



# Taking the High Road How to Deal Ethically with Unethical Bullies

By Francine Friedman Griesing

**A**s early as the 1980s, the U.S. District Court for the Northern District of Texas identified a “pernicious” practice of professional bullying, commenting that

[w]ith alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers . . . [and] refereeing abusive litigation tactics that range from benign incivility to outright obstruction.<sup>1</sup>

Despite judicial condemnation, attorneys throughout the country still use sharp practices and aggressive tactics and treat opposing counsel and parties with disrespect.<sup>2</sup>

However, all attorneys are subject to the professional and ethical rules of the forum in which they practice. The rules may be promulgated on the federal, state, local, alternative-dispute resolution, and/or individual judge level. As explained below, the American Bar Association’s (ABA) *Model Rules of Professional Conduct* (Model Rules) and their state counterparts impose ethical obligations on counsel to behave professionally, even while zealously advocating for their clients. (All practitioners should consult the rules of the jurisdiction in which they practice as the jurisdiction’s requirements may deviate from the Model

Rules.) Moreover, the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 provide mechanisms with which attorneys may challenge, or stand up to, opponents whose litigation style lies outside the bounds of ethical and fair practice.

This article will cover several ethical issues arising out of aggressive litigation practices and present an array of tools to use when dealing with opposing counsel who cross the ethical line. It will cover situations in which opposing counsel make material misrepresentations to the court, file frivolous claims and motions, thwart the taking of discovery or the advancement of a case, harass opposing counsel, contact your client without your knowledge, or use dishonest tactics during settlement negotiations. It will also highlight how the ubiquity of social media and technological advances impacts bullying and the interplay between discrimination and bullying in the practice of law.

## **Zealous Advocacy, Professional Misconduct, and Reporting Requirements**

Many attorneys operate under the misconception that the Model Rules contain an express duty for them to advocate zealously on behalf of their clients. Some compound this misconception with the belief that zealous advocacy authorizes abrasiveness, bullying, hardball lawyering, and a win-at-all-costs attitude.

However, over 30 years ago, the Model Rules intentionally eliminated an express duty to advocate zealously and replaced it with a duty to represent one's client with "reasonable diligence."<sup>3</sup> Specifically, the current Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."<sup>4</sup>

**Parameters of zealouslyness.** The terms *zealously* and *zeal* appear only in the preamble to the Model Rules and in the comment to Model Rule 1.3. Even there, the idea of zealous advocacy is tempered. In the preamble to the Model Rules, the drafters advise that a "lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law," must include "a professional, courteous, and civil attitude toward all persons involved in the legal system."<sup>5</sup> Additionally, in the comment to Model Rule 1.3, the drafters note that although lawyers must act "with zeal in advocacy upon the client's behalf . . . [they are] not bound . . . to press for every advantage that might be realized for a client."<sup>6</sup> Therefore, attorneys who excuse aggressive tactics on the grounds that they are advocating zealously for their clients are standing on shaky ethical ground and flatly ignoring the requirements for professionalism and civility in their dealings with others.

An attorney may practice with zeal and remain squarely within ethical bounds: zeal in advocacy may mean readiness, eagerness, forwardness, or fervor. When attorneys are belligerent, aggressive, or offensive, however, they misunderstand the true meaning of zeal and how to act with it. The preamble to the Model Rules charges all attorneys with a "special responsibility for the quality of justice," meaning that "a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."<sup>7</sup> Adding to the lofty preamble statements, and as discussed below, Model Rule 3.4 generally imposes on an attorney a duty of fairness to an opposing party and counsel. Furthermore, the Model Rules also dictate that attorneys treat third parties (i.e., nonclients) with respect:

Rule 4.4: Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.<sup>8</sup>

Thus, although attorneys may practice with zeal, a practice style that includes actions meant to harass, intimidate, or embarrass opposing counsel, parties to the litigation, and third parties violates the Model Rules and is unethical.

**Professional misconduct and sanctions.** In a section entitled "Maintaining the Integrity of the Profession," the Model Rules explicitly state that violations—and

even attempted violations—of the rules are actionable as instances of professional misconduct:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; [or]
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. . . .<sup>9</sup>

The comment to Model Rule 8.4 explains that "[l]awyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . ."<sup>10</sup> Discipline may come in an array of penalties, such as a fine, suspension, or, in extreme cases, even disbarment.

