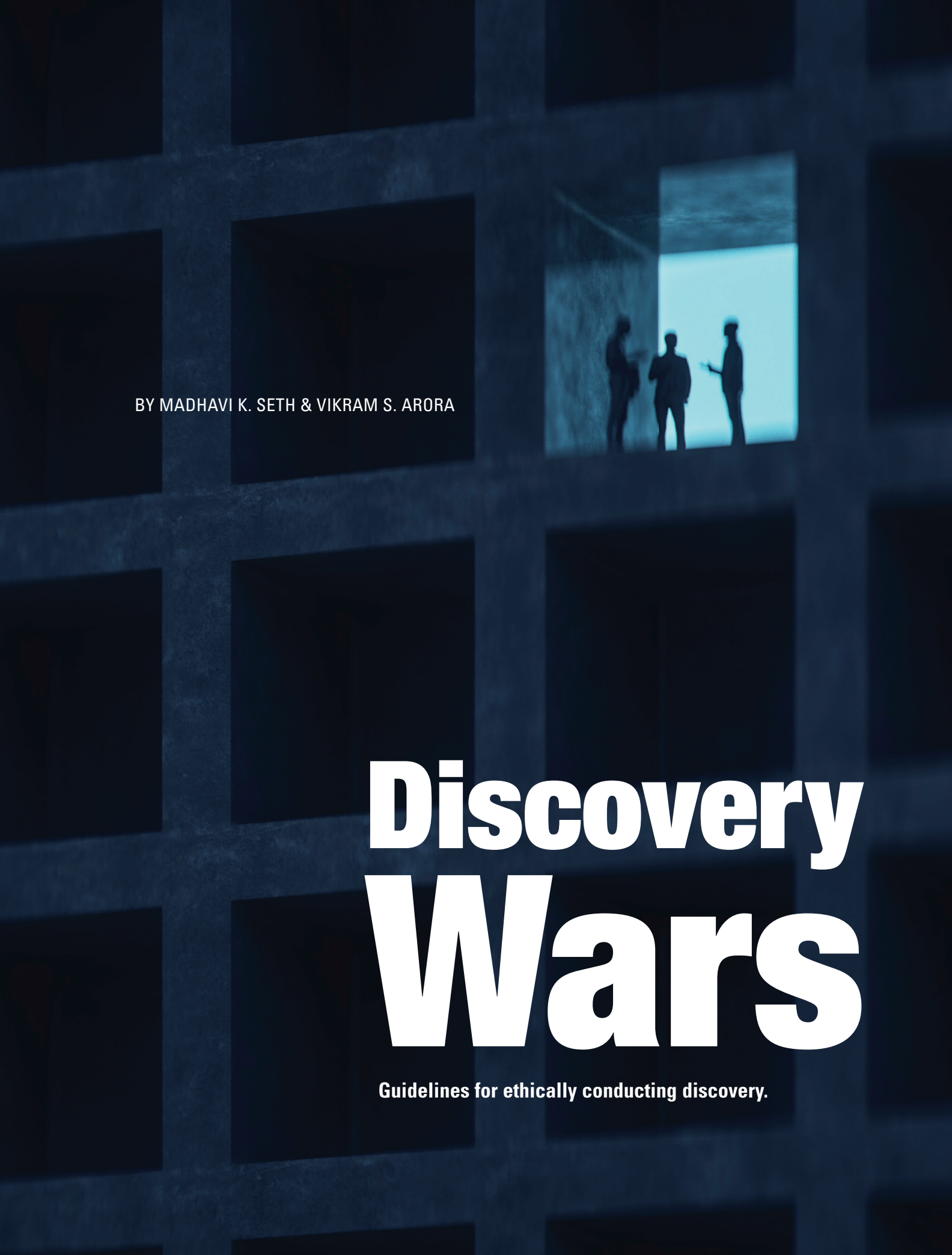

BY MADHAVI K. SETH & VIKRAM S. ARORA

Discovery Wars

Guidelines for ethically conducting discovery.

OF ALL THE STAGES OF LITIGATION, DISCOVERY IS ARGUABLY THE MOST CRITICAL. Discovery can uncover evidence that supports or weakens a party's underlying theory of a case. In discovery, litigators also can find themselves walking a fine line between zealous advocacy and ethical pitfalls. Modern American jurisprudence has led many attorneys to seek guidance on their obligations under Illinois procedural and professional conduct rules when preparing their client's employees as witnesses and contacting an adverse party's former or current employees during discovery.

