admission of testimony about a party-opponent's admissions. The contraction of the definition of hearsay eliminates the need to invoke an exception or exemption, but the terminology persists.

24. Id.

25. John H. Mansfield, Evidential Use of Litigation Activity of the Parties, 43 SYRACUSE L. REV. 695, 727 n.90 (1992) (citing United States v. Harris, 914 F.2d 927 (7th Cir. 1990), a case in which the defense counsel suggested to a witness that the witness had seen a third party, not the accused, at the crime scene).
In contrast, in civil cases, the courts have been more reluctant to invoke the admission by conduct doctrine against litigants. On the one hand, they have applied the doctrine when the litigant herself has committed criminal or tortious acts obstructing pretrial discovery. Thus, the courts will admit evidence of a litigant's personal spoliation of evidence such as a civil defendant's destruction of relevant documents or physical evidence. However, the courts generally have balked at admitting evidence of lawful conduct by the litigant and her attorney. At a series of continuing legal education seminars sponsored by the National Practice Institute in 1992-93, some attorneys and judges in attendance remarked that it would be "unheard of" to admit an attorney's pretrial discovery misconduct against the attorney's client at trial on this theory.

In late 1992, Professor John Mansfield of the Harvard Law School published a provocative article entitled *Evidential Use of Litigation Activity of the Parties.* As a general rule, a statement in an affidavit by a client, submitted in support of a pretrial motion, may come back to haunt the client as a personal admission at the subsequent trial. Similarly, as Professor Mansfield notes, a remark by the client's attorney during the opening statement in one trial might be offered as a vicarious admission against the same client in a later trial. Mansfield observes that the pretrial and trial activity of both litigants and their attorneys can generate evidence against the litigants. He takes the position that such evidence should be admissible against the client unless there is a substantial likelihood that evidential use of the activity will deter an...


27. The seminars were conducted in San Diego, California (January 22, 1993), Los Angeles, California (January 23, 1993), and Minneapolis, Minnesota (March 21, 1993). The author participated in each of these seminars where he raised the possibility of treating the opposition's pretrial discovery misconduct as an admission at trial.


activity which furthers an important objective of the litigation process. He argues, however, that there is such a significant interest in "uninhibited [pretrial discovery] investigative activity" that as a generalization, evidence of that activity should be inadmissible.

This article explores the extent to which Professor Mansfield's generalization should apply to the discovery misconduct of litigants and their attorneys. The thesis of this article is that discovery misconduct should be excepted from the generalization. The first section of this article addresses the question of whether a civil litigant's personal discovery misconduct should be admissible against the litigant client at trial as an "admission by conduct" of the weakness of the client's position. The section concludes that the evidence should be admissible even when the conduct is neither criminal nor tortious. The conduct should be treated as an admission by conduct so long as the conduct supports a rational, permissive inference that the client believes his or her position in the litigation to be weak. The second section of this article turns to the related question of whether the discovery misconduct of the litigant's attorney should be admissible against the litigant even when the litigant has neither authorized nor ratified the conduct. This section argues that the attorney's conduct is relevant and ought to be admissible for this purpose. However, the section also concedes that as a practical matter, the courts in some jurisdictions will probably exclude testimony about such conduct whenever its admission would run afoul of the advocate-witness prohibition—the rule of legal ethics generally prohibiting attorneys from testifying at trials at which they serve as advocates. In most jurisdictions, the routine recognition of a litigant's right to prove the opposing attorney's pretrial discovery misconduct will likely have to await the reform of the advocate-witness rule.

31. Id. at 701-02.
32. Id. at 727.
I. THE OPPOSING CLIENT'S PERSONAL DISCOVERY MISCONDUCT

A. The Probative Value of Evidence of the Client's Personal Misconduct

Suppose that before trial, the opposing client personally commits an act of spoliation of evidence. Although he realizes that a particular document is relevant to a pending lawsuit, he is also aware that its contents would undermine his position in the lawsuit. He consequently destroys the document. By doing so, in many jurisdictions, he commits an independent tort. In some jurisdictions with broadly worded obstruction of justice statutes, he also may have perpetrated a crime. Although evidence of such misconduct will be embarrassing to the client, at the subsequent trial in the same lawsuit many courts would admit the evidence on the theory that his acts amounted to an admission by conduct. The fact that the client resorted to this tactic is probative circumstantial evidence that he believes that his position in the litigation is weak. To be sure, there are other possible explanations for the client's conduct. For instance, the client may have resorted to this tactic simply as "additional insurance" of victory. However, there is at least a permissive inference that the client's motivation was a belief that he would lose on the merits if the opposition discovered the document in question. In turn, the client's consciousness of the weakness of his position is some evidence that the position is indeed weak. Admittedly, it is possible that the client is mistaken about the invalidity of his position in the litigation; the client might be laboring under a misapprehension about the governing substantive law. However, compared to the judge and jurors, the client is in a particularly good position to know the merit of his position. His belief that his position lacks merit is probative of the position's weakness.

The question that arises, though, is whether this theory of admissibility applies only when the act committed by the client constitutes an independent tort or crime. Suppose, for example, that although the act violated the client’s discovery obligations, the act amounted to neither a criminal offense nor a tort. Could evidence of the act nevertheless be admitted on a consciousness of liability theory? As previously stated, in the past the courts have been reluctant to extend the doctrine this far.\(^{37}\) One leading treatise indicates that the theory is limited to fact situations in which the client “resort[s] to wrongful devices.”\(^{38}\)

That limitation is unsound. In the cases in which courts have admitted testimony about criminal or tortious acts evidencing consciousness of liability or guilt, they have not done so because the acts constituted crimes or torts.\(^{39}\) Rather, they have admitted the evidence despite the fact that the act incidentally amounted to a crime or tort.\(^{40}\) The jury’s realization that the client committed a crime or tort might well prejudice the jurors against the client. The risk of such prejudice is a potential reason for excluding otherwise admissible evidence.\(^{41}\) Under the legal relevance doctrine, codified in Federal Rule of Evidence 403 governing in federal practice (35 states have adopted evidence codes patterned after the Federal Rules),\(^{42}\) a judge may exclude otherwise admissible, relevant evidence when she fears that the introduction of the evidence would generate “unfair prejudice” against the litigant.\(^{43}\) Even if the jurors were not convinced of the client’s liability, they might be tempted to return a verdict adverse to the client as a means of punishing the client for his misdeed.

