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# Trying the Trial

Andrew S. Pollis

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# Trying the Trial

Andrew S. Pollis\*

## ABSTRACT

*Lawyers routinely make strategic advocacy choices that reflect inferentially on the credibility of their clients' claims and defenses. But courts have historically been reluctant to admit evidence of litigation conduct, sometimes even expressing hostility at the very notion of doing so. This Article deconstructs that reluctance. It argues not only that litigation conduct has probative value, but also that there is social utility in subjecting litigation behavior to juror scrutiny.*

*The primary goals of trial are, of course, searching for truth and achieving justice. But judges routinely conceal from jurors evidence of litigation conduct—inconsistent pleadings, abusive discovery, and evidence-selection choices—even though that conduct can be compelling evidence that would assist jurors in the quest for truthful factfinding and just results. At the same time, there is almost universal consensus on two points: (1) litigation misconduct has become pervasive because it is profitable; and (2) it goes largely unchecked.*

*Judges refuse to permit jurors to evaluate litigation conduct for a variety of reasons, most of which stem from misguided notions of institutional competence—that judges, not juries, are in a better position to manage the trial process and to regulate the profession. But this Article shows that admitting evidence of litigation conduct would have twin benefits: it would preserve the jury's historic power to evaluate relevant circumstantial evidence, and it would provide much-needed disincentives for the sort of misconduct that has come to permeate our justice system.*

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\* Associate Professor, Case Western Reserve University School of Law. Deep gratitude for support and helpful commentary to Case Western and my faculty colleagues, particularly Paul Giannelli, Jessie Hill, Sharona Hoffman, Erik Jensen, Dale Nance (whose writings in this area helped me shape my arguments and whose invaluable critiques forced me to articulate them more clearly), and Cassandra Burke Robertson. Thanks also to the faculty of the University of Pittsburgh School of Law (particularly David A. Harris) and University of Toledo College of Law for hosting me at faculty exchanges to deliver this paper. I am also grateful to the late John Mansfield, whose earlier work inspired this Article.

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## INTRODUCTION

When Ford Motor Company launched the Explorer SUV in 1990, it also unwittingly launched a spate of product-liability litigation over the vehicle's tendency to roll over during normal maneuvering.<sup>1</sup> One of the early cases was filed in California by Benetta Buell-Wilson and her husband Barry—a couple seeking damages as a result of a rollover

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<sup>1</sup> See Howard Latin & Bobby Kasolas, *Bad Designs, Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. REV. 1161, 1196–98 (2002) (describing Ford Explorer design defects). See generally *Frontline: Rollover: The Hidden History of the SUV* (PBS television broadcast Feb. 21, 2002) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/rollover/etc/script.html>) (discussing the Ford Explorer's history of rollovers).

that left Benetta a paraplegic.<sup>2</sup> The jury found Ford liable and awarded substantial compensatory damages.<sup>3</sup> In the subsequent punitive-damages phase, Ford's lawyer made a strategic decision aimed at avoiding punitive damages: he apologized to the jury for Ford's having "knowingly put a defective product out on the market" and also represented to the jury that the engineers responsible for the defect were "sorry that they let the rest of the company down."<sup>4</sup>

But we now know that the apology was not genuine; Ford has continued to dispute liability in subsequent rollover trials.<sup>5</sup> One might expect, then, that subsequent plaintiffs would have been able to introduce the apology into evidence so that subsequent juries could consider the probative value of Ford's lawyers' words. Not so. Ford has convinced trial courts to exclude evidence of the apology.<sup>6</sup> One court has brushed aside the apology as "purely argument made after a disastrous verdict," defending Ford's counsel for adopting an "amelioratory" tone "to try to mitigate a bad situation" and characterizing a plaintiff's attempt to introduce the apology as "almost ludicrous."<sup>7</sup>

But why? Why is it ludicrous for a jury to learn, in a product-liability trial, that the manufacturer has acknowledged in an earlier trial that its product was defective? If a Ford executive had made the same sort of statement outside of the courtroom, its admissibility would be almost certain.<sup>8</sup> And if the insincere apology was offered by a crafty lawyer merely to mitigate punitive damages, the insincerity is itself probative of a state of mind that might actually *warrant* an award

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2 Buell-Wilson v. Ford Motor Co., 73 Cal. Rptr. 3d 277, 290 (Ct. App. 2008).

3 *Id.* (noting that jury awarded total compensatory damages of over \$120 million).

4 *Id.* at 296 (quoting trial court record).

5 *See, e.g.,* Green v. Ford Motor Co., No. 1:08-cv-0163-LJM-TAB, 2010 WL 2673926, at \*2 (S.D. Ind. June 30, 2010); Bado-Santana v. Ford Motor Co., 364 F. Supp. 2d 79, 82, 109 (D.P.R. 2005).

6 *See, e.g.,* Defendant Ford Motor Company's Brief in Support of Its Motion *in Limine* (No. 8) to Exclude Reference to Closing Argument in *Buell-Wilson* Litigation at Ex. F, Green v. Ford Motor Co., No. 1:08-cv-0163-LJM-TAB (S.D. Ind. Apr. 16, 2010), ECF No. 122-6 [hereinafter *Ford Orders*].

7 *See* Order at 2, Wheeler v. Ford Motor Co., No. 01-CP-32-0656 (S.C. Ct. C.P. Lexington County Aug. 23, 2004) (reproduced in *Ford Orders* at Ex. F).

8 *See, e.g.,* Wright v. Farouk Sys., Inc., 701 F.3d 907, 910–11 (11th Cir. 2012) (holding chairman's statement about problems with hair dye admissible as admission of party opponent in subsequent product-liability action against company). *See generally* Jeffrey S. Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL'Y 567, 571 (2012) ("Apologies have long been admitted to prove evidence of negligence liability."). Although some states have enacted laws designed to restrict the admissibility of apologies, most of those laws protect only statements of general "regret or remorse" while still preserving "the admissibility of apologies that admit fault." *Id.* at 576.

of punitive damages.<sup>9</sup> So why do the statements of Ford's counsel in a prior closing argument enjoy a special evidentiary privilege? At a time when the public perceives that lawyers litigate "excessively and abusively,"<sup>10</sup> why are jurors excluded from evaluating and responding to attorney conduct? Why have courts *protected* Ford against the evidentiary use of its lawyer's disingenuous apology?

The issue is not confined to apologies or to statements made in closing argument. If we step back and look more broadly at various types of litigation conduct, it is difficult to refute a basic premise: from pleading to discovery to trial, litigation activity can have powerful inferential value for the ultimate questions that the jury is tasked with resolving. Prior pleadings, for example, can reveal inconsistent theories of liability that bear on credibility.<sup>11</sup> Discovery abuses can demonstrate a desire to manipulate the judicial process in the hope of masking the abuser's weak claims or defenses.<sup>12</sup> And, the selection of evidence at trial can often speak volumes—especially about evidence that a party chooses to withhold.<sup>13</sup> Wigmore noted, over a century ago, that these types of inferences—that a party's fraudulent or otherwise nefarious presentation or suppression of evidence indicates he believes his case to be weak or unfounded—are among "the simplest in human experience."<sup>14</sup>

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<sup>9</sup> "The purpose of punitive damages, the Supreme Court has repeatedly told us, is to punish and deter, like the criminal law." Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 *YALE L.J.* 392, 395 (2008).

<sup>10</sup> *E.g.*, John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 *DUKE L.J.* 547, 549 (2010).

<sup>11</sup> *See, e.g.*, *LWT, Inc. v. Childers*, 19 F.3d 539, 542 (10th Cir. 1994) ("Plaintiff's reliance upon defendant's limited warranty in the South Carolina litigation is directly contrary to the position it takes here that the limited warranty never became part of the sales agreement between plaintiff and defendant.").

<sup>12</sup> *See, e.g.*, *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) ("Petitioners' failure to supply the requested information . . . supports 'the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense.'" (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909))); Edward J. Imwinkelried, *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*, 1993 *BYU L. REV.* 793, 824 ("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.").

<sup>13</sup> *See, e.g.*, Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 *CALIF. L. REV.* 1011, 1011 (1978) ("[T]he absence of certain evidence can be as significant a source of jurors' inferences as its admission.").

<sup>14</sup> 2 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 278, at 133 (James H. Chadbourn rev. ed. 1979). It is perhaps the simplicity of this inference that explains why "jurors often assess the client . . . by the conduct of the attorney representing her." Im-

As logical as they are, these simple inferences have failed to gain widespread recognition in the law. Commentators and courts have largely disfavored the notion of allowing jurors to evaluate important information about the parties' litigation choices.<sup>15</sup> They resist allowing jurors to hear evidence of litigation conduct (or misconduct) because they believe that judges, not juries, are better positioned to evaluate it<sup>16</sup> or, as in the Ford Explorer rollover litigation, because they want to avoid binding the client to the lawyer's strategic decisions. There are some exceptions, but courts have treated these exceptions inconsistently and with extraordinary caution.<sup>17</sup>

This Article takes a fresh look at these issues and urges a more liberal view of the evidentiary value of litigation conduct. If, as the Federal Rules of Evidence admonish, the ultimate purpose of trial is "ascertaining the truth and securing a just determination,"<sup>18</sup> it seems odd that we would routinely deprive the factfinder of some of the most powerful evidence that can bear on those aims. Likewise, if jury service is a benchmark of democratic participation in the political process,<sup>19</sup> why do we curtail that participation by insulating litigation conduct from juror scrutiny? And finally, what is the justification for concluding that judges are better equipped than juries to pass judgment on the conduct of lawyers in litigation when subjecting that conduct to juror scrutiny might provide a needed incentive for lawyers to make more socially acceptable litigation choices?

These issues, of course, are not so simple; they require a complex analysis that calls into play questions of institutional competency,<sup>20</sup> the

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winkelried, *supra* note 12, at 794 (citing Michael E. Tigar, *Jury Argument: You, the Facts, and the Law*, LITIG., Summer 1988 at,19, 19–20).

<sup>15</sup> The "mistrust of juries" is manifested in the history of the Federal Rules of Evidence themselves. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.1, at 2 (5th ed. 2012) (noting that the first justification for evidence law is "mistrust of juries"). Courts, too, have long held that judges have the right to prevent a defendant from placing a "plaintiff's litigation tactics on trial." *E.g.*, *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998).

<sup>16</sup> See, *e.g.*, Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1107 (2010) ("In many, and perhaps most, cases, the jury is in a much worse position than the judge to assess the comparative accessibility of evidence by the parties as well as the motives of parties and their counsel in taking various actions in preparation for trial.").

<sup>17</sup> See, *e.g.*, *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) ("[T]here is no absolute rule preventing use of an earlier opening statement by counsel . . . . We are not willing, however, to subject such statements to the more expansive practices sometimes permitted under the rule allowing use of admissions by a party-opponent.").

<sup>18</sup> See FED. R. EVID. 102.

<sup>19</sup> See Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 441 (2014).

<sup>20</sup> See, *e.g.*, Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction*

propriety of judicial discretion, lawyers' ethical and professional responsibilities, and, at bottom, the fundamental goals of the trial process. This Article grapples with that complex analysis. It proceeds in six parts. Part I begins with a brief discussion of the fundamental goal of evidence law, because only with that goal in mind can we evaluate the propriety of any particular category of evidence. Undoubtedly, ascertaining truth and securing just determinations—which for the sake of clarity this Article will refer to as “accurate factfinding”<sup>21</sup>—are central to our trial system. But there are other competing considerations built into the adversary process, and they are often overlooked in our desire to celebrate that supposed accuracy. The evidence rules themselves provide for the exclusion of some evidence that would theoretically bolster accurate factfinding; they do so because we place a higher value on promoting other social policies, such as protecting privileged communications and encouraging settlement. Once we accept the premise that we regulate evidence for a variety of reasons that sometimes conflict with the goals of trial, we are required to engage in a thoughtful assessment of the competing goals in order to strike the right balance.

We are then free to ask what other purposes the evidence rules might serve. Part II identifies an important one: regulating litigation conduct. Our adversarial system is designed to be just that—adversarial.<sup>22</sup> The lawyer's job is to manipulate procedural and evidentiary rules in order to achieve a victory for her client, even if accurate factfinding—and civility—are casualties of that process.<sup>23</sup> The struc-

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*After Revised Rule 37(E): An Evidence-Based Approach*, 83 *FORDHAM L. REV.* 1299, 1308 (2014) (discussing “institutional competency” in context of spoliation).

<sup>21</sup> Some colleagues who reviewed drafts of this Article expressed reservations about the use of the words “truth” and “justice,” suggesting that those terms are amorphous or capable of suggesting concepts different from accurate factfinding. *See also, e.g.*, Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355, 379 (2001) (“The reality is that justice is an elusive and difficult concept.”); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 *S. CAL. L. REV.* 649, 659 n.33 (1987) (“The concepts of ‘truth,’ and of ‘objective truth,’ are elusive and controversial.”). Those words are not this author's; as noted above, “truth” and “just determination” come straight out of Federal Rule of Evidence 102. But, to the extent anyone might perceive them as having a significance different from the one here intended, it is perhaps wiser to use a phrase that is less likely to engender misconceptions—although I recognize that the phrase “accurate factfinding” may carry its own interpretational perils.

<sup>22</sup> *See, e.g.*, Joseph Jaconelli, *What Is a Trial?*, in 1 *JUDICIAL TRIBUNALS IN ENGLAND AND EUROPE, 1200–1700* 18, 24 (Maureen Mulholland et al. eds., 2003) (differentiating between adversarial and inquisitorial approaches to trial); *see also* DALE A. NANCE, *THE BURDENS OF PROOF: DISCRIMINATORY POWER, WEIGHT OF EVIDENCE, AND TENACITY OF BELIEF* § 4.1, at 188–89 (forthcoming 2016) (same).

<sup>23</sup> *E.g.*, Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 *NOTRE*

ture of our adversarial system renders it particularly vulnerable to abuse, and those who practice abusive conduct do so because it is profitable. We can alter that dynamic only by imposing consequences for behavior that we seek to discourage. Part II, then, serves as a foundation for the ultimate conclusion: allowing evidence of lawyer conduct into the trial process—and submitting that evidence to a jury’s scrutiny—would provide an important counterincentive in reshaping the contours of acceptable litigation behavior.

Part III moves from the theoretical and general to the practical and specific. It demonstrates that litigation conduct can have important evidentiary value for dispute resolution. It articulates three classifications for certain litigation conduct: (1) lawyer admissions; (2) discovery behavior; and (3) selection or concealment of evidence. This Part synthesizes and critiques the inconsistent judicial and scholarly approaches to the admissibility of these categories of litigation conduct. It demonstrates that the systematic exclusion of evidence merely because it falls into the rubric of litigation conduct is unwarranted under both doctrinal principles of evidence law and the policy considerations that underlie them.

Part IV then explains the social utility in permitting juries to hear and evaluate evidence falling into these categories. Just as we fashion evidence rules to promote other social policies that are extrinsic to a particular lawsuit, so too should we admit evidence of litigation misconduct in order to shape the contours of acceptable lawyer behavior. This is a familiar function for juries; we have historically permitted them to establish acceptable social norms, and there is no reason systematically to exclude the legal system from that scrutiny—especially because the self-regulated legal profession has failed to provide the necessary disincentives to the misconduct.

Part V subjects litigation misconduct to the traditional balancing test we apply under the evidence rules for determining admissibility.<sup>24</sup> The evidence is unquestionably relevant, especially if we respect the jury’s inference-drawing power.<sup>25</sup> Of course, there are significant arguments for concluding the probative value of the evidence is “substantially outweighed” by other considerations.<sup>26</sup> But this Article

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DAME J.L. ETHICS & PUB. POL’Y 209, 211 (2006) (explaining that lawyers are ethically obligated to represent clients “who may have little to gain from [the] ascertainment” of truth).

<sup>24</sup> See FED. R. EVID. 402–403.

<sup>25</sup> See FED. R. EVID. 402 (declaring general rule that “[r]elevant evidence is admissible”).

<sup>26</sup> See FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of” other competing considerations); see also *infra* text accompanying note 131 (discussing Rule 403).

concludes that the other considerations are manageable and that the benefits of increased accuracy and greater litigation integrity outweigh them.

Finally, Part VI synthesizes the various anticipated objections to the introduction of evidence of litigation conduct. It suggests some possible protections to meet those objections but largely concludes that the benefits of admitting this type of evidence outweigh the costs.

To date the commentators in this area have neither considered the topic holistically<sup>27</sup> nor offered a typology. The one notable exception is John Mansfield, who postulated in 1992 that courts should circumscribe evidential use of litigation conduct if admitting the evidence would deter conduct that “furthers an important objective of the litigation process.”<sup>28</sup> As explained below, this Article takes no issue with Mansfield’s general admonition, but the admonition begs important questions that this Article aims to evaluate. And that evaluation leads to the conclusion that permitting jurors to consider evidence of litigation conduct will further the most important objectives of the litigation process: accurate results and public confidence in the legal system.

## I. THE MULTIFACETED PURPOSES OF EVIDENCE RULES

At the core of any admissibility analysis lies a foundational question: what purpose do evidence rules serve?<sup>29</sup> Asking that question seems like a remarkably obvious starting place. And yet it has not enjoyed the importance it deserves in the actual conduct of trials,<sup>30</sup> which are often conducted more out of “tradition and habit” than with thoughtful consideration.<sup>31</sup>

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<sup>27</sup> Cf. Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1226 (2004) (“In general, the few scholars who have written in the area write on either perjury, or evidence destruction, or missing witnesses, or some other isolated genre of manipulation. Very few treat the problem of evidence manipulation generically.” (footnotes omitted)).

<sup>28</sup> John H. Mansfield, *Evidential Use of Litigation Activity of the Parties*, 43 SYRACUSE L. REV. 695, 701–02 (1992).

<sup>29</sup> See MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 103 (1997) (“As in other spheres of social life, so in the forensic context: the precise shape of factual inquiries depends in large measure on the goals served by them.”); Sanchirico, *supra* note 27, at 1286 (“When it comes to society’s task of policing evidentiary manipulation, the trajectory of social benefits is starkly dependent on what one takes to be the object of trial.”).

<sup>30</sup> See Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 308 (1998) (“[T]he discussion of factual accuracy in adjudication can be greatly improved if the diverse objectives of legal proceedings are attended to more closely than in the prevailing convention.”).

<sup>31</sup> Joseph M. Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27, 28 (1984); see also Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 361 (2010) (“Evidence law is largely barren of theory generally”; for example, “impeachment rules sprouted as

### A. *The Elusive Concept of Accurate Factfinding*

No one would dispute that accurate factfinding is the trial's primary function.<sup>32</sup> Legal literature is filled with similar admonitions.<sup>33</sup> But identifying the destination is obviously easier than getting there. Ancient forms of trial had the same goal, but they used methods that today seem absurd.<sup>34</sup> Trials once "required the accused or the party with the burden of proof to take an oath and then submit to some dangerous ordeal. If the person emerged from the ordeal unscathed, then he had proved his case."<sup>35</sup> Along the same lines, "[t]rial by battle required the parties to engage in a duel of some sort, often a fight to the death."<sup>36</sup>

We no longer resort to such arcane devices. "[B]y the last third of the eighteenth century, . . . juries were required to base their decision solely on evidence presented at trial."<sup>37</sup> But we certainly know better than to conclude that we have overcome the absurdities that can plague the factfinding process. Early twentieth-century trial history reveals systematic racial biases that plagued accurate factfinding,<sup>38</sup> and contemporary examples also abound—including a recent case in which the State of Ohio kept a man on death row for twenty years while prosecutors deliberately withheld exculpatory evidence.<sup>39</sup>

Accurate factfinding, then, is clearly a fragile endeavor. It falls easy prey both to those who disregard the rules and to the rules them-

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ad hoc responses to perceived abuses by lawyers in the nineteenth century, not from some reified theory of proof."); Richard O. Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System*, 49 HASTINGS L.J. 343, 344 (1998) ("Evidence law . . . does not respond to the realities of the actual world . . .").

<sup>32</sup> See FED. R. EVID. 102; see also Sanchirico, *supra* note 27, at 1220 ("Most analyses of evidence law take litigation's prime object to be the discovery of truth about past events.")

<sup>33</sup> E.g., Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 631–32 (1998) ("[A]ccuracy of adjudication is very important *at trial*, even in civil cases. I can see no other coherent way to interpret the role of adjudication in a system of laws, what we ask the trier of fact to do within that system, or the evidentiary rules that we employ in assisting the trier in its task."); A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 926 ("Efforts aimed at the ascertainment of truth must be central to the role of counsel in any system for the resolution of disputes.")

<sup>34</sup> See Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 352–53 (2003) (describing ordeals, battles, and other ancient dispute-resolution mechanisms).

<sup>35</sup> ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 71 (2001) (footnote omitted).

<sup>36</sup> *Id.*

<sup>37</sup> Sward, *supra* note 34, at 355.

<sup>38</sup> See, e.g., Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009) (describing various race-based injustices in the course of the criminal proceedings against nine African-Americans falsely accused of raping two white women in 1931 Alabama).

<sup>39</sup> See *D'Ambrosio v. Bagley*, 656 F.3d 379, 383 (6th Cir. 2011).

selves when they are misguided. As a result, for example, a party can own up to wrongdoing in one trial (as Ford did in the rollover litigation) and then deny it in the next.<sup>40</sup> Complicating the matter further, accurate factfinding is not the only objective of evidence rules, as the next Section explains.

### B. *Sacrificing Accurate Factfinding to Achieve Other Policy Objectives*

Evidence law restrains admissibility of some relevant evidence “to respect other values that are prized by the legal system.”<sup>41</sup> Consider, for example, the role that evidentiary privileges play in concealing evidence that would otherwise expose the truth; we value the confidentiality of communications in certain relationships more than we value the factfinder’s access to the underlying information.<sup>42</sup> We likewise value settlement so highly that we proscribe the introduction of settlement communications as trial evidence, even when those communications might facilitate accurate factfinding.<sup>43</sup>

Even the hearsay rule<sup>44</sup> can inhibit accuracy in factfinding. Consider, for example, a simple traffic dispute in which the plaintiff and defendant testify differently about whether the light was red or green. If the only other witness to the accident was a neutral third party who is unavailable for trial, the factfinder might benefit from knowing what that third party told the plaintiff.<sup>45</sup> But we generally prohibit that evidence, both because we distrust the ability of biased witnesses to report the observations of others (or, more precisely, of jurors’ ability to evaluate the reliability of the hearsay)<sup>46</sup> and because our trial procedure favors the full opportunity to cross-examine every witness whose observations enter into substantive evidence.<sup>47</sup> The hearsay

<sup>40</sup> See *supra* notes 1–7 and accompanying text.

<sup>41</sup> Jaconelli, *supra* note 22, at 26.

<sup>42</sup> See, e.g., Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 278–79 (2006) (describing recognized relationship-based evidentiary privileges).

<sup>43</sup> See FED. R. EVID. 408; see also Mansfield, *supra* note 28, at 698.