Therefore, it is worth exploring how to comply with Illinois and federal professional and procedural rules when preparing a client's employees as knowledgeable witnesses and contacting the adverse party's employees for evidence. Being aware of the sanctions that attorneys may face for not meeting their obligations under the rules also is important.

Assessing former and current employees for discovery

Under Federal Rule of Civil Procedure (FRCP) 30(b)(6), a party's attorney has an affirmative duty to designate witnesses who can provide complete, knowledgeable, and binding answers on behalf of that party.[1] But, because they qualify as "persons other than officers, directors, and managing agents," former employees must consent to testify as witnesses.[2] Additionally, courts have denied motions to compel depositions of former employees if they would not aid in the exploration of a material issue in a case.[3]

Once a testifying witness has been designated, she must be prepared to testify about matters within her personal knowledge and those "known or reasonably available" to the party.[4] In *PPM Finance, Inc. v. Norandal,* the Seventh Circuit held that a bank's former chief financial officer could testify in a deposition as to matters outside of his personal knowledge because he was designated as a witness and authorized to testify not only as to matters of his personal knowledge but also to matters "known or reasonably available" to the bank.[5]

Illinois Supreme Court Rule (ISCR) 206 governs depositions and mirrors FRCP 30(b)(6). ISCR 206 provides that a corporation must designate "one of more officers, directors, or managing agents, or other persons to testify on its behalf."[6] The Rule, its commentary, and precedents interpreting it do not specify whether former employees qualify as "other persons to testify" on the corporation's behalf. However, the Rule does not require that the corporation designate a representative deponent who has personal knowledge.[7] Instead, the Rule requires that the representative deponent testify "as to matters known or reasonably available to the corporation."[8] With this, if designating a former employee as a representative deponent for a party, attorneys need not ensure that the former employee has personal knowledge but only knowledge that is known or reasonably available to the party at the time of the deposition.

Ex Parte communications with current and former employees

Under the American Bar Association's Model Rule of Professional Conduct (ABA Model Rule) 4.2, attorneys may not communicate about the subject of the representation

1. Fed. R. Civ. P. 30(b)(6).
2. *Id.*
3. See, *e.g.*, *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002).
4. *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004).
5. *Id.*
6. Ill. S. Ct. R. 206(a)(1).
7. *CE Design Ltd. v. Continental Casualty Co.*, 2016 IL App (2d) 150530-U, ¶ 250.
8. *Id.*

TAKEAWAYS >>

- When deposing current employees working for a defendant corporation, courts may apply a "control" group test to determine whether *ex parte* communication can take place.
- Even employees who may be deposed may not be authorized to disclose privileged information.
- Providing knowledgeable witnesses and following the Illinois and federal rules of civil procedure are more important than zealously representing your client.

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ATTORNEYS MAY CONDUCT *EX PARTE* INTERVIEWS WITH CURRENT EMPLOYEES, EXCEPT FOR THE MOST SENIOR MANAGEMENT OFFICIALS IN A CORPORATION'S "CONTROL GROUP." COURTS WILL CONSIDER THE RESPONSIBILITIES OF EMPLOYEES TO DETERMINE WHETHER THEY ARE PROTECTED FROM AN ATTORNEY'S *EX PARTE* COMMUNICATIONS AS MEMBERS OF THE "CONTROL GROUP."

with a person who is known to be represented by another lawyer in the matter.[9] The three exceptions that authorize the attorney to communicate with the represented party are: 1) by consent of the other attorney; 2) by law; or 3) by court order.[10] ABA Model Rule 4.2 is designed to protect the attorney-client relationship and safeguard clients from improper advances by opposing counsel.

Because former employees fall outside the scope of ABA Model Rule 4.2, attorneys may conduct *ex parte* interviews of an adverse party's former employees. Although the commentary within the Model Rule provides examples of when opposing counsel may not contact particular employees, attorneys should look to precedents interpreting the Rule and its jurisdictional equivalents to assess the scope of their permissible communications with an adverse party's employees.

Illinois Rule of Professional Conduct (IRPC) 4.2 mirrors ABA Model Rule 4.2 and governs the scope of an attorney's communications with represented parties. IRPC 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[11]

Because IRPC 4.2 does not indicate whether former employees are represented parties, a party's attorneys may informally contact an adverse party's former employees.[12] However, in communicating with former employees of an organization, attorneys must not use methods that "violate the legal rights of the [party]."[13] Under IRPC 4.4, such methods include those that have "no substantial purpose other than to embarrass, delay, or burden a third person" or constitute "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."[14]