In spite of Rule 403, the courts routinely admit consciousness-of-liability or guilt evidence for the simple reason that it is

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37. GARD, supra note 26, § 13:46, discusses the theory, but almost all the cases cited involve acts which are tortious or criminal.
38. MCCORMICK, supra note 23, § 265, at 465.
42. RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 26-27 (3d ed. 1991) (listing 34 states). In addition, Kentucky recently adopted a code modeled after the Federal Rules. Similar evidence codes will soon go into effect in a number of other jurisdictions, including Indiana.
43. FED. R. EVID. 403.
highly relevant to show the client's belief that her case is weak. It is not the act's character as a crime or tort which supplies its logical relevance.⁴⁴ Even if the act were perfectly lawful, the facts would remain: after realizing that the document was relevant in a pending lawsuit, the client suppressed the document. Standing alone, those facts support a rational inference that the document's contents would have damaged the client's position in the litigation.

It is true that in many jurisdictions, spoliation of evidence now constitutes a tort.⁴⁵ However, the recognition of spoliation as an independent tort is a recent, twentieth century phenomenon.⁴⁶ The cases admitting evidence of spoliation as proof of consciousness of liability antedate the treatment of spoliation as a tort. As early as the seventeenth century, English courts permitted the opponent to invite the jury to draw an adverse inference from a client's spoliation of relevant evidence.⁴⁷ The application of the consciousness-of-liability theory to spoliation evidence has an ancient lineage, even though spoliation is a relative newcomer in tort law. In short, literally for centuries the courts permitted juries to draw an inference of consciousness of liability from acts of spoliation although the spoliation did not amount to a tort.

The law of privileges also points to the conclusion that the client's discovery misconduct should be admissible even when the misconduct falls short of a crime or tort. In many jurisdictions, when a litigant claims a common-law or statutory privilege at trial, during closing argument the opposition may urge the jury to infer that the suppressed testimony would have been unfavorable to the litigant invoking the privilege.⁴⁸ In these cases, the litigant's conduct is entirely lawful. As holder of the privilege, the litigant has a right to bar the testimony. That right is the essence of the privilege. Yet these jurisdic-

⁴⁴ IMWINKELRIED, supra note 21, § 2:16; 1 WHARTON, supra note 39, § 233.
⁴⁷ Howard, supra note 26, at 130 n.20; see also Sam LaManna, Courts Take a Harder Line on Spoliation, NAT'L L.J., July 26, 1993, at 17.
⁴⁸ MCCORMICK, supra note 23, § 74.1.
tions allow the opposition to present the argument in summation because there is nevertheless a permissive inference that the excluded testimony would have shown the weakness of the litigant’s position. “No showing of wrong or fraud seems to be required . . . for the inference that the evidence if produced would have been unfavorable.”\textsuperscript{49} In context, the assertion of the privilege gives rise to that rational inference, and that inference validates the closing argument. Analogously, whenever a client’s act of discovery misconduct gives rise to the requisite inference, the act is relevant as evidence of the client’s consciousness of the weakness of his position in the litigation.

\subsection*{B. Counterarguments to the Admissibility of the Client’s Discovery Misconduct}

The logical relevance of an item of evidence does not guarantee its admission at trial. In numerous cases, the courts exclude relevant evidence. In some cases, they do so under statutes such as Federal Rule of Evidence 403 on the ground that incidental probative dangers substantially outweigh the probative value of the evidence, as mentioned earlier. In other cases, they do so to promote an extrinsic social policy. The attorney-client privilege is a case in point. Upholding that privilege can result in the exclusion of relevant, demonstrably reliable evidence. However, the courts sustain these privilege claims on the ground that the existence of the privilege promotes candor between client and attorney and thereby contributes to the effective functioning of the legal system.\textsuperscript{50} Both grounds for exclusion can be invoked to attack the admissibility of evidence of the client’s discovery misconduct, offered on a consciousness-of-liability theory.

\subsection*{1. The probative value of such evidence is outweighed by the probative danger that the introduction of the evidence and rebuttal testimony will focus the jury’s attention on a collateral issue and distract the jury from the historical merits of the case}

The principal task facing the trier of fact is to decide the historical merits of the case. To do so, the trier must usually resolve questions about a central historical event such as a

\textsuperscript{49} Id. § 74.1, at 104.

traffic accident or commercial transaction. To the extent that the trial judge admits evidence about other "collateral" occurrences—events other than the main events on the merits of the case—there is a risk that the jurors will lose sight of the main events on which they should focus. For example, under Federal Rule of Evidence 403, the judge may exclude relevant evidence when she concludes that the evidence poses a substantial danger of "confusion of the issues . . . or misleading the jury."51

A party resisting the admission of evidence of his discovery misconduct might cite Rule 403 as support for the argument that the evidence will distract the jury from the merits of the case. The argument is plausible. For example, the question is not whether the defendant physically blocked access to a plant which the plaintiff's expert was scheduled to inspect; the question is whether the plant is an unreasonably dangerous work site. Likewise, the question is not whether the defendant concealed an accounts payable log page reflecting a debt to the plaintiff; the question is whether the defendant received a shipment of merchandise from the plaintiff.

