

# **HOLD ON TO YOUR BAR LICENSE: THE MODEL RULES OF PROFESSIONAL CONDUCT, THE PITFALLS OF CIVIL DISCOVERY AND HOW AN ATTORNEY CAN GET INTO TROUBLE**

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## **I. Introduction**

Of course, it would not be a good idea to tell opposing counsel in a filmed and transcribed deposition to “Sit down, you fat tub of ