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# The Adversary System As A Means of Seeking Truth and Justice, 35 J. Marshall L. Rev. 147 (2002)

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# ARTICLES

# THE ADVERSARY SYSTEM AS A MEANS OF SEEKING TRUTH AND JUSTICE

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"The purpose of a lawsuit is to arrive at the truth of the controversy, in order that justice may be done."[1] It is one of the "decencies of civilization that no one would dispute."[2]

## INTRODUCTION

Litigation accomplishes the purpose of truth seeking by employing the adversary system.[3] The adversary system is based on the assumption that the truth of a controversy will best be arrived at by granting the competing parties, with the help of an advocate, an opportunity to fight as hard as possible.[4] Few systems rely more on the self-interests of the participants.[5] The system operates on the assumption that the self-interests of the combatants will clash so as to hone the issues in such a way as to find the truth, and thus, reach a just result.[6]

The adversary system has been compared to the Church's canonization of Saints.[7] In the canonization process, a "devil's advocate" is appointed with the designated purpose of compiling all the reasons to oppose canonizing the person in question.[8] The

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1. Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 479+ (1962) (quoting DWIGHT G. MCCARTY, PSYCHOLOGY & THE LAW 223 (1960)).

2. Barrett, *supra* note 1, at 479 (quoting *Mich. Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913)).

3. *Id.* at 479-80.

4. *Id.* at 480.

5. RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 8 (2d ed. 1997).

6. *Id.*

7. Barrett, *supra* note 1, at 480-81.

8. *Id.*

underlying theory behind the procedure is that the truth is best served by placing the responsibility on the parties themselves to formulate their case and destroy the case of their adversary.[9] This rationale is identical to that of the adversary system.

There are at least three sides to every dispute. The adversaries introduce facts that each thinks are relevant and material. Each set of facts comprises one side of the dispute. The third side to the dispute consists of the sum of those facts. Because the sum of the facts is not always relevant and material, the adversary system regulates the conduct of each participant's attorney and the process of discovery. The adversary system's ultimate purpose is to best find the facts and resolve the dispute. The rules set forth in the Model Rules of Professional Conduct ("Model Rules") and the rules of discovery in the Federal Rules of Civil Procedure help to achieve this purpose.

Adhering to the Model Rules is a responsibility of every attorney.[10] As an example, Illinois has adopted a set of professional conduct rules, the Illinois Rules of Professional Conduct, ("Illinois Rules") which are similar to the Model Rules.[11] These rules are mandatory[12] as are the rules of discovery.[13] Violations of either of these sets of rules subject an attorney to possible sanctions. In addition to these rules, there are Codes of Civility that are merely precatory.[14] Illinois has adopted such a Code of Civility. These rules and codes attempt to balance the tension between an attorney's responsibility of seeking the truth and being an advocate. As a safeguard, the court also possesses the inherent power to sanction bad faith conduct in litigation.[15]

Part I of this Article discusses the Model Rules. It begins with a brief history of the Model Rules and continues with a discussion of various rules that give rise to an attorney's various

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9. *Id.* at 480.

10. *See* MODEL RULES OF PROF'L CONDUCT Pmbl. ¶ 11 (1999) (stating that "[e]very lawyer is responsible for observance of the Rules of Professional Conduct.").

11. *See generally* ILLINOIS RULES OF PROF'L CONDUCT (1999).

12. *See* ILLINOIS RULES OF PROF'L CONDUCT Preamble (1999) (stating that "[v]iolation of these rules is grounds for discipline").

13. Spain v. Owens Corning Fiberglass Corp., 710 N.E.2d 528, 537 (Ill. App. Ct. 1999).

14. *See* Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 448 (1992) (listing the proposed standards for professional conduct in the Seventh Circuit). In the Preamble to this Civility Code, the authors specifically state that the code is "voluntary," "designed to encourage," and "shall not be used as a basis for litigation or for sanctions or penalties." *Id.*

15. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (holding that "a court may assess attorney's fees when a party has 'acted in bad faith vexatiously, wantonly or for oppressive reasons.'") (quoting F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974)).

duties. Part II of this Article discusses the rules of discovery contained in the Federal Rules of Civil Procedure and the possible sanctions imposed if one violates them. Part III of this Article begins by comparing an attorney's duty to the public as an officer of the court with his duty to his client. Part III concludes with a discussion of the rules of discovery and how these rules should be interpreted to best support the adversary system in arriving at the truth of a lawsuit.