However, it would be a mistake to think that as a matter of course, trial judges exercise their discretion under Rule 403 to exclude any item of evidence relating to an event other than the central historical event on the merits of the case. Quite the contrary is true. For example, in tort product liability actions, plaintiffs frequently introduce evidence of other accidents involving the same or a similarly designed product.52 Evidence of other accidents involving other victims is admissible to establish the existence of the defect in the product's design.53 "Indeed, from a jury's point of view, there may be no more important evidence on the issue of the product's defective condition than the performance and experience of that product in the real world."54 It would certainly be inaccurate to claim that judges never exercise discretion to exclude evidence of collateral accidents,55 but the courts seem receptive to testi-

51. FED. R. EVID. 403.
53. IMWINKELRIED, supra note 21, § 7:21.
55. Edward J. Imwinkelried, Uncharged Misconduct Evidence: Getting It Out
mony about collateral events so long as the events have significant probative worth on the historical merits of the case.56

Like evidence of another accident proffered in a product liability case, testimony about discovery misconduct can be highly relevant circumstantial proof. When an identically designed product malfunctions and the defendant manufacturer cannot offer a credible, alternative explanation for the cause of the accident, there is a powerful inference that the product has a design defect. Similarly, when a client singles out and destroys only the records relating to the commercial transaction on which the plaintiff is suing, there is a strong inference that the records would have demonstrated the defendant's liability. On its face, Rule 403 permits the judge to balance the probative value of the item of evidence against the attendant probative dangers. Although in both cases (the other accident and the discovery misdeed) the evidence relates to "collateral" events, it is equally true that both items of evidence can have considerable probative worth. When they possess substantial probative value, both types of evidence can survive scrutiny under Rule 403.

Even in an extreme case when the evidence of the client's discovery misconduct has only marginal probative value, the trial judge can usually reduce the danger of jury distraction to acceptable proportions without altogether excluding the evidence. The trial judge's ruling need not be an "all or nothing" proposition.57 Under Rule 403, it is quite common for the judge to admit some of the proffered evidence but exclude the balance.58 If the client were guilty of several incidents of discovery misconduct, the judge could reduce the risk of distraction by limiting the number of incidents provable at trial.59 Or suppose that the plaintiff proposes calling four witnesses to testify to the defendant's act of discovery misconduct. The judge

into the Light, TRIAL, Nov. 1984, at 58.

56. Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1440 (10th Cir. 1992) ("In such actions, courts routinely permit the introduction of substantially similar acts . . . ."); Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1082-83 (5th Cir. 1986); James B. Sales, Admissibility of Evidence of Other Similar Accidents or Complaints and Evidence of Subsequent Remedial Measures, 1984 S.M.U. PRODUCTS LIABILITY INSTITUTE § 6.01[3] ("The requisite degree of similarity is plainly not very high.") (quoting Mitchell v. Fruehauf Corp., 568 F.2d 1139, 1147 (5th Cir. 1978)).

57. IMWINKELNED, supra note 21, § 8:32, at 61.
58. Id.
59. Id.
could minimize the risk of distraction by restricting the plain-
tiff to two witnesses. In short, even though pretrial acts of 
discovery misconduct are technically collateral to the main 
events in issue, the probative danger of distraction does not 
justify a general rule excluding the client's pretrial discovery 
misconduct.

2. The evidence should be excluded on the policy ground that 
the admission of such evidence will pressure the client's attor-
ney to testify in violation of the advocate-witness prohibition

As Professor Mansfield notes, the advocate-witness prohibi-
tion can conceivably block the evidential use of a party's litiga-
tion activity. Under the American Bar Association's former 
Code of Professional Responsibility, a lawyer generally could 
not testify in a case in which she was acting as trial attor-
ney; the lawyer would be personally disqualified from trying 
the case. Moreover, the Code vicariously disqualified any other 
member of the lawyer's firm from trying the case. Under the 
ABA's current Model Rules of Professional Conduct, the lawyer-
waitis is still personally disqualified; but the vicarious dis-
qualification of other firm members is no longer in effect. It 
is true that, on their face, these provisions are rules of legal 
ethics; however, many courts have enforced the rules by exclud-
ing proposed testimony by lawyers that would run afoul of the 
ethical proscriptions.

Notwithstanding these proscriptions, the courts ordinarily 
should admit evidence about a client's personal discovery mis-
conduct. Even assuming arguendo that the courts ought to 
exclude testimony violative of the advocate-witness prohibition, 
in many, if not most, cases in which a party offers such evi-
dence, neither the proponent party nor the opponent will have 
to resort to testimony that would violate these proscriptions.

In the typical case, the proponent will not have to present 
her own attorney's testimony to establish the opposing client's 
discovery misconduct. Suppose, for example, that the miscon-

60. See United States v. Benefield, 889 F.2d 1061 (11th Cir. 1989) (restricting 
the number of character witnesses); CARLSON ET AL., supra note 42, at 320.
61. Mansfield, supra note 25, at 704-06.
63. Id.
64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983).
duct takes the form of a misleading affidavit or declaration submitted in connection with a pretrial discovery motion. The proponent will not have to proffer her attorney's testimony to authenticate the affidavit or declaration; the document will be on file with the court, and the judge may judicially notice the contents of the court files.\textsuperscript{66} Judicial notice dispenses with the necessity for live testimony. Further, assume that the misconduct occurs at a deposition hearing. The court reporter's official transcript of the hearing will document the misconduct. The transcript can be admitted based on the reporter's testimony or an attached, self-authenticating attesting certificate executed by the reporter.\textsuperscript{67} Or suppose that the opposing client personally interfered with an expert's scheduled examination of either the client's personal condition or property in the client's custody. Since the expert herself could testify to the client's acts, there would be no need to call the proponent's attorney. Indeed, the proponent's attorney might not have even witnessed the opposing client's acts; attorneys frequently do not attend such examinations and inspections.\textsuperscript{68}

Now shift to the perspective of the client who allegedly committed the pretrial discovery misconduct. As a practical matter, will that client have to call his attorney to rebut the testimony about the alleged misconduct? Since the client has firsthand knowledge of his own conduct, the client can testify about his action or inaction. Again, in many instances, the attorney will not even be present when the conduct occurs.