**Obligation to report professional misconduct.**

Given a device with which to discipline unethical behavior, what allows lawyers to engage continually in intimidation and overly aggressive litigation tactics is our own failure to call the bullies and rule breakers to task for their bad behavior. While the idea of reporting your adversary's ethical infractions may not seem appealing to you and may even invoke opposing counsel's anger, our own ethical obligations compel such reporting when the misconduct is particularly egregious.

The Model Rules provide the following guidance on self-regulation:

Rule 8.3: Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.<sup>11</sup>



**TIP**

To handle a bullying, unethical adversary, communicate in writing to keep a record of the exchanges, and refer to the ethical rules to back up your response.

The Model Rules require reporting even in isolated incidents because such incidents “may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”<sup>12</sup>

Attorneys may use “a measure of judgment” when deciding whether to report unethical conduct because Model Rule 8.3 “limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.”<sup>13</sup> However, several factors weigh in favor of reporting incidents of professional bullying: (1) the elimination of an express duty to advocate zealously in favor of a standard of reasonable diligence; (2) the American Bar Association’s emphasis on advocacy with civility; and (3) a desire to practice in, and have nonlawyers participate in, a respected judicial system.

**Bullying and Rule Breaking: Specific Behaviors**

To more specifically explore the ways in which sharp practices

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violate the Model Rules, this section reviews ethical violations related to opposing counsel making material misrepresentations to the court, filing frivolous claims and motions, thwarting the taking of discovery or the advancement of a case, harassing opposing counsel, contacting your client without your knowledge and consent, and using dishonest tactics during settlement negotiations.

**Improper service and misrepresentations regarding service.**

An unethical plaintiffs lawyer may attempt to gain an easy advantage over defendants by intentionally manipulating the service of process requirements or outright lying regarding service. Stories abound of lawyers intentionally using a wrong name or address to delay service.

In a more extreme example of dishonesty, a plaintiffs lawyer may submit an affidavit of service claiming falsely that he has hand-served the defendant a copy of the complaint. When the defendant fails to act, the plaintiff moves for a default judgment, leaving the defendant with no recourse unless he is able to prove that he was not served or that the plaintiff intentionally failed to make proper service.

Other questionable conduct includes intentionally serving someone without authority to accept service or encouraging your client to evade service.

Such deceitful behavior clearly violates one or more of the following model rules:

Rule 3.3: Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
  - (1) 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>14</sup>

Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.<sup>15</sup>

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- ... .
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice; . . .<sup>16</sup>

**Frivolous claims filing.** Not all lawsuits—nor all claims and defenses at issue in a lawsuit—are meritorious. Lawyers unwisely may pursue claims that lack any evidentiary support or that are untimely due to an expired statute of limitations. Unprofessional adversaries who make material misrepresentations in support of frivolous motions are manipulating the facts and the law, which is not in keeping with their ethical duties.

The Model Rules prohibit the filing of a clearly frivolous lawsuit:

Rule 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact 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.<sup>17</sup>

Sanctions often can be imposed on attorneys who pursue frivolous claims where there is bad faith, or where the offending attorney knew or should have known that the pursuit of litigation was without any reasonable basis in law or equity.<sup>18</sup> A common example occurs in collection cases for professional services, such as legal fees, when defense attorneys routinely assert frivolous malpractice counterclaims to pressure the plaintiff to withdraw the case. In such an instance, note that there may be a duty for the nonoffending attorney to provide written notice of any deficiencies in the complaint prior to seeking sanctions relating to such deficiencies.

Depending upon the jurisdiction, lawyers also may be criminally liable if they demand settlement for a clearly frivolous lawsuit.<sup>19</sup> At the very least, lawyers who file frivolous lawsuits or assert frivolous claims or defenses have behaved unethically.

**Obstructionist tactics.** Attorneys are officers of the court; as such, they have a duty to present truthfully the facts of a case, the procedural history, and the governing law. Good advocates creatively spin the facts and law to present the best portrait of their clients. Unethical advocates file multiple motions to cause delays and increase costs, attempt to put off discovery with stay motions, move to extend deadlines, and submit extensive motions for summary judgment before providing discovery when facts are at issue. Some unscrupulous lawyers will fail to seek timely discovery and then oppose a motion for summary judgment, claiming that they need discovery to respond even though

they never asked for it during the discovery period. Furthermore, aggressive lawyers overuse objections, use speaking objections, counsel witnesses to refuse to answer questions, and harangue the attorney who is taking depositions in order to fluster the attorney and to intimidate and/or signal to the deponents that the deponents' counsel has lost control of the proceedings.