<sup>44</sup> See FED. R. EVID. 802.

<sup>45</sup> See NANCE, *supra* note 22, § 4.1.3, at 201 (noting “arguments over the years from various scholars that jurors are as capable of handling hearsay as they are of handling other kinds of admissible evidence of questionable reliability”).

<sup>46</sup> See, e.g., Sward, *supra* note 34, at 355 (“The idea behind evidence law, whether explicitly stated or not, is that a jury of lay persons cannot be entirely trusted to evaluate evidence . . . .”); see also Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 501 (1998) (criticizing assumption that jurors are less competent than judges to evaluate hearsay).

<sup>47</sup> See, e.g., David Greenwald, Comment, *The Forgetful Witness*, 60 U. CHI. L. REV. 167,

rule thus reflects our greater concern for the integrity of the trial process than for the accuracy of an individual trial result.<sup>48</sup> Chris William Sanchirico observes that we are sometimes “more concerned with whether the declarant herself testifies than with whether what she says is truthful.”<sup>49</sup>

Evidentiary rules that promote policies other than accurate factfinding run the risk of “promot[ing] the appearance of deceit by restricting the introduction of evidence that jurors expect to receive . . . .”<sup>50</sup> So if we want evidence rules to serve behavior-incenting purposes beyond simple accurate factfinding in a particular case, we should be deliberative about those purposes, weigh them against the virtues of admitting the evidence for its probative value, and reach rational conclusions about how to strike the appropriate balances. Yet as Sanchirico notes, the incentives for future conduct embedded in the law of evidence “receive[ ] scant attention.”<sup>51</sup> The next Part directs our attention to one area of conduct that is sorely in need of new incentives: lawyers’ misconduct in the litigation process itself.

## II. THE NEED FOR ADDITIONAL REGULATION OF LAWYER CONDUCT

The premise of our adversarial system is that factfinders can perform their functions most accurately when advocates present them with the opposing parties’ strongest competing versions of the facts. By its nature, however, the adversarial system, if not regulated adequately, encourages lawyers to infect their competing versions of the facts with misconduct. This Part explains the inherent dangers of the adversarial system and then examines more closely circumstances in which those dangers can, and have, run amok.

### *A. The Inherent Challenges of Accurate Factfinding in an Adversarial System*

The American justice system is based on an adversarial process, premised “on the supposition that the clash between the opposing

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167 n.3 (1993). The right of cross-examination rises to the level of a fundamental right in criminal cases. See *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (“[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”).

<sup>48</sup> See generally, e.g., Van Kessel, *supra* note 46.

<sup>49</sup> Sanchirico, *supra* note 27, at 1219.

<sup>50</sup> See Bruce A. Green, “*The Whole Truth?*”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 699 (1992).

<sup>51</sup> Sanchirico, *supra* note 27, at 1220–21.

parties is more likely than other methods to produce the truth.”<sup>52</sup> It works not because lawyers in litigation prize accurate factfinding for its own sake, but because each adversary is motivated to present the most compelling version of the dispute. Juries then evaluate the “competing narratives and then decid[e] which story is more persuasive.”<sup>53</sup> It is thus “common wisdom that the quality of advocacy” can have an important bearing on the result.<sup>54</sup>

It should come as no surprise, then, that lawyers who fashion trial narratives are far more concerned with victory than with accurate factfinding; accurate factfinding is “not the governing principle for the lawyer.”<sup>55</sup> Lawyers have a tremendous amount of autonomy in deciding how to prepare and present a case;<sup>56</sup> they are “motivated to present . . . only such evidence as is favorable to [their] position” and seek to exclude harmful evidence even when its “value in the quest for the truth is beyond dispute.”<sup>57</sup> In the “showmanship” of trial,<sup>58</sup> the lawyer is actually “compelled to keep the truth hidden” if the truth is not helpful to her client.<sup>59</sup>

Bruce Green has elaborated on this deception in the specific context of witness preparation.<sup>60</sup> “Unbeknownst to the jury, and contrary to the jury’s expectations, in many cases lawyers carefully craft and rehearse the testimony of witnesses before calling them to the stand,”<sup>61</sup> leaving jurors with the false impression that the testimony is “spontaneous.”<sup>62</sup> Rehearsing testimony and advising witnesses of other aspects of the case, such as other witnesses’ expected testimony

<sup>52</sup> Jaconelli, *supra* note 22, at 24.

<sup>53</sup> Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 *GEO. L.J.* 281, 285 (2013).

<sup>54</sup> Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 *STAN. L. REV.* 137, 139 (2013); *see also* Lawrence Jenab & M.H. Hoeflich, *Forensic Oratory in Antebellum America*, 51 *U. KAN. L. REV.* 449, 450 (2003) (“[F]orensic oratory, known in the nineteenth century as ‘judicial eloquence,’ has been an important part of trial practice from the origins of the American legal tradition . . .”).

<sup>55</sup> Henning, *supra* note 23, at 214; *see also* DAMAŠKA, *supra* note 29, at 84 (“Eager to advance their interest, the parties and their lawyers may be tempted to select proof of inferior cognitive potential if useful to them for tactical reasons . . .”).

<sup>56</sup> *See* DAMAŠKA, *supra* note 29, at 75 (describing importance of “[c]ounsel’s pretrial activities in gathering information and preparing the sources of evidence for trial”).

<sup>57</sup> *Id.* at 99.

<sup>58</sup> *See* Jenab & Hoeflich, *supra* note 54, at 450.

<sup>59</sup> *See* Henning, *supra* note 23, at 212–13.

<sup>60</sup> *See* Green, *supra* note 50, at 705 (“As currently practiced and promoted in the professional literature, however, witness preparation may do more to *undermine* than to promote the discovery of truth.”).

<sup>61</sup> *Id.* at 704 (footnote omitted).

<sup>62</sup> *Id.* at 705.

or the applicable legal standards, “cause witnesses to recall things differently from how they originally perceived them” and makes them more certain of their recollections and “more believable than they would ordinarily appear.”<sup>63</sup> At the same time, “extensive rehearsal” makes it “more difficult for opposing counsel to expose inaccuracies through cross-examination.”<sup>64</sup>

Green laments not only the deceptive practice, but also the fact that “little has been done to regulate it.”<sup>65</sup> He notes that the rules of evidence seem oblivious to “what is counseled by the popular literature on trial advocacy and actually carried out in practice.”<sup>66</sup> Some would argue that the decision not to regulate is the correct one; Charles P. Curtis caused controversy in 1951 when Stanford Law School published his article proclaiming that “one of the functions of a lawyer is to lie for his client . . . . A lawyer is required to be disingenuous.”<sup>67</sup> That characterization, controversial in its day, seems perhaps even more absurd today, when the rules governing lawyer conduct expressly preclude deception.<sup>68</sup> But even today—as Justice Sandra Day O’Connor has recognized—“[m]any attorneys believe that zealously representing their clients means pushing all rules of ethics and decency to the limit.”<sup>69</sup>

This is not to suggest that all lawyers lie. But the very autonomy that underscores our adversary system is its Achilles heel. We run “the risk that utilitarian individualism will cause a heightened disengagement from the anchors of professionalism.”<sup>70</sup> And rewarding disingenuous conduct—or even the perception that we do so—compromises the integrity and reliability of the trial process generally.<sup>71</sup> It causes us to question “whether the [trial] proceeding accu-

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<sup>63</sup> *Id.* at 704–05.

<sup>64</sup> *Id.* at 705.

<sup>65</sup> *Id.* at 705–06.

<sup>66</sup> *See id.* at 708 (footnote omitted).

<sup>67</sup> Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951). Curtis was a Boston lawyer, and the Boston Herald covered news of his controversial writing, as did the Harvard Crimson. *See Curtis Statement on Court Lying Mums Law Professors*, HARV. CRIMSON (Sept. 27, 1952), <http://www.thecrimson.com/article/1952/9/27/curtis-statement-on-court-lying-mums/> (describing reactions to Curtis’s original article and coverage of it in the Boston Herald).

<sup>68</sup> *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (AM. BAR ASS’N 2013) (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

<sup>69</sup> Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 7 (1998) (quoting Sam Benson, *Why I Quit Practicing Law*, NEWSWEEK, Nov. 4, 1991, at 10, 10).

<sup>70</sup> Orrin K. Ames III, *Concerns About the Lack of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 531, 540 (2005).

<sup>71</sup> *See* Henning, *supra* note 23, at 211–12.

rately reflects the truth about what occurred when it concludes.”<sup>72</sup> And, more broadly, it engenders “much of the criticism of the legal profession.”<sup>73</sup>

### B. *Adversarial Lawyer Conduct at Its Extreme*

The questionable incentives created by the adversarial system are most troubling when lawyer behavior deviates from acceptable ethical and professional norms. “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.”<sup>74</sup> Some have analogized these lawyers to Sylvester Stallone’s movie character, the bellicose John Rambo.<sup>75</sup> One commentator describes “a metamorphosis of the legal profession from the type of lawyering symbolized by Atticus Finch, to the ‘Rambo’ style of lawyering that we see practiced today.”<sup>76</sup>

Abusive lawyer conduct comes in many forms. It exists at the pleading stage, in the form of both questionable lawsuits and aggressive defenses and counterclaims.<sup>77</sup> It exists in “groundless motions and abusive discovery tactics” designed to “shackle opposing counsel with reams of paperwork, producing exorbitant litigation costs.”<sup>78</sup> There is also a proliferation of simple name-calling and bullying; “flip-

<sup>72</sup> *Id.* at 212.

<sup>73</sup> *Id.* at 211.

<sup>74</sup> Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1637 (1996).

<sup>75</sup> *E.g.*, Judith D. Fischer, *Incivility in Lawyers’ Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 365–66 (2011) (“The growing incivility in the legal profession has been amply criticized in recent years. There is even a shorthand term for it: ‘Rambo Litigation’ . . . .” (footnote omitted)); SWARD, *supra* note 35, at 117–18 (“[A]dversarial adjudication may encourage what is sometimes referred to as ‘Rambo’ tactics.”). The character John Rambo first appeared in the movie *FIRST BLOOD* (Anabasis N.V. and Elcajo Productions 1982).

<sup>76</sup> Ames, *supra* note 70, at 535–36 (footnotes omitted); *see also* Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 FORDHAM L. REV. 959, 965 (1995) (“The ideal of Atticus Finch, the courageous lawyer carrying out an unpopular assignment with grace and dignity, was jettisoned and replaced by what judge after judge came to view as *lawyer as Rambo*, seen in courts across the country every day.”). Atticus Finch, of course, was the heroic lawyer depicted in *TO KILL A MOCKINGBIRD*. *See* HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>77</sup> *See, e.g.*, Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1089 (2005).

<sup>78</sup> Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 36–37 (1993); *see also* Beisner, *supra* note 10, at 549 (“Discovery abuse also represents one of the principal causes of delay and congestion in the judicial system.”). In a recent order entitled, “Order on One Millionth Discovery Dispute,” a federal district-court judge wrote that the court was “exhausted with” the parties’ endless discovery disputes. Order on One Millionth Discovery Dispute at 1, *Herron v. Fannie Mae*, No. 10-943 (RMC) (D.D.C. Feb. 2, 2015).

pant remarks, jibes and email asides are a rising concern for advocates of legal professionalism, and a key motivation for a series of initiatives to improve lawyer manners and reduce overly aggressive attitudes in court and legal writing.”<sup>79</sup> The Delaware Supreme Court has observed that “discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to . . . courts around the nation.”<sup>80</sup> It is an ironic byproduct of the rules of civil procedure,<sup>81</sup> which include discovery mechanisms designed to minimize surprise at trial<sup>82</sup> but that lawyers can also easily exploit for improper purposes. Discovery abuses can take two forms—overly aggressive efforts to pursue discovery and evasive discovery responses.<sup>83</sup> Discovery bullies aggressively pursue production of embarrassing or burdensome information of questionable or no relevance to the underlying dispute.<sup>84</sup> In contrast, discovery evaders hide the ball; they make the process “a game to be played by wordsmiths who will exploit every real and imagined ambiguity” to avoid honest responses.<sup>85</sup> One commentator notes that “the pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discov-

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<sup>79</sup> Andrew Strickler, *Judges Grow Frustrated as Atty Barbs Proliferate*, LAW360 (Aug. 25, 2015, 9:24 PM), <http://www.law360.com/articles/694862/judges-grow-frustrated-as-atty-barbs-proliferate>.

<sup>80</sup> *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994).

<sup>81</sup> “The Federal Rules mark the transformation of the trial into litigation: the short trial following soon on the completion of the pleadings became a long process involving considerable pretrial activity, culminating only occasionally in a trial.” Sward, *supra* note 34, at 389.

<sup>82</sup> See, e.g., Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 908 (1997).

<sup>83</sup> See, e.g., John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 625 n.288 (1999) (distinguishing between “‘tripping’ disputes, which ‘refer to complaints by one litigant against the other charging interference with the former’s efforts to conduct discovery,’” and “‘pushing’ disputes, which involve ‘activities’” that “‘are unduly aggressive, demanding, burdensome or otherwise outside proper bounds.’” (quoting COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE I-8–I-9 (1965)).

<sup>84</sup> See, e.g., Beisner, *supra* note 10, at 595. Effective December 1, 2015, the standard for discovery in federal courts changed drastically. No longer may a litigant pursue discovery of anything “reasonably calculated to lead to the discovery of admissible evidence.” Cf. FED. R. CIV. P. 26(b)(1) (2014). Instead, information is now discoverable only if it is “relevant to any party’s claim or defense and proportional to the needs of the case . . . .” FED. R. CIV. P. 26(b)(1) (2015). The amendment is a “sea change,” see Andrew J. Kennedy, *Significant Changes to Discovery and Case Management Practices*, LITIG. NEWS (Oct. 14, 2015), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/101415-federal-rules-amendments.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/101415-federal-rules-amendments.html), but it remains to be seen whether it will curb or encourage discovery abuses.

<sup>85</sup> See Henning, *supra* note 23, at 229.

ery excessively and abusively.”<sup>86</sup> This misconduct, in addition to being unpleasant, results in “satellite litigation” in the form of discovery motions, “causing huge delays and driving litigation costs even higher.”<sup>87</sup>

Misbehavior in depositions has been a particular problem, perhaps because they proceed in person and without judicial supervision.<sup>88</sup> In that unsupervised context, “the John Rambos of the litigation world act outside the rules of ‘civil’ discovery and claim that the ethical proscription to ‘zealously represent’ their clients justifies their behavior.”<sup>89</sup> One New York court noted civility in the legal profession “is routinely polluted by the conduct of attorneys at depositions,” which “have become breeding grounds for a myriad of unprofessional and dilatory conduct.”<sup>90</sup> Deposition misconduct was so extreme in one Delaware case that the Delaware Supreme Court devoted an entire appendix to one of its decisions drawing attention to it—even when the conduct had no direct bearing on the issues before the court.<sup>91</sup>

But the criticism falls on deaf ears, and money is one of the main reasons why; the legal system rewards bully lawyers. On the plaintiff side, the bullies often gain notoriety more for their successes than for their misdeeds. The Delaware case is perhaps the most infamous example: a famous Texas lawyer’s litigation conduct was so bad in that case that the court characterized it as “extraordinarily rude, uncivil, and vulgar.”<sup>92</sup> His conduct in Delaware was neither an isolated example<sup>93</sup> nor unique to him.<sup>94</sup> But this same lawyer, known as “The King

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<sup>86</sup> Beisner, *supra* note 10, at 549. To be sure, there are commentators who “maintain there is little empirical evidence to support what they label as the ‘pervasive myth of pervasive discovery abuse.’” Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 609 (2002) (quoting Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1393 (1994)). This Article does not seek to quantify the problem; it is enough to note the general consensus that “disengagement” from professionalism “appears to have already pervaded the profession.” Ames, *supra* note 70, at 540.

<sup>87</sup> Keeling, *supra* note 78, at 37.

<sup>88</sup> See Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 576 (1996).

<sup>89</sup> *Id.* at 563.

<sup>90</sup> *Mora v. St. Vincent’s Catholic Med. Ctr. of N.Y.*, 800 N.Y.S.2d 298, 301 (Sup. Ct. 2005).

<sup>91</sup> *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51–57 (Del. 1994).

<sup>92</sup> *Id.* at 53. Among other things, the lawyer in question called his adversary in a deposition an “asshole” and said he “could gag a maggot off a meat wagon.” *Id.* at 54.

<sup>93</sup> See Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 33 n.3 (2012); see also *The Art of Litigation, Texas Deposition—Jamail, Tucker, and Carstarphen*, YOUTUBE (Oct. 13, 2009), [https://www.youtube.com/watch?vW3\\_KT5PeY](https://www.youtube.com/watch?vW3_KT5PeY).

of Torts,” was America’s “wealthiest practicing attorney”<sup>95</sup> until his recent death<sup>96</sup> and enjoyed high praise from clients, politicians, celebrities, and even law schools.<sup>97</sup>

On the defense side, bullies “assert[ ] themselves in the plush offices of corporate law firms and in multi-party federal court cases.”<sup>98</sup> Large firms vie for reputations that lead to rankings such as most “fearsome”—a category describing firms that “threaten to disrupt business as usual” and “have the ability to impact operations, rack up costly bills and potentially ruin reputations.”<sup>99</sup> One of the nation’s largest firms,<sup>100</sup> having recently attained that “fearsome” ranking, responded not with remorse but with pride; the managing partner expressed gratitude “that people take note of our work” and said the ranking was “a validation to our clients that they’re picking the right

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<sup>94</sup> See Macey, *supra* note 77, at 1089 (noting that Joe Jamail’s conduct “should not be interpreted as an unusual or isolated example of attorney misbehavior”); see also Boothe-Perry, *supra* note 93, at 33 n.3 (listing examples of outrageous deposition behavior).

<sup>95</sup> *The World’s Billionaires: #1118 Joe Jamail, Jr.*, FORBES, <http://www.forbes.com/profile/joe-jamail-jr/> (last visited Jan. 19, 2016).

<sup>96</sup> E.g., Robert D. McFadden, *Joe Jamail, Flamboyant Texas Lawyer Who Won Billions for Clients, Dies at 90*, N.Y. TIMES (Dec. 23, 2015), [http://www.nytimes.com/2015/12/24/business/joe-jamail-flamboyant-texas-lawyer-dies-at-90-won-pennzoils-10-5-billion-award-against-texaco.html?\\_r=0](http://www.nytimes.com/2015/12/24/business/joe-jamail-flamboyant-texas-lawyer-dies-at-90-won-pennzoils-10-5-billion-award-against-texaco.html?_r=0).

<sup>97</sup> See Deborah L. Rhode, *Lawyers As Citizens*, 50 WM. & MARY L. REV. 1323, 1327 (2009) (“One of the nation’s most notoriously uncivil practitioners, Joe Jamail, . . . has a pavilion, legal research center, and two statues honoring his accomplishments at the University of Texas Law School.”); see also Kevin Pruitt, *Joe Jamail: Texas Trial-Blazer*, YOUTUBE (Apr. 15, 2012), <http://www.youtube.com/watch?v=rdxcSMz5ksA> (produced by University of Texas School of Law 2007). To be fair, the video documents numerous examples of the attorney’s praiseworthy skill and generosity. But it is difficult to reconcile the praise with the known litigation misconduct, especially when the attorney chose to disparage the Delaware court’s criticism of his behavior. See Brenda Sapino, *Jamail Unfazed by Delaware Court’s Blast*, TEX. LAW., Feb. 14, 1994.

<sup>98</sup> Cary, *supra* note 88, at 565.

<sup>99</sup> See Janet H. Cho, *Jones Day Again Makes the “Fearsome Foursome,” the Top 4 Law Firms Clients Most Dread Facing* [http://www.cleveland.com/business/index.ssf/2014/10/jones\\_day\\_again\\_makes\\_the\\_fearsome\\_foursome\\_the\\_top\\_4\\_law\\_firms\\_clients\\_most\\_dread\\_facing.html](http://www.cleveland.com/business/index.ssf/2014/10/jones_day_again_makes_the_fearsome_foursome_the_top_4_law_firms_clients_most_dread_facing.html) (last updated Oct. 1, 2014, 10:29 AM) (quoting BTI CONSULTING GROUP, BTI LITIGATION OUTLOOK 2015: CHANGES, TRENDS AND OPPORTUNITIES FOR LAW FIRMS (2014)).

<sup>100</sup> See Dimitra Kessenides, *Big Law Firms Raise Profits by Showing Some Partners the Door*, BLOOMBERG BUSINESS (Apr. 28, 2014), <http://www.businessweek.com/articles/2014-04-28/steady-growth-eludes-nation-s-largest-law-firms> (listing Jones Day as having seventh-highest revenues among U.S. firms).

team.”<sup>101</sup> Lawyers thus *aspire* to achieve recognition for behaving in disruptive ways.<sup>102</sup>

It is impossible to quantify the harm from this abusive litigation culture. Its victims—often those who are already economically disadvantaged<sup>103</sup>—are left “with the perception that whoever has the toughest lawyer and enough resources to wear the other side down will carry the day.”<sup>104</sup> Litigation misconduct drives up costs,<sup>105</sup> extracts unwarranted settlements,<sup>106</sup> and perpetuates the public’s disdain for lawyers and the justice system.<sup>107</sup> And misconduct begets misconduct; “[o]ne of the unfortunate consequences of these tactics is the creation of a revenge motive in the opponent. After a strenuous round of attacks, the ethical lawyer, who has had to endure hours of abuse, may stoop to the same behavior.”<sup>108</sup> If nothing else, it may be the only way of ensuring parity in the proceedings.<sup>109</sup> In the end, “[t]his ‘self-interest’ approach to lawyering . . . results in a very high

<sup>101</sup> Cho, *supra* note 99 (quoting Chris Kelly, partner-in-charge). A district court recently found that a lawyer from the same firm had engaged in “repeated . . . obstructionist deposition conduct” and ordered her to “write and produce a training video” to explain to newer lawyers how to behave appropriately. See *Sec. Nat’l Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595, 610 (N.D. Iowa 2014), *rev’d sub nom.* *Sec. Nat’l Bank of Sioux City, IA v. Jones Day*, 800 F.3d 936, 945 (8th Cir. 2015) (declining to decide whether the lawyer committed “sanctionable conduct” but holding that trial court failed to give “particularized notice” and “meaningful opportunity to respond” to the sanction proceedings). In the law firm’s appeal of the sanction order, it argued (among other things) that the improper conduct “was acceptable.” See Brief of Appellants at 32, *Sec. Nat’l Bank of Sioux City, IA v. Jones Day*, 800 F.3d 936 (8th Cir. 2015) (No. 14-3006).

<sup>102</sup> See Robert N. Saylor, *Rambo Litigation Why Hardball Tactics Don’t Work*, A.B.A. J., Mar. 1, 1988, at 79, 79 (“Unfortunately, entire firms adopt [hardball tactics] as a signature and many lawyers perceive a mini-epidemic. Why? The perception is that it works.”).