A closer question would arise, though, if the client admitted the conduct but contended that his motivation was not any realization of the weakness of his position in the litigation, but instead good faith reliance on advice given him by his attorney. In this situation, would the client need to call his attorney to the stand to establish his contention? Even here the client could prove his contention without calling his attorney as a witness. The client could testify to the attorney's advice over any hearsay objection. Although the client is testifying about a sentence uttered out-of-court by the attorney, the sentence would be admissible as nonhearsay. If the advice took the form

\begin{footnotesize}
\begin{enumerate}
\item{66} EDWARD J. IMWINKELRIED ET AL., CALIFORNIA EVIDENTIARY FOUNDATIONS 468 (1988).
\item{67} EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 300-01 (2d ed. 1989).
\item{68} IMWINKELRIED \& BLUMOFF, supra note 5, §§ 9:13, 9:26.
\end{enumerate}
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of an order or suggestion by the attorney, the sentence would be imperative in form. The hearsay rule applies only to assertive statements, and the rule is consequently limited to statements which are declarative sentences or used as declarative assertions. Moreover, even if on its face the statement was a declarative sentence, the client would be offering the testimony for a legitimate, nonhearsay purpose. The hearsay rule applies only when the proponent offers the out-of-court statement to prove the truth of the assertion contained in the statement. When an out-of-court statement is offered to prove only the effect on the state of mind of the hearer or reader, the statement is admissible as nonhearsay—the so-called mental input theory of logical relevance. The mental input theory is applicable here; the client contends that the attorney's advice produced in his mind a good faith belief that his conduct was permissible.

In an extreme case, the proponent of the evidence of the opposing client's misconduct might dispute the client's testimony that the client's attorney had given him this advice. In this version of the scenario, the client might have occasion to call his attorney to the stand to corroborate his testimony. However, once the admissibility of evidence of the litigant's discovery misconduct became a well-settled proposition, there is a likelihood that it would become common practice to reduce such advice to writing. When the advice was in writing, the client could not only testify to the advice over a hearsay objection, but also introduce the writing to support his testimony without having to call his attorney as a corroborative witness. At this late juncture in the litigation, the client would undoubtedly be familiar with his attorney's handwriting style. Therefore the client would be a competent witness to authenticate the attorney's written advice.

Hence, even positing that the courts should exclude testimony by advocate-witnesses, the courts can embrace the proposition that evidence of an opposing client's personal pretrial discovery misconduct is admissible. In many instances in which such evidence is offered, neither its proponent nor the opposing

69. FED. R. EVID. 801(a).
70. CARLSON ET AL., supra note 42, at 569-74.
71. FED. R. EVID. 801(c).
72. CARLSON ET AL., supra note 42, at 578.
73. FED. R. EVID. 901(b)(2).
client will need to resort to advocate-witness testimony. As we have seen, the client’s personal misdeeds can be highly probative on the question of the merit of the client’s position in the litigation. Furthermore, neither the legal relevance doctrine nor the advocate-witness prohibition should bar the courts from announcing that as a general proposition, a party may offer evidence of the opposing client’s misconduct on a consciousness-of-liability or guilt theory at trial.

II. DISCOVERY MISCONDUCT BY THE OPPOSING CLIENT’S ATTORNEY

Part I demonstrated that the courts should treat a client’s own pretrial discovery misconduct as an admission by conduct at trial. This section turns now to the question of whether that treatment should extend to discovery misconduct by the client’s attorney. Concededly, the probative value of the attorney’s misdeeds is not identical to that of the client’s personal misconduct. Further, the considerations countervailing against admissibility differ somewhat when the miscreant is the attorney rather than the client. Nevertheless, on balance, like the client’s own misdeeds, the attorney’s discovery misconduct should be admissible at trial on the theory that it evidences the weakness of the client’s position in the litigation.

A. The Probative Value of Evidence of Misconduct by the Client’s Attorney

Part I.A discussed the logical relevance of a client’s personal discovery misconduct. The initial inferential step is concluding from the conduct that the client subjectively believed that his position in the litigation was weak and that such belief presumably motivated the conduct. The final inferential step is a conclusion as to the weakness of the position; the court permits the proponent to treat the client’s belief as substantive evidence that the client’s position lacks merit.

Superficially, the logical relevance analysis differs when the actor is the client’s attorney. It would arguably be suspect to infer the client’s state of mind from the attorney’s conduct. The Federal Rules of Evidence liberalize the admissibility of lay opinion testimony,\(^4\) but many courts continue to exclude

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one person's opinion as to another person's state of mind.\textsuperscript{75} These courts consider such opinions too speculative; after all, one person cannot "read" another person's mind. If we would not permit the attorney to opine directly as to the client's state of mind, we should reject a theory of admissibility premised on an inference of the client's state of mind from the attorney's behavior.

However, that argument misses the point. The attorney's misconduct is relevant even if we draw no inference about the client's state of mind from the conduct. The only inference we need draw is the attorney's own state of mind, that is, the attorney's subjective belief that the client's position is weak. In the final analysis, evidence of the attorney's misconduct is not relevant because of an inference concerning the client's state of mind; it is relevant only because it leads to the ultimate, material inference that the client's position in the litigation is weak. Although the logical relevance of the attorney's misconduct relies on a different intermediate inference, the evidence leads to the same conclusion, that of the substantive weakness of the client's position. The theory of logical relevance simply takes a different route to the same conclusion.

If anything, evidence of the attorney's discovery misconduct may be more probative of the final inference. In some litigation, the case is reducible to a factual dispute, and the client has firsthand knowledge of the pertinent facts. In a simple tort case arising from a traffic accident, the defendant driver may know whether he ran the red light. Consequently, his knowledge of the merits of the case is superior to that of his attorney. However, in many cases, the attorney's sense of the case's merit may be sounder than that of the client. The case may turn on the legal significance of the underlying facts, and the attorney is likely to have a better grasp of the applicable substantive law. The attorney may even have a better understanding of the facts than the client. The alleged tortfeasor may have been an employee of the defendant client. The client himself may have no personal knowledge of the incident; and certainly by the time she has concluded significant discovery in the case, the attorney can have a superior appreciation of the factual merit of the client's position. In all these cases, the attorney's subjective sense of the case's merit is a better gauge of the objective

merit of the client's position than is the client's own assessment of the case. Therefore, misconduct by the attorney may be an even better gauge of the substantive merits of the client's case than would be misconduct by the client.

B. Counterarguments to the Admissibility of the Discovery Misconduct of the Client's Attorney

Like evidence of a client's misdeeds, testimony about the attorney's discovery misconduct may be excluded although it is logically relevant. There are a number of possible objections to the testimony.