## I. THE MODEL RULES OF PROFESSIONAL CONDUCT

In 1887, a formal code of legal ethics was first adopted in the United States by the State of Alabama.[16] The American Bar Association ("ABA") responded twenty years later with the promulgation of its Canons of Professional Ethics.[17] The Canons remained in effect for sixty-one years[18] and were then replaced by the Model Code of Professional Responsibility.[19] Less than ten years later, the ABA established the Kutak Commission to draft a new code of conduct for attorneys.[20] The Commission's work resulted in the ABA's 1983 enactment of the Model Rules.[21] These rules constitute the current articulation of the legal profession's ethical norms.[22] The Model Rules prescribe many of a lawyer's professional responsibilities.[23] Encompassed in these rules of professional conduct are duties an attorney owes to the public, the court, his or her adversary, and his or her client. Part A of this Section discusses the duty an attorney owes to the public. Part B discusses the attorney's duty to the court. Part C discusses the attorney's duty to his or her adversary and lastly, Part D discusses an attorney's duty to his or her client.

### *A. Duty to the Public*

A lawyer is "a public citizen having [a] special responsibility for the quality of justice."[24] As a member of the public, an attorney has a duty to improve the legal system, to uphold justice, and to improve the level of legal services provided by members of the profession.[25] Although no single rule precisely covers an attorney's

16. Christopher W. Deering, *Candor Toward the Tribunal: Should An Attorney Sacrifice Truth and Integrity For the Sake of the Client?* 31 SUFFOLK U. L. REV. 59, 67 (1997).
17. *Id.* at 68.
18. *Id.*
19. *Id.* at 72.
20. *Id.* at 73.
21. Deering, *supra* note 16, at 73.
22. *Id.*
23. *See generally* MODEL RULES OF PROF'L CONDUCT Pmbl. (1999).
24. *Id.* at 1.
25. *Id.* at 5.

duty to the public, the underlying purpose of all of the rules is to protect the public. The Preamble to the Model Rules states that: "[l]awyers play a vital role in the preservation of society."[26] In order to satisfy that role, a lawyer must understand how he or she, as an individual, relates to the legal system as a whole.[27] "The Rules of Professional Conduct, when properly applied, serve to define that relationship."[28]

### *B. Duty to the Court*

An attorney is an "officer of the legal system."[29] As an officer of the legal system, an attorney has a duty to bring before the court only claims that have merit.[30] An attorney also has a duty as the court's officer to make all efforts possible, while maintaining his or her client's interests, to expedite a lawsuit.[31] Lastly, an attorney, as officer of the court, has a general duty of "candor" to the court.[32] Encompassed in this general duty of candor is the duty

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26. *Id.* at 12.

27. *Id.*

28. MODEL RULES OF PROF'L CONDUCT Pmbl. ¶ 12 (1999).

29. *Id.* at 1.

30. *See* MODEL RULES OF PROF'L CONDUCT Rule 3.1 (1999) (covering "meritorious claims and contentions"). Rule 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

*Id. See also* ILLINOIS RULES OF PROF'L CONDUCT Rule 3.1 (2002) (containing the same language as the Model Rules Rule 3.1). The court referred to the latter part of Rule 3.1 in *United States ex rel. Bell v. Klincar* when it stated that even if the attorney knew that his client was guilty in the underlying cause of action, he still had a duty to obtain any "truthful exculpatory testimony." 1993 WL 243188, *3 (N.D. Ill. June 30, 1993).

31. *See* MODEL RULES OF PROF'L CONDUCT Rule 3.2 (1999) (covering the expedition of litigation). "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." *Id. See also* ILLINOIS RULES OF PROF'L CONDUCT Rule 3.2 (2002) (containing the same language as the Model Rules Rule 3.2). The court in *In re Smith* held that an attorney violated Rule 3.2 of the Illinois Rules in the handling of five marriage dissolution cases. 659 N.E.2d 896, 902-03 (Ill. 1995). In one case, the attorney was retained in May 1991. *Id.* at 901. The client paid the attorney fees by August 1991. *Id.* The attorney did not complete the case for three years. *Id.* The attorney handled the other marriage dissolution cases similarly. *Id.* at 902.