<sup>103</sup> “A party with more money and more at stake can often out-investigate, out-discover, out-conceal, and out-introduce its opponents.” John Leubsdorf, *Evidence Law As a System of Incentives*, 95 IOWA L. REV. 1621, 1626 (2010).

<sup>104</sup> Cary, *supra* note 88, at 578.

<sup>105</sup> See, e.g., *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 983 (11th Cir. 2008) (lamenting “exponentially increasing transaction costs” of pleading misconduct and resulting impact on discovery).

<sup>106</sup> See Keeling, *supra* note 78, at 37 (noting that when adversaries exploit their resources through litigation misconduct, “even the most deserving opponents are constrained to initiate settlement negotiations”).

<sup>107</sup> See, e.g., Irma S. Russell, *An Authentic Life in the Law: A Tribute to James K. Logan*, 43 U. KAN. L. REV. 609, 615 (1995) (“Public disdain for the law and lawyers seems connected to the belief that the legal system benefits lawyers more than the public it is ostensibly intended to serve.”).

<sup>108</sup> Cary, *supra* note 88, at 575–76.

<sup>109</sup> See Yablon, *supra* note 74, at 1623 (“[A litigator perceives] that if her opponent engages in abusive discovery practices and she does not, she or her client will be worse off.”).

risk of lawyers' isolation from relationships to others, to our culture, and to the law as a values-based institution."<sup>110</sup>

Moreover, the legal system has failed to respond effectively.<sup>111</sup> "Solutions are elusive because it is entrenched that civilized litigation is an oxymoron."<sup>112</sup> There are certainly "rules [and] guidelines to control the behavior,"<sup>113</sup> including some of the 2015 amendments to the Federal Rules of Civil Procedure,<sup>114</sup> but lawyers generally expect "that the available sanctions will not work, or are too expensive and cumbersome to utilize."<sup>115</sup> In the pleading context, Sherman J. Clark writes that Federal Rule of Civil Procedure 11 "has yet to prove a sufficient protection against . . . abuses, despite periodic amendments."<sup>116</sup> Even when attorneys do complain to judges, it is difficult to get judicial attention except in the clearest and worst of cases, typically involving a direct affront to the court's authority, such as a blatant violation of a court order.<sup>117</sup> Some appellate courts, in reviewing trial courts' discovery sanctions against attorneys, construe the appli-

<sup>110</sup> Ames, *supra* note 70, at 536.

<sup>111</sup> See, e.g., Sanchirico, *supra* note 27, at 1247 (focusing on evidence tampering and noting that "the law, though it does not ignore the activity, does at best a halfhearted job of preventing it").

<sup>112</sup> Sayler, *supra* note 102, at 81.

<sup>113</sup> Cary, *supra* note 88, at 580.

<sup>114</sup> Federal Rule of Civil Procedure 1 now contains "aspirational" language designed both "to underscore the importance of cooperation on discovery for litigants" and the judicial responsibility "to contain overuse, misuse or abuse of the discovery process." Edward D. Cavanagh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, THE ANTITRUST SOURCE 1, 6 (Apr. 2014), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/apr14\\_cavanagh\\_4-8f.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr14_cavanagh_4-8f.auth_checkdam.pdf). But the new language will likely have little impact on litigation behavior—not only because it remains aspirational, but also because it "was not intended to create any new duty." See John J. Jablonski and Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEFENSE COUNSEL J. 411, 432 (2015).

<sup>115</sup> Cary, *supra* note 88, at 580; see also *id.* at 595 ("Often lawyers are loathe [sic] to complain about the Rambo behavior they have encountered in depositions. They may feel that complaining will accomplish nothing, the remedy will be so delayed as to be useless, the expense of a motion to compel will not be justified, or the behavior, while bad, is not so bad.").

<sup>116</sup> Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 HASTINGS L.J. 565, 574–75 (1998).

<sup>117</sup> See, e.g., Cary, *supra* note 88, at 572 ("Judges hate playing the role of the parent who must resolve petty disputes among attorneys in the deposition process."); *id.* at 585 ("Judges are sometimes loathe [sic] to enter an order eliminating a line of questioning when they do not know all the issues in the case."); Yablon, *supra* note 74, at 1641 ("[O]nly the most disgusting and despicable litigation conduct tends to get sanctioned."). The House of Representatives, recognizing the judicial reluctance to impose sanctions under Rule 11, recently passed the Lawsuit Abuse Reduction Act of 2015, which would make sanctions mandatory rather than discretionary. See H.R. 758, 114th Cong. (2015).

cable rules narrowly, limiting the imposition of fee awards against counsel (as opposed to awards against parties) in the absence of explicit language authorizing them.<sup>118</sup> And even when a court imposes sanctions against a lawyer to address litigation misconduct, the sanction attracts media coverage in part because it is so unusual;<sup>119</sup> the Delaware Supreme Court's sanction against an attorney for his misconduct<sup>120</sup> stands out in large part because it is anomalous for a court—especially a high court—to address the issue at all, much less so prominently.<sup>121</sup>

Litigation misconduct has thus snowballed “despite educational efforts, decreased tolerance among lawyers for this behavior, the proliferation of bar association professionalism initiatives, and the ever-present deterrent of the ethical rules and their subsequent disciplinary process.”<sup>122</sup> And it will continue as long the perception remains that it is profitable—or, at least, necessary to survive in the increasingly competitive business of practicing law.<sup>123</sup> It is a manifestation of the “utilitarian individualism” that permeates our culture.<sup>124</sup>

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<sup>118</sup> *E.g.*, *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1225 (10th Cir. 2015) (holding that FED. R. CIV. P. 37(c)(1)(A) “does not authorize sanctions against counsel”); *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 141 (3d Cir. 2009) (same); *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003) (same).

<sup>119</sup> *See, e.g.*, Katerina E. Milenkovski, *Discovery “Ineptitude” Costs Delta Airlines Another \$3 Million* (Jan. 5, 2016), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/010516-delta-discovery.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/010516-delta-discovery.html) (reporting on district court's rejection of discount on partner billing rates in assessing discovery sanctions); Caroline Simson, *Pa. Hospital's Atty Must Pay \$1M for Witness Instruction Flub* (Nov. 6, 2014, 5:13 PM), <http://www.law360.com/articles/594052/pa-hospital-s-atty-must-pay-1m-for-witness-instruction-flub> (reporting on million-dollar sanction award levied by Pennsylvania trial court against attorney who, during trial, purposely violated pretrial order excluding certain evidence).

<sup>120</sup> *See* *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51–57 (Del. 1994); *see also supra* notes 91–92 and accompanying text.

<sup>121</sup> Other recent anomalies include the Federal Circuit's decision in *Oplus Techs., Ltd. v. Vizio, Inc.*, 782 F.3d 1371 (Fed. Cir. 2015) (vacating and remanding district court's denial of attorney fees for litigation misconduct), and the Seventh Circuit's decision in *Secrease v. W. & S. Life Insurance Co.*, 800 F.3d 397 (7th Cir. 2015) (affirming dismissal with prejudice of a plaintiff's claim based on a finding that he had defrauded the court). But *Oplus* arose in the patent context, where a statute explicitly authorizes awards of “reasonable attorney fees to the prevailing party” in “exceptional cases.” *See* 35 U.S.C. § 285 (2012); *Oplus Techs., Ltd.*, 782 F.3d at 1372. And *Secrease* involved a pro se plaintiff who “falsified evidence,” 800 F.3d at 401—conduct even more extreme than the typical litigation behavior addressed in this Article.

<sup>122</sup> Michael Flynn, *The Fight for Information with the Obstructionist Lawyer*, 33 AM. J. TRIAL ADVOC. 275, 276–78 (2009) (footnotes omitted).

<sup>123</sup> *See* Macey, *supra* note 77, at 1092 (“A major cost of the increased competition within the legal profession is the decline in civility and professionalism among lawyers.”).

<sup>124</sup> *See* Ames, *supra* note 70, at 535 (describing Alexis de Toqueville's concern that the American value of “individualism would bring each person to a point where she would maximize

“Unless somehow restrained or channeled, utilitarian individualism will continue to affect the legal profession, in the adversary system, and in lawyers’ relationships with clients.”<sup>125</sup>

The general consensus is that attorneys will behave better when they appreciate that the costs of misbehaving exceed the benefits.<sup>126</sup> Part IV pursues that theme. But first, Part III closely examines the three different types of litigation conduct that have evidentiary value and analyzes how courts and commentators have reacted to attempts to introduce that conduct into evidence.

### III. A TYPOLOGY OF LITIGATION CONDUCT THAT HAS EVIDENTIARY VALUE

Deconstructing litigation conduct and determining whether it might have evidentiary value at trial might appear to involve nothing more than a straightforward analysis under existing evidentiary rules. In general, those rules endorse the admission of relevant evidence<sup>127</sup> with certain exceptions. Professor John Mansfield observed one principal way in which litigation conduct is relevant: “[w]hen the evidence consists of the conduct of a party or his lawyer in connection with the litigation, the chain of inferences to the material issue will involve a proposition about the party’s or his lawyer’s state of mind.”<sup>128</sup> State of mind, in turn, is often an element of a claim or defense and is certainly relevant in assessing credibility.<sup>129</sup>

But the analysis is not so simple. For one thing, there are exceptions to the admissibility of relevant evidence.<sup>130</sup> The most notable

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the fulfillment of her individual self-interest, even at the cost of the communities around him or her”).

<sup>125</sup> *Id.* at 538.

<sup>126</sup> See Cary, *supra* note 88, at 596 (“When Rambo behavior begins to cost money, then it will stop.”); Yablon, *supra* note 74, at 1640 (“The answer . . . is simple: find a way to make discovery abuse *less fun*.”).

<sup>127</sup> See FED. R. EVID. 402.

<sup>128</sup> Mansfield, *supra* note 28, at 695–96; see also *id.* at 723 (“The inference is through the mind of counsel and the party to their sources of information.”); *id.* at 746 (noting that litigation “activity itself constitutes a substantial amount of relevant evidence”).

<sup>129</sup> See *Fidelity Nat’l Fin., Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, No. 09-CV-140-GPC-KSC, 2014 WL 1286392, at \*6 (S.D. Cal. Mar. 28, 2014) (stating that litigation conduct is relevant “when allegations of misconduct properly put an individual’s intent at issue in a civil action” (quoting *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 728 P.2d 1202, 1208–09 (Cal. 1986)); see also, e.g., Pollis, *supra* note 19, at 480 (noting that state of mind is an element of “any claim in which the plaintiff must demonstrate the defendant’s knowledge, motive, or intent in order to prevail”).

<sup>130</sup> See FED. R. EVID. 402 advisory committee’s note (discussing a variety of circumstances in which relevant evidence is excluded under the Federal Rules of Evidence).

exception is the balancing test that judges conduct in evaluating whether “relevant evidence” carries an excessive risk of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”—in which case they “may exclude” it.<sup>131</sup> Moreover, as explained below, judicial response to litigation conduct has rarely focused exclusively on that traditional balancing test.

It becomes important, then, to understand what courts have said about litigation conduct. To do so, this Part offers a typology that breaks down the conduct into three discrete categories: (1) lawyer admissions; (2) abusive conduct, including in discovery; and (3) strategic choices about the presentation of evidence at trial.<sup>132</sup> This Part demonstrates that the judicial response to evidence in each category has been inconsistent and often hostile. This Part also establishes that the evidence in each category should not be categorically excluded merely because the evidence emerged out of the litigation itself rather than out of the parties’ underlying dispute.

#### A. *Category 1: Lawyers’ Litigation Admissions*

Some scholars characterize a lawyer as the client’s “mouthpiece.”<sup>133</sup> Despite the derogatory connotation,<sup>134</sup> that term serves for present purposes to describe the lawyer’s role as the spokesperson for the client, authorized to speak and to write on the client’s behalf. When the lawyer’s authorized language later contradicts a client’s position, whether in the same or subsequent litigation, it has an evidentiary value—just as the client’s direct statements would.<sup>135</sup> Moreover, according evidentiary value to a lawyer’s prior statement would have

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<sup>131</sup> FED. R. EVID. 403. Beyond the balancing test of Rule 403, the rules provide numerous procedural protections, such as the rule against hearsay evidence, FED. R. EVID. 802, that elevate the fair conduct of trial over the substantive value of information. And, the rules provide substantive protections, such as the prohibition of evidence of settlement negotiations, FED. R. EVID. 408, that promote policies not directly related to the conduct of trial but deemed important enough to warrant evidentiary exclusion. See *supra* text accompanying notes 41–43.

<sup>132</sup> Mansfield perhaps anticipated the typology; he wrote that “[o]ur adjudicatory system places major reliance upon the activity of the parties in framing issues and in gathering and introducing evidence.” Mansfield, *supra* note 28, at 745–46.

<sup>133</sup> See, e.g., Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers’ Ethics*, 108 MICH. L. REV. 925, 937 (2010).

<sup>134</sup> The term “mouthpiece” betrays a “bleak view of the profession” in which “the lawyer, once engaged, does his client’s bidding, lawful or not, ethical or not.” *In re Griffiths*, 413 U.S. 717, 731–32 (1973) (Burger, C.J., dissenting).

<sup>135</sup> See, e.g., Brady W. Mills, *Overzealous Advocacy: The Perils of Taking Inconsistent Litigation Positions*, 21 TUL. J. INT’L & COMP. L. 361, 365 (2013) (“[T]aking arguably inconsistent litigation positions” can impact “credibility.”).

a salient effect in discouraging litigation gamesmanship and would address the attendant “concerns about the proper administration of justice.”<sup>136</sup> Lawyers’ litigation admissions thus form an important category of litigation conduct that deserves evidentiary recognition. It has sometimes enjoyed that status, albeit in limited and doctrinally confusing ways.<sup>137</sup>

### 1. *The Admissibility of Inconsistent Statements Generally*

Before focusing specifically on lawyers’ admissions, it bears mention that one of the most powerful tools in the cross-examination arsenal is the ability to confront a witness—to impeach him—with a prior inconsistent statement.<sup>138</sup> A witness’s prior inconsistent statement on a critical point of testimony undermines not only the force of that testimony, but also, more generally, his overall credibility.<sup>139</sup> So, for example, we easily question the credibility of a witness’s trial testimony that the traffic light was red if we know she wrote a statement for the police report indicating that it was green—or, for that matter, stating that she did not see what color it was. And, more broadly, we question whether a witness who gave those conflicting accounts of the traffic light is credible on other aspects of the accident she claims to have witnessed. We speak in terms of overall witness credibility,<sup>140</sup> not line-by-line credibility of testimony. The practice of impeaching through prior inconsistent statements is so entrenched in evidence law that the Federal Rules of Evidence make no direct mention of the admissibility of such statements;<sup>141</sup> instead, they acknowledge the practice only obliquely in specifying that the questioning attorney “need not show” the inconsistent statement “or disclose its contents to the witness.”<sup>142</sup>

<sup>136</sup> See *id.* at 366.

<sup>137</sup> See *infra* Part III.A.2.

<sup>138</sup> See 1 MCCORMICK ON EVIDENCE § 34, at 207 (Kenneth S. Broun ed., 7th ed. 2013) (“[T]he most widely used impeachment technique is proof that the witness made a pretrial statement inconsistent with her trial testimony.”); see also Edward D. Ohlbaum, *Jacob’s Voice, Esau’s Hands: Evidence-Speak for Trial Lawyers*, 31 STETSON L. REV. 7, 31 (2001) (“One of the most effective and frequently used armaments in the trial lawyer’s arsenal is impeachment by prior inconsistent statement.”).

<sup>139</sup> See 1 MCCORMICK ON EVIDENCE, *supra* note 138, § 34, at 209.

<sup>140</sup> See generally, e.g., Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165 (1990) (evaluating competency of jurors in assessing overall credibility of witnesses).

<sup>141</sup> In 1975, just after the Federal Rules of Evidence went into effect, see Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, the Supreme Court cited no promulgated rule for the “basic” proposition that “prior inconsistent statements may be used to impeach the credibility of a witness.” See *United States v. Hale*, 422 U.S. 171, 176 (1975).

<sup>142</sup> FED. R. EVID. 613(a). The rule also specifies that “the party must, on request, show [the

The cherished right to confront witnesses with prior inconsistencies takes on even greater force when the declarant is a party to the proceedings. A party's prior inconsistent statements are deemed particularly probative and trustworthy, because he "can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under . . . oath."<sup>143</sup> The law uses a discrete term—"admissions"—to describe the inconsistent statements of a party<sup>144</sup> and confers on them an important evidentiary significance not bestowed on all prior inconsistent statements of non-parties: party admissions always constitute affirmative evidence, rather than just a basis for impeachment.<sup>145</sup> As such, they are admissible whether or not the opposing party actually testifies as a witness at trial (so long as they meet other evidentiary criteria).<sup>146</sup> By contrast, third-party witnesses' inconsistent statements, while always available for impeachment if the witness testifies,<sup>147</sup> do not always constitute affirmative evidence.<sup>148</sup> Thus, in the civil case over a traffic accident,

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inconsistent statement] or disclose its contents to an adverse party's attorney." *Id.*; see also FED. R. EVID. 801(d)(1)(A) (excluding from definition of hearsay the prior sworn testimony of a witness under cross-examination).

<sup>143</sup> EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 266 (4th ed. 1963).

<sup>144</sup> The 2011 amendment to Federal Rule of Evidence 801 discarded the term "Admissions" in favor of "Opposing Party's Statement." See H.R. Doc. No. 112-28, at 162-163 (2011). This change in nomenclature reflects two concepts. First, the statement need only be "inconsistent with the party's position at trial"; it need not be an admission of "liability or guilt." KENNETH S. BROUN, ROBERT P. MOSTELLER & PAUL C. GIANNELLI, *EVIDENCE: CASES AND MATERIALS* 840 (8th ed. 2014). Second, and unlike third-party witnesses' declarations against interest, an opposing party's statement "need not have been against the interest of the declarant when made," so long as it is inconsistent with a position the party has advanced at trial. PAUL C. GIANNELLI, *UNDERSTANDING FEDERAL AND CALIFORNIA EVIDENCE* § 32.06[D], at 547 (1st ed. 2014). Despite the revised rule language, caselaw continues to refer to a party's own inconsistent statements as "admissions." See, e.g., *United States v. George*, 761 F.3d 42, 57 (1st Cir. 2014).

<sup>145</sup> Admissions of party opponents are excluded from the definition of "hearsay," FED. R. EVID. 801(d)(2), and, as such are admissible as affirmative evidence. See, e.g., *Edwards v. Nat'l Vision Inc.*, 568 F. App'x 854, 858 (11th Cir. 2014); see also 2 MCCORMICK ON EVIDENCE, *supra* note 138, § 254, at 261 ("[A]dmissions are outside the framework of hearsay exceptions, classed as nonhearsay, and excluded from the hearsay rule."); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853, 900 (2002) ("[R]elevant oral or written admissions of a party opponent are admissible against that party when offered by an opponent, and such admissions are exempted from the operation of the rule against hearsay. They constitute substantive evidence rather than mere impeaching statements.").

<sup>146</sup> Other evidentiary criteria would include the relevance/prejudice balancing test of Federal Rule of Evidence 403, competency of the witness testifying as to the party's prior statement, FED. R. EVID. 601, and the witness's personal knowledge of the statement, FED. R. EVID. 602.

<sup>147</sup> See, e.g., *United States v. Mergen*, 543 F. App'x 46, 49 (2d Cir. 2013).

<sup>148</sup> Third-party witnesses' prior statements are admissible as affirmative evidence in only two circumstances. First, when "[t]he declarant testifies," a prior inconsistent statement is ex-

the plaintiff can freely elicit testimony from a nonparty witness who overheard the defendant confess out of court to running a red light and hitting the plaintiff's vehicle, because the defendant is a party. The defendant's out-of-court statement is admissible whether or not she has offered inconsistent testimony; indeed, it is admissible whether or not she testifies at all.

## 2. *The Admissibility of Lawyer Statements as Admissions*

In theory, the analysis should be no more complicated when the admission in question comes in the form of a lawyer's words rather than from the party directly. The rules of evidence provide that an opposing party's prior statement is excluded from the definition of "hearsay" when it is made "by a person whom the party authorized to make a statement on the subject"<sup>149</sup> or when it was made "by the party's agent or employee on a matter within the scope of that relationship and while it existed."<sup>150</sup> Both of these provisions are apposite to statements lawyers make on their clients' behalves, as scholars have had no trouble concluding.<sup>151</sup> Nevertheless, the law in this area is muddled and infected with unwarranted concerns that have posed unnecessary obstacles to the introduction of lawyer admissions into evidence.

### a. *Pleadings*

Perhaps the most frequent debate about the admissibility of a lawyer's statement on behalf of the client arises in the context of pleadings.<sup>152</sup> The reason for this debate is at first blush elusive; after

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cluded from the definition of hearsay if it was "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." FED. R. EVID. 801(d)(1)(A). Second, when "the declarant is unavailable as a witness," the prior statement is an exception to the rule against hearsay if it was "given as a witness at a trial, hearing, or lawful deposition," FED. R. EVID. 804(b)(1)(A), and if the current adverse party "had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination." FED. R. EVID. 804(b)(1)(B).

<sup>149</sup> FED. R. EVID. 801(d)(2)(C).

<sup>150</sup> FED. R. EVID. 801(d)(2)(D).

<sup>151</sup> See Gary S. Humble, *Evidentiary Admissions of Defense Counsel in Federal Criminal Cases*, 24 AM. CRIM. L. REV. 93, 98 (1986) ("[A]ttorney statements generally should not be treated differently than statements made by other agents."); Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 430 (2002) ("A party's attorney is perhaps the clearest imaginable example of an agent authorized to speak."); Shatz & Whitt, *supra* note 145, at 900 ("[I]t is well established that attorneys' statements come within the rule and that attorneys who are employed by a party are considered to have *prima facie* authority to make such admissions for that party."). See generally Deborah A. DeMott, *The Lawyer As Agent*, 67 FORDHAM L. REV. 301 (1998).

<sup>152</sup> See Mansfield, *supra* note 28, at 707 (noting the "large number of judicial decisions over

all, pleadings are fact-intensive documents signed by the lawyer on the client's behalf.<sup>153</sup> Professor Sherman Clark thus calls them “paradigmatic examples of party admissions.”<sup>154</sup> And courts have often concurred, permitting litigants to introduce their adversaries' prior factual allegations, both in pleadings from prior litigation<sup>155</sup> and in pleadings superseded by amendment in the same action.<sup>156</sup> Some courts have held it to be an abuse of discretion to refuse such evidence.<sup>157</sup> But, a “significant minority” of courts has rejected the introduction of prior

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a long period of time” that “have grappled with the question of whether pleadings should be admissible in evidence”).

<sup>153</sup> See FED. R. CIV. P. 11(a) (“Every pleading . . . must be signed by at least one attorney of record in the attorney's name . . .”).

<sup>154</sup> Clark, *supra* note 116, at 566.

<sup>155</sup> *W.V. Realty Inc. v. N. Ins. Co. of N.Y.*, 334 F.3d 306, 316 (3d Cir. 2003) (“As a general rule, however, [t]he allegations asserted in an earlier lawsuit may be introduced by the adversary as evidence in [a] second action[.]” (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1283, at 541–42 (2d ed. 1990)) (alterations in original)); *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (“Pleadings in a prior case may be used as evidentiary admissions.” (quoting *Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986))); *LWT, Inc. v. Childers*, 19 F.3d 539, 542 (10th Cir. 1994) (“Inconsistent allegations contained in prior pleadings are admissible as evidence in subsequent litigation.”); *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) (“[S]uch pleadings . . . are admissible . . . in any subsequent litigation involving that party.”); *Cont'l Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) (“[T]he pleading of a party made in another action . . . are admissible as admissions of the pleading party to the facts alleged therein . . .”); *Van Houten-Maynard v. ANR Pipeline Co.*, No. 89 C 0377, 1995 WL 317056, at \*11 (N.D. Ill. May 23, 1995) (“[A] pleading in one proceeding is admissible and may be considered as an adverse evidentiary admission in a subsequent proceeding.”).

<sup>156</sup> *W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank*, 712 F.3d 165, 172–73 (3d Cir. 2013) (“A superseded pleading may be offered as evidence rebutting a subsequent contrary assertion.”); *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991) (“[I]t is a substantial abuse of discretion not to allow the jury to be aware that a complaint has been amended, and to examine the prior complaint.”); *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989) (finding that where personal-injury plaintiff substantially changed the pleaded facts surrounding how he came to be injured, “the district court's refusal to permit the jurors to be informed of the amendment and to examine the original complaint so that they could contrast it with the amended complaint was a substantial abuse of discretion”); *McKeon*, 738 F.2d at 31 (“[S]uch pleadings . . . are admissible in the case in which they were originally filed . . .”); *Cont'l Ins.*, 439 F.2d at 1298 (“[P]leadings in the same action which have been superseded by amendment . . . are admissible as admissions of the pleading party to the facts alleged therein . . .”); *Sw. Energy Prod. Co. v. Berry-Helfand*, 411 S.W.3d 581, 604 (Tex. Ct. App. 2013). (“Abandoned or superseded pleadings are admissible against the pleader as admissions by a party-opponent.”); see also *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002) (finding that prior pleadings are admissible “[u]nder some circumstances”).

<sup>157</sup> See, e.g., *LWT*, 19 F.3d at 542 (“Plaintiff's reliance upon defendant's limited warranty in the South Carolina litigation is directly contrary to the position it takes here that the limited warranty never became part of the sales agreement between plaintiff and defendant . . . The district court, therefore, abused its discretion in refusing to consider the South Carolina pleadings.”).

pleadings,<sup>158</sup> leading the First Circuit to note the “lack of unanimity”<sup>159</sup> and the Eighth Circuit to characterize the admissibility of prior pleadings as “a thorny issue in the law of evidence.”<sup>160</sup> And, as Professor Eleanor Swift notes, even “respected commentators assert . . . that factual statements made by a party in prior pleadings should *not* be admissible against that party at trial.”<sup>161</sup>

But the admission of these factual statements is quite proper and finds support in both logic and fairness. Logic dictates that prior pleadings by a party-opponent, signed by the attorney as agent, are no different from other evidence of factual admissions—statements that are typically admissible under the Federal Rules of Evidence.<sup>162</sup> On the fairness side, there is no justification for permitting a party to “advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version,” and then assert that different version, “safe in the belief that the trier of fact will never learn of the change in stories.”<sup>163</sup> So long as the attorney has not detoured outside the zone of her agency, “there is nothing unfair about having to explain one’s past lawsuits.”<sup>164</sup> And the right to explain the inconsistency, which always accompanies the introduction of evidentiary admissions,<sup>165</sup> normally remediates any unfairness that might otherwise result.<sup>166</sup>

<sup>158</sup> See Mansfield, *supra* note 28, at 707.

<sup>159</sup> Vincent v. Louis Marx & Co., 874 F.2d 36, 39 (1st Cir. 1989), *abrogated on other grounds* by Harlow v. Chin, 545 N.E.2d 602, 606 (Mass. 1989).

<sup>160</sup> Garman v. Griffin, 666 F.2d 1156, 1157 (8th Cir. 1981).

<sup>161</sup> Eleanor Swift, *Rival Claims to “Truth,”* 49 HASTINGS L.J. 605, 605 (1998).

<sup>162</sup> See FED. R. EVID. 801(d)(2); Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432 (10th Cir. 1990) (qualifying prior pleadings as admissions under Federal Rule of Evidence 801(d)(2)); see also *supra* text accompanying notes 141–146.

<sup>163</sup> United States v. McKeon, 738 F.2d 26, 31 (2d Cir. 1984); see also United States v. GAF Corp., 928 F.2d 1253, 1260 (2d Cir. 1991) (reversing conviction where defendant was not permitted to introduce original version of government’s bill of particulars because “the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims.”).

<sup>164</sup> Williams v. Union Carbide Corp., 790 F.2d 552, 556 (6th Cir. 1986); see also Van Deelen v. Johnson, No. 05-4039-SAC, 2008 WL 4683022, at \*4 (D. Kan. Oct. 22, 2008).

<sup>165</sup> Evidentiary admissions “are not binding or conclusive on the trier of fact. Like any other evidence, evidentiary admissions are subject to contradiction or explanation.” Ediberto Roman, “*Your Honor What I Meant to State Was . . .*”: A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines As Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP. L. REV. 981, 992 (1995) (footnote omitted).

<sup>166</sup> Minish v. Hanuman Fellowship, 154 Cal. Rptr. 3d 87, 103 (Ct. App. 2013) (“[T]he party who made the pleadings must be allowed to explain the changes.” (quoting Deveny v. Entropin, Inc. 42 Cal. Rptr. 3d 807, 820 (Ct. App. 2006))); see also SST Sterling Swiss Trust 1987 AG v. New Line Cinema, Corp., No. CV 05-2835 DSF(VBKx), 2005 WL 6141290, at \*2 n.1 (C.D. Cal. Oct. 31, 2005) (“[P]rior pleadings are superseded as pleadings, but may still be admissible in

Courts and commentators have given divergent reasons for not admitting prior pleadings. One reason is the general distaste for litigating about litigation, on the theory that it diverts attention away from the main event.<sup>167</sup> For example, the Seventh Circuit affirmed a trial court's refusal to allow an automobile manufacturer to expose the plaintiff's "ambulatory theories" of liability, invoking the judge's right "to keep the jury focused on the claim of liability that requires decision" and not allow the defendant to "hijack the trial" by highlighting "the plaintiff's litigation tactics."<sup>168</sup> Missing from the court's analysis, however, was the probative value the jury could have ascribed to the fact that the plaintiff's strategy was so fluid; the claim of liability that "requires decision" is arguably less credible when the factfinder learns that the plaintiff had articulated different liability theories before settling on the one advanced at trial.<sup>169</sup> And if there was no "reasonable factual basis" for the plaintiff to have pleaded the other theories,<sup>170</sup> the lawyer responsible for the discarded allegations has no reason to think twice about approaching the next lawsuit in the same misguided way.

Some courts express discomfort "hold[ing] parties responsible for allegations in their pleadings when it is evident that they truly had little idea of the contents therein."<sup>171</sup> In essence, this approach reflects a theme that underlies much of the opposition to the admissibility of litigation conduct—that clients should not have to suffer the consequences of their lawyers' strategic decisions.<sup>172</sup> This approach implicitly rejects the notion that lawyers are their clients' agents for purposes of the evidentiary analysis and absolves clients of responsibility for their lawyers' pleading choices. But the Supreme Court has refused to permit clients to "avoid the consequences of the acts or omissions of this freely selected agent" in "our system of representa-

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evidence against the pleader so long as the pleader is given an opportunity to explain any contradictions." (citing *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989)).

<sup>167</sup> See, e.g., *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998) ("A court is entitled to keep the jury focused on the claim of liability that requires decision . . .").

<sup>168</sup> *Id.*

<sup>169</sup> See *id.* ("DePaepe's theory of liability has evolved since the suit began.").

<sup>170</sup> See *Mansfield*, *supra* note 28, at 711 (noting one "purpose of pleadings" is to permit parties to assert issues "in respect to which they have a reasonable factual basis").

<sup>171</sup> E.g., *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 261–62 (Mont. 2010); see also *Lytle v. Stearns*, 830 P.2d 1197, 1205 (Kan. 1992) ("[C]lients are rarely in a position to explain the legal theories and strategies chosen by their attorney.").

<sup>172</sup> See, e.g., *Sabella v. S. Pac. Co.*, 449 P.2d 750, 756 (Cal. 1969) ("[P]unishment of counsel to the detriment of his client is not the function of the court."); see also *infra* notes 265–66, 379 and accompanying text.

tive litigation.”<sup>173</sup> Considering the extent to which clients must live with their lawyers’ strategic choices in almost every other context<sup>174</sup> (including in criminal cases, where the client’s liberty is at stake),<sup>175</sup> it seems odd to distinguish between the lawyer and the client in evaluating the opening salvo in litigation—particularly one that by its nature is so fact intensive. And, again, the rule of inadmissibility only encourages lawyers to plead without regard to underlying factual support.<sup>176</sup>

Courts have also held that using pleaded allegations as factual admissions would encourage vague pleading as a way around admissibility, which would “thwart the underlying ‘fair notice of claim’ purpose of notice pleading.”<sup>177</sup> Mansfield echoed this concern,<sup>178</sup> but it seems antiquated because adequate factual recitation is now imperative under the heightened pleading regime inaugurated by the Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>179</sup>

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<sup>173</sup> *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962); *see also* *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 397 (1993) (noting that clients must be “held accountable for the acts and omissions of their chosen counsel”). There are exceptions to this rule, as Justice Black recognized in *Link*, 370 U.S. at 644–45 (Black, J., dissenting) (“One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that.”). One exception arises in the criminal context, where effective assistance of defense counsel is a constitutional right. *See generally* *Strickland v. Washington*, 466 U.S. 668 (1984). Another arises in the civil context, where many courts are willing to vacate default judgments under Federal Rule of Civil Procedure 60(b)(6) for a lawyer’s “gross negligence.” *See, e.g.,* *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169–70 (9th Cir. 2002). Neither of these exceptions would typically alter the evidentiary analysis for the types of attorney conduct addressed in this Article.

<sup>174</sup> *See* Douglas R. Richmond, *Sanctioning Clients for Lawyers’ Misconduct—Problems of Agency and Equity*, 2012 MICH. ST. L. REV. 835, 863 (noting “the general rule that both lawyers and clients ‘are bound by [lawyers’] trial strategy’” (quoting *Smith v. United States*, 834 F.2d 166, 171 (10th Cir. 1987))). Among other things, parties whose lawyers stake out positions at the trial-court level may not take inconsistent positions on appeal. *See, e.g.,* *United States v. Pierce*, 785 F.3d 832, 843–44 (2d Cir. 2015).

<sup>175</sup> In criminal cases, only a handful of decisions—whether to plead guilty, whether to submit to a trial by jury, whether to appeal, whether to attend the trial, and whether to testify—require the client’s consent; “decisions on a substantially larger group of matters . . . are for counsel.” *See* 3 WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 11.6(a), at 783–84 (3d ed. 2007).

<sup>176</sup> *See supra* notes 152–61 and accompanying text.

<sup>177</sup> *E.g.,* *Kelly v. Ellefson*, 712 N.W.2d 759, 768 (Minn. 2006).

<sup>178</sup> Mansfield, *supra* note 28, at 711 (“A pleader, conscious that his pleading can be used against him, may take care to keep his allegations as general as possible in order to minimize their probative value. If allegations are kept very general, they may be less useful in providing notice to the opponent of the matters in respect to which he will need to be ready with evidence.”).

<sup>179</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

*Twombly* overruled the liberal pleading standard of *Conley v. Gibson*,<sup>180</sup> which governed at the time of Mansfield's discussion. Now, a pleading that is factually barren to the point of depriving the defendant of fair notice will easily fall victim to a motion to dismiss.<sup>181</sup> Although the heightened pleading standards have inspired much criticism (including this author's),<sup>182</sup> they nevertheless protect against the risk that lawyers will plead too generically as a way around the creation of evidence that can later be used against their clients.<sup>183</sup>

Finally, courts and commentators have asserted that the ability to use pleadings as evidence conflicts with a pleader's right under Federal Rule of Civil Procedure 8 to "state as many separate claims or defenses as it has, regardless of consistency."<sup>184</sup> Mansfield asserts that this right "should not be undermined by allowing the use of pleadings as evidence against the pleader."<sup>185</sup> The Fifth and Seventh Circuits have expressed similar views.<sup>186</sup> But the right to plead inconsistently does not lead inexorably to the evidentiary view these courts and commentators have taken. Indeed, there are two significant wrinkles in their analyses. First, the rule that permits inconsistent pleading is designed to protect against dismissal of the complaint as a matter of law;<sup>187</sup> it should not be confused with the very different scrutiny ap-

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<sup>180</sup> *Conley v. Gibson*, 355 U.S. 41 (1957). *Twombly* held that *Conley* "has earned its retirement." *Twombly*, 550 U.S. at 562–63. Under *Twombly*, federal courts now require "factual specificity" in pleading. See, e.g., Luke Meier, *Why Twombly Is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709, 728 (2012).

<sup>181</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation").

<sup>182</sup> See Pollis, *supra* note 19, at 450–52 (criticizing *Iqbal*); *id.* at 459–60 (criticizing *Twombly*).

<sup>183</sup> Cf. Mansfield, *supra* note 28, at 711–12.

<sup>184</sup> See FED. R. CIV. P. 8(d)(3).

<sup>185</sup> Mansfield, *supra* note 28, at 712.

<sup>186</sup> See *DePaape v. Gen. Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998) (noting that plaintiffs should be permitted to plead broadly and inconsistently and then use post-pleading "discovery to winnow or refine theories of liability"); *Cont'l Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) (noting that permitting introduction into evidence of inconsistent pleadings "would place a litigant at his peril in exercising the liberal pleading and joinder provisions of the Federal Rules of Procedure").

<sup>187</sup> See, e.g., *Leal v. McHugh*, 731 F.3d 405, 414 (5th Cir. 2013) (noting that inconsistent allegations "will withstand a motion to dismiss"); *Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95–96 (2d Cir. 1994) ("[E]ven if Henry's claims were somehow inconsistent[,] . . . we could and would entertain them both."). One interesting manifestation of the right to plead inconsistently as a matter of law appears in tax cases, where "symmetry of treatment with respect to the recipient and the payor is not required." See *Bank of Palm Beach & Trust Co. v. United States*, 476 F.2d 1343, 1345 (Ct. Cl. 1973). Thus, the IRS is entitled to argue that a person who receives money earned taxable income while simultaneously challenging the payor's right to deduct the payment as an expense. See *id.*

plied by the *factfinder* in assessing the *credibility* of the pleaded allegations.<sup>188</sup> Second, even under Federal Rule of Civil Procedure 8, a party must have a reasonable factual basis for her allegations.<sup>189</sup> There should thus be no hesitancy in allowing the factfinder to evaluate those allegations—either to demonstrate that the plaintiff truly believes them (as opposed to inconsistent allegations pressed at trial) or, perhaps just as importantly, to demonstrate that she is willing to plead what she does not believe.

Some have argued that modern tort law demands the right to plead inconsistently because of the many potentially responsible defendants and the “several theories of liability” the law recognizes.<sup>190</sup> But many of the problems ascribed to tort pleading involve no inconsistency at all. For example, injuries often have multiple causes, so pleading liability against both operators and manufacturers is not necessarily inconsistent; it becomes so only where the plaintiff asserts in a first action that the defendants in that action were *solely* responsible for the injury, in which case the earlier pleading should be admissible in a second action.<sup>191</sup> Likewise, the typical third-party indemnity claim, premised on the defendant’s own liability, is not an *admission* of liability, but rather an expression of “contingent liability” in which

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<sup>188</sup> Cf. Clark, *supra* note 116, at 573 (“I reject the claim that deference to the procedure rules should cast doubt on the admissibility of factual statements contained in pleadings . . .”).

<sup>189</sup> See *id.* at 578–79 (noting that liberal pleading rules do not “allow parties to make factual allegations which they do not reasonably believe to be true”); *id.* at 574 (“[T]he difficulty posed by a liberal pleading regime is not that parties will be deterred from speaking, but that they will speak too readily. . . . [W]e need to protect the full and fair functioning of the litigation process from the risks inherent in liberal pleading.”); see also Dreier v. Upjohn Co., 492 A.2d 164, 167 (Conn. 1985) (“While alternative and inconsistent pleading is permitted, it would be an abuse of such permission for a plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth.”).

<sup>190</sup> See Garman v. Griffin, 666 F.2d 1156, 1157, 1160 (8th Cir. 1981) (noting that plaintiffs sued both school-bus manufacturer and driver for wrongful death of eleven-year-old boy under negligence and strict-liability theories, respectively); Cont’l Ins. Co. of N.Y. v. Sherman, 439 F.2d 1294, 1298–99 (5th Cir. 1971) (noting that cross-claim implicitly required party to take position inconsistent with position in other action); Svege v. Mercedes-Benz Credit Corp., 329 F. Supp. 2d 285, 286–88 (D. Conn. 2004) (holding—where plaintiffs sued both truck driver that struck decedent’s vehicle and manufacturer and seller of vehicle—that it would be unfair to “penalize Plaintiffs for availing themselves of the opportunity expressly provided by the Federal Rules to plead inconsistent theories”); see also Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 607 (1984) (noting “the modern proliferation of novel statutory causes of action”).

<sup>191</sup> See, e.g., Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1434–35 (10th Cir. 1990) (holding plaintiff’s earlier product-liability complaint against manufacturer of helicopter admissible in trial of negligence claims against helicopter owner and operator where second suit alleged that the owner and operator were the only liable parties).

the defendant only “hypothetically asserts his or her own liability.”<sup>192</sup> We need no general rule of inadmissibility in order for the trial judge in such a case to exclude hypothetical pleadings as being likely to mislead the jury.<sup>193</sup>

*b. Statements in Prior Trials*

By the time a case reaches trial, the skilled attorney has distilled her theory of the case down to the version she thinks is most likely to persuade a jury to reach a favorable verdict. As she does so, she increases the risk that persuasion will overtake accurate factfinding as a motivating objective,<sup>194</sup> and consistency in presentation can become a casualty of advocacy. When that occurs, the lawyer’s inconsistent statements to prior factfinders—provided they were made on behalf of the same client—can sometimes serve as “powerful evidence” in subsequent proceedings,<sup>195</sup> creating “an inference of a readiness to change stories to adjust to new circumstances and from that a certain state of mind about the facts.”<sup>196</sup> Ford’s change of positions in the rollover litigation is a compelling example.<sup>197</sup> But, as the Ford case demonstrates, courts have failed consistently to treat lawyer statements in prior trials as party admissions in subsequent proceedings.<sup>198</sup>

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<sup>192</sup> Clark, *supra* note 116, at 582. The hypothetical nature of this sort of pleading can be apparent from the face of the pleading even when the pleader “did not say the words such as ‘in the alternative’ or ‘even if.’” See *Brandt Indus., Ltd. v. Pitonyak Mach. Corp.*, No. 1:10-CV-0857-TWP-DML, 2012 WL 4357447, at \*3 (S.D. Ind. Sept. 24, 2012); see also *Boullé, Ltd. v. De Boullé Diamond & Jewelry, Inc.*, No. 3:12-CV-01462-L, 2014 WL 4261994, at \*6–7 (N.D. Tex. Aug. 29, 2014).

<sup>193</sup> See FED. R. EVID. 403; *Vincent v. Louis Marx & Co.*, 874 F.2d 36, 41 (1st Cir. 1989) (“[T]his would appear to be the type of question that calls for the balancing approach under Fed. R. Evid. 403 . . . .”); see also *Sunday Riley Modern Skin Care, L.L.C. v. Maesa*, No. CIV.A. H-12-1650, 2014 WL 722870, at \*7 (S.D. Tex. Feb. 20, 2014) (suggesting that parties can avoid inconsistent alternative pleadings by “expressly not[ing] the contingent nature of the complaint”).

<sup>194</sup> See *supra* notes 52–73 and accompanying text.

<sup>195</sup> See *Poulin, supra* note 151, at 404 (discussing prosecutorial admissions).

<sup>196</sup> *Mansfield, supra* note 28, at 718.

<sup>197</sup> See *supra* notes 1–8 and accompanying text. Courts have also been “extremely inconsistent” in evaluating the admissibility of factual statements in written and oral arguments to judges. *Roman, supra* note 165, at 1012. But the caselaw in this area is fairly sparse. See, e.g., *United States v. Demizio*, No. 08-CR-336(JG), 2009 WL 2163099, at \*4 (E.D.N.Y. July 20, 2009) (noting uncertainty as to whether “the contents of legal memoranda, rather than formal pleadings, are treated . . . differently [from] other proposed party admissions”). The analysis for written or oral arguments made to a court before trial should be no different from the analysis of statements made to the factfinder at trial.

<sup>198</sup> See *supra* notes 6–7.

Taking inconsistent positions in two different civil trials is troubling enough. But the transgression takes on greater dimension in the criminal context; “[p]rosecutors frequently argue inconsistent facts or theories of culpability, especially in cases involving co-defendants.”<sup>199</sup> Professor Anne Bowen Poulin has described prosecutorial inconsistency as “a more serious problem than other types of inconsistency tolerated by the system.”<sup>200</sup> An egregious example is at the core of the Supreme Court’s decision in *Bradshaw v. Stumpf*,<sup>201</sup> in which an Ohio prosecutor “was on record as maintaining that [the two defendants] should both be executed on the ground that each was the triggerman, when it was undisputed that only one of them could have been.”<sup>202</sup> The Court remanded the case to the Sixth Circuit to consider the asserted due-process violation, and the Sixth Circuit, in a 9–8 en banc decision, upheld the second-tried defendant’s death sentence.<sup>203</sup> According to the Sixth Circuit majority, “[a]ll that the prosecution did was to argue for two different inferences from the same, unquestionably complete, evidentiary record.”<sup>204</sup> The dissenters had a notably different view, accusing the prosecution of “convenient flip-flopping” that “simply reeks of unfairness.”<sup>205</sup> The dissent chastised the “unwavering commitment to a win-at-any-cost callousness that is directly at odds with our solemn oath to preserve and defend the Constitution of the United States.”<sup>206</sup> As commentators have noted, the flip-flopping “plainly runs counter to the prosecutor’s duty to seek jus-

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<sup>199</sup> Brandon Buskey, *If the Convictions Don’t Fit, You Must Acquit: Examining the Constitutional Limitations on the State’s Pursuit of Inconsistent Criminal Prosecutions*, 36 N.Y.U. REV. L. & SOC. CHANGE 311, 314 (2012); see also Barry Tarlow, *Limitations on the Prosecution’s Ability to Make Inconsistent Arguments in Successive Cases*, CHAMPION, Dec. 1997, at 40, 40 (lamenting “the increasingly common prosecution practice of using irreconcilable fact-based arguments in successive trials to convict two defendants of the same crime”).