1. The probative value of such evidence is outweighed by the attendant probative dangers

At first blush, it might appear that evidence of the attorney's misconduct should at the very least be more subject to a Rule 403 objection than should testimony about the client's misconduct. However, the appearance is deceiving. If the theory of logical relevance treated the attorney's behavior as a basis for inferring the client's state of mind, the appearance would be accurate. On this assumption, testimony about the attorney's misconduct would usually be less probative; it would be safer to draw an inference of the client's state of mind from the client's own behavior. Since testimony about the attorney's misconduct would have less probative value, the testimony would be more vulnerable to a 403 objection.

However, as Part II.A elaborated, the probative value of evidence of the attorney's misconduct does not depend on any inference as to the client's state of mind. Rather, the inference is from the attorney's behavior to the attorney's own subjective assessment of the strength of the client's position. That inference is just as direct and trustworthy as the inference from the client's personal misconduct to the client's subjective state of mind. When, as is often the case, the attorney is in a better position to evaluate the merit of the client's position, the attorney's behavior is more probative of the ultimate fact in issue. A trial judge applying Rule 403 to evidence of the attorney's misdeeds should not assume that the attorney's behavior is less probative than the client's or that the attorney's behavior can be more readily excluded under Rule 403. In each case, the judge should consider the quantum of probative value of the evidence on the issue of the weakness of
the client's litigation position. In many instances, the probative worth of the attorney's misconduct will be greater than that of the client's misconduct. In a given case, it would be perfectly consistent for the judge under Rule 403 to exclude evidence of the client's misconduct while admitting testimony about the attorney's misconduct.

2. **The evidence should be inadmissible against the client because it would be unfair to impute the attorney's misconduct to the client**

   In a sense, if the judge admits the attorney's misconduct as evidence against the client, the judge is holding the client vicariously responsible for the attorney's misconduct. The courts ordinarily impose *respondeat superior* liability on a master or principal only when the actor is a servant or agent. 76 Technically, the attorney is an independent contractor rather than an agent or servant of the client. 77 When an employment relationship amounts to an agency relationship, the principal has control over both the ends the employee pursues and the means the employee uses to achieve those ends. 78 In contrast, a relationship constitutes an independent contract when the principal dictates only the result to be achieved. 79 The client does instruct the attorney as to what legal outcome the client desires. However, since the client does not tell the attorney which privilege arguments to invoke or discovery motions to file, the attorney is an independent contractor. In addition, the client may not have authorized or ratified the discovery misconduct in question. It therefore seems to exceed the appropriate limits of agency law to admit evidence of the attorney's misconduct against the client.

   That line of argument might well be persuasive if the issue were the imposition of tort liability on the client for the attorney's conduct. Suppose, for example, that a plaintiff sued the attorney's client for the tort of abuse of process. 80 During an earlier lawsuit on behalf of the client, the attorney might have filed an otherwise proper motion for an illicit, ulterior

77. WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 6 (1964).
78. *Id.;* Frankel v. Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993).
79. *Frankel,* 987 F.2d at 89; see SEAVEY, supra note 77, § 6.
80. KEETON ET AL., *supra* note 76, § 121.
purpose. If the evidence established that the client had neither authorized nor ratified the attorney's conduct, the defendant client might escape liability in the subsequent abuse of process action.

However, in other contexts, the client is in effect held vicariously responsible for the attorney's conduct. Liability to discovery sanctions is a case in point. The attorney's misconduct can expose the client to a wide range of sanctions, including court orders enforceable directly against the client. For instance, when the judge orders issue preclusion or evidence preclusion as a sanction, the burden of the order falls upon the client. Sanctions law permits the judge to enter these orders against the client even when the client's attorney is the miscreant. A sanction is a type of penalty. In a broad sense, when the judge admits evidence of the attorney's misconduct against the client, the client is being penalized for the attorney's misbehavior; the admission of the evidence is simply

81. Id.
82. See Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962) (holding the client liable for the acts of his "freely selected agent").
84. It is true that under revised Federal Rule of Civil Procedure 11, it is ordinarily improper to impose a sanction on the client unless the client is guilty of personal misconduct. Slane v. Rio Grande Water Conservation Dist., 115 F.R.D. 61 (D. Colo. 1987). See generally JOSEPH, supra note 14, § 16(E)(1). However, as a general rule of sanctions law, the client may be held responsible for the attorney's misconduct. As the court remarked in Farm Construction Services v. Fudge, 831 F.2d 18, 21 (1st Cir. 1987):

With respect to appellant's claim that sanctions should have been imposed on counsel rather than the client, this argument would require us to ignore established law. In Link v. Wabash Railroad Co., 370 U.S. 626, . . . (1962), the Supreme Court expressly stated,

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.

370 U.S. 626, 633-34 . . . . This Circuit, following Link, has turned a "deaf ear" to the plea that "the sins of the attorney should not be visited upon the client."

The client, of course, has the ultimate remedy of suing her attorney for malpractice. See also Leonard E. Gross, Suppression of Evidence as a Remedy for Attorney Misconduct: Shall the Sins of the Attorney Be Visited upon the Client?, 54 ALB. L. REV. 437 (1990).
another kind of penalty. If an attorney's misconduct can trigger a sanction assessed directly against the client, the misconduct should be admissible against the client at trial.

Moreover, the Federal Rules of Evidence make it clear that the parameters of agency law no longer define the limits of admissibility. Federal Rule of Evidence 801(d) reads:

A statement is not hearsay if . . . (2) The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made within the existence of the relationship . . . 85

Subsection (C) codifies the old, conservative view, conditioning the admission of an agent's statements against the principal on proof that the principal had authorized the agent to serve as a spokesperson.86 Under that view, the courts were reluctant to characterize an attorney's out-of-court statements and acts as admissions provable against the attorney's client.87

However, subsection (D) breaks down the traditional equation between agency law and evidence law.88 Under (D), while the declarant must be an agent and the declaration must relate to the agent's employment duties, it is no longer necessary that the declaration itself be authorized or ratified by the principal. Further, the courts have liberally interpreted the term "agent" in subsection (D); significantly, they have construed the term as encompassing attorneys,89 who are technically independent contractors. As a result, the vicarious admission doctrine, set out in subsection (D), has been extended to out-of-court statements by attorneys.90

85. FED. R. EVID. 801(d).
86. CARLSON ET AL., supra note 42, at 601-02.
87. GARD, supra note 26, § 13:34, at 488.
88. CARLSON ET AL., supra note 42, at 602.
90. BINDER, supra note 89, at 459-60 (collecting cases which have extended
Hence, under both sanctions law and hearsay doctrine, the attorney's actions and statements can be imputed to the client although the client has not authorized the action or statement. Even combined with the unauthorized character of the act or statement, the attorney's status as an independent contractor does not preclude the imputation. If sanctions law and hearsay doctrine fix the benchmark, it is justifiable to impute the attorney's discovery misconduct to the client and treat the misconduct as an admission by the client.