Aggressive obstructionist tactics may surface during discovery because written discovery is only exchanged by the parties (not filed with the court) and because depositions are taken in law offices

**Aggressive lawyers counsel witnesses to refuse to answer questions and harangue the attorney who is taking depositions.**

outside the presence of a judicial officer. For instance, a recent motion for sanctions revealed vehement emails during the scheduling of a deposition (not even during the deposition itself), in which a partner from a major law firm told his opponent: “F#\*% with me and you will have a huge \*%^&hole” and “You are such a whiner. I will kick your ass, in court or anywhere else pansy.”<sup>20</sup> Again, this conduct occurred during the scheduling of a deposition, and the aggressive partner was unchecked by a judicial officer.

Such tactics constitute ethical violations of the Model Rules, which impose duties of timeliness, fairness to opposing counsel and parties to the litigation, and

candor. For example, in terms of timeliness, Model Rule 3.2 discourages obstructionist tactics: “A lawyer shall make reasonable efforts to expedite litigation consistent with the efforts of the client.”<sup>21</sup> Regarding discovery and trial, Model Rule 3.4 dictates fairness to opposing counsel and parties to the litigation, stating, among other requirements, that a lawyer shall not “unlawfully obstruct another party’s access to evidence,” “falsify evidence,” or “knowingly disobey an obligation under the rules of a tribunal[.]”<sup>22</sup> And Model Rule 3.3 addresses situations in which the duty of candor is breached by unsavory tactics:

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) 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;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that

a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.<sup>23</sup>

The Federal Rules of Civil Procedure also address obstructionist behavior. Efforts to obstruct the disclosure of relevant information, such as “detailed objections, private consultations with the witness, instructions not to answer, instructions how to answer, colloquies, interruptions, [and] ad hominem attacks” are violations of Federal Rule of Civil Procedure 30 and may invoke sanctions.<sup>24</sup> In terms of limiting an attorney’s ability to instruct a witness not to answer a question, the Federal Rules of Civil Procedure specifically note that

[a] person may instruct a witness not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).<sup>25</sup>

In addition, the Federal Rules of Civil Procedure require civility when objecting to a question, for “[a]ny objection made during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.”<sup>26</sup>

Federal Rule of Civil Procedure 30 and Model Rule 3.4 are

intertwined in scope. The actions that are sanctionable under Federal Rule of Civil Procedure 30 also constitute ethical violations of the Model Rule 3.4. For example, speaking objections and impermissible directions to a witness not to answer hamper access to evidence and can leave the wrong impression about the answer to a fact question, which runs contrary to Model Rule 3.4’s censure against obstructing another party’s access to evidence or falsifying evidence. Moreover, attorneys who practice in federal court are charged with knowledge of the Federal Rules of Civil Procedure; if an attorney disregards these rules by failing to concisely object to a line of questioning at deposition or by bickering or interfering with the attorney taking the deposition, then that attorney has knowingly disobeyed an obligation under the rules governing federal practice, which is specifically prohibited by Model Rule 3.4(c).

#### **Confrontational tactics.**

Another type of bullying behavior includes attacking opposing counsel on a personal level. Such personally aggressive tactics include sexist and racist remarks. This behavior is also obstructionist when its purpose is to thwart discovery or advancement of a case via intimidation.

Aggressive deposition tactics have a hurtful effect on groups who are marginalized within the profession, including, but not limited to, new lawyers, women, people of color, people with disabilities, and LGBT lawyers. In the preamble to the Model Rules, the charge to behave professionally, courteously, and civilly forbids name-calling and insults to opposing counsel.