<sup>200</sup> Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1430 (2001).

<sup>201</sup> *Bradshaw v. Stumpf*, 545 U.S. 175 (2005).

<sup>202</sup> *Id.* at 189 (Souter, J., concurring).

<sup>203</sup> See *Stumpf v. Robinson*, 722 F.3d 739, 754 (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 905 (2014).

<sup>204</sup> *Id.* at 749.

<sup>205</sup> *Id.* at 758 (Daughtrey, J., dissenting).

<sup>206</sup> *Id.* Justice Stevens, on at least two occasions, emphasized his belief “that serious questions are raised ‘when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.’” See *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., dissenting) (quoting *United States v. Powers*, 467 F.2d 1089, 1097 (7th Cir. 1972) (Stevens, J., dissenting)), *denying cert. to* 31 F.3d 1319 (5th Cir. 1994). The First Circuit has also emphasized that the government’s responsibility “is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.” *United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1988).

tice.”<sup>207</sup> And yet, the legal system is on record as tolerating two death sentences for a crime only one person could have committed.<sup>208</sup>

The Sixth Circuit’s decision in *Stumpf* focused on the defendant’s due-process rights, not the evidentiary issue.<sup>209</sup> Indeed, the majority emphasized that the defendant’s lawyer had “responded to the State’s argument by pointing out the inconsistency in the State’s theory.”<sup>210</sup> It seems, then, that even the majority found it necessary to protect a defendant’s rights in these circumstances by permitting evidence of the prosecution’s inconsistent statements. That position is simple common sense, as “prosecutorial flip-flops on factual positions . . . surely suggest the existence of some doubt.”<sup>211</sup> Even so, “[t]he admissibility of prosecutors’ statements in related cases as admissions of a party opponent” is “an area of law that has been significantly fractured.”<sup>212</sup> Several cases have rejected the use of inconsistent statements from a co-defendant’s prior prosecution<sup>213</sup>—including one in

<sup>207</sup> Shatz & Whitt, *supra* note 145, at 864–65.

<sup>208</sup> Nor is the inconsistency in *Stumpf* an aberration. In one Ninth Circuit case, for example, “[t]he prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at [one defendant’s] trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at [the second defendant’s] trial.” *Thompson v. Calderon*, 120 F.3d 1045, 1057 (9th Cir. 1997) (en banc) (plurality opinion), *rev’d on other grounds*, 523 U.S. 538 (1998); *see also* *Smith v. Groose*, 205 F.3d 1045, 1050–51 (8th Cir. 2000) (“The State points out in its brief that ‘[t]here is no question that the victims were killed during the burglary either before or after the petitioner began to participate.’ This is precisely the point—the State argued in one case, ‘before,’ and in another case, ‘after,’ . . . allow[ing] the State to convict as many defendants as possible in a series of cases in which the question of timing was crucial.”); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (en banc) (Clark, J., concurring) ([T]he prosecution’s theories of the same crime in the two different trials negate one another. They are totally inconsistent. . . . Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth.”).

<sup>209</sup> *Stumpf*, 722 F.3d at 754.

<sup>210</sup> *Id.* at 750.

<sup>211</sup> Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 694 (2014).

<sup>212</sup> *State v. Pearce*, No. 30502, 2007 WL 1544152, at \*11 (Idaho Ct. App. May 30, 2007), *aff’d*, 192 P.3d 1065 (Idaho 2008).

<sup>213</sup> *See, e.g.*, *United States v. DeLoach*, 34 F.3d 1001, 1005–06 (11th Cir. 1994) (“[T]he . . . prosecutor [at the prior trial] was engaged in ‘advocacy as to the credibility of witnesses’ and inviting the ‘jury to draw certain inferences,’ two circumstances under which *McKeon* expressly stated a lawyer’s comments would not be admissible.” (quoting *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984))); *People v. Farmer*, 765 P.2d 940, 962 (Cal. 1989) (“What the prosecutor argued in another trial is not a proper subject for closing argument . . . because it is not a fact in evidence” and “because the jury is unaware of the context of the quoted argument and may thus be misled.”), *abrogated on other grounds*, *People v. Waidla*, 996 P.2d 46, 66 (Cal. 2000); *Commonwealth v. Keo*, 3 N.E.3d 55, 68 (Mass. 2014) (“[A] transcript of the prosecutor’s closing argument from Sok’s trial would not have been admissible at the defendant’s trial because the Commonwealth properly presented alternative (albeit inconsistent) theories of liability in each trial . . .”).

which the aggrieved defendant was later exonerated.<sup>214</sup> In the Seventh Circuit, prosecutors lack the requisite authority to bind the sovereign, so their statements are *never* admissible as prior inconsistent statement.<sup>215</sup>

Perhaps the judicial hostility to admitting a lawyer's prior inconsistent trial statements endures because of the Second Circuit's equivocation in a seminal 1984 decision, *United States v. McKeon*.<sup>216</sup> At first blush, *McKeon* seems to support admissibility of a lawyer's prior inconsistent statements; it affirmed the trial court's admission of a defense lawyer's statement from a prior trial.<sup>217</sup> In doing so, the court articulated two important reasons for rejecting a blanket rule of inadmissibility: first, such a rule would "invite abuse and sharp practice";<sup>218</sup> and second, it would compromise the "function of trials as truth-seeking proceedings," particularly "if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact."<sup>219</sup>

*McKeon* nevertheless retreated from these broad statements by distinguishing admission of lawyers' statements from "the more expansive practices sometimes permitted under the rule allowing use of admissions by a party-opponent."<sup>220</sup> Rather than evaluate lawyers' statements under the ordinary party-admission rule, the *McKeon* court imposed several additional factors on the analysis,<sup>221</sup> including

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<sup>214</sup> See *People v. Cruz*, 643 N.E.2d 636, 665 (Ill. 1994) (following *McKeon* factors and refusing admission of prior prosecution statement); JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 175–80 (2000) (documenting Cruz's exoneration); see also Poulin, *supra* note 151, at 403 ("The prosecutor's shift in position [in *Cruz*] could have raised a warning flag if the court had admitted the prosecution's earlier statements, allowing the jury to consider whether that shift signaled an effort to make up for a deficient case.").

<sup>215</sup> *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997); see also *Bellamy v. State*, 941 A.2d 1107, 1115–16 (Md. 2008) (describing various circuits' position on this question); Poulin, *supra* note 151, at 407 & n.42 (discussing *Zizzo*).

<sup>216</sup> *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984). At the time it was decided, "*McKeon* [was] the cutting edge of the law of vicarious admissions." Alan Mansfield, *Lawyer's Admissions*, *LITIG.* Fall 1985, at 39, 41.

<sup>217</sup> *McKeon*, 738 F.2d at 33.

<sup>218</sup> *Id.* at 31.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 32–33; see also *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991) (explaining *McKeon* holding), *modified*, 952 F.2d 623 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992); *State v. Pearce*, 192 P.3d 1065, 1075 (Idaho 2008) ("The [*McKeon*] court implied" that the distinguishing feature between prior attorney statements that are admissible and those that are not is that the former are "statements of fact equivalent to testimonial statements by the

whether there is an innocent explanation for the inconsistency.<sup>222</sup> But determining whether there is an innocent explanation implicates credibility, a fact-intensive evaluation that we normally delegate to juries.<sup>223</sup> Indeed, the potential impact on credibility is precisely the purpose for admitting the inconsistency in the first place.<sup>224</sup> The *McKeon* holding thus propagated the dangerous perception that lawyers' statements should enjoy greater insulation from juror scrutiny than their clients'. And that holding has endured; thirty years later, courts still invoke the existence of an innocent explanation as dispositive of admissibility.<sup>225</sup>

Furthermore, the *McKeon* decision focused on the admissibility of prior argument of defense counsel in a criminal case, and two of the *McKeon* factors are applicable only in that context.<sup>226</sup> These considerations should play no role in civil cases where a litigant's liberty is not at stake and where "the party against whom the statements are offered generally can take the stand and explain, deny, or rebut the statements"<sup>227</sup> without compromising the right not to testify.<sup>228</sup> They also are unwarranted when applied to the prosecution in criminal cases, because the government enjoys no "right against self-incrimination" and no "constitutional right to counsel."<sup>229</sup> Professor Poulin has thus criticized *McKeon* for erecting "too many barriers to admissibility of inconsistent prosecution statements."<sup>230</sup>

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client," whereas the latter "constituted advocacy regarding witness credibility and inferences to be drawn from the evidence."); Poulin, *supra* note 200, at 1437 ("The [*McKeon*] court . . . adopted a case-by-case approach based on a multi-factor test to determine when counsel's earlier opening statement would be admitted; it feared the problems that could flow from the 'expansive practices sometimes permitted' under the party-admissions rule." (quoting *McKeon*, 738 F.2d at 31–33)).

<sup>222</sup> *McKeon*, 738 F.2d at 32.

<sup>223</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 270 (1986) ("Credibility determinations . . . are jury functions, not those of a judge . . .").

<sup>224</sup> See Poulin, *supra* note 151, at 404–05.

<sup>225</sup> See *Commonwealth v. Keo*, 3 N.E.3d 55, 69 (Mass. 2014) ("[T]he evidence of the prior closing argument only could have been used if there had been a judicial determination 'by a preponderance of the evidence . . . that an innocent explanation for the inconsistency d[id] not exist.'" (alteration in original) (quoting *McKeon*, 738 F.2d at 33)).

<sup>226</sup> Those two factors are: (1) whether the evidence might unfairly undermine "the government's obligation to prove all the elements" of the crime charged, and (2) whether explaining "a seeming inconsistency" might otherwise compromise "other rights of the defense." *McKeon*, 738 F.2d at 32.

<sup>227</sup> *Jordan v. Binns*, 712 F.3d 1123, 1128 (7th Cir. 2013).

<sup>228</sup> Cf. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

<sup>229</sup> *United States v. Bakshinian*, 65 F. Supp. 2d 1104, 1108 (C.D. Cal. 1999).

<sup>230</sup> Poulin, *supra* note 151, at 439.

*McKeon* has thus enjoyed mixed influence. Some courts have found its reasoning “persuasive”<sup>231</sup> and have adopted its holding. At least one court has established its own three-part test for admission of counsel’s prior statement.<sup>232</sup> Another has “express[ed] some doubt as to the legal value of *McKeon*’s procedural safeguards” and looks instead to the existing “ample protection” in the evidence rules.<sup>233</sup> But courts have not responded uniformly; in the criminal context, for example, “[t]he admissibility of government statements as admissions of party opponents has been controversial, provoking a split among the circuits.”<sup>234</sup>

Mansfield suggested in 1992 that “after *McKeon*, counsel will be more careful about what he says in his opening statement.”<sup>235</sup> In fact, thirty years after *McKeon*, there is reason to think the opposite—that courts often permit lawyers, including prosecutors, to avoid answering for their inconsistent statements. One court, in rejecting the admissibility of a prior statement of counsel, has recently invoked the old maxim that “closing arguments of counsel are not evidence.”<sup>236</sup> But that standard jury charge<sup>237</sup> utterly ignores the probative value a lawyer’s statement can have when it contradicts a later-asserted fact, theory, or argument. Unless they have a reason to behave differently, some lawyers “will continue to ‘blow hot and cold as the occasion demands’ without regard for the damage that inconsistent positions cause to our justice system.”<sup>238</sup>

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<sup>231</sup> See, e.g., *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 685 (Wis. 1998).

<sup>232</sup> *Bellamy v. State*, 941 A.2d 1107, 1119 (Md. 2008) (requiring: (1) that assertion of fact be “clearly inconsistent with a subsequent assertion at trial,” (2) that it be “equivalent to testimonial statements,” and (3) that inference of unwarranted inconsistency be “a fair inference” not subject to “an innocent explanation”).

<sup>233</sup> See *United States v. Pursley*, 577 F.3d 1204, 1226 (10th Cir. 2009); see also *Humble*, *supra* note 151, at 118 (suggesting that *McKeon* factors “do not represent a significant departure from established principles.”).

<sup>234</sup> *United States v. Lopez-Ortiz*, 648 F. Supp. 2d 241, 246 (D.P.R. 2009); see also *Poulin*, *supra* note 200, at 1434 (“Courts have shown increasing willingness to admit such statements, although some express reluctance and either refuse to admit the statements altogether or subject them to special scrutiny.”).

<sup>235</sup> Mansfield, *supra* note 28, at 721.

<sup>236</sup> See *Commonwealth v. Keo*, 3 N.E.3d 55, 69 (Mass. 2014).

<sup>237</sup> See, e.g., *Agard v. Portuondo*, 117 F.3d 696, 713 (2d Cir. 1997), *rev’d on other grounds*, 529 U.S. 61 (2000).

<sup>238</sup> Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with A Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, “Mend the Hold,” “Fraud on the Court,” and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 602 (1998) (footnote omitted) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.3 (4th Cir. 1982)).

Finally, some might argue that the doctrine of judicial estoppel is adequate to rein in lawyers' inconsistent positions. Judicial estoppel "precludes a party that successfully asserted a position in a prior proceeding from asserting an inconsistent position in a later proceeding."<sup>239</sup> But the application of judicial estoppel is generally confined to the circumstance in which the offender has already won a prior lawsuit.<sup>240</sup> Thus, the policy served by the doctrine of judicial estoppel is not so much the avoidance of inconsistent positions, but rather the avoidance of "winning, twice, on the basis of incompatible positions."<sup>241</sup> The doctrine is indifferent to litigant inconsistency if the litigant's first version of the assertion was *not* successful. Judicial estoppel may thus stop some cases from getting to trial, but it is an inadequate substitute for allowing the jury to consider lawyers' inconsistent statements for those cases that *do* go to trial.

### B. Category 2: Lawyers' Abusive Conduct

The "win-at-any-cost" mentality that the Sixth Circuit dissenters lamented in *Stumpf*<sup>242</sup> is by no means reflected only in inconsistent positions. The conflict between a lawyer's zeal to win and accurate factfinding rears its head in many other ways.<sup>243</sup> Lawyers who abuse the system (and their adversaries) with unwarranted claims and defenses and abusive discovery tactics often do so precisely because they lack confidence in their ability to prevail on the merits.<sup>244</sup> It is thus reasonable for a factfinder to infer that abusive litigation conduct suggests a weak case—a concept that Edward Imwinkelried calls the "admission-by-conduct theory."<sup>245</sup> Furthermore, admitting evidence of abusive tactics would discourage lawyers from engaging in them.

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<sup>239</sup> Poulin, *supra* note 200, at 1451.

<sup>240</sup> See, e.g., *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 810 (7th Cir. 1987) ([I]f you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events.").

<sup>241</sup> *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990).

<sup>242</sup> *Stumpf v. Robinson*, 722 F.3d 739, 758 (6th Cir. 2013) (en banc) (Daughtrey, J., dissenting), *cert. denied*, 134 S. Ct. 905 (2014).

<sup>243</sup> See *supra* text accompanying notes 52–73.

<sup>244</sup> See Nance, *supra* note 16, at 1102.

<sup>245</sup> See Imwinkelried, *supra* note 12, at 824 ("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."); see also Mansfield, *supra* note 28, at 727 ("From the actions of interviewing a witness, employing an expert, taking a deposition, seeking the issuance of a subpoena, an inference may be possible to the party's or his counsel's beliefs . . .").

But courts have been generally loath to permit juries to hear evidence of litigation misconduct.<sup>246</sup> Attorneys and judges have “remarked that it would be ‘unheard of’ to admit an attorney’s pretrial discovery misconduct against the attorney’s client at [a civil] trial.”<sup>247</sup> Many courts justify that position by invoking the judge-imposed remedies that the Federal Rules of Civil Procedure authorize to address poor lawyer behavior<sup>248</sup> and by raising issues of institutional competence—that “it is generally for the judge . . . and not a jury to determine whether a party should be penalized for bad faith tactics.”<sup>249</sup> The cases are replete with language suggesting that jurors are incapable of evaluating “procedural aspects” of cases<sup>250</sup> or of understanding “litigation techniques.”<sup>251</sup> They also express concern that such evidence would have to come in the form of attorney testimony, because lay witnesses are “unable to explain to the jury all of the intricacies of the defense attorneys’ actions and strategies.”<sup>252</sup> Some cases and commentators express concern that permitting litigation conduct to enter into the merits of dispute resolution would encroach on the litigation

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<sup>246</sup> See, e.g., *Lemon v. Harlem Globetrotters Int’l, Inc.*, Nos. CV 04-0299 PHX DGC, CV 04-1023 PHX DGC, 2006 WL 3524379, at \*2 (D. Ariz. Dec. 6, 2006) (holding that certain litigation conduct “may not be introduced at trial or mentioned to the jury”); *De Anza Santa Cruz Mobile Estates Homeowners Ass’n v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d 708, 733 (Ct. App. 2001) (“[I]mproper evidence of defendant’s litigation conduct so inflamed the jurors that it infected the entire trial . . . .”); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (Fla. Dist. Ct. App. 1995) (“Evidence related to the history of pretrial discovery conduct should normally not be a matter submitted for the jury’s consideration on the issues of liability.”).

<sup>247</sup> *Imwinkelried*, *supra* note 12, at 798.

<sup>248</sup> See, e.g., *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 914 (Mont. 1993) (noting that the Rules of Civil Procedure contain “adequate remedies”); see also *Int’l Surplus Lines Ins. Co. v. Univ. of Wyo. Research Corp.*, 850 F. Supp. 1509, 1528–29 (D. Wyo. 1994), *aff’d sub nom.* *Int’l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901 (10th Cir. 1995); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 520 (Ky. 2006); *Barefield v. DPIC Cos.*, 600 S.E.2d 256, 274 (W. Va. 2004) (Davis, J., concurring); *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 257 (Wyo. 2000).

<sup>249</sup> *Palmer*, 861 P.2d at 914; see also *Schwam v. Farmers Ins. Co. of Ariz.*, No. C20040437, 2008 WL 6494888, at \*2 (Ariz. Super. Ct. Dec. 8, 2008).

<sup>250</sup> See, e.g., *Toy v. Am. Family Mut. Ins. Co.*, No. 12-CV-01683-PAB-MJW, 2014 WL 485922, at \*4 (D. Colo. Feb. 6, 2014).

<sup>251</sup> See *Knotts*, 197 S.W.3d at 520–21; *Palmer*, 861 P.2d at 914; see also Randy Papetti, Note, *The Insurer’s Duty of Good Faith in the Context of Litigation*, 60 GEO. WASH. L. REV. 1931, 1958 (1992) (“Juries are not well-equipped to evaluate the propriety and significance of most litigation tactics, let alone the relevance of such tactics to proving a tort claim for bad faith.”).

<sup>252</sup> See *Palmer*, 861 P.2d at 916.

privilege,<sup>253</sup> which “bars defamation actions based on statements made about the subject matter of proposed or pending litigation.”<sup>254</sup>

In tort claims against insurers, however, courts have shown a slightly greater receptivity to admitting evidence of litigation conduct. In that context, courts sometimes admit evidence of an insurer’s abusive litigation conduct to support an extracontractual claim premised on the insurer’s bad faith.<sup>255</sup> Bad-faith cases are fodder for debate about the admissibility of litigation conduct because insurers owe their insureds “a quasi-fiduciary duty of good faith,”<sup>256</sup> and most courts have extended that duty past the point at which a lawsuit is filed.<sup>257</sup> Some of those courts have thus held that “pleadings and legal strategies” can demonstrate “[a]n insurer’s unreasonable defense,” which in turn “may evidence bad faith.”<sup>258</sup> Some courts have recognized that litigation conduct “may bear on the reasonableness of the insurer’s decision and its state of mind when it evaluated and denied the underlying claim.”<sup>259</sup> These courts counsel “extreme caution” but are nevertheless willing to defer to the trial court the task of determining

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<sup>253</sup> See, e.g., Douglas R. Richmond, *Depositions of Other Lawyers*, 81 TENN. L. REV. 47, 51, 53 (2013).

<sup>254</sup> *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 817 (Colo. Ct. App. 2006); see also *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 693 (Haw. 2003) (delineating numerous policy considerations underlying litigation privilege). But see *Barefield v. DPIC Cos.*, 600 S.E.2d 256, 273–74 (W. Va. 2004) (Davis, J., concurring) (“[F]or the exclusive purpose of a bad faith action, there is no litigation privilege defense to misconduct occurring in an underlying claim.”).

<sup>255</sup> Evidence of post-filing litigation conduct may be admitted if the probative value outweighs the “high prejudicial effect of such evidence.” *Barefield*, 600 S.E.2d at 278–79 (citing *Palmer*, 861 P.2d at 913–16).

<sup>256</sup> See Papetti, *supra* note 251, at 1933 (footnote omitted).

<sup>257</sup> See *White v. W. Title Ins. Co.*, 710 P.2d 309, 317 (Cal. 1985); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 517 (Ky. 2006); *Federated Mut. Ins. Co. v. Anderson*, 991 P.2d 915, 921–22 (Mont. 1999).

<sup>258</sup> See *Ingalls v. Paul Revere Life Ins. Grp.*, 561 N.W.2d 273, 280 (N.D. 1997); see also *Krisa v. Equitable Life Assurance Soc’y*, 109 F. Supp. 2d 316, 321 (M.D. Pa. 2000) (finding that insurer’s baseless fraud counterclaim supported insured’s bad-faith claim); *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38, 43 (Ind. Ct. App. 1999) (stating that insurer could not “escape liability” for having taken a bad-faith “litigation position.”); *Knotts*, 197 S.W.3d at 518 (noting that some courts allow “evidence of the litigation tactics, strategies, and techniques employed on behalf of the insurance company”); *Federated Mut.*, 991 P.2d at 922 (noting that “the continuing duty of good faith can be breached by an insurer’s postfiling conduct,” including “the actions of attorneys” and a “meritless appeal”); *Hollock v. Erie Ins. Exch.*, 903 A.2d 1185, 1187 (Pa. 2006) (Cappy, C.J., dissenting) (stating that jury should have been permitted to evaluate bad faith based on insurer’s attempt “to obfuscate the litigation process” and “undermine the truth determining process”). See generally Papetti, *supra* note 251, at 1965 (acknowledging that “postfiling conduct” can “cast light on the reasonableness of the insurer’s decision and state of mind when evaluating and denying the policyholder’s original claim.”).

<sup>259</sup> *Palmer*, 861 P.2d at 915; see also *Knotts*, 197 S.W.3d at 521–22.

whether to admit the evidence using the standard balancing test between relevance and prejudice.<sup>260</sup>

But even in the bad-faith context, most courts have “strictly limited” the admission of litigation conduct.<sup>261</sup> They offer a variety of reasons. Some seek to avoid “punish[ing] insurers for pursuing legitimate lines of defense . . . of dubious claims.”<sup>262</sup> Those courts fail to explain, however, why jurors are incompetent to determine which lines of defense are legitimate or which claims are dubious; indeed, evaluating claims and defenses is at the core of what all juries are expected to do.

