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Taking the High Road: How to Deal Ethically with Bullies Who Don’t Play by the Rules

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I. SCOPE OF ARTICLE

This program will discuss ethical challenges relating to aggressive client advocacy and appropriate responses to counsel who cross the ethical line. It will cover situations in which opposing counsel makes material misrepresentations to the court, files frivolous claims and motions, thwarts the taking of discovery or the advancement of a case, contacts your client without your knowledge or uses dishonest tactics during settlement negotiations.

A. Applicable Rules

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, alternate dispute resolution and/or individual judge level. Although those rules may vary, this program’s primary focus will be the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the American Bar Association’s (“ABA”) Model Rules of Professional Conduct (“Model Rules”), which have broad application and are a model for many states.

B. The Rationale for and Objective of this Program

As early as the 1980s, the United States 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.” Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D. 284, 286 (N.D. Tex. 1988). Despite judicial condemnation, attorneys throughout the country still use sharp practice or aggressive tactics and treat opposing counsel and parties with disrespect. See Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991) (“professional incivility [is] a situation of general concern in this circuit and elsewhere.”). As explained below, the Model Rules and their state counterparts impose ethical obligations on counsel to behave professionally, even while zealously advocating for their clients. Moreover, the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 provide mechanisms with which attorneys may challenge, or, in other words, stand up to, opponents whose litigation style lies outside the bounds of ethical and fair practice. This program 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 engage in those practices.

II. AN OVERVIEW OF ZEALOUS ADVOCACY, PROFESSIONAL MISCONDUCT, AND REPORTING REQUIREMENTS

A. No Express Duty to Zealously Advocate

Many attorneys operate under the misconception that the Model Rules contain an express duty for them to zealously advocate 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 20 years ago, the ABA’s Model Rules intentionally eliminated an express duty to zealously advocate and replaced it with a duty to represent one’s client with “reasonable diligence.” The current Model Rule provides:

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

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: “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.” See Preamble and Scope at ¶ 9. Additionally, in the Comment to Model Rule 1.3, the drafters note that while lawyers must act “with zeal in advocacy upon the client's behalf . . . [they are] not bound, however, to press for every advantage that might be realized for a client.” See Comment to Model Rule 1.3 at ¶ 1. Attorneys who excuse aggressive tactics because they are zealously advocating for their clients stand on shaky ethical ground and flatly ignore requirements for professionalism and civility in their dealings with others.

B. Overly Zealous Advocates Are Rulebreakers

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, 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.” See Preamble and Scope to Model Rules at ¶ 1. Adding to the lofty Preamble statements, and as discussed in the section on discovery below, Model Rule 3.4 generally imposes on an attorney a duty of fairness to an opposing party and counsel. The Model Rules also dictate that attorneys treat third parties well, for:

**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.

While 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.

C. Rulebreakers Engage in Professional Misconduct

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.

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 . . . .” See Comment to Model Rule 8.4 at ¶ 1. Discipline may come in an array of penalties, such as a fine, suspension or, in extreme cases, even disbarment. Given a device with which to discipline unethical behavior, what allows lawyers to continually engage in intimidating and overly aggressive litigation tactics is our own failure to call the bullies and rulebreakers to task for their bad behavior.

D. Our Obligation to Report Professional Misconduct

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.
The Model Rules require reporting even in isolated incidents because it “may indicate a pattern of misconduct that only a disciplinary investigation can uncover.” See Comment to Model Rule 8.3 at ¶ 1. However, 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.” See Comment to Model Rule 8.3 at ¶ 3. Several factors weigh in favor of reporting incidents of professional bullying: (1) the elimination of an express duty to zealously advocate 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 non-lawyers participate in, a respected judicial system.

III. SPECIFIC INSTANCES OF BULLYING & RULEBREAKING

To more specifically explore the ways in which sharp practices violate the Model Rules, the following section reviews ethical violations relating 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, contacting your client without your knowledge and consent or using dishonest tactics during settlement negotiations.