32. *See* MODEL RULES OF PROF'L CONDUCT Rule 3.3 (1999) (covering an attorney's general duty of candor to the court). Rule 3.3 also states that the duties of candor to the court continue throughout the legal proceeding and must be followed even if it means that otherwise protected information under Rule 1.6 (Confidentiality) must be disclosed. *Id.* at 3.3(b). Model Rule 3.3 further states "[a] lawyer may refuse to offer evidence that the lawyer

to refrain from knowingly making misrepresentations of material facts or law to the court.[33] The duty of candor also includes the positive duty to disclose to the court material facts that, if not disclosed, would cause the attorney to assist his or her client in a criminal or fraudulent act.[34] The duty of candor to the court also includes the positive duty to disclose to the court controlling legal authority that the attorney knows is directly adverse to his or her

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reasonably believes is false." *Id.* at 3.3(c). Finally, Model Rule 3.3 states that "[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." *Id.* at 3.3(d). *See also* ILLINOIS RULES OF PROF'L CONDUCT Rule 3.3 (2002) (containing all of the requirements of Model Rule 3.3 and eleven additional requirements). These additional requirements of Illinois Rule 3.3 are that an attorney, who appears in front of the court, shall not:

> (5) participate in the creation of or preservation of evidence when the lawyer knows or reasonably should know the evidence is false;
> (6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent;
> (7) engage in other illegal conduct or conduct in violation of these rules;
> (8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant;
> (9) intentionally degrade a witness or other person by stating or alluding to personal facts concerning that person which are not relevant to the case;
> (10) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but a lawyer may argue, on analysis of evidence, for any position or conclusion with respect to the matter stated herein;
> (11) refuse to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client;
> (12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do;
> (13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce;
> (14) advise or cause a person to become unavailable as a witness by leaving the jurisdiction or making secret their whereabouts within the jurisdiction; or
> (15) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case . . . .

ILLINOIS RULES OF PROF'L CONDUCT Rule 3.3(a)(515) (2002).

An Illinois court held that Illinois Rule 3.3(a)(11) and (13) were violated when an attorney, during a deposition of his client, directed his client not to answer questions that the court had approved and had ordered to be answered. Castillo v. St. Paul Fire & Marine Ins. Co., 828 F. Supp. 594, 603 (C.D. Ill. 1992).

33. MODEL RULES OF PROF'L CONDUCT Rule 3.3(a)(1) (1999).

34. *Id.* at 3.3(a)(3).

client's interests that the opposing party has failed to disclose.[35] Lastly, an attorney, as a court officer, must not knowingly present any false evidence, and if he or she finds out that material evidence is false after it has been presented, he or she must remedy this.[36] The duty of candor to the court is set forth in Rule 3.3 of the Model Rules and the Illinois Rules.

### C. *Duty to the Adversary*

An attorney has a duty to the opposing party to the lawsuit and the opposing counsel.[37] This duty is defined in Rule 3.4 of the Model Rules and the Illinois Rules. Encompassed in this duty is the duty to refrain from unlawfully interfering with the opposing party's access to any evidence.[38] An attorney may not interfere with the access to evidence him or herself by assisting another party in doing so.[39] This duty to one's adversary also prohibits an attorney from falsifying evidence, from advising or helping a witness who intends to testify falsely, and from offering an illegal inducement to a potential witness.[40] This duty also prohibits an attorney from knowingly failing to obey a rule of the court.[41] It prohibits an attorney from making frivolous discovery requests or unreasonably failing to comply with an opposing party's proper discovery requests.[42] It also prohibits an attorney from addressing any irrelevant issue at trial.[43] An attorney is also prohibited from asserting any factual, personal knowledge, except when he or she acts as a witness, or from asserting any personal opinions.[44]

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35. *Id.*

36. *Id.* at 3.3(a)(4). *See* MODEL RULES OF PROF'L CONDUCT Rule 3.4 (1999) (covering the duties owed by an attorney to the opposing party and opposing counsel).