3. The admission of the attorney's misconduct against the client is contrary to public policy because the specter of admission might deter counsel from vigorously asserting her client's rights during pretrial discovery.

As previously stated, Professor Mansfield's position is that the evidential use of a party's litigation conduct should be forbidden when admitting the evidence would likely deter an activity furthering an important objective of the judicial system.\textsuperscript{91} In particular, he believes that the parties' pretrial investigative activity furthers vital objectives of the judicial system—facilitating pretrial evaluation of claims (and their ensuing settlement) and contributing to more accurate fact finding at trial.\textsuperscript{93} He asserts that pretrial investigative activity should therefore be largely "uninhibited."\textsuperscript{94} Attaching "an evidential cost" to such activity might discourage discovery and make it more difficult for the judicial system to promote pretrial settlement and accurate fact finding.\textsuperscript{95}

Professor Mansfield's argument lends some support to the contention that treating the attorney's discovery misconduct as an admission by the client would contravene public policy. The experience with sanctions under Federal Rule of Civil Procedure 11 is also supportive. It has been suggested that the standards for imposing sanctions under Rule 11 are so vague that the mere prospect of sanctions is having a chilling effect on vigorous advocacy by litigators.\textsuperscript{96} Even the drafters of Rule 11

\begin{thebibliography}{99}
\bibitem{91} Mansfield, \textit{supra} note 25, at 701-02.
\bibitem{92} Id. at 727.
\bibitem{93} Id.
\bibitem{94} Id.
\bibitem{95} Id. at 728 n.90.
\bibitem{96} Melissa L. Nelken, \textit{Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment}, 74
\end{thebibliography}
acknowledge that if enforced unpredictably, the rule may "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." With some anecdotal evidence, one commentator asserts that "[t]he lawyer who hears the footsteps of sanctions may be less willing to pursue an aggressive course or to advance a novel . . . theory." 

Albeit plausible, this argument is unconvincing. It is true that in the main, attorneys should be encouraged to conduct a thorough pretrial investigation of their clients' position; and the policy of encouraging pretrial investigation may warrant the recognition of a general exclusionary rule barring evidential use of investigative activity. However, the focus of this article is on discovery misconduct. As Professor Mansfield himself has stated, "There should be an exception, it is suggested, because if there was misconduct, the case falls outside the exclusionary policy. There is no reason to protect and encourage misconduct."

Discovery misconduct in the precise form of obstructionism has become such a substantial problem that the judiciary should be taking steps to deter it. The case for excluding evidence of discovery misconduct overstates the risk of chilling legitimate attorney behavior and overlooks the policy considerations favoring the admission of such evidence.

It is debatable whether Rule 11 is having the claimed chilling effect. However, even assuming the truth of that claim, it does not follow that treating an attorney's obstructionism as an admission by the client would have a similar impact. Rule 11 supposedly generates a chilling effect because its substantive standards are ambiguous and its application is consequently unpredictable. The text of Rule 11 undeniably contains
broad, rather vague language. For example, under Rule 11, an attorney's filing is sanctionable if the filing is "interposed for any improper purpose." It is understandable that language so indefinite and expansive might give a practicing attorney pause.

However, the admission-by-conduct theory relates to a narrower, more readily identifiable category of behavior. To trigger the theory, the proponent of the evidence at trial must do more than point to an unethical act by the opposing attorney. To begin with, the act must be intentional. Moreover, the act must be in the nature of the suppression of evidence or the obstruction of access to evidence. Unless the act falls into this category of conduct, as a matter of logic the act will not give rise to the inference of consciousness of liability or guilt. Including a frivolous count in a complaint might subject the plaintiff's attorney to a Rule 11 sanction; but standing alone, that conduct would not sustain a permissive inference that the plaintiff's attorney was attempting to block the defense's access to any evidence. Rule 11 has an exceptionally broad sweep, but the admission theory would apply to a much more limited category of attorney behavior.

Not only is it an exaggeration to claim that the application of the admission theory to attorney misconduct will chill competent representation during pretrial discovery; the claim also overlooks policy considerations that more than counterbalance any potential chill. The threat of discipline imposed by the bar has been largely ineffective to deter discovery misconduct. In many jurisdictions, the slow pace of bar disciplinary proceedings robs the threat of much of its credibility. Likewise, the prospect of sanctions imposed by the judge has not curbed discovery misconduct. For that matter, embroiling the innocent party in time-consuming, satellite litigation over sanctions may work to the advantage of the guilty party—especially in "fast track" jurisdictions.

However, treating the attorney's misconduct as the client's admission may strike the right pressure point: the client. The

104. FED. R. CIV. P. 11.
105. GARD, supra note 26, § 13:46, at 517.
106. Note, supra note 103, at 634-44.
107. See supra notes 9-10 and accompanying text.
108. See supra note 11 and accompanying text.
109. See supra notes 16-17 and accompanying text.
client pays the attorney's fee, and hence the client is in a better position than either the bar or the judge to effectively bring the attorney's discovery misconduct to a halt. Once the client realizes that such misconduct may be provable against him at trial, the client will have good reason to instruct the attorney to eschew obstructionism. If the person who pays the bill gives the attorney that instruction, the attorney is likely to take the instruction seriously. If there is a need to deter discovery misconduct, the legal system should apply the deterrent pressure where it will do the most good. The attorney might not be in awe of the authority of either the bar or the judge, but the attorney is likely to heed the client who wields the power of the purse.