A. Improper Service and Misrepresentations to the Court Regarding Service

An unethical plaintiff’s 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 account of dishonesty, a plaintiff’s lawyer hand-served the defendant a copy of a letter plaintiff had sent to the Department of Labor. Counsel proceeded to falsely claim that he had hand-served the defendant a copy of the complaint at the same time as the letter. Under the law, service should have been made by certified mail. When the defendant failed to act, the plaintiff moved for a default judgment. The defendant had no recourse unless he was able to prove he had not been served or that plaintiff intentionally failed to make proper service. Such deceitful behavior clearly violates the Model Rules:

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.

**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.

**Rule 3.4 Fairness to Opposing Party & Counsel**

(a) 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;

**B. Filing Frivolous Claims**

Not all lawsuits – nor all claims and defenses at issue in a lawsuit – are meritorious. Lawyers may unwisely pursue claims that lack any evidentiary support or which are untimely due to an expired Statute of Limitations. 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.
Sanctions can often 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. (See, e.g., Denman v. Public Service Electric & Gas Co., No. A-3025-10T4 (N.J. Super. August 24, 2012). (affirming award of attorneys fees for knowingly pursuing a claim in violation of the statute of limitations). In such an instance, however, note that there may first be a duty for the non-offending attorney to provide written notice of any deficiencies in the complaint prior to seeking sanctions relating to such deficiencies.

Depending upon the jurisdiction, Counsel may also be criminally liable if they demand settlement for a clearly frivolous lawsuit. See, e.g., State of New Hampshire v. Hynes, 978 A.2d 264, 268 (N.H. 2009) (affirming conviction of theft by extortion). At the very least, counsel who file frivolous lawsuits or assert frivolous claims or defenses have behaved unethically.

C. Abuse of Motion Practice

Attorneys are officers of the court, and as such, they have a duty to truthfully present 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 delay 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. Unprofessional adversaries who make material misrepresentations are manipulating the facts and the law, which is not in keeping with their ethical duties. The Model Rules impose duties of timeliness and candor:

**Rule 3.2 Expediting Litigation**

(a) A lawyer shall make reasonable efforts to expedite litigation consistent with the efforts of the client.

**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, which 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.

D. Thwarting Discovery or Advancement of the Case

Aggressive 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 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.” Again, this conduct occurred during the scheduling of a deposition, and the aggressive partner was unchecked by a judicial officer.
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.” Model Rule 3.2 also discourages obstructionist tactics, for, “A lawyer shall make reasonable efforts to expedite litigation consistent with the efforts of the client.”

Despite these rules, misconduct during discovery and depositions abound:

1. **Suggestive or Argumentative Objections and Refusals to Answer Questions**

   Aggressive lawyers overuse objections, use speaking objections, and harangue the attorneys who are taking depositions in order to fluster the attorney and to intimidate and/or signal to the deponents that the deponent’s counsel has lost control of the proceedings. 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.” F.R.C.P. 30(d)(1). The Federal Rules of Civil Procedure also limit an attorney’s ability to instruct a witness not to answer a question: “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).” Id. 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 F.R.C.P. 30 and may invoke sanctions. *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (noting sanctioned counsel appeared on eighty-five percent of deposition transcript with statements other than objections as to form or requests for court reporter to read back question).

   Not only are these actions sanctionable under F.R.C.P. 30, but they also constitute ethical violations of the Model Rules. 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. Such results run 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).

2. Sexist and Racists Remarks at Deposition

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. Yet, 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 “nut case.” See Florida Bar v. Martocci, 791 So. 2d 1074, 1074-6 (Fla. 2001) (publicly reprimanding, requiring a two-year probation, and assessing costs against sanctioned attorney). 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 “[s]anctions are also appropriate when an attorney egregiously fails to conform to accepted notions of conduct.” 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). Even in 2012, sexist comments have occurred in writing. Recent news reports leaked a motion for sanctions and its accompanying exhibits (lengthy email chains between counsel attempting to schedule a deposition) in which a partner from a major law firm insults, curses at and threatens his opponent. When his 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 added, “Don’t f#*% with me [man]. Big mistake.” 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.
E. Contacting Client Without Counsel’s Knowledge or Consent

As client representatives, attorneys expect to handle all communications from their adversaries. Indeed, the Model Rules mandate that attorneys only contact represented persons 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.