37. *See* MODEL RULE OF PROF'L CONDUCT Rule 3.4 (1999) (defining a lawyers' duty to opposing counsel and fairness to the opposing party).

38. *Id.* at 3.4(a). The court in *U.S. v. Hunter* stated that an attorney "may have" violated Rule 3.4 of the Illinois Rules by "unlawfully obstruct[ing] another party's access to evidence" when the attorney removed boxes of money from the defendant's home, thus preventing the police from acquiring this evidence. No. 93 CR 318, 1995 WL 12513, at *2 (N.D. Ill. Jan. 6, 1995).
The court, in *Castillo v. St. Paul Fire & Marine Ins. Co.*, held that an attorney violated Rule 3.4(a)(l) of the Illinois Rules by unlawfully interfering with the opposing party's opportunity to obtain evidence when he raised meritless objections based on the attorney client privilege and when he ordered his client not to answer the opponent's questions based on the same meritless objections. 828 F. Supp. 594, 603 (C.D. Ill. 1992).

39. MODEL RULES OF PROF'L CONDUCT Rule 3.4(a) (1999).

40. *Id.* at 3.4(b).

41. *Id.* at 3.4(c). This rule does not apply if the attorney openly refuses to disobey a duty because he or she believes that no valid duty exists. *Id.*

42. *Id.* at 3.4(d).

43. *Id.* at 3.4(e). This includes those issues that are unsupportable by admissible evidence. *Id.*

44. MODEL RULES OF PROF'L CONDUCT Rule 3.4(e) (1999). This rule applies

Lastly, the attorney's duty to his or her opponent includes the duty to refrain from asking any person, other than his or her client, to refuse to volunteer any relevant information.[45]

### D. Duty to the Client

Encompassed in the Model Rules are many duties an attorney owes to his or her client. These duties include the duty of competence,[46] the duty of diligence and promptness,[47] the duty of communication,[48] the duty of confidentiality,[49] and the duty of loyalty.[50] These duties are similarly prescribed in the Illinois Rules.[51]

## II. RULES 26 AND 27 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure provide guidelines for an attorney to follow in the discovery process of civil litigation. The rules also include sanctions to be imposed when an attorney fails to follow these guidelines.

Rule 26 covers the general provisions governing the discovery process and the attorney's duty of disclosure.[52] Rule 26(b)(1) permits discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[53] Thus, Rule 26 contemplates the discovery of all admissible evidence and anything that is "reasonably calculated to lead to the discovery of admissible evidence."[54]

Rule 37 deals with an attorney's failure to make or cooperate in discovery and the sanctions to be imposed when such failure occurs.[55]

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to an attorney's personal opinion regarding whether the cause is just, whether the witness is credible, whether the civil litigant is culpable or whether the accused is guilty or innocent. *Id.*

45. *Id.* at 3.4(f). This rule does not apply if the person is a relative, an employee or an agent of a client; and if the lawyer reasonably believes that the person's interests will not be harmed by refusing to give the information. *Id.*

46. MODEL RULES OF PROF'L CONDUCT (1999) Rule 1.1.

47. *Id.* at 1.3.

48. *Id.* at 1.4.

49. *Id.* at 1.6.

50. *Id.* at 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12.

51. *See* ILLINOIS RULES OF PROF'L CONDUCT (2002) Rule 1.1 (describing the duty of competence); Rule 1.3 (describing the duty of diligence); Rule 1.4 (describing the duty of communication); Rule 1.6 (describing the duty of confidentiality); Rule 11.12 (discussing various duties of loyalty that arise in conflict of interest situations).

52. *See* FED. R. CIV. P. 26 (including provisions addressing discovery scope, exemptions and trial preparation).

53. *Id.*

54. *See* Schaap v. Executive Indus., Inc., 130 F.R.D. 384, 386 (N.D. Ill. 1990) (quoting FED. R. CIV. P. 26(b)(1)).