Courts also fear depriving a defendant of “the right to defend an action with all the weapons at its command.”<sup>263</sup> But that concern is troubling, because it suggests that there is an unfettered right to use litigation “weapons.”<sup>264</sup> Surely there is not; we cannot tolerate the assertion of unsupportable claims or defenses or abusive discovery tactics designed solely to harass an adversary. Again, we need to draw a distinction between legitimate and abusive conduct, and there is no principled basis for concluding that jurors, with the benefit of proper instructions and argument from counsel, are incapable of doing so.

And then we return to the common theme: some courts balk at holding the client “responsible for the attorney’s litigation strategy.”<sup>265</sup> But that concern only propagates the problem. It encourages clients to hire attorneys without regard for their professional integrity, because the client will never have to pay the price for it. And it encourages the attorneys to cross the line in order to compete for business.<sup>266</sup>

Finally, many courts have concluded that litigation conduct is simply irrelevant to the underlying dispute—that it “should rarely, if

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<sup>260</sup> *Palmer*, 861 P.2d at 915; *see also* *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 818 (Colo. Ct. App. 2006); *Barefield*, 600 S.E.2d at 279 (Davis, J., concurring) (“In my judgment, the decision in *Palmer* presents the approach that should be used by trial courts in West Virginia when deciding whether to admit evidence of post-litigation misconduct in a bad faith action premised upon pre-litigation conduct.”); *see also supra* note 131 and accompanying text.

<sup>261</sup> *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 634 (S.D. 2009).

<sup>262</sup> *Palmer*, 861 P.2d at 914; *see also, e.g.,* *Roesler v. TIG Ins. Co.*, 251 F. App’x 489, 498 (10th Cir. 2007); *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995); *Knotts*, 197 S.W.3d at 520; *Sims v. Travelers Ins. Co.*, 16 P.3d 468, 471 (Okla. Civ. App. 2000); *Acuity*, 771 N.W.2d at 634–35.

<sup>263</sup> *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 78 (Mo. Ct. App. 1995); *see also Parsons*, 165 P.3d at 819 (“[I]nsurers would be deterred from conducting a vigorous defense if their pleadings could be used as evidence of pre-existing bad faith.”).

<sup>264</sup> *See Morris*, 895 S.W.2d at 78.

<sup>265</sup> *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 368 (Ct. App. 1987).

<sup>266</sup> *See supra* text accompanying notes 98–102.

ever, be allowed to serve as proof of bad faith,” because “once litigation has commenced, the actions taken in its defense are not probative of whether the insurer’s denial of the claim was in bad faith.”<sup>267</sup> One court has expressed the relevance problem as a truism: “[T]he conduct must at least be capable of giving rise to an inference that the insurer’s action was part of a calculated undertaking ‘to evade the insurer’s obligations under the insurance contract.’”<sup>268</sup> One can hardly dispute that point. But it begs the question: who should decide whether to draw the inference—the court or the jury?<sup>269</sup> Consider the contrasting views on the simple question whether post-litigation conduct can warrant an inference of bad faith; where one court sees post-litigation conduct as “not probative” of an earlier claim denial,<sup>270</sup> another sees probative value in the potential finding that the insurer engaged in a “continuing course of conduct.”<sup>271</sup> Courts have obvious difficulty speaking with one voice on these issues, so why do we automatically conclude that judges are more competent than juries to evaluate these questions?

Courts, then, have unduly restricted the use of litigation conduct as substantive evidence even in bad-faith cases. And they have been even more parsimonious in recognizing its probative value outside that narrow context.<sup>272</sup> But there is reason to permit it broadly. The duty of good faith extends beyond insurance transactions; it also applies, for example, “to the . . . litigation of contract claims and defenses” outside the insurance context.<sup>273</sup> Moreover, confining the admissibility of litigation conduct only to the conduct of an insurer

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<sup>267</sup> *Sims*, 16 P.3d at 471; see also *Parsons*, 165 P.3d at 817 (finding that litigation conduct by an attorney after refusal or delay may have limited relevance); *Knotts*, 197 S.W.3d at 522 (acknowledging policy considerations exist under Kentucky law to not include litigation conduct); *Acuity*, 771 N.W.2d at 634–35 (finding that admission of litigation tactics as proof of bad faith will penalize client for pursuing a defense).

<sup>268</sup> *Mine Safety Appliances Co. v. N. River Ins. Co.*, No. 2:09CV348, 2012 WL 4107872, at \*1 (W.D. Pa. Sept. 18, 2012) (quoting *W.V. Realty, Inc. v. N. Ins. Co.*, 334 F.3d 306, 313 (3d Cir. 2003)).

<sup>269</sup> See generally *Pollis*, *supra* note 19, at 446–72 (describing various inference-drawing functions that courts have usurped from juries).

<sup>270</sup> See *Sims*, 16 P.3d at 471 (discussing *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 340–41 (10th Cir. 1995)).

<sup>271</sup> See *Federated Mut. Ins. Co. v. Anderson*, 991 P.2d 915, 922–23 (Mont. 1999).

<sup>272</sup> See, e.g., *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 368 (Ct. App. 1987) (litigation conduct admissible in bad-faith cases only because of the “special relationship between insurer and insured”); see also *Papetti*, *supra* note 251, at 1948 (discussing refusal of court in *Palmer* to apply admissibility of litigation conduct to show bad faith outside of insurance setting).

<sup>273</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981).

defendant—and not also the conduct of the plaintiff—creates an unfair disadvantage for that defendant;<sup>274</sup> why is it not a two-way street?

One commentator's answer is that "litigation effectiveness undoubtedly suffers when zeal is replaced by mandated prudence and constant consideration of an adversary's interests."<sup>275</sup> But that perspective only reinforces the greater value we sometimes place on adversary interest over accurate factfinding and professionalism in the legal profession. Subjecting litigation conduct to jury scrutiny would be a powerful incentive to ensure that all the actors behave appropriately—in ways they are happy to explain or defend to a jury—or suffer the consequences.

### C. *Category 3: Failure to Produce Evidence*

The final category of litigation conduct that has probative value is evidence not produced at trial—that is, evidence that bears on the dispute and that a reasonable person would expect the party in control of that evidence to produce. We logically conclude that the failure to introduce this evidence "amounts to an admission by conduct"—that is, the evidence would have been harmful to the litigation position of the party who failed to introduce it,<sup>276</sup> as Blackstone noted centuries ago.<sup>277</sup> But judicial response to this logical inference has been "deeply conflicted"<sup>278</sup> and "confusing."<sup>279</sup> While many courts instruct juries

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<sup>274</sup> See *Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 599 S.E.2d 673, 688 (W. Va. 2004) (Maynard, C.J., concurring in part and dissenting in part) ("[W]hen one adversary party is punished simply for being adversarial, the system breaks down and degenerates into an unfair and biased exercise in bullying. It is about as fair as a boxing match where one boxer has a hand tied behind his back.").

<sup>275</sup> See Papetti, *supra* note 251, at 1962–63.

<sup>276</sup> See, e.g., Paul Robert Eckert, Note, *Utilizing the Doctrine of Adverse Interferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 WM. & MARY L. REV. 749, 779 (1996); see also Paul Bergman, *Admonishing Jurors to Disregard What They Haven't Heard*, 25 LOY. L.A. L. REV. 689, 691 (1992) ("Based on everyday experience outside the courtroom, most of us expect that if someone is wrongly accused, that person will speak up in his or her own defense. We regard failure to do so as a tacit admission of wrongdoing."); Mansfield, *supra* note 28, at 728 ("[I]f a party interviewed a witness and then did not call him, there is an inference that what the witness said in the interview was unfavorable to the party."); Saltzburg, *supra* note 13, at 1011 ("[T]he absence of certain evidence can be as significant a source of jurors' inferences as its admission.").

<sup>277</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 367–68 (15th ed. 1809) ("[I]f it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed."); see also Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137, 145–46 (1985) (explaining the "naturalness" of this notion appeals to "jurors' common sense").

<sup>278</sup> See Nance, *supra* note 16, at 1132.

that they may draw adverse inferences against the party that failed to produce evidence,<sup>280</sup> others (and some commentators) oppose these instructions.<sup>281</sup>

In considering unproduced evidence, we must distinguish between two kinds. The first is evidence that a party has the ability to introduce but chooses not to offer to the factfinder; we may refer to this as *missing evidence*. The second is evidence that a party has chosen to destroy or withhold, which we commonly characterize as *spoliated evidence*. The two obviously overlap, but they raise slightly different evidentiary questions.

### 1. *The Treatment of Missing Evidence*

Over a century ago, the Supreme Court recognized that “if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”<sup>282</sup> Despite that language, most courts recognize at most “a permissible inference,” not a presumption.<sup>283</sup> “And in most or all jurisdictions, the judiciary has found it necessary to develop a complex body of law on the question of whether to allow a party to invite the inference.”<sup>284</sup>

Some courts have liberally allowed a party to argue for the inference by “comment[ing] on an opposing party’s failure to call a witness during closing argument.”<sup>285</sup> The inference is generally thought to be

<sup>279</sup> See Stier, *supra* note 277, at 137.

<sup>280</sup> “Common law courts of England and the United States have used some form of the missing witness doctrine for more than 250 years.” Carl T. Edwards, Note, *Speak of the Missing Witness, and Surely He Shall Appear: The Missing Witness Doctrine and the Constitutional Rights of Criminal Defendants*—State v. Blair, 117 Wash. 2d 479, 816 P.2d 718 (1991), 67 WASH. L. REV. 691, 697 (1992); see also, e.g., United States v. Adigun, 998 F. Supp. 2d 356, 366 (M.D. Pa. 2014) (explaining criminal defendant’s right to missing-witness jury instruction); Stier, *supra* note 277, at 150 (“If the inference is permitted, the court is allowed (or required) to instruct the jury about the nature of the inference.” (footnote omitted)).

<sup>281</sup> “The last several decades have witnessed a growing wariness among courts about the wisdom of the missing witness rule, however, and a number of courts have rejected it outright.” State v. Tahair, 772 A.2d 1079, 1083–84 (Vt. 2001) (collecting cases); see also Stier, *supra* note 277, at 146 (“[T]he courts have produced a set of guidelines that are extraordinary for their unnatural complexity, their ability to confuse, and their potential for abuse.”).

<sup>282</sup> Graves v. United States, 150 U.S. 118, 121 (1893). Of course, the maxim does not apply to a criminal defendant’s decision not to testify. See U.S. CONST. amend. V; Griffin v. California, 380 U.S. 609, 615 (1965).

<sup>283</sup> See Burgess v. United States, 440 F.2d 226, 233 n.10 (D.C. Cir. 1970); Kochanski v. Speedway SuperAmerica, LLC, 850 N.W.2d 160, 167 (Wis. 2014).

<sup>284</sup> NANCE, *supra* note 22, at 239.

<sup>285</sup> State v. Andrews, 96 A.3d 1199, 1228 (Conn. 2014).

warranted only if the evidence is material, if the party who failed to introduce evidence actually controlled it (or had greater control over it than the party arguing for the inference), and if the party failing to produce the evidence has no reasonable explanation for the failure.<sup>286</sup> Some of the decisions permitting parties to argue for the inference focus on one or more of these elements.<sup>287</sup>

But other courts explicitly instruct juries *not* to infer anything from the failure of a party to call a witness,<sup>288</sup> and several cases express hostility toward missing-evidence inferences. Some courts reject the inference when the party advancing it was in a position to introduce the evidence herself;<sup>289</sup> the Supreme Court's language also suggests that limitation.<sup>290</sup> Some courts and commentators distrust jurors' ability to process "safely" the significance of the evidence and the attendant argument of counsel.<sup>291</sup> They fear that the underlying conditions that warrant the inference are too complicated for jurors to evaluate and that, as a consequence, "counsel's arguments for an inference can be treacherous."<sup>292</sup> Other critics of the inference believe that the alternative explanations for missing evidence are more likely

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<sup>286</sup> See, e.g., *United States v. Graves*, 545 F. App'x 230, 241 (4th Cir. 2013) (per curiam) (articulating control and materiality requirements), *cert. denied*, 134 S. Ct. 2900 (2014); *Kochanski*, 850 N.W.2d at 169–70 (affirming appellate court's reversal of judgment for plaintiff because the record did not support a finding that former employees had material information and were in defendant's control).

<sup>287</sup> See, e.g., *Osborne v. City of Long Beach*, No. 87-6262, 1988 WL 141391, at \*7 (9th Cir. Dec. 20, 1988) (holding that withheld-evidence argument was proper against party that failed to establish imprisoned witness's unavailability for trial); *State v. Carter*, 449 A.2d 1280, 1302–03 (N.J. 1982) (permitting adverse-inference argument "[w]here one party has superior knowledge of the identity of a witness or of what testimony might be expected").

<sup>288</sup> See *United States v. Pierce*, 785 F.3d 832, 843–44 (2d Cir. 2015) (affirming trial-court judge's use of his "standard 'uncalled witnesses' charge").

<sup>289</sup> See, e.g., *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990) (suggesting that "the trier of fact may draw no inference from a party's mere failure to call a witness who is susceptible to subpoena by either party"); *United States v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982) (rejecting missing-witness inference where defendant could have subpoenaed witness to testify); *Washington v. Perez*, 98 A.3d 1140, 1156–57 (N.J. 2014) (rejecting missing-witness inference as applied to defense expert witnesses who were equally available to the plaintiff); see also *Nance*, *supra* note 16, at 1094–96 (explaining that "calling the witness is the better alternative" if the witness is equally available to both sides).

<sup>290</sup> See *Graves v. United States*, 150 U.S. 118, 121 (1893) (authorizing inference as to witnesses that are "peculiarly within" the power of the party against whom inference is sought).

<sup>291</sup> See *United States v. Young*, 463 F.2d 934, 947–48 (D.C. Cir. 1972) (Robinson, J., concurring).

<sup>292</sup> See *id.*; see also *Nance*, *supra* note 33, at 634 (asserting "a need to protect the jury from being asked to perform functions incompatible with its ostensible role").

to be accurate than the inference that the evidence would have been harmful to the party that failed to produce it.<sup>293</sup>

Courts and scholars also direct criticism at the “gamesmanship” that a missing-evidence inference might encourage.<sup>294</sup> One commentator posits that the opportunity to seek the inference “invites abuse by counsel” and is often “treated as just another weapon available for the duel between the lawyers.”<sup>295</sup> The concern has grown since the doctrine’s inception “in light of ‘modern discovery and other disclosure procedures,’ which ‘serve[ ] to diminish both its justification and the need for the inference.’”<sup>296</sup> In other words, the party who seeks to invoke the adverse inference could instead have simply presented the evidence herself.<sup>297</sup> Dale Nance urges that “it is better to get the missing evidence before the court, when that is possible, so the jury can assess it than for the jury merely to try to draw inferences about the significance of its omission.”<sup>298</sup>

The concerns underlying these criticisms are valid. But they suffer from a common flaw: They all incorrectly presuppose that a jury is not competent to scrutinize the argument diligently. It is the jurors’ task to determine whether to draw inferences from other types of circumstantial evidence, and there is no sound justification for treating this category of circumstantial evidence any differently.<sup>299</sup> Jurors, for example, can determine whether the missing evidence is of the sort

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<sup>293</sup> See *State v. Tahair*, 772 A.2d 1079, 1085 (Vt. 2001) (“[W]hile a negative inference from the failure to call a witness might seem ‘natural’ to a jury, there may—in reality—be many reasons for the decision unrelated to the content of the testimony.”); *Livermore*, *supra* note 31, at 29–30 (“Without some means of knowing which belief underlies conduct, any resulting adverse inference is more likely to be wrong than right.”); *Stier*, *supra* note 277, at 144 (“The problem is that we cannot know the content of the testimony that the absent witness would give.”).

<sup>294</sup> *Bramble*, 680 F.2d at 592; see also *Stier*, *supra* note 277, at 171 (criticizing practice of counsel’s seeking “a free ride from a missing witness”).

<sup>295</sup> *Stier*, *supra* note 277, at 155; see also *Livermore*, *supra* note 31, at 33 (“Given the generally fragile probative value of the inference, it becomes clear that much of what actually goes on in trial courts is the effort to obtain a nonprobative tactical advantage.”).

<sup>296</sup> *State v. Quinones*, No. A-0269-04T1, 2008 WL 833500, at \*15 (N.J. Super. Ct. App. Div. Mar. 31, 2008) (Fisher, J., concurring) (per curiam) (quoting *McCORMICK ON EVIDENCE* § 264, (Edward W. Cleary ed., 6th ed. 2006)); see also *Livermore*, *supra* note 31, at 32 (“The missing witness inference arose long before the advent of modern discovery procedures. Today, in civil litigation, the content of any proposed testimony is not only knowable but also generally known.”); *Stier*, *supra* note 277, at 157 (“[T]he opportunity for discovery makes *any* witness ‘available’ to a party.” (citing *McCORMICK ON EVIDENCE* § 272, at 806 (Edward W. Cleary ed., 3d ed. 1984))).

<sup>297</sup> Nance, *supra* note 16, at 1094–95.

<sup>298</sup> NANCE, *supra* note 22, at 237.

<sup>299</sup> See *Pollis*, *supra* note 19, at 436–37.

that “should always be offered” if available.<sup>300</sup> If one party argues for an adverse inference on the strength of a missing witness, the other party has the same opportunity—thus canceling out any advantage unless the jury is persuaded that the missing witness was more naturally in the control of one party or the other.<sup>301</sup> The jury will also be in a position to evaluate, based on the other evidence, whether the witness in question was likely to be in the control of a party or possess relevant knowledge.<sup>302</sup> And any concerns about logistical problems that truly fall in the judge’s domain—for example, whether the witness in question is within the court’s subpoena power—are easily met with instructions from the judge.<sup>303</sup>

It is also true that a jury may lack the necessary context for evaluating the propriety of the inference without bogging down the trial with “evidence attempting to explain why the evidence was not put in.”<sup>304</sup> But, as Mansfield explained, that concern is not “sufficient to justify a flat prohibition against the use of the failure to put in evidence.”<sup>305</sup> Rather, the court should assess in each case the degree to which the explanatory evidence unnecessarily complicates the trial, and the trial judge should enjoy the discretion to make admissibility rulings based upon the specific circumstances of the case before her.<sup>306</sup>

## 2. *The Treatment of Spoliated Evidence*

Beyond strategic choices that lawyers may make about what evidence to introduce at trial, there is another evidentiary tactic that is far more serious and insidious: “destruction of evidence,” also “known as spoliation.”<sup>307</sup> As Sanchirico notes, the literature suggests an “apparent epidemic of evidence tampering,”<sup>308</sup> although the actual extent

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<sup>300</sup> Cf. Livermore, *supra* note 31, at 28–29.

<sup>301</sup> See *id.* at 32; *Graves v. United States*, 150 U.S. 118, 121 (1893) (authorizing inference as to witnesses that are “peculiarly within” the control of the party against whom inference is sought).

<sup>302</sup> Cf. Livermore, *supra* note 31, at 27 (quoting a stock jury instruction that allows a jury to draw an adverse inference against whichever party is more in control of the witness, presumably also allowing the jury to determine which party was in control).

<sup>303</sup> See Stier, *supra* note 277, at 170.

<sup>304</sup> See Mansfield, *supra* note 28, at 734; see also Livermore, *supra* note 31, at 30 (“To offer an explanation is to invite the jury to consider a collateral issue and at a cost in trial time as great as offering the evidence itself.”).

<sup>305</sup> Mansfield, *supra* note 28, at 735.

<sup>306</sup> See FED. R. EVID. 403.

<sup>307</sup> Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction Is an Effective Sanction in Electronic Discovery Cases*, 64 S.C. L. REV. 681, 682 (2013).

<sup>308</sup> Sanchirico, *supra* note 27, at 1219; see also Charles R. Nesson, *Incentives to Spoliate*

of the problem has been the subject of recent debate.<sup>309</sup> Regardless of its prevalence, “no one doubts that evidence tampering is a serious concern.”<sup>310</sup> It is more of a concern in our digital age than it ever was before.<sup>311</sup> When spoliation occurs, it presents a troubling problem of proof, because evidence is destroyed before it ever reaches the adversary’s hands.

Spoliation has indisputable relevance to the underlying dispute; proof of spoliation “supports an inference that the party has a guilty conscience and, hence, is guilty (or at fault).”<sup>312</sup> This “consciousness-of-liability theory . . . has an ancient lineage”;<sup>313</sup> a party who spoliates evidence understands that the evidence would undermine its litigation position and destroys the evidence to hide it from its adversary and, ultimately, the factfinder.<sup>314</sup> It thus has a probative value similar to

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*Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

<sup>309</sup> See Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 644 (2012) (“How often [parties tamper with evidence] is a matter of some dispute.”). An oft-cited study “concluded that fifty percent of all litigators found spoliation to be either a frequent or regular problem.” David A. Bell, Margaret M. Koesel & Tracey L. Turnbull, *Let’s Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 771 (1997). But that study has questionable value. See Sanchirico, *supra* note 27, at 1231–34 (debunking the existence of an actual study on spoliation and explaining the true derivation of the oft-cited “50 percent” statistic); Dale A. Nance, *Hear No Evil, See No Evil: A Comment on Professor Nesson’s Claims About Evidence Suppression*, 13 CARDOZO L. REV. 809, 813 (1991) (challenging the analytical basis for some scholars’ assertions as to the dimensions of the spoliation problem).

<sup>310</sup> Bloom, *supra* note 309, at 644; see also Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) (“Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns.”).

<sup>311</sup> See Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 2 (2011) (“[T]he vulnerability of electronically stored information to deletion or alteration has generated increasing concern by attorneys and courts.”); Lambert, *supra* note 307, at 682 (noting that spoliation “has become increasingly problematic as more evidence is stored electronically”); Robert A. Weninger, *Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom*, 61 CATH. U. L. REV. 775, 775–76 (2012) (observing that “the nature of digitized information” exacerbates the problem of spoliation); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790–91 (2010) (“[T]he annual number of e-discovery sanction cases is generally increasing, [and] there has been a significant increase in both motions and awards since 2004.”).

<sup>312</sup> Swift, *supra* note 161, at 612.

<sup>313</sup> Imwinkelried, *supra* note 12, at 802; see also *Wilson v. United States*, 162 U.S. 613, 621 (1896) (“The destruction . . . of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury.”).