However, some lawyers simply cannot help themselves. For instance, the Florida Bar sanctioned an attorney for demeaning a Puerto Rican female opponent by telling her that depositions were not conducted according to “girl’s rules,” by calling her a “stupid idiot” and

a “bush leaguer,” and by referring to her client as “crazy” and a “nut case.”<sup>27</sup> Faced with an attorney who had made similarly disparaging comments, such as “[t]ell that little mouse to pipe down” and “[g]o away, little girl,” the New York Supreme Court stated that “[o]bstructionist tactics may merit sanctions” and that “[s]anctions are also appropriate when an attorney egregiously fails to conform to accepted notions of conduct.”<sup>28</sup>

Even in recent years when we think lawyers would know better, sexist comments have occurred in writing and in emails between counsel. In the aforementioned case involving scheduling a deposition in which a partner from a major law firm insulted, cursed at, and threatened his opponent, when the opponent removed a female first-year associate from the email chain, the partner responded, “I added her back on because she needs to grow up.” Advised to “give it a rest,” the partner retorted, “Don’t f#\*% with me [man]. Big mistake.”<sup>29</sup>

Sexist and racist comments from an adversary, particularly when they obstruct the taking of a deposition, are outside the bounds of ethical conduct and are sanctionable. The Model Rules have been revised to more squarely address these issues:

#### **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

...

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. . . .<sup>30</sup>

The comment to Model Rule 8.4 contains examples of inappropriate gender comments, and examples

abound in the media.<sup>31</sup> Notably, however, Model Rule 8.4 or a similar version has not been adopted in most jurisdictions, so lawyers have to rely on other, less specific rules to address offensive language and treatment.

**Unsolicited contact with the other lawyer's client.** As client representatives, attorneys expect to handle all communications from their adversaries. Indeed, the Model Rules mandate that attorneys contact represented people only through their counsel:

Rule 4.2: Communication with Person Represented by Counsel  
In 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.<sup>32</sup>

Model Rule 4.2 is meant to prevent “overreaching by other lawyers who are participating in the matter” and “the uncounselled disclosure of information relating to the representation.”<sup>33</sup> For instance, an unprofessional adversary may contact an employee of a represented corporation in order to verify facts alleged in a complaint. If the subject matter that the adversary and employee discuss relates to the pending lawsuit, then the adversary has committed an ethical violation.<sup>34</sup> The Model Rules discourage unauthorized contact with clients to the extent that one “must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”<sup>35</sup>

Model Rule 4.2 is not limited to the litigation context. An entire Florida law firm recently was disqualified from a case because the

lead counsel made comments to an adverse party in an arbitration matter.<sup>36</sup> The contact took place in a hallway during a break in the arbitration.<sup>37</sup> Notably, the arbitration at which the communication took place was separate from the matter from which the firm was disqualified, but it involved the same lawyers and the same defendant.<sup>38</sup> Because the communication had the effect of influencing the defendant's relationship with his counsel, the court stated that it had an “effect” on the case at issue; thus, the disqualification was warranted.<sup>39</sup>

**Model Rule 8.4 or a similar version has not been adopted in most jurisdictions, so lawyers have to rely on other, less specific rules to address offensive language and treatment.**

**Dishonesty regarding settlements.** It is disappointing how many litigators working on settlements find that opposing counsel do not honor the deal when exchanging draft agreements. Unlike in litigation, these situations are less likely to be found in reported decisions unless an action is commenced for bad faith or to enforce a settlement when one side backs out of the deal. However, anecdotal reports reveal that counsel may not include all the agreed terms in a settlement agreement or may fail to show all changes in tracked or red-lined documents. Likewise, counsel may attempt to

“confirm” terms that were never agreed upon. It is not always clear if this is inadvertent or intentional.

The rules previously discussed apply here as well:

Rule 4.4: Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.<sup>40</sup>

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]<sup>41</sup>

**Tools for Dealing with Unprofessional Adversaries**

**Federal Rule of Civil Procedure 11.** Attorneys dealing with unprofessional adversaries may use Federal Rule of Civil Procedure 11 to bring to the court's attention the filing of frivolous pleadings, the continuation of an untenable position, or the inclusion of a material misrepresentation in a court filing.

According to Rule 11(a), an attorney must sign every pleading or written motion submitted to the court. Rule 11(b) provides that by signing the pleading or written motion, the attorney has verified that the document is not being presented for an improper purpose, is based on existing law or a non-frivolous argument for extending or creating new law, and contains factual assertions or denials of them that have or are likely to have evidentiary support. Thus, filing a frivolous pleading, maintaining an untenable position, and making a material misrepresentation to the court are actions upon which a Rule 11 sanction may be based.