55. *See* FED. R. CIV. P. 37 (requiring sanctions if the discovery rules are

## III. THE ADVERSARY SYSTEM AS A MEANS OF ACHIEVING A TRUTHFUL AND JUST OUTCOME

The adversary system is the system employed in the United States to resolve litigation disputes. It relies on the "unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice."[56] If the system allows any untruthfulness or lack of candor to exist, the process loses validity.[57] If the adversary system loses validity, there will no longer be any reason for the system to continue.[58] To assure that a truthful and just outcome results, attorneys are bound by the Rules of Professional Conduct as adopted by the state in which they practice. In addition, because discovery plays a major role in arriving at the truth of a lawsuit, attorneys are also bound by the rules of discovery within the Federal Rules of Civil Procedure.

Part A of this Section discusses the conflict that arises when an attorney's duties to the public and to his or her client arise out of the same situation and how an attorney should solve that issue when it arises. Part B of this Section discusses the rules of discovery contained in the Federal Rules of Civil Procedure and how those rules should be interpreted to arrive at the truth in a lawsuit.

### *A. The Conflict in the Duty an Attorney Owes to the Public and to His or Her Client*

"A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."[59] Normally, these responsibilities interplay harmoniously.[60] However, in the course of practicing law, conflicts do arise.[61] The attorney is then confronted with the issue of whose interests he or she must further. The Model Rules prescribe terms in an attempt to resolve conflicts an attorney confronts due to his or her varying duties to the public, the court, his or her adversary, and his or her client.[62]

However, these rules do not precisely solve the issue of whose interests are paramount - the court's or the client's. This Article proposes that it is the court's interests that must be furthered before the client's.

An attorney's duty to his or her client has been considered by

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violated).

56. U.S. v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).
57. *Id.*
58. *Id.*
59. MODEL RULES OF PROF'L CONDUCT (1999) Pmbl. ¶ 1.
60. *Id.*
61. *Id.*
62. *Id.*

some to be above all others.[63] Lord Brougham, in 1818, made a famous statement to the House of Lords in defense of Queen Caroline:

> An advocate, in the discharge of his duty, knows but one person in the entire world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[64]

However, in response, a wise commentator and contemporary of Lord Brougham, stated the opposite view:

> The lawyer is not a hired mercenary; nor a hired vilifier of the other side; but rather is to be compared to the noble knights of the middle ages, who were professional warriors in the interest of truth and justice; who donned their armor and fought; their oath was to conquer or die on the field of honor, but they were to conquer in a fair and open fight.[65]

This Article agrees with the latter statement rather than the former. An attorney, of course, may not forsake his or her client. However, his or her first obligation is to promote justice for all parties to the lawsuit.[66]

The United States Supreme Court, as stated in *Theard v. United States*, agrees.[67] The Court quoted Justice Cardozo then judge, of the New York Court of Appeals as saying that "[m]embership in the bar is a privilege burdened with conditions."[68] The Court went on to say, in reference to the attorney/appellant in the case, that he became a member of "that ancient fellowship" that is the bar for more than personal interests.[69] The Court stated that, when an attorney becomes a member of the bar, he or she becomes an "officer of the court," and, as such, becomes, similar to the court, "an instrument or agency to advance the ends of justice."[70]

The Honorable Marvin E. Aspen of the United States District Court for the Northern District of Illinois agrees, as stated in his article entitled, "Let Us Be 'Officers of the Court.'"[71] Judge Aspen responds to the argument used by "Rambo-style" attorneys in defense of their uncivil tactics that they are merely zealously

63. Deering, *supra* note 17, at 64.
64. *See id.* at 69 (citing 2 Trial of Queen Caroline 8 (1821)).
65. *Id.*
66. *Id.* at 63.
67. 354 U.S. 278, 281 (1957).
68. *Id.* (quoting *Matter of Rouss*, 116 N.E. 782, 783 (1917)).
69. *Id.*
70. *Id.*
71. Hon. Marvin E. Aspen, *Let us Be 'Officers of the Court'* 83 A.B.A. J. 94 (July 1997).

representing their clients.[72] He states that the notion that one's duty to his or her client could precede one's duty of professionalism is "indefensible as a matter of law."[73]

Illinois courts agree that attorneys are "officers of the court" and, as such, owe their primary duty to the administration of justice.[74] If an attorney's duty to his or her client ever conflicts with the duty he or she owes to the public as its "officer," he or she must first recognize his or her duty to the public.[75] If an attorney's priorities were not first to the public, and then to his or her client, the principles of justice would not be served.[76] This principle of utmost loyalty to the public and to the court is recognized in several Illinois cases including *Caruso v. Murphy*,[77] *Cannon v. Loyola University of Chicago*,[78] and *Castillo v. St. Paul Fire & Marine Insurance Co.*[79]