Regarding current employees, Illinois courts have applied the "control group test" to assess whether attorneys are in compliance with IRPC 4.2 during discovery. Under this test, attorneys may conduct *ex parte* interviews with current employees, except for the most senior management officials in a corporation's "control group."[15] Courts will consider the responsibilities of employees to determine whether they are protected from an attorney's *ex parte* communications as members of the "control group." For instance, in *Fair Automotive Repair v. Car-X Service Systems, Inc.,* the Second District of the Illinois Appellate Court held that the plaintiff's counsel did not violate disciplinary rules because the defendant's employees did not have sufficient decision-making or advisory responsibilities for them to be part of the "control group" of senior management.[16]

Additionally, the scope of an attorney's *ex parte* communications with former employees was addressed in *Equal Employment Opportunity Commission v. University of Chicago Medical Center.*[17] In that case, the U.S. District Court for the Northern District of Illinois held that the plaintiff's attorneys were permitted to contact former managers of the defendant *ex parte* for purposes of their investigation prior to the commencement of the lawsuit. The court applied the "control group test" and clarified that ABA Model Rule 4.2 did not apply to former employees because their statements did not "constitute admissions of the corporation or acts binding on the corporation."[18]

Similarly, in *Orlowski v. Dominick's Finer Foods*, the Northern District of Illinois held that three types of employees were generally protected from *ex parte* communications by opposing counsel: 1) managerial employees; 2) employees whose acts in the matter could be imputed to the organization; and 3) employees whose admissions at trial would be binding on the organization.[19] Former employees are outside the scope of ABA Model Rule 4.2 because, unlike current employees, they

ISBA RESOURCES >>

- Gino L. DiVito, *The Surprising Number of Differences Between the Federal and Illinois Rules of Evidence*, 108 Ill. B.J. 30 (Jan. 2020), law.isba.org/3i5BevR.
- Roy Dripps, *Depositions Under Illinois Law: The Federal Example*, 106 Ill. B.J. 38 (June 2018), law.isba.org/2roexCW.
- Patrick M. Kinnally, *Witnesses, Statements, and Depositions: A Few New Thoughts*, Trial Briefs (Aug. 2016), law.isba.org/37nF22v.

9. Model R. Prof'l Conduct R. 4.2.
10. *Id.*
11. Ill. R. Prof'l Conduct R. 4.2.
12. *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 731 (N.D. Ill. 1996).
13. Ill. R. Prof'l Conduct R. 4.2 at n. 7.
14. Ill. R. Prof'l Conduct R. 4.4.
15. *Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc.*,128 Ill. App. 3d. 763, 771 (2d Dist. 1984).
16. *Id.*
17. *Equal Employment Opportunity Comm'n v. University of Chicago Medical Center*, No. 11 C 6379, 2012 WL 1329171, at *1 (N.D. Ill. Apr. 16, 2012).
18. *Id.* at *3-4.
19. *Orlowski*, 937 F. Supp. at 728.

cannot "bind the corporation in the sense that an agent binds a principal."[20] The court also held that, because managers and comanagers made fundamental employment decisions, such as hiring, scheduling work shifts, and recommending terminations, they were protected as "managerial employees" from being contacted *ex parte* by opposing counsel.[21]

Consistent with ABA Model Rules 4.2 and 4.4, attorneys may contact lower-level employees, such as assistant managers, department managers, and supervisors. However, attorneys may not ask lower-level employees for privileged information. Members of the "control group" who leave the company also do not have a right to access privileged communications between the company and its counsel, including a former control group member's prior communications with the company's counsel.[22]

Sanctions for not designating knowledgeable witnesses

A court may impose sanctions if a party does not produce a knowledgeable witness during discovery.[23] For instance, in *Buycks-Roberson v. Citibank Federal Savings Bank*, the Northern District of Illinois held that a bank, which had produced an unknowledgeable witness for deposition, had violated federal rules.[24] The court also held that sanctions against the bank would have been warranted but only if the opposing party had presented the bank with their objections to the deposition before filing a motion for sanctions.

Additionally, an attorney's failure to produce a knowledgeable witness may result in the party being held in civil or criminal contempt. In *Wachovia Securities, LLC. v. NOLA, LLC*, the Northern District of Illinois held a defendant in civil contempt, under Illinois law, for failing to designate an appropriate witness in connection with discovery for a citation to discover assets.[25] The witness who was designated was a foreign national over whom the defendant had no control, who lived in the United Kingdom, and failed to appear for deposition despite defense counsel's representations to the court that he would appear. Because the defense counsel's conduct resulted in delays of more than a year, the Northern District of Illinois ordered the defendant to produce another witness to appear for deposition. The court also held the defendant in civil contempt and ordered it to pay appropriate fines and the plaintiff's attorney fees and costs for having to brief the issues.