4. The evidence should be excluded on the ground that the admission of such evidence will pressure the client's attorney to testify in violation of the advocate-witness prohibition

As in the case of the client's personal discovery misconduct, the final counterargument rests on the advocate-witness prohibition. However, in this context, the counterargument is stronger.

As in the case of the client's own misconduct, there will be times when the counterargument fails merely because there is little or no need for testimony by an attorney in violation of the prohibition. If the only issue is whether the attorney committed the act in question, there may be better evidence than the attorney's testimony. There might be third party witnesses to the act who are less biased than the attorneys, or by happenstance, an impartial court official or a disinterested layperson may have been present. Or the act might be documented and described in detail by the transcript of the deposition hearing where the misconduct allegedly occurred. Even when the pivotal issue is why the attorney committed the act in question, there might be better evidence than the attorney's own trial testimony. By the time of trial when the attorney realizes the contemplated evidential use of her conduct, her bias would probably have the greatest impact on her testimony. In contrast, if at the time of the act she stated her intent or motivation, not only would the statement arguably be admissible under Federal Rule of Evidence 803(3),\textsuperscript{110} the reliability of

\textsuperscript{110} Rule 803 authorizes the admission of a statement of a declarant's "then
the pretrial statement would also be less suspect than the attorney's trial testimony. Thus, in some cases, it may be possible to present evidence of the attorney's discovery misconduct at trial without necessitating testimony by the attorneys on either side.

Realistically, though, such cases will be rare. In the more typical case, one or both of the clients may have a bona fide need to call their attorney to the stand to testify about the alleged discovery misconduct. The only persons present may have been the two attorneys, and the issue of the occurrence of the act may be a swearing contest between the attorneys. Even when it is uncontroverted that the act occurred, there may be a serious question about the motivation for the act; at the time of the act, the attorney may not have made a contemporaneous avowal of her intent. In these cases, if the judge admits evidence of the attorney's discovery misconduct, the evidence will almost inevitably inject the issue of the attorney's credibility into the case. The courts have tended to apply the advocate-witness prohibition when the introduction of such evidence will have that effect.111

Part I of this article demonstrated that when the proffered evidence describes the client's own misconduct, the proponent can frequently moot the question of the advocate-witness prohibition by demonstrating that there is no necessity for attorney testimony. In that context, the prohibition does not preclude the adoption of a general rule admitting evidence of the client's misconduct even if we accept the prohibition at face value. However, in most cases in which the evidence relates to misconduct by the client's attorney, the proponent will be unable to moot the issue of the application of the prohibition. When the focus is squarely on the attorney's behavior, the introduction of the evidence may prompt one or both of the parties to resort to attorney testimony. For that reason, we must confront the policy question of whether the prohibition mandates a general rule excluding evidence of the attorney's misconduct. That question should be answered in the negative.

To begin with, an affirmative answer would represent Catch 22 reasoning. The advocate-witness prohibition is a rule

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of legal ethics rather than evidence. An affirmative answer entails invoking that rule of legal ethics to shield at trial evidence of the attorney's discovery misconduct. However, that misconduct is likely to amount to a violation of other rules of legal ethics. A.B.A. Model Rule 3.4(a) forbids an attorney from "unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." After listing these forbidden acts, the same rule prohibits an attorney from "counsel[ing] or assist[ing] another person to do any such act." Rule 3.4(d) makes it a disciplinary offense to "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Rule 3.4(f) adds that an attorney may not "request a person other than a client to refrain from voluntarily giving relevant information to another party." All of these acts are classic examples of admissions by conduct, and all of these acts are direct violations of the legal ethical standards prescribed by the Model Rules. It is wrong-minded to allow the opposing client to cite one rule of legal ethics to exclude evidence of conduct which is independently violative of other rules of legal ethics. Permitting the opposition to do so compounds the violation.

Furthermore, it is of dubious wisdom to use the mechanism of an evidentiary exclusionary rule to enforce this rule of legal ethics. Professor Mansfield has written that none of the rationales advanced for the advocate-witness prohibition is "entirely satisfactory." Other respected commentators have voiced doubts about the advisability of the rule. Whatever may be the merit of the prohibition as a doctrine of legal ethics, the case for using an evidentiary exclusionary rule to enforce the doctrine is unconvincing. The very evolution of the legal

112. Underwood & Fortune, supra note 46, ch. 4.
113. Id. ch. 6.
115. Id. Rule 3.4(b).
116. Id. Rule 3.4(d).
117. Id. Rule 3.4(f).
118. Mansfield, supra note 25, at 704.
ethics doctrine suggests a growing understanding that it is unjustifiable to use an evidentiary enforcement mechanism.

The starting point in the evolution of the doctrine was the extreme version of the rule vicariously disqualifying the other members of the advocate-witness' firm as well as personally disqualifying the advocate-witness. That was the version set out in the American Bar Association's former Code of Professional Responsibility. Concededly, when the same attorney testifies and presents the closing argument, there may be a risk that the jury will confuse the facts testified to and the inferences argued during summation. The risk of jury confusion is a probative danger which the judge may factor into her Rule 403 analysis. However, the commentators noted that risk is absent when another attorney from the firm serves as trial advocate; one attorney testifies, but a different attorney delivers the opening statement and closing argument. The exclusion of the attorney-witness' testimony is indefensible; there is no more risk of confusion than there would be when the trial advocate calls any other witness to the stand.

In part due to such criticism, the doctrine evolved into a more limited rule which merely personally disqualified the trial advocate. Under this version of the rule, an attorney-witness may testify if another member of the firm tries the case, but an attorney-witness may not testify at a hearing she herself is trying. This is the narrower, modified version of the doctrine set out in the new Rules of Professional Conduct. Although the modification of the doctrine is more defensible than the earlier version, even the modification has not escaped criticism. In defense of the modified doctrine, it is sometimes argued that the opposition is "handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the

121. FED. R. EVID. 403.
123. UNDERWOOD & FORTUNE, supra note 46, § 4.2, at 142 ("little chance that the line between fact and argument will be blurred"); Brown & Brown, supra note 122, at 609-11 (1979).
However, that argument is spurious. Perhaps the most potent impeachment technique is proof of the witness's bias. Even before any cross-examination of the attorney-witness, it becomes evident to the jury that the attorney-witness's credibility is impeachable for bias. The jury has seen the lawyer serve as the client's attorney during the earlier stages of the trial, and that same lawyer now takes the stand as a witness. The inference of the advocate-witness's bias is obvious, strong, and undeniable.