### 1. *Caruso v. Murphy*

*Caruso v. Murphy* involved a paternity suit.[80] The petitioner claimed that the respondent was not the father of her child despite the following facts: (1) the petitioner and respondent were living together at the time of the child's conception; (2) the respondent was in the hospital delivery room when the petitioner gave birth to the child; (3) the respondent was named as the child's father on the child's birth certificate and the petitioner certified this information; and (4) blood tests showed a 99.99% probability that the respondent was the father of the child.[81] Despite these facts, the petitioner and her attorney continued to challenge the respondent's paternity claim.[82] The trial court sanctioned both the petitioner and her attorney for filing frivolous pleadings and awarded the respondent his attorney's fees and costs.[83]

On appeal, the attorney claimed that he was "obliged" to bring forth the lawsuit because his client denied the respondent's paternity.[84] In response, the court strongly rejected the idea that an attorney could hide his wrongdoing by claiming that he did

72. *Id.* at 95.
73. *Id.*
74. Caruso v. Murphy, 542 N.E.2d 375, 379 (Ill. App. Ct. 1989) (quoting *Van Berkel v. Fox Farm & Road Mach.*, 581 F. Supp. 1248, 1251 (D. Minn. 1984)).
75. *Id.*
76. *Id.*
77. *Id.*
78. 676 F. Supp. 823 (N.D. Ill. 1987).
79. 828 F. Supp. 594 (C.D. Ill. 1992).
80. *Caruso*, 542 N.E.2d at 376.
81. *Id.* at 377.
82. *Id.*
83. *Id.*
84. *Id.* at 378.

what his client asked him to do.[85] The court held that, although an attorney has a professional obligation to his client, he must dismiss a lawsuit that has no merit, even if his client objects to the dismissal.[86] The court used the "officer of the court" rationale and stated that as court officers, attorneys owe their primary loyalty to the administration of justice.[87] The court further explained that if ever a conflict arose between an attorney's competing duties, she must first recognize her public duties.[88] The court concluded that, if this were not the case, justice would not be served.[89]

### 2. *Cannon v. Loyola University of Chicago*

In *Cannon v. Loyola University of Chicago*, the plaintiff was a rejected applicant of seven defendant medical schools.[90] She had sued each school to gain admission and each lawsuit was dismissed.[91] All seven schools, in a final judgment, were granted their attorney's fees and costs due to the plaintiff's violation of Rule 11 of the Federal Rules.[92] In addition, the plaintiff was enjoined from filing additional claims arising out of her past rejections from medical school.[93] After an unsuccessful appeal of the judgment, she insisted on challenging its enforcement.[94] In response, the court held both the plaintiff and her attorney in civil contempt.[95] Additionally, the court disqualified the plaintiff's attorney, who was also the plaintiff's husband, from ever representing her in any action arising out of her past medical school rejections.[96] The court stated that it was no excuse for the attorney to say that he acted solely under the direction of his client.[97] The court stated that an attorney's "first duty is to the administration of justice," and, if conflicting duties ever arise, "he must give precedence to his duty to the public."[98]

### 3. *Castillo v. St. Paul Fire & Marine Insurance Co.*

In *Castillo v. St. Paul Fire & Marine Insurance Co.*, Mr. Walker was the attorney for the plaintiff, Dr. Castillo, in the