<sup>314</sup> See Adams, *supra* note 311, at 8 (“Wigmore classified spoliation of evidence as a type of conduct that provides evidence of consciousness of a weak case.” (citing 2 WIGMORE, *supra* note 14, § 277); Nance, *supra* note 16, at 1091.

the value of a witness who lies on the witness stand.<sup>315</sup> Spoliation can establish not only the underlying misconduct, but also a level of awareness of the misconduct that can justify punitive damages.<sup>316</sup>

Beyond these inferences, spoliation “threatens to undermine the integrity of civil trial process. It is a form of cheating [that] blatantly compromises the ideal of the trial as a search for truth.”<sup>317</sup> But Sanchirico explains that “the question of what the law does to address the problem has been the subject of little systematic empirical analysis.”<sup>318</sup> There are a number of sanctions that judges can impose upon a party that has been found to have spoliated.<sup>319</sup> Even so, Charles Nesson believes that “judges seem willing, even anxious, to ignore or minimize the role of spoliation rather than to recognize and address it as a serious problem.”<sup>320</sup> Frederic Bloom believes that the repercussions of spoliation are not severe enough; “[a] negative inference . . . leaves the spoliator in no worse a position than if he had dutifully preserved and produced the evidence . . . .”<sup>321</sup>

The issue is somewhat complicated by the disagreement among courts about what type of conduct actually constitutes spoliation. The requisite “level of mental culpability” is “the subject of intense debate among scholars and courts.”<sup>322</sup> The debate focuses in particular on the extent to which a spoliation inference is warranted when the spoliation occurred in the absence of bad faith or intentional misconduct.<sup>323</sup> The rule with respect to electronically stored information tracks this

<sup>315</sup> See Pollis, *supra* note 19, at 461–62, 471–72 (describing evidentiary value of dishonest witness testimony).

<sup>316</sup> Spoliation was at play in the factual background of one of the Supreme Court’s seminal cases on punitive damages, in which an insurance-company supervisor “ordered [an investigator] to change the portion of his report describing the facts of the accident and his analysis of liability.” *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1141, 1148–49, 1172 (Utah 2001), *rev’d on other grounds*, 538 U.S. 408 (2003).

<sup>317</sup> Nesson, *supra* note 308, at 793.

<sup>318</sup> Sanchirico, *supra* note 27, at 1241.

<sup>319</sup> Leubsdorf, *supra* note 103, at 1650 (“A civil court can impose sanctions for spoliation that include dismissing a claim, striking a defense, taking certain facts as established, and assessing attorney fees against the party or lawyer at fault.”).

<sup>320</sup> Nesson, *supra* note 308, at 793.

<sup>321</sup> Bloom, *supra* note 309, at 645.

<sup>322</sup> Lambert, *supra* note 307, at 690; *see also* David C. Norton, Justin M. Woodard & Grace A. Cleveland, *Fifty Shades of Sanctions: What Hath the Goldsmith’s Apprentice Wrought?*, 64 S.C. L. REV. 459, 486 (2013) (collecting cases in table form); Pollis, *supra* note 19, at 471 n.254 (surveying caselaw on extent of spoliator’s required level of intent to justify adverse inference). *See generally* Linzey Erickson, Note, *Give Us a Break: The (In)equity of Courts Imposing Severe Sanctions for Spoliation Without a Finding of Bad Faith*, 60 DRAKE L. REV. 887 (2012) (arguing for bad-faith standard).

<sup>323</sup> See Pollis, *supra* note 19, at 471 n.254.

debate; a recent amendment to the civil rules permits a trial court to impose a wide variety of sanctions “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”<sup>324</sup>

One might expect that the fact-intensive nature of a spoliation determination—including the determination of the spoliator’s bad faith—would be the ideal type of dispute to submit to juries. After all, the very purpose of the jury in our modern litigation system is to resolve factual disputes.<sup>325</sup> Instead, the determination whether or not spoliation has occurred is usually left to the judge.<sup>326</sup> And if the judge finds spoliation, the remedy is often a “permissive” adverse-inference instruction, rather than a mandatory one.<sup>327</sup>

But if a case raises spoliation-related factual questions that potentially warrant an adverse inference, this power allocation between the judge and jury is off kilter. On the one hand, it vests in the trial judge a factfinding power—did spoliation occur, and was it in bad faith?—that belongs to the jury.<sup>328</sup> On the other hand, judges who conclude that spoliation occurred often issue instructions that give the jury no helpful guidance about what to do with that finding.<sup>329</sup>

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<sup>324</sup> FED. R. CIV. P. 37(e).

<sup>325</sup> See, e.g., Steven J. Madrid, Note, *Annexation of the Jury’s Role in Res Judicata Disputes: The Silent Migration from Question of Fact to Question of Law*, 98 CORNELL L. REV. 463, 482 n.110 (2013) (“There is a constitutional right to have a jury hear factual disputes and this cannot be discarded anytime it appears that a judge could come to a decision with greater predictability.”).

<sup>326</sup> See, e.g., *Zellers v. NexTech Ne., LLC*, 533 F. App’x 192, 196 (4th Cir. 2013) (“[A] district court’s refusal to apply an adverse inference based on a party’s alleged spoliation of evidence ‘must stand unless it was an abuse of its broad discretion in this regard.’” (quoting *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 260 (4th Cir. 2011))), cert. denied, 134 S. Ct. 911 (2014); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014) (“[T]he trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy.”); see also Scheindlin & Orr, *supra* note 20, at 1303 (describing various approaches to jury involvement in evaluating spoliation).

<sup>327</sup> See, e.g., *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013).

<sup>328</sup> See *Adams*, *supra* note 311, at 48 (“[T]he use of adverse inference instructions as a form of sanctions creates an inconsistency in the division of labor between judges and juries with respect to fact-finding.”); *id.* at 18–19 (“There will often be an evidentiary basis for a reasonable jury to infer that spoliation was in bad faith rather than negligent or grossly negligent.”). Although the caselaw does not mention it, the delegation of spoliation factfinding to judges may stem from Federal Rule of Evidence 104(b), which provides in relevant part: “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.”

<sup>329</sup> See, e.g., Nance, *supra* note 16, at 1110 (discussing *Jaffee v. Redmond*, 51 F.3d 1346, 1351–52 n.9 (7th Cir. 1995), *aff’d*, 518 U.S. 1 (1996)). A notable exception is *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995), in which the trial court, [r]ather than deciding the spoliation issue itself, . . . provided the jury with appropriate guidelines” for determining

Scholars generally agree that the typical adverse-inference instruction is unhelpful.<sup>330</sup> But scholars disagree about the remedy they would fashion to replace the instruction. Nance, for example, would “radically curtail[ ]” the use of adverse-inference instructions in “favor of simpler remedies that are imposed by the court without the involvement of the jury,”<sup>331</sup> such as issue preclusion.<sup>332</sup> John Leubsdorf believes that adverse-inference instructions lead to juries’ imposition of “excessive punishment,” especially because “the jury is unlikely to hear all the circumstances relevant to determining the appropriate stringency of the sanction.”<sup>333</sup> Like Nance, he also notes that judges have more flexible sanction options at their disposal.<sup>334</sup> And scholars have noted that spoliation runs the risk of leading to “an improper character inference” that infects not just the item of spoliated evidence, but also the underlying character of the spoliator.<sup>335</sup>

But others see a different solution. They believe the jury has a role to play in evaluating the significance of spoliation, which has a centuries-old legal history.<sup>336</sup> Charles Adams advocates abandoning

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whether spoliation occurred and how to address it. *Id.* at 157. By contrast, the recent amendment to the civil rules has only exacerbated the problem; it now gives the judge the power, upon making the factual finding of intentional spoliation, to instruct the jury that it “may” presume that the evidence would have been unfavorable but will not require any particular guidance as to how the jury should do so. *See* FED. R. CIV. P. 37(e)(2)(B)).

<sup>330</sup> *See, e.g.,* Lambert, *supra* note 307, at 699 (“In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.” (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219 (S.D.N.Y. 2003))). Sanchirico suggests that the adverse-inference instruction does more harm than good, because it does not displace the admission of evidence of the spoliation and instead “convey[s] to the jury” only “the judge’s displeasure with the spoliator.” Sanchirico, *supra* note 27, at 1302–03.

<sup>331</sup> Nance, *supra* note 16, at 1091; *see also* NANCE, *supra* note 22, at 241 (“Some courts today choose, I think wisely, to . . . select[ ] one of the other available doctrinal tools that authorize judicially imposed sanctions.”); Nance, *supra* note 33, at 622 (advocating “a substantial decrease in the use of missing evidence arguments to juries and associated jury instructions”).

<sup>332</sup> *See* Nance, *supra* note 16, at 1109–18; *see also id.* at 1129 (“[M]y suggestion would extend issue preclusion to all cases of bad faith and, quite plausibly, to many cases of gross negligence as well.”).

<sup>333</sup> Leubsdorf, *supra* note 103, at 1654.

<sup>334</sup> *Id.* (noting that judges can “choose from an array of sanctions such as fining a lawyer or shifting litigation costs”).

<sup>335</sup> *See, e.g.,* Sanchirico, *supra* note 27, at 1278 n.297 (arguing that jurors will jump “from the bad act of spoliation, for example, to the bad act of unsafe product design”); *see also* 2 WIGMORE, *supra* note 14, § 278, at 133 (“The inference . . . does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.”); Nance, *supra* note 16, at 1102 (“[E]vidence about one’s litigative behavior constitutes ‘other bad acts’ evidence, . . . inviting the juror to reason that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits.”).

<sup>336</sup> *See* Imwinkelried, *supra* note 12, at 802 (“As early as the seventeenth century, English

the adverse-inference instruction and simply allowing “evidence of spoliation to be admitted at trial if a reasonable jury could find that spoliation had occurred and if the spoliation was relevant to a material issue.”<sup>337</sup> That evidence, like any other evidence on any other fact, would be the proper subject of closing argument to the jury on whether “the spoliated evidence was unfavorable to the spoliator.”<sup>338</sup> He urges the court to “rely on attorney advocacy and the good sense of jurors to decide whether spoliation has occurred, and if so, how the proof of spoliation should affect the outcome of the trial.”<sup>339</sup>

All of the commentators aspire to accurate factfinding. What distinguishes them is the approach they believe will best achieve it and will appropriately “punish” and “deter” the spoliator.<sup>340</sup> But if, as Bloom contends, “truth remains at the hopeful heart of spoliation doctrine,”<sup>341</sup> we need to place greater faith in juries to hold the offenders responsible for their misconduct. Only then can we strike the right balance between accurate factfinding and advocacy without depriving juries of the factfinding and dispute-resolution role that our justice system has delegated to them.

#### IV. THE SOCIAL UTILITY OF JUROR ASSESSMENT OF LITIGATION CONDUCT

We have seen how the adversary system, in its quest to promote accurate factfinding, nevertheless creates incentives for distorting it. We need adequate safeguards to ensure fair play. The best way to do that is to allow those who decide the contest—the jurors—to play an increased role in enforcing the rules. Mansfield urged that we should not admit evidence if doing so creates “a substantial likelihood” of deterring conduct we wish to promote.<sup>342</sup> The inverse is also true; at least when evidence has independent probative value, the fact that its admission would also curb conduct we wish to discourage is an additional justification for admitting it.<sup>343</sup>

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courts permitted the opponent to invite the jury to draw an adverse inference from a client’s spoliation of relevant evidence.”).

<sup>337</sup> Adams, *supra* note 311, at 6.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> See Lambert, *supra* note 307, at 686.

<sup>341</sup> Bloom, *supra* note 309, at 646.

<sup>342</sup> See Mansfield, *supra* note 28, at 701–02; see also Imwinkelried, *supra* note 12, at 798–99 (describing Mansfield’s writing).

<sup>343</sup> See Imwinkelried, *supra* note 12, at 817–18 (discussing how attorney misconduct being provable against client in court will curb misconduct).

Indeed, one function of the jury system is to serve as a check against undesirable conduct. “Individually, juries resolve discrete disputes; collectively, their verdicts are ‘a reflection of community values and norms.’”<sup>344</sup> Sanchirico has recognized this dynamic in the product-liability context; a product manufacturer inclined to cut corners and then to destroy evidence of its misconduct will continue to do so until “the price of spoliation is increased—via increased antitampering enforcement,” at which point “we can expect the manufacturer to shift toward other methods of avoiding product liability litigation outcomes. One of these is to choose a safe product design.”<sup>345</sup> There is no reason the evidence rules cannot also be a catalyst for regulating litigation conduct.<sup>346</sup>

Moreover, existing methods of addressing litigation misconduct are inadequate.<sup>347</sup> Imwinkelried notes the inadequacy in connection with discovery misconduct, where “[t]he threat of discipline imposed by the bar has been largely ineffective,” as has “the prospect of sanctions imposed by the judge.”<sup>348</sup> He points to “satellite litigation over sanctions,” which “may work to the advantage of the guilty party.”<sup>349</sup> He thus concludes that “[a]n imaginative, offensive strategy against discovery misconduct is long overdue.”<sup>350</sup> Nesson has criticized judges’ unwillingness to enforce the rules and the resulting “message to every litigator” that spoliation will be tolerated.<sup>351</sup> Clark has similarly observed that available sanctions have “yet to prove a sufficient protection against pleading abuses.”<sup>352</sup> And, “[d]espite the outcry among courts and litigants, some litigants continue to tell courts whatever they believe will suit their present interests.”<sup>353</sup>

These problems continue to exist because of our “self-regulated” system, in which judges and fellow lawyers have had exclusive reign to

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<sup>344</sup> Pollis, *supra* note 19, at 477 (quoting Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 619 (2013)).

<sup>345</sup> Sanchirico, *supra* note 27, at 1294.

<sup>346</sup> See Clark, *supra* note 116, at 575 (“Accordingly, we must rely on the adversarial process with respect to pleading just as we do with respect to our system of justice generally.”).

<sup>347</sup> See *supra* notes 111–21 and accompanying text.

<sup>348</sup> Imwinkelried, *supra* note 12, at 817.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 825.

<sup>351</sup> See Nesson, *supra* note 308, at 806–07 (noting that spoliation continues despite “an impressive array of tools for punishing a litigant or third party who has despoiled evidence” because “judges are extremely reluctant either to expose discovery violations or to punish discovery violations once exposed”).

<sup>352</sup> Clark, *supra* note 116, at 574–75.

<sup>353</sup> Anderson & Holober, *supra* note 238, at 600.

address litigation misconduct.<sup>354</sup> Alex B. Long notes that “the legal profession has a problem in terms of the public’s perception of lawyers’ honesty and the profession’s ability and willingness to police its members.”<sup>355</sup> Jonathan Macey has aptly suggested that we consider “whether such self-regulation is still in the public interest, if indeed it ever was.”<sup>356</sup> In addition to restoring to juries their rightful power to draw inferences based on litigation conduct, permitting juries to consider that conduct as evidence would also serve an important norm-establishing function.<sup>357</sup> Litigators, like other actors, would come to understand that their behaviors are either acceptable or unacceptable—the latter reflected in costs imposed by juries through their verdicts. Holding parties accountable for their attorneys’ “inconsistent positions,” for example, would discourage such behavior, the net effect of which would “protect judicial integrity and ultimately, the public’s trust in the rule of law.”<sup>358</sup> Permitting juries to consider this evidence would have the impact we want it to have. In the pleading context, for example, it would work to the disadvantage of “those who have misused the liberal pleading rules by introducing baseless claims or by pretending to have a level of certainty they did not possess.”<sup>359</sup> This would keep “overzealous advocacy . . . in check.”<sup>360</sup> Additionally, “[t]he very possibility of this type of argument could deter counsel from engaging in pretrial discovery misconduct.”<sup>361</sup>

To be sure, there are some scholars who react skeptically to any suggestion of influencing social norms through evidence rules.<sup>362</sup> Swift, for example, cautions us to be wary of such an “instrumental argument,” because there is no consensus on whether “an evidence rule . . . will deter undesirable out-of-the-courtroom behavior.”<sup>363</sup>

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<sup>354</sup> See Macey, *supra* note 77, at 1081.

<sup>355</sup> Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413, 415 (2010).

<sup>356</sup> Macey, *supra* note 77, at 1081.

<sup>357</sup> See Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 922 (1992) (“The jury . . . determines the norms that will be applied in that case.”).

<sup>358</sup> Anderson & Holober, *supra* note 238, at 733; see also Clark, *supra* note 116, at 575 (noting that “we must rely on the adversarial process with respect to pleading just as we do with respect to our system of justice generally” by permitting “a party’s own statements [to] be used as evidence against it”); Roman, *supra* note 165, at 1014 (“Attorneys must be more accountable for their assertions.”).

<sup>359</sup> Clark, *supra* note 116, at 584.

<sup>360</sup> Roman, *supra* note 165, at 1015.

<sup>361</sup> Imwinkelried, *supra* note 12, at 794.

<sup>362</sup> See, e.g., Swift, *supra* note 161, at 610.

<sup>363</sup> See *id.* at 607 (focusing on pleading inconsistencies).

“The academic commentators,” she notes, “offer contradictory predictions of how attorneys will behave.”<sup>364</sup> She thus would not support the admission of litigation conduct as a tool to regulate the “behavior of attorneys”; instead, she would focus on whether the conduct does or does not advance “the goal of increasing rational factfinding.”<sup>365</sup> But Swift allows that “the rules affect behavior”; her concern is that “we do not know *how much* of an effect they will have.”<sup>366</sup> She also recognizes that utility-based evidence rules raise concerns only when they “detract from the rationality of outcomes.”<sup>367</sup> But given the generally probative value of litigation conduct, we should leave it to lawyers to argue the inferences and to jurors to draw them (or not).<sup>368</sup> In this way, we reap the benefits of preserving the integrity of our jury system and the “instrumental” benefits—whatever one believes them to be—of discouraging the offensive behavior.<sup>369</sup>

## V. ANALYZING LITIGATION CONDUCT UNDER EXISTING EVIDENCE RULES

An analysis under existing evidence rules demonstrates the propriety of admitting evidence of litigation misconduct, even beyond the social-utility benefits. Under the rules, the evidence must be relevant,<sup>370</sup> and its probative value must not be “substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>371</sup> This Part examines the factors that go into that balancing test and explores why courts should discard traditional notions that have historically led them to exclude evidence of litigation conduct. As I have elsewhere argued, the right to a jury trial guaranteed by the Seventh Amendment demands that we scrutinize carefully any reluctance to permit jurors to engage in their proper factfinding roles.<sup>372</sup>

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<sup>364</sup> *Id.* at 609.

<sup>365</sup> *See id.* at 610.

<sup>366</sup> *Id.* at 613.

<sup>367</sup> *See id.*

<sup>368</sup> *See generally* Pollis, *supra* note 19, at 472–78 (emphasizing importance of maintaining juries as factfinders).

<sup>369</sup> *See generally id.*

<sup>370</sup> *See* FED. R. EVID. 402.

<sup>371</sup> *See* FED. R. EVID. 403.

<sup>372</sup> *See* U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”); Pollis, *supra* note 19, at 472–78.

### A. *Relevance*

Determining whether evidence is relevant requires judges to form determinations about the reasonableness of inferences jurors might draw from it. Those determinations are inherently subjective, and we must be wary of usurping the jury's power to draw inferences simply because the judge would not choose to draw them.<sup>373</sup> In any event, commentators have long recognized the logical inferences juries can draw from evidence of litigation conduct.<sup>374</sup>

But there remains judicial hostility to admitting this evidence, and part of that hostility may lie in its distance in time from the underlying dispute. “[T]he law of evidence strives to admit facts that were generated as close in time and space as possible” to the source of the dispute, which Kim Lane Scheppelle characterizes as “ground zero.”<sup>375</sup> But, she notes, privileging the evidential value of temporal proximity “is also deeply problematic in many ways,” including its propensity for “elevating what is distinctive and particular about the individual event in question over and above what is a larger social pattern, which might be a more adequate causal account.”<sup>376</sup> In other words, litigation behavior *may* serve as a better window into the truth than testimony about long-ago events.<sup>377</sup>

We can see this dynamic in action when we apply it to a particular dispute. Suppose, for example, that in a civil case a plaintiff accuses the defendant, a former employee, of stealing trade secrets and delivering them to her new employer. The ground-zero evidence will consist of the documents and witness accounts of what occurred at around the time of the alleged theft. This evidence may include the defendant's own testimony that her negotiations with the new employer were benign and had nothing to do with trade secrets. Now suppose it comes to light that she took notes of those negotiations but withheld them in discovery. The discovery violation—the withholding or destruction of ground-zero evidence—is more removed from ground zero but is perhaps far more probative of what actually occurred than the ground-zero evidence that exists.<sup>378</sup> At the very least, that evaluation should be left to the jury.

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<sup>373</sup> See Pollis, *supra* note 19, at 460 (“[M]easur[ing] . . . the likelihood or reasonableness of two competing inferences . . . is necessarily a subjective exercise . . .”).

<sup>374</sup> See *supra* notes 14, 276–77 and accompanying text.

<sup>375</sup> Kim Lane Scheppelle, *The Ground-Zero Theory of Evidence*, 49 HASTINGS L.J. 321, 322 (1998).

<sup>376</sup> *Id.* at 323 (emphasis omitted).

<sup>377</sup> See Imwinkelried, *supra* note 12, at 803–05.

<sup>378</sup> Cf. *id.* at 806 (“[E]ven though pretrial acts of discovery misconduct are technically

Allowing lawyer conduct into evidence also requires our willingness to permit an inference, which courts have resisted, that the lawyer's conduct is probative of the client's mental processes. Again, this is a running theme we encounter in the litigation-conduct-as-evidence debate.<sup>379</sup> A mechanical response focuses on ordinary principles of agency.<sup>380</sup> As their clients' agents, lawyers bind their clients in numerous ways,<sup>381</sup> and there is no principled distinction that would permit a client to avoid derivative responsibility for a lawyer's litigation misconduct any more than we relieve clients of the other strategic choices the lawyers make.<sup>382</sup> Imwinkelried also notes that attorney misconduct can "lead[ ] to the ultimate, material inference that the client's position in the litigation is weak" even without relying on agency principles.<sup>383</sup> And, in any event, the desire to protect clients from their own attorneys is a dangerous basis on which to analyze the question; it leaves the attorney "free to argue or speak as inconsistently as he wishes" and to engage in other litigation misconduct "without running the risk" that these abuses "will 'boomerang' to his client's detriment."<sup>384</sup>

### B. *Rule 403 Considerations*

The various considerations in the balancing test under Federal Rule of Evidence 403 do not categorically counsel against admissibility of litigation conduct. If we examine them one by one, we see no justification for a blanket exclusion of litigation-conduct evidence on the basis of unfair prejudice, issue confusion, undue delay, or waste of time.<sup>385</sup>

#### 1. *Unfair Prejudice*

The subjectivity that underlies the relevance inquiry is even more problematic in evaluating unfair prejudice.<sup>386</sup> Those who take the view that clients should never pay for the sins of their lawyers are

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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.").

<sup>379</sup> See *supra* notes 171–75, 265 and accompanying text.

<sup>380</sup> See *supra* note 151 and accompanying text.

<sup>381</sup> See *supra* note 173 and accompanying text.

<sup>382</sup> See *supra* notes 173–75 and accompanying text.

<sup>383</sup> Imwinkelried, *supra* note 12, at 810.

<sup>384</sup> See Humble, *supra* note 151, at 119.