Sanctions for *ex parte* communications with former employees

For having *ex parte* communications with an adverse party's former employees, attorneys may be disqualified, prohibited from using evidence from those communications, or ordered to pay monetary sanctions in the form of attorney fees and costs.

Disqualification is a drastic measure that "courts should hesitate to impose except when absolutely necessary."[26] To determine whether disqualification of an attorney is warranted, courts carefully balance the attorney's misdeeds with "the prerogative of a party to proceed with counsel of its choice."[27] Courts generally view motions to disqualify "with extreme caution for they can be misused as techniques of harassment."[28] In *Harris Davis Rebar, LLC. v. Structural Iron Workers Local Union No. 1 Pension Trust Fund*, the Northern District of Illinois held that the defense counsel had violated IRPC 4.2 by failing to notify opposing counsel that they had met with and received potentially privileged documents from the plaintiff's former manager and vice president. Specifically, the defense counsel had actively discussed matters about the representation, which they knew had been confidential or privileged, and received documents that contained communications between plaintiff and its counsel.

Although the court in *Harris Davis Rebar* found the defense counsel's actions to be reckless, it did not disqualify the defense counsel because they had believed themselves justified in their actions. Namely, the defense counsel had conducted research into the ethical and legal implications of the intentional but unauthorized disclosure of confidential or privileged information obtained from a third party. Nevertheless, in considering the totality of the circumstances, the court imposed sanctions by ordering the defense counsel to destroy all documents received from the plaintiff's former manager; prohibiting the defense counsel from using the information during the course of the litigation, unless it was obtained in the course of discovery; and ordering the defense counsel to reimburse the plaintiff for its attorney fees and costs associated with bringing the motion for sanctions.

Similarly, in *In re Air Crash Disaster Near Roselawn Indiana on Oct. 31, 1994*, the court held that the plaintiffs' counsel violated IRPC 4.2 after they inadvertently sent questionnaires to the defendant's current employees seeking information as

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20. *Id.* at 727.
21. *Id.* at 728.
22. *Wychocki v. Franciscan Sisters of Chicago*, No. 10-C-2954, 2011 WL 2446426, at *4 (N.D. Ill. June 15, 2011).
23. Fed. R. Civ. P. 37(a)(3)(B)(ii) and (d)(1)(A)(i).
24. *Buycks-Roberson v. Citibank Federal Savings Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995).
25. *Wachovia Securities, LLC. v. NOLA, LLC*, No. 05C7213, 2008 WL 4866333, at *3 (N.D. Ill. June 5, 2008).
26. *Harris Davis Rebar, LLC, v. Structural Iron Workers Local Union No. 1 Pension Trust Fund*, No. 17C6473, 2019 WL 447622, at *7 (N.D. Ill. Feb. 5, 2019).
27. *Id.*
28. *Id.*

to the subject matter of the lawsuit.[29] The Northern District of Illinois considered the totality of the circumstances and found it prudent to "consider the seriousness of the violations, whether the violations were intentional, as well as the nature and extent of prejudice suffered by the parties in the future as a result of the violation."[30] Although the court considered imposing monetary sanctions, it found that such sanctions were not appropriate because: the plaintiffs' counsel acted in good faith; there was a general absence of caselaw to address the issue; and the court's resulting opinion would be "more than enough punishment" to deter him and other members of the bar from violating ethical rules.[31] Nevertheless, the court highlighted that the plaintiffs' counsel was obligated to contact opposing counsel or the court to obtain prior permission for sending the questionnaires. As a result, the court granted the defendant's motion for sanctions, ordered that the questionnaires be returned to defense counsel, and barred plaintiffs' counsel from offering the answers to the questionnaires as evidence.

While the attorneys did not intentionally aim to violate the ethical rules, the Northern District of Illinois in *In re Air Crash Disaster* noted that the attorneys' unethical conduct was the result of their "understandable desire to zealously represent" their clients.[32] However, as the court also noted, "even zealous advocacy must confine itself to the Rules of Professional Conduct."[33] Thus, it would be worthwhile for practicing attorneys to consider the court's comments in their efforts to, during discovery, comply with Illinois procedural and ethical rules as zealous advocates for their clients and as officers of the court. IBJ

29. *In re Air Crash Disaster Near Roselawn, Indiana on Oct. 31, 1994*, 909 F. Supp. 1116, 1121–1123 (N.D. Ill. 1995).
30. *Id.* at 1124.
31. *Id.* at 1125.
32. *Id.*
33. *Id.*