85. *Caruso*, 542 N.E.2d at 379 (quoting *Blair v. Shenandoah Women's Ctr., Inc.*, 757 F.2d 1435, 1438 (4th Cir. 1985)).
86. *Caruso*, 542 N.E.2d at 379.
87. *Id.* at 379 (quoting *Van Berkel*, 581 F. Supp. at 1251).
88. *Id.*
89. *Id.*
90. *Cannon*, 676 F. Supp. at 825.
91. *Id.*
92. *Id.*
93. *Id.* at 826.
94. *Id.* at 826-28.
95. *Cannon*, 676 F. Supp. at 828.
96. *Id.*
97. *Id.* at 830.
98. *Id.*

underlying suit.[99] The defendants in the underlying suit were St. Paul Fire & Marine Insurance Company and Burnham City Hospital.[100] Mr. Walker and his associate engaged in outrageous discovery abuse during the depositions of their client Dr. Castillo.[101] The first deposition was taken without Mr. Walker's presence but rather with his associate present.[102] As a result of this discovery abuse, the Judge assessed a fee to be paid equally between Dr. Castillo and his attorney.[103] The Judge also directed Dr. Castillo to answer the questions attempted at the earlier deposition and directed his attorney to refrain from interfering with the process.[104] Mr. Walker was present at the second deposition where, again, similar instances of discovery abuse occurred.[105] As a result of this second occurrence of discovery abuse and the failure to abide by the previous court order, the court dismissed Dr. Castillo's case with prejudice and placed Mr. Walker in civil contempt.[106] In addition, because Mr. Walker's conduct was so unprofessional, the court, exercising its inherent power, suspended Mr. Walker from the practice of law for a minimum of one year.[107]

One of Mr. Walker's arguments was that he was bound by his duty to his client, Dr. Castillo, to respond as he did during the second deposition despite the judge's order to refrain from interfering.[108] The court dismissed this argument as meritless and a mere attempt by Mr. Walker to mislead the court.[109] The court used this argument as another example of Mr. Walker's unfit character to practice law.[110]

### *B. The Broad Scope of Discovery Delimited by the Federal Rules of Civil Procedure*

Discovery requests are given a liberal construction under the Federal Rules.[111] The rules "permit discovery of any item relevant

99. *Castillo*, 828 F. Supp. at 596.
100. *Id.*
101. *Id.* at 596-97.
102. *Id.* at 596.
103. *Id.* at 597.
104. *Castillo*, 828 F. Supp. at 597.
105. *Id.*
106. *Id.* This is not the first time Mr. Walker was censured for disobeying a court order. *Id.* at 603. *See* Kilpatrick v. First Church of the Nazarene, 538 N.E.2d 136, 130 (Ill. App. Ct. 1989) (entering judgment against Walker and his client in the amount of $7,120.90 for the attorney's conduct). *See also In Re* Joint E. and So. Dist. Asbestos Litig., 129 Bankr. 710 (E. & S.D.N.Y. 1991) (holding Walker in contempt and fining him $81, 655.01).
107. *Id.* at 598, 604.
108. *Id.* at 600.
109. *Castillo*, 828 F. Supp. at 600.
110. *Id.*
111. Schaap v. Executive Indus., Inc., 130 F.R.D. 384, 386 (N.D. Ill. 1990).

to any claim or defense of any party."[112] The test for relevance in the area of discovery is extremely broad.[113] In addition, the federal rules grant district court judges discretion in overseeing the discovery process; district court judges' decisions are only reviewed for abuse of discretion.[114] The liberal policy of the federal courts is designed to achieve full disclosure prior to trial.[115] It was the court's firm belief that litigation "ought not devolve into a game of hide the ball."[116]

In *Moriarty v. LSC Illinois Corp.*, the plaintiff, Moriarty, sued the defendant, LSC, for unpaid ERISA employer contributions under a successor liability theory.[117] Moriarty requested a multitude of documents to be produced by LSC.[118] The court held that all of these documents were discoverable and must be produced.[119] The court explained that Rule 26 of the Federal Rules requires all relevant information that is not privileged to be produced if it relates to "the subject matter involved in the pending action."[120] Even if the information would be inadmissible at trial, if it "appears reasonably calculated to lead to the discovery of admissible evidence," it is discoverable.[121]

In *Craig v. Exxon*, the plaintiff was terminated from employment in 1996, allegedly because she was excessively absent and tardy.[122] She believed that this was a pretext and that her pregnancy was the actual reason for her termination.[123] During discovery, the plaintiff requested that the defendant identify all other employees who had received a final written warning for

112. Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994).

113. Chi. Dist. Council of Carpenters Pension Fund v. D.P. Builders, Inc., No. 97 C 2496, 1997 WL G685021, at *3 (N.D. Ill. Oct. 31, 1997).