Model Rule 4.2 is meant to prevent “overreaching by other lawyers who are participating in the matter” and “the uncounseled disclosure of information relating to the representation.” *See* Comment to Model Rule 4.2 at ¶ 1. 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. *See* Comment to Model Rule 4.2 at ¶ (“This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.”). 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.” *See* Comment to Model Rule 4.2 at ¶ 3.

Model Rule 4.2 is not limited to the litigation context. An entire Florida law firm was recently disqualified from a case because the lead counsel made comments to an adverse party in an arbitration matter. *Bedoya v. Aventura Limousine & Transp. Service Inc.*, No. 11-24432, *69 2012 LEXIS 68322 (S.D. Fla. May 16, 2012).* The contact took place in a hallway during a break in the arbitration. *Id.* at 15. Notably, the arbitration at which the communication took place was separate from the matter from which the firm was disqualified, but involved the same lawyers and the same Defendant. *Id* at 19. Since the communication had the effect of influencing the
Defendant’s relationship with his counsel, the court stated it had an “effect” on the case at issue, thus the disqualification was warranted. *Id* at 20.

F. F. 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 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 due to inadvertence or intentional. The rules previously discussed apply here as well.

*Rule 4.4 Respect for Rights of Third Persons*

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.

*Rule 8.4 Misconduct*

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

IV. TOOLS FOR DEALING WITH UNPROFESSIONAL ADVERSARIES

A. 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, and the inclusion of a material misrepresentation in a court filing. According to F.R.C.P. 11(a), an attorney must sign every pleading or written motion submitted to the court. F.R.C.P. 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, or making a material misrepresentation to
the court are actions upon which an F.R.C.P. 11 sanction may be based.

If attorneys wish to file a motion for sanctions under F.R.C.P. 11, they must serve that
motion under F.R.C.P. 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 F.R.C.P. 11(c)(1), a law firm is held jointly responsible for
any sanctionable conduct of its partners, associates, and employees “absent exceptional
circumstances.” Moreover, F.R.C.P. 11(c)(2) authorizes the court to award reasonable expenses,
including attorney’s fees, incurred by the filing of a motion for sanctions. The goal of F.R.C.P.
11 is to deter unprofessional conduct, so any penalties for actions that violate F.R.C.P. 11 should
be made in accordance with that goal.

B. 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.” 28 U.S.C. § 1927. Courts have held that an attorney may be
sanctioned under Section 1927 “despite the absence of conscious impropriety.” Jones v. Cont’l
Corp., 789 F.2d 1225, 1230 (6th Cir. 1986). Thus, the movant need not show that the attorney
being challenged under Section 1927 acted with bad faith; rather one only must prove 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.” Id.

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. See

C. 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.” 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)(4)” or “a party fails to permit inspection.” 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.” 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 non-producing
party reneging on a promise to produce discovery at the last second or claiming to produce
discovery and then producing only a small portion the discovery promised. Where a non-
producing 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.

V. 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 zealously advocate on behalf of their
clients. These unprofessional adversaries misunderstand the Model Rules and the obligations
that they impose on attorneys. Their conduct 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.

VI. PRACTICE POINTERS

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 profession must endeavor to prevent or whether the incident may be one of a pattern and practice for the offending attorney.
- Research any attorney you suspect of being a RAMBO litigator. You may uncover tactics he or she has used against others, leaving you better positioned to deal with them. In some cases, you may be able to use your findings as evidence that the tactic is being used against you or your client.
- 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 non-verbal conduct that could amount to sanctionable behavior. In addition to “reading” non-verbal conduct into the record, consider obtaining verification from a witness (e.g. the deponent, another lawyer who is present). You may also 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 Fed. R. Civ. P. 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 Fed. R. Civ. P. 37 when dealing with obstructionist tactics that prevent access to rightly discoverable information.