Can the modified doctrine be defended on the alternative ground that there is a risk of jury confusion? The risk is certainly greater than it would be in a case where one firm member serves as trial attorney but another firm member testifies. In that case, there is little risk that the jury will confuse the facts testified to by one attorney and the inferences argued by the other. Here the same attorney testifies to facts and later argues inferences. Yet even in this situation, the risk of confusion is inadequate justification for excluding the attorney's testimony.

In many published opinions, the courts have upheld the admission of a witness's direct testimony in which the witness testified to both facts and opinionated inferences from the facts. For example, the cases are legion permitting experienced police officers to both factually describe an accused's conduct and opine that the conduct matches the modus operandi for a particular crime. In these opinions, the courts have made short shrift of the contention that the testimony presents an intolerable risk that the jury will mistake inference for fact. However, the potential risk of confusion in the above situations dwarfs the potential risk presented when an attor-

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126. EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE § 9-7, at 240 (2d ed. 1992) ("Bias impeachment is one of the best weight attacks, since the jurors can easily understand the attack."). The Supreme Court has accorded special constitutional status to the right to impeach a witness for bias. EDWARD J. IMWINKELRIED, EXCULATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE § 8-7b (1990).
129. See id. for a collection of cases.
ney argues inferences hours, days, or weeks after testifying to facts. The time gap between the testimony and the argument reduces the risk to a level far below the danger of confusion present in the opinions which discuss other types of witnesses. If the danger of confusion does not warrant the exclusion of the testimony in those opinions, *a fortiori* the risk does not justify evidentiary enforcement of the advocate-witness prohibition.

A new ethical rule, adopted by the California bar, reflects a further step in the evolution of the advocate-witness doctrine. Under Rule 5-210, which took effect in 1989, the client's attorney may testify over the opposing party's objection. The only requisite is "the informed, written consent of the client." The implicit assumption of Rule 5-210 is that the opposing party should not have the benefit of an evidentiary exclusionary rule to block testimony by the client's attorney. If the proponent of the opposing attorney's discovery misconduct desires to call his attorney to prove the alleged misconduct, the proponent may. Similarly, the opposing client may call his attorney to rebut the allegation.

Even in the jurisdictions which have not yet followed the lead of the California bar, there are indications of growing judicial dissatisfaction with the advocate-witness prohibition. Many courts have rejected disqualification motions based on the prohibition for the stated reason that testimony by the attorney would be cumulative. Some courts have gone to the length of ruling that even when there might otherwise be a genuine need for the attorney's testimony about a certain fact, an offer by the attorney's client to stipulate to that fact eliminates the need.

It would be dishonest to overstate either the extent of the liberalization of the advocate-witness prohibition or the likelihood that courts will admit testimony violative of the prohibition. Most jurisdictions remain committed to either the original, broad prohibition or the modified version of the doctrine. There is a large body of modern case law recognizing the advo-

cate-witness prohibition. To borrow a phrase once applied to a much-maligned contract doctrine, the courts have often enforced the prohibition "with a rigor worthy of a better cause." The upshot is that many jurisdictions will undoubtedly continue to employ an evidentiary exclusionary rule to bar testimony by either attorney trying the case. If the proponent proffers testimony about the opposing attorney's discovery misconduct, judges in these jurisdictions will be inclined to find the testimony objectionable.

III. CONCLUSION

This article has advanced the thesis that at trial, a litigant should be permitted to treat the opposition's pretrial discovery obstructionism as an admission by conduct of the weakness of the opposition's position in the litigation. In the foreseeable future, the thesis is likely to make only limited inroads with the courts. As Part II pointed out, the jurisdictions which are still committed to the advocate-witness prohibition may balk at admitting testimony about the attorney's discovery misconduct. Part I presents the less controversial argument for applying the admission theory to the client's personal discovery misconduct, but even that argument may strike some courts as too avant-garde; the courts are likely to admit evidence of client misconduct only when there is "the clearest proof."35

Although this article presents a novel theory, it is one worth pressing. The admission-by-conduct theory is a well-settled one; and discovery obstructionism by either the client or the client's attorney is probative on that theory. Moreover, the theory is a promising deterrent to discovery misconduct against which neither bar discipline nor judicial sanction has proved to be an effective disincentive. The admission-by-conduct theory is promising precisely because it can make the client pay in a meaningful sense for discovery misconduct. Once the client comes to that realization, the client may desist from misconduct. More importantly, the client may tell the attorney that

133. David B. Harrison, Annotation, Disqualification of Attorney Because Member of His Firm Is or Ought to Be Witness in Case—Modern Cases, 5 A.L.R.4th 574 (1981).

134. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-21(a), at 102 (3d ed. 1987) (commenting on the common law rule that to form a contract, the terms of an acceptance must be an absolutely perfect "mirror-image" of the terms of the offer).

135. GARD, supra note 26, § 13:34, at 485.
the attorney is to refrain from discovery misconduct. Even an attorney who has little regard for the bar or judiciary may listen closely to the client who controls the purse strings.

Sadly, in the past the minority of attorneys bent on frustrating the discovery system have been more creative than the majority of attorneys who litigate in good faith. The former have whole “bags full of tricks,” including obstructionist tactics.\textsuperscript{136} It is time that the latter match the creativity of the former. An imaginative, offensive strategy against discovery misconduct is long overdue.\textsuperscript{137} The admission-by-conduct theory may be that strategy.

\textsuperscript{136} Peter Gruenberger, \textit{Discovery Abusers Have Many Bags Full of Tricks}, \textit{Legal Times}, July 4, 1983, at 18.

\textsuperscript{137} \textit{Underwood \& Fortune}, supra note 46, § 5.9, at 204 (“Counsel should be alert to opportunities to turn the consequences of an opponent’s misconduct back upon him or her.”).