114. Shots v. CSX Transp., Inc., 887 F. Supp. 206, 207 (S.D. Ind. 1995).

115. *Vardon Golf Co., Inc.*, 156 F.R.D. at 650.

116. Peachtree Lane Assoc., Ltd. v. Granader, 188 B.R. 815, 824 n.7 (N.D. Ill. 1995).

117. Moriarty v. LSC Ill. Corp., No. 98 C 7997, 1999 WL 1270711, at *1 (N.D. Ill. Dec. 29, 1999).

118. *Id.* at *2-3. The documents requested included all reports made by LSC to any health, welfare, or pension plan; all payroll records including who was receiving the payroll, the number of hours worked, the rate of pay, the type of job, the withheld amount for federal taxes, social security, state taxes, cash disbursements, cash receipts; annual earning records of each employee; a record of all non-employee compensation; all documents showing any ownership in LSC for the past three years; names of all employees, including details about them, and who had any ownership interest in LSC by way of profit sharing plans for the past three years. *Id.*

119. *Id.* at *3.

120. *Id.* at *4 (quoting FED. R. CIV. P. 26).

121. *Id.*

122. Craig v. Exxon Corp., No. 97 C 8936, 1998 WL 850812, at *1 (N.D. Ill. Dec. 2, 1998).

123. *Id.*

attendance, absences, "lates," "tardies," or "early quits," from January 1, 1990, to the present.[124] She also requested the identification of all employees who had reached the requisite number of absences, "lates," "tardies," or "early quits," but did not receive warnings.[125] Her last request was for all documents that dealt with any attendance policy or the dissemination of any attendance policy in effect between January 1, 1990, and September 3, 1996.[126] In response to these requests, the defendant objected to producing any information from the time period prior to 1995 or subsequent to 1996.[127] The court compelled the defendant to comply with the discovery request, holding that the information sought by the plaintiff was well within the scope of Rule 26.[128] The court explained that the standard for discovery under Rule 26 "is widely recognized as one that is necessarily broad in its scope in order to allow the parties essentially equal access to the operative facts."[129]

The scope of discovery should be construed broadly in order to aid in the search for truth.[130] Courts look unfavorably upon anything that restricts its scope such as the attorney clients and work product privileges.[131] Thus, these privileges are narrowly construed to limit the effect they have on the discovery process.[132] The Seventh Circuit agrees that the scope of privileges such as these "should be confined to the narrowest possible limits."[133]

The interpretation of the Model Rules and the rules of discovery affect the adversary system's ability to achieve its purpose. Interpreting the Model Rules as holding an attorney's duty to the public as officer of the court to be the attorney's first priority and by broadly construing the rules of discovery, the adversary system is supported in arriving at a truthful and just result.

## CONCLUSION

The ultimate purpose of the adversary system is to seek truth and justice. To achieve this purpose, the system regulates attorneys' conduct through the Model Rules as adopted by each

124. *Id.*
125. *Id.*
126. *Id.*
127. *Craig*, 1998 WL 850812, at *1.
128. *Id.* at *2.
129. *Id.* at *1 (quoting *Onwuku v. Federal Express Corp.*, 178 F.R.D. 508, 516 (D. Minn. 1997)).
130. United States v. White, 950 F.2d 426, 430 (7th Cir. 1991).
131. Ziemack v. Centel Corp., No. 92 C 3551, 1995 WL 314526, at *2 (N.D. Ill. May 19, 1995). *See also Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 135.
132. *Allendale*, 152 F.R.D. at 135.
133. *Id.*

particular state and the Federal Rules. The Model Rules impose a duty on attorneys, as officers of the court, and to the public. The first priority of the adversary system is arriving at a truthful and just result. Attorneys must remember that they are "officers of the court" and, as such, owe primary allegiance to the administration of justice.[134] An attorney's duty to the public as an officer of the court precedes his or her duty to the client.[135]

When courts interpret the rules of discovery contained in the Federal Rules they must broadly construe them so that all relevant evidence is disclosed. The Model Rules and the Federal Rules, interpreted as this Article proposes, allow the adversary system to go forward unharmed and also provide a safeguard against the evil of human nature's self-interest.

134. Van Berkel v. Fox Farm & Rd. Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984).

135. *Id.*