<sup>385</sup> This Article does not address two of the factors under Rule 403, misleading the jury and cumulative evidence. These factors are inapposite, except perhaps in specific cases that courts can address as they come up.

<sup>386</sup> See Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV.

likely to find the evidence unfairly prejudicial for the same reasons they reject it on relevance grounds—and courts should reject that reasoning in the prejudice context, as well.

Fairness considerations also demand that the other party have an adequate opportunity to explain the litigation-conduct evidence “so far as the truth will permit.”<sup>387</sup> The jury can “hear the explanation and decide the truth for itself.”<sup>388</sup> If there is a benign explanation, it is not very difficult to bring that out through proper evidence.<sup>389</sup> The opportunity to explain will thus overcome any danger of unfair prejudice.

## 2. *Confusing the Issues*

Nor does introducing evidence of litigation conduct necessarily create insurmountable dangers of confusion. As a threshold matter, allowing judges to evaluate complexity leaves evidentiary rulings vulnerable to judicial hubris.<sup>390</sup> Leubsdorf notes the “natural” inclination of “judges and lawyers to justify deciding what kinds of evidence should be kept from jurors by assuming that they know better than jurors both the true value of evidence and the ways jurors use or misuse evidence.”<sup>391</sup> In one recent case, for example, a judge in a spoliation context admonished the defendant that it could not bring the matter to the jury’s attention, because “[t]he fact-finding necessary to resolve the spoliation issue” had “already occurred, thereby obviating

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220, 236–37 (1976) (noting that “[t]he prejudice rule involves so many subjective decisions by the judge” that the tests “represent little more than gentle admonitions to trial courts”).

<sup>387</sup> *Oscanyan v. Arms Co.*, 103 U.S. 261, 264 (1880); *see also* *Hall v. Wal-Mart Stores E., LP*, 447 F. Supp. 2d 604, 608 (W.D. Va. 2006) (discussing *Oscanyan*).

<sup>388</sup> *Humble*, *supra* note 151, at 119.

<sup>389</sup> *See* *Clark*, *supra* note 116, at 585–86 (providing sample transcript for how testimony explaining prior litigation inconsistency might read, based on the facts in *Garman v. Griffin*, 666 F.2d 1156 (8th Cir. 1981)). *See generally* *Mansfield*, *supra* note 28, at 703 (“There is nothing about use of the parties’ litigation activity as evidence that makes it more likely to lead to complex and time-consuming rebuttal than other sorts of evidence.”). The added burden of permitting explanation is not itself a basis for excluding the initial evidence of misconduct. *See id.* at 702 (“[T]he fact that one item of evidence may lead to the introduction of others ordinarily does not provide a reason for excluding the first.”).

<sup>390</sup> *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1254 (2006) (critiquing “a judicial posture of superior cognitive ability and greater freedom from bias”); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2033 (1997) (“Being a great judge requires the hubris to do what seems necessary, and perhaps surprisingly, the humility to admit the limitations of oneself and the materials at hand.”).

<sup>391</sup> *Leubsdorf*, *supra* note 390, at 1254; *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1778 (2003) (“[T]he legal system makes pragmatic allocative choices in the guise of principled analysis.”).

any role for the jury . . . .”<sup>392</sup> It is one thing to acknowledge that the judge is an evidentiary gatekeeper; it is quite another to conclude that certain types of information are categorically beyond a reasonable jury’s ability to process or that judges enjoy the at-will prerogative to usurp the jury’s factfinding power.<sup>393</sup>

In any event, the complexity concern is founded on longstanding assumptions about jury competency.<sup>394</sup> But, as explained above, there is no convincing reason that juries should be considered any less competent than judges to evaluate the circumstances giving rise to inconsistency, abusive discovery conduct, or missing evidence.<sup>395</sup> There is no basis for distinguishing jurors’ ability to assess litigation functions from the complex standards they evaluate all the time in civil cases (including, often, legal-malpractice cases).<sup>396</sup> Indeed, in some jurisdictions, deceptive attorney conduct is itself the basis of criminal liability and civil claims for treble damages that juries must assess.<sup>397</sup> So, rather than dismiss the jury’s competence to assess the inferential

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<sup>392</sup> Aaron v. Kroger Ltd. P’ship I, No. 2:10CV606, 2012 WL 78392, at \*2 (E.D. Va. Jan. 6, 2012).

<sup>393</sup> See Leubsdorf, *supra* note 390, at 1253–54 (suggesting that the rules of evidence originated to place only the best evidence before jurors but concluding that the rules can be justified only by attributing a lack of competence to the jury); see also Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury’s Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 7, 10 (2000) (discussing the alarming gradual trend toward expanding the judge’s power at the expense of the jury and considering ways in which the judge’s abuse of preliminary factfinding power could dictate the trial outcome).

<sup>394</sup> John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 258–59 (1935) (suggesting that litigation misconduct should “not be admitted unless it appears to the judge” that “reasonably intelligent jurors [can] make an effective appraisal”); see also NANCE, *supra* note 22, at 238 (suggesting that to assess compliance with litigation rules, “the jury would have to be educated about the rules and practices of litigation, an education that could be quite difficult to provide, both costly and distracting in the courtroom setting); Nance, *supra* note 16, at 1109 (“[I]f ‘poetic justice’ is to be done, it can be done, and should be done, by judges rather than juries.”); Nance, *supra* note 33, at 651–52 (suggesting numerous factors “that affect decisions of counsel with regard to evidence within the context of litigation are often matters well beyond the understanding of lay jurors” and that “concerns having to do with the integrity of the bar” are “appropriate for the judiciary to monitor more directly than by submitting the issue to the trier of fact.”).

<sup>395</sup> See *supra* text accompanying notes 261–62, 269–71, 300.

<sup>396</sup> See, e.g., Brannen v. Seifert, 1 N.E.3d 1096, 1117 (Ill. App. Ct. 2013) (“[I]n a legal malpractice action, juries may properly consider standards of professional ethics pertaining to attorneys . . . .”), *appeal denied*, 5 N.E.3d 1123 (Ill. 2014).

<sup>397</sup> See generally Long, *supra* note 355, at 419 (“At least twelve jurisdictions—including California and New York—have statutes on the books that single out lawyers who engage in deceit or collusion. In nearly all of these jurisdictions, a lawyer found to have engaged in such action faces criminal penalties, civil liability in the form of treble damages, or both.” (footnote omitted)).

value of litigation conduct, the justice system should treat that conduct as it has treated other fact questions for hundreds of years—relying on the advocates’ “ability to present the case in the most effective manner possible.”<sup>398</sup>

Nance raises two important concerns that implicate jury competence. First, he worries that jurors are left with no choice except to speculate about the effect the spoliation should have on their assessment of liability.<sup>399</sup> The speculation, in turn, will lead to less accurate trial results than his other proposed solutions, such as judicially ordered issue preclusion.<sup>400</sup> This concern is not well founded. Research shows that jurors “draw conclusions based on whether information assembles into plausible narratives.”<sup>401</sup> Thus, the potential dispositive significance of an adverse inference functions no differently from any other single piece of powerful evidence that a jury may hear over the course of a trial. In cases where the jury would otherwise be strongly inclined to resolve the ultimate issue of liability in favor of the spoliator, it will be the unusual case in which unexplainable spoliation will have occurred in the first place—and, when it does, the party introducing it will have a justifiably difficult time exploiting spoliation to overcome the jurors’ assessments of the evidence that points strongly in the other direction. On the other hand, spoliation is obviously more likely to make a difference in otherwise close cases, where it fits with the other evidence of liability—but those are precisely the cases in which we most want spoliation play a stronger evidentiary role.

Second, Nance likens “evidence about one’s litigative behavior” to “‘other bad acts’ evidence.”<sup>402</sup> He fears the jury’s assumption “that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits.”<sup>403</sup> Empirical evidence in this area would be useful in evaluating how jurors actually react in

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<sup>398</sup> See Jenab & Hoeflich, *supra* note 54, at 471.

<sup>399</sup> Nance, *supra* note 16, at 1100 (“No matter how the juror approaches the problem, she cannot avoid a stark dilemma: she can only very roughly assess—one is right to say ‘speculate’ about—the potential impact of the lost information.”).

<sup>400</sup> See *supra* notes 331–32 and accompanying text.

<sup>401</sup> Griffin, *supra* note 53, at 293.

<sup>402</sup> See Nance, *supra* note 16, at 1102; see also FED. R. EVID. 404(b)(1) (“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”). Nance acknowledges that “this particular problem does not come within the literal prohibition of Rule 404(b),” but he nevertheless believes “there is still a serious risk of a kind of prejudice that is ordinarily considered unfair.” Nance, *supra* note 33, at 659.

<sup>403</sup> Nance, *supra* note 16, at 1102.

these circumstances.<sup>404</sup> The more likely inference the jury would draw, however, is that a party who suppressed evidence did so because the evidence was harmful. Furthermore, other instances of witness cover-up—such as a lie exposed at trial through impeachment—could theoretically be considered bad acts, but that fact alone does not justify withdrawing the evidence from the jury’s consideration.

### 3. *Undue Delay and Wasting Time*

There are inevitably resource-allocation concerns whenever the trial process is burdened with additional evidence. As Mansfield notes, “[t]he drawing of an inference from a party’s trial behavior and the rebutting of that inference may lead to problems in trial management.”<sup>405</sup> But Mansfield also recognizes, rightly so, that the added cost is worthwhile if “borne for the sake of increasing the accuracy of findings.”<sup>406</sup>

The costs are also offset by the value of making misbehavior less remunerative, which in turn will provide a disincentive for lawyers to misbehave. Ultimately, then, we reduce the monetary and societal costs associated with Rambo litigation by allowing juries to hear about tactics that will offend them.<sup>407</sup> The hope is that lawyers will not wish to run the risk of subjecting their litigation conduct to jurors’ scrutiny and will avoid misbehaving in the first place. If that disincentive serves its purpose, there will be relatively few trials burdened by the process of admitting evidence of litigation conduct.

## VI. MEETING THE OTHER OBJECTIONS

Like any other prescription for improving our adversary system, admitting litigation conduct as evidence is not without its costs, many of which have already been described above. Some of these costs are more tangible than others, and some are based on mistaken presumptions of comparative institutional competence. In the end, this Article argues the benefits outweigh the costs, although certain safeguards may be appropriate to protect against inequities.

To begin with, trial itself can become more costly and less efficient when we open the door to the introduction of litigation-conduct

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<sup>404</sup> See Leubsdorf, *supra* note 103, at 1628 (noting that the claim “that jurors will overvalue certain kinds of evidence” has been “invoked to justify almost any exclusionary rule,” and its “appeal . . . is matched only by the failure of empirical evidence to support it”).

<sup>405</sup> Mansfield, *supra* note 28, at 703.

<sup>406</sup> See *id.* at 702.

<sup>407</sup> See *supra* notes 78–89, 359–61 and accompanying text.

evidence. This cost is partially addressed above.<sup>408</sup> It is always more time-consuming to expand the universe of admissible evidence, in part because it can lengthen the trial and in part because it may call upon the judge to rule on more evidentiary objections.<sup>409</sup> But if these costs result in greater verdict accuracy and help to curb offensive lawyer conduct, then they are costs the judicial system should happily bear. As I have elsewhere argued, higher costs “are acceptable if what we get in exchange is the priceless benefit of preserving the jury’s constitutional function.”<sup>410</sup> Here, we not only preserve that function, we also gain an important advantage in creating disincentives for attorneys to misbehave. That advantage may, in turn, offset the increased costs by diminishing the costs associated with bad conduct.<sup>411</sup>

Some would prefer that juries confine their work to resolving the ultimate dispute in the litigation, rather than embroiling themselves in what they consider side issues. Nance, for example, has articulated this concern, suggesting that judges should maintain sole control over the regulation of pretrial activities.<sup>412</sup> He also argues that “the trial judge has pertinent educational, experiential, as well as case-specific informational advantages” that situate her better to evaluate whether the parties have optimized the production of relevant evidence.<sup>413</sup> At the core of this concern lies a presumption that this Article disputes—that the probative value of litigation conduct, as reflected in both pretrial activities and evidence selection, is not high enough to justify the costs associated with allowing the jury to assess it. But if one believes, as I do, that the evidence can provide powerful support for legitimate inferences bearing on questions of ultimate liability, then these are not really side issues at all, and the attendant costs are justified.<sup>414</sup>

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<sup>408</sup> See *supra* text accompanying notes 405–406.

<sup>409</sup> See Mansfield *supra* note 28, at 702–03 (noting that allowing trial conduct evidence may lead to increase in evidentiary objections and introduction of rebuttal evidence).

<sup>410</sup> Pollis, *supra* note 19, at 482.

<sup>411</sup> See, e.g., *supra* notes 89, 101, 105 and accompanying text.

<sup>412</sup> See Nance, *supra* note 16, at 1103–05. Nance would also object to the jury’s consideration of the parties’ trial conduct—that is, choices about how much evidence to introduce—as a factor in their ultimate verdict. See NANCE, *supra* note 22, at 238 (“Judges have a distinct comparative advantage in their understanding of the dynamics (the rules, the economics, and the behavioral norms) of litigation and are, therefore, in a much better position to assess the arguments that will be made by parties in defense of their choices about evidence preparation and selection.”).

<sup>413</sup> NANCE, *supra* note 22, at 233.

<sup>414</sup> Indeed, Nance allows that the explanation for missing evidence “may sometimes have probative value on the underlying merits.” *Id.* at 234. But he does not believe jurors should have a role in determining whether the parties have optimized the production of probative evidence; instead, he posits that remedies for failure to optimize evidence production should be

Inference-drawing aside, judicial supervision has failed to adequately rein in litigation misconduct.<sup>415</sup> Perhaps the reluctance to discipline stems from the fact that judges are themselves lawyers and are “captured” by the legal profession.<sup>416</sup> Whatever the etiology, the empirical history belies the institutional competence argument.<sup>417</sup> In the face of calls for greater judicial enforcement of litigation rules, judges have resisted.<sup>418</sup> And even when judges heed the call to wield their power more definitively, imposing sanctions does “not seem to have

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crafted by the judge. *See id.* & n.155. He suspects that juries otherwise run the risk of improperly “penalizing litigants for what the jury sees as a failure by the litigant to be forthcoming with evidence.” *Id.* at 237. In my view, however, the distinction between optimal production of evidence and inferences available from the absence of probative evidence is too fine to delineate, at least in this context, and runs the risk of improperly reallocating factfinding functions away from the jury.

<sup>415</sup> *See* Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 32 (1993) (noting that judicial imposition of punitive provisions has “spawned more abuse than they have eliminated”); *supra* notes 111–21 & 347–56 and accompanying text.

<sup>416</sup> *See generally* Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457 (2002); *see also* Long, *supra* note 355, at 415–16 (“When discussing the lawyer disciplinary process, commentators also frequently make note of the public’s skepticism regarding whether the legal profession is willing to draft and enforce professional ethics rules in the public’s interest, rather than the interest of the profession itself.”); Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS 367, 383 (2013) (“Scholars have repeatedly complained that courts and bar committees do a poor job of disciplining incompetent or dishonest lawyers. Disciplinary authorities are reluctant to penalize colleagues within their own guild . . . .” (footnote omitted)).

<sup>417</sup> Keeling, *supra* note 415, at 45 (noting that where they have the discretion to do so, “judges will often decline to assess sanctions” in order to save time and expense, “unless sanctions have the effect of removing the litigation from the docket”).

<sup>418</sup> *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2109–10 (2003) (suggesting that judges rarely invoke “formal statutory sanctions”). In the discovery context, for example, we see “[c]ontinued judicial reluctance to apply the sanctions provisions in the discovery rules,” which “further perpetuates the abuse.” Lindsey D. Blanchard, *Rule 37(a)’s Loser-Pays “Mandate”: More Bark than Bite*, 42 U. MEM. L. REV. 109, 147 (2011). Margareth Etienne suggests that judges, although averse to formal sanctions, nevertheless regulate misconduct by issuing “[u]nfavorable rulings on substantive claims” to “penalize lawyer conduct in the courtroom.” Etienne, *supra*, at 2110; *see also id.* at 2149 (“Despite the increased availability of disciplinary tools, judges continue to rely on inherent and less formal means to punish and deter lawyer misconduct.”). To the extent judges engage in that sort of punitive decision making, we should be very concerned that they do so without legal grounding and that, in doing so, they usurp the jury’s factfinding role. *See* Pollis, *supra* note 19, at 448.

had dramatic effect.”<sup>419</sup> A more effective method of discouraging misconduct is clearly required.<sup>420</sup>

And then there is the ubiquitous theme encountered throughout the debate: that clients should not pay the price for lawyer misconduct. The responses to this concern, set forth above,<sup>421</sup> are grounded largely in agency doctrine. Tort liability may also have a role to play in regulating lawyer behavior so that clients do not suffer for their lawyers’ behavioral mistakes.<sup>422</sup> But it is apparent those responses are not entirely satisfying, particularly for criminal defendants, who have more at stake than pecuniary interests.<sup>423</sup> Civil clients, too, can have limited ability to evaluate and select capable counsel and to control that counsel’s litigative conduct.<sup>424</sup>

There is also a serious concern that perhaps overlaps with the unfair-prejudice analysis: the extent to which the evidence will interfere with the attorney-client relationship.<sup>425</sup> It is “[o]ne of the most troublesome arguments against admitting attorney statements.”<sup>426</sup> When the lawyer’s conduct becomes a contested issue at trial, it naturally raises the question whether the lawyer herself will be a necessary witness whose testimony interferes with her ability to serve as an advocate under the Model Rules of Professional Conduct.<sup>427</sup> While evidence of litigation conduct will often be admissible without calling the attorney to the stand,<sup>428</sup> it may be impossible “to rebut an inference

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<sup>419</sup> Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773, 806 (1998).

<sup>420</sup> See, e.g., Long, *supra* note 355, at 474 (“[I]n narrow instances, expanded civil liability for attorney fraud committed upon a court is appropriate.”).

<sup>421</sup> See *supra* notes 172–175, 265–266, 379–384 and accompanying text.

<sup>422</sup> Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 *AM. U. J. GENDER, SOC. POL’Y & L.* 1, 37 (2012) (“[T]he time is proper to integrate professionalism in the determination of legal malpractice cases as part of the lawyer regulatory system as a whole.”).

<sup>423</sup> See Etienne, *supra* note 418, at 2163 (“Even if there were a perfect agency relationship between criminal defense lawyers and their clients, . . . reliance on it . . . to penalize defendants would still be improvident.”). *But see* 3 *LAFAVE, ISRAEL, KING & KERR, supra* note 175, § 11.6(a), at 770–84 (explaining that a lawyer may make most strategic decisions in criminal cases without consulting client).

<sup>424</sup> See Cary, *supra* note 88, at 564–65.

<sup>425</sup> See Mansfield, *supra* note 28, at 704 (“When the question is whether the litigation conduct of a lawyer may be used as an item of evidence, the possibility is presented of a violation of the prohibition against a person functioning at the same time as lawyer and witness.”).

<sup>426</sup> Humble, *supra* note 151, at 105.

<sup>427</sup> See *MODEL RULES OF PROF’L CONDUCT R. 3.7(a)* (AM. BAR ASS’N 2013) (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . .”)

<sup>428</sup> While the vehicle for admitting each type of evidence will vary, there generally will be

from litigation activity of a party” without testimony from the attorney explaining to the jury why he “acted as he did.”<sup>429</sup>

Even so, there are strong reasons for not allowing the attorney-witness rule to serve as a basis for excluding evidence. The rule itself contains an exception if “disqualification of the lawyer would work substantial hardship on the client,”<sup>430</sup> leaving judges wide discretion to permit the evidence, and any necessary rebuttal, without depriving the client of her chosen counsel. Invoking that exception is all the more appropriate in those circumstances where the evidence of misconduct is weak and the explanation is strong. More broadly, the threat of disqualification becomes the tail wagging the dog if lawyers succeed in using the ethical rule as a way to exclude evidence of misconduct; doing so only “compounds the violation.”<sup>431</sup>

In certain cases, then, it may be inequitable to allow the factfinder to draw inferences against the client based on the lawyer’s conduct. This Article therefore recommends a cautious initial approach to my prescription—one that relies on the discretion that judges already enjoy in evidentiary matters. After conducting the traditional admissibility analysis under Rule 403, judges should evaluate whether the particular circumstances of the case or of the representation suggest that admitting evidence of litigation conduct would work a manifest injustice. If it would, the evidence should not come in. But this tempered approach should not serve to undercut the basic thrust of this Article’s argument. And, perhaps with empirical research into the way juries actually employ evidence of litigation conduct in their decisionmaking, as well as research on the ultimate effect the proposal in this Article would have on lawyer behavior, we may grow more comfortable expanding the admissibility of litigation conduct so that we reduce the risk that the exceptions will swallow the rule.

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no need to call an attorney as a witness whenever the evidence exists in documentary form. The same is true of non-documentary discovery misconduct. *See* Imwinkelried, *supra* note 12, at 806–07.

<sup>429</sup> *See* Mansfield, *supra* note 28, at 703; *see also* Imwinkelried, *supra* note 12, at 819 (“[T]here may be a serious question about the motivation for the act . . . [I]f 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.”).

<sup>430</sup> MODEL RULES OF PROF’L CONDUCT R. 3.7(a)(3)

<sup>431</sup> *See* Imwinkelried, *supra* note 12, at 820 (“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.”).

## CONCLUSION

For too long, lawyers have conducted themselves in litigation without fear that their conduct will come back to haunt them or their clients.<sup>432</sup> They have done so because it is profitable and because they get away with it.<sup>433</sup> They get away with it because the consequences for misconduct have been inconsistent and inadequate and because courts have failed to appreciate the evidential value of their behavior.<sup>434</sup>

It is time to recognize both the probative and societal value of allowing juries to draw inferences from the way parties and their counsel choose to litigate. It is time to ensure that the inference Wigmore characterized as “one of the simplest in human experience”<sup>435</sup> enjoys its proper role in dispute resolution and in regulating our judicial system.

That does not mean, of course, that courts should be powerless to exclude evidence of litigation conduct if the probative value is legitimately outweighed by other considerations.<sup>436</sup> But it means that courts should not automatically exclude the evidence merely because it was created in the course of litigation or by a lawyer. To the contrary, the probative and societal value of allowing jurors to scrutinize litigation strategy will be the best antidote to the abusive and irresponsible litigation tactics that have come to infect our judicial system. It means that lawyers who misuse the litigation process to harass their adversaries or withhold evidence will have an incentive not to do so and will potentially pay a price if they do. And it means that litigants like Ford cannot curry favor with one jury by having its attorney acknowledge wrongdoing and then conceal the admission in later trials over the same misconduct.

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<sup>432</sup> See Imwinkelried, *supra* note 12, at 816–17.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> 2 WIGMORE, *supra* note 14, § 278, at 133.

<sup>436</sup> See, e.g., Mansfield, *supra* note 28, at 702–03 (recognizing that under Federal Rule of Evidence 403, some litigation conduct should be excluded).