If attorneys wish to file a motion for sanctions under Rule 11, they must serve that motion under Federal Rule of Civil Procedure 5, which gives the attorney who is the subject of the motion 21 days to change the inappropriate conduct, e.g., by withdrawing a frivolous pleading or correcting the material misrepresentation. Once the 21-day waiting period passes, the motion may be presented to the court for consideration. Under Rule 11(c) (1), a law firm is held jointly responsible for any sanctionable conduct of its partners, associates, and employees, “absent exceptional circumstances.”<sup>42</sup> Moreover, Rule 11(c) (2) authorizes the court to award reasonable expenses, including attorney fees, incurred by the filing of a motion for sanctions. The goal of Rule 11 is to deter unprofessional conduct, so any penalties for actions that violate Rule 11 should be made in accordance with that goal.

**28 U.S.C. § 1927.** When faced with an unprofessional adversary who unreasonably prolongs a matter, an attorney may challenge that behavior under 28 U.S.C. § 1927. Section 1927 provides that a court may require an attorney “who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”<sup>43</sup> Courts have held that an attorney may be sanctioned under section 1927 “despite the absence of conscious impropriety.”<sup>44</sup> Thus, the movant need not show that the attorney being challenged under section 1927 acted with bad faith; rather, the movant must prove only that the attorney “knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of non-frivolous claims.”<sup>45</sup>

Unlike Rule 11, section 1927 does not authorize the imposition of sanctions on a represented party or

on the law firm of which the sanctioned attorney is a member.<sup>46</sup>

**Federal Rule of Civil Procedure 37.** Lawyers can strategically use Rule 37 motions to compel when dealing with a Rambo litigator’s obstructionist tactics during discovery. Under the rule, “[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection.”<sup>47</sup> Such a motion can be made if “a deponent fails to answer a question asked under Rule 30 or 31,” “a party fails to answer an interrogatory submitted under Rule 33,” “a corporation . . . fails to make a designation under Rule 30(b)(6) or 31(a)

**File a motion to compel if opposing counsel is engaging in obstructionist behavior during discovery.**

(4),” or “a party . . . fails to permit inspection.”<sup>48</sup> A motion to compel

must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.<sup>49</sup>

However, no standard has been established for what constitutes a good-faith attempt to meet and confer.

Novice lawyers are especially vulnerable to falling for tactics such as a nonproducing party renegeing at the last second on a promise to produce discovery or claiming to produce discovery and then producing only a small portion of the discovery promised. Where a nonproducing party violates its discovery obligations

or the obligation to meet and confer, the party requesting discovery should consider filing a motion to compel. The most effective motion to compel is concise and to the point, as judges generally dislike dealing with discovery abuses and have little patience for such issues. Other than in exceptionally complex cases, a motion to compel should be just a few pages long and should cite appropriate rules without lengthy legal quotations. Used correctly, a motion to compel can put the judge on notice that the opposing party is behaving unethically and, more importantly, can help in obtaining entitled discovery. In cases of particularly egregious disregard for deadlines or failures to disclose, sanctions can be imposed, often in the form of attorney fees and expenses for the time spent drafting and filing the motion to compel.

### Conclusion

Many attorneys practice with the misconception that their ethical duties require overly aggressive advocacy. Attorneys who bully, break ethical rules, and misuse their positions often excuse their bad behavior by referencing a “duty” to advocate zealously on behalf of their clients. These unprofessional adversaries misunderstand the Model Rules and the obligations that they impose on attorneys.

In the face of aggressive litigation tactics, here are some practical steps to take:

- Recall your duty to report misconduct and decide whether actions at issue rise to the level of an offense that a self-regulating professional must endeavor to prevent or whether the incident may be one of a pattern and practice by the offending attorney.
- Research any attorney whom you suspect of being a Rambo litigator. You may uncover

tactics that this attorney has used against others, leaving you better positioned to deal with him. In some cases, you may be able to use your findings as evidence that the tactic being used against you or your client is consistent with a pattern of misconduct by the offending lawyer.

- Memorialize opposing counsel's conduct in a written communication, such as a letter or an email, outlining the rules and statutes that he has violated.
- File a motion to compel if opposing counsel is engaging in obstructionist behavior during discovery.
- At a deposition, describe on the record nonverbal conduct that could amount to sanctionable behavior. In addition to "reading" nonverbal conduct into the record, consider obtaining verification from a witness (e.g., the deponent or another lawyer who is present). You also may ask the witness on the record, "Do you feel intimidated or offended?"
- If opposing counsel is known for engaging in sharp practices or bullying, consider noticing a videotape deposition.
- Identify personal attacks or factual misrepresentations made in opposing counsel's briefs or motions.
- File a motion for sanctions under Federal Rule of Civil Procedure 11 based on opposing counsel's objectionable conduct and provide specific, written documentation of that conduct in the motion's supporting exhibits.
- File a motion to compel under Federal Rule of Civil Procedure 37 when dealing with obstructionist tactics that prevent access to rightly discoverable information.

In sum, the conduct of some attorneys violates ethical rules and exposes them to sanctions. In order to deter bad behavior and to encourage practice with civility, we must use the tools available to us under the Model Rules, the Federal Rules of Civil Procedure, and 28 U.S.C § 1927 to call unprofessional adversaries to task by reporting unethical acts and, in some cases, asking for sanctions. ■

### Notes

1. *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

2. *See Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 779 (7th Cir. 1991) (noting that "professional incivility [is] a situation of general concern in this circuit and elsewhere").

3. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

4. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2019).

5. *Id.* pmbl. & scope ¶ 9.

6. *Id.* r. 1.3 cmt. ¶ 1.

7. *Id.* pmbl. & scope ¶ 1, ¶ 5.

8. *Id.* r. 4.4.

9. *Id.* r. 8.4.

10. *Id.* cmt. ¶ 1.

11. *Id.* r. 8.3.

12. *Id.* r. 8.3 cmt. ¶ 1.

13. *Id.* cmt. ¶ 3.

14. MODEL RULES OF PROF'L CONDUCT r. 3.3.

15. *Id.* r. 3.4.

16. *Id.* r. 8.4.

17. *Id.* r. 3.1.

18. *See, e.g., Denman v. Pub. Serv. Elec. & Gas Co.*, No. A-3025-10T4 (N.J. Super. Ct. Aug. 24, 2012) (affirming award of attorney fees for knowingly pursuing a claim in violation of the statute of limitations).

19. *See, e.g., State v. Hynes*, 978 A.2d 264, 268 (N.H. 2009) (affirming conviction of theft by extortion).

20. Plaintiffs' Motion for Sanctions, *Buxton Arlington Pet, LLC v. Pete & Mac's Arlington, LLC*, No. 348-256203-11 (Tarrant Cty., Tex., Dist. Ct. 2012).

21. MODEL RULES OF PROF'L CONDUCT r. 3.2.

22. *Id.* r. 3.4.

23. *Id.* r. 3.3.

24. *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (noting that sanctioned counsel appeared on 85 percent of deposition transcripts with statements other than objections as to form or requests for the court reporter to read back questions).

25. FED. R. CIV. P. 30(d)(1).

26. *Id.*

27. *See Fla. Bar v. Martocci*, 791 So. 2d 1074, 1074-76 (Fla. 2001) (publicly reprimanding, requiring a two-year probation for, and assessing costs against sanctioned attorney).

28. *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184-86 (N.Y. App. Div. 1992) (sanctioning attorney for misconduct with \$1,000 fine).

29. Plaintiffs' Motion for Sanctions, *Buxton Arlington Pet, LLC v. Pete & Mac's Arlington, LLC*, No. 348-256203-11, at \*6 (Tarrant Cty., Tex., Dist. Ct. 2012).

30. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2019).

31. *Id.* cmt. ¶ 3.

32. *Id.* r. 4.2.

33. *Id.* cmt. ¶ 1.

34. *See id.* ¶ 4 ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").

35. *Id.* ¶ 3.

36. *Bedoya v. Aventura Limousine & Transp. Serv. Inc.*, No. 11-24432, 2012 LEXIS 68322, at \*69 (S.D. Fla. May 16, 2012).

37. *Id.* at \*15.

38. *Id.* at \*19.

39. *Id.* at \*20.

40. MODEL RULES OF PROF'L CONDUCT r. 4.4.

41. *Id.* r. 8.4.

42. FED. R. CIV. P. 11(c)(1).

43. 28 U.S.C. § 1927 (2000).

44. *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986).

45. *Id.*

46. *See Claiborne v. Wisdom*, 414 F.3d 715, 722-24 (7th Cir. 2005).

47. FED. R. CIV. P. 37(a)(3)(B).

48. *Id.*

49. *Id.* (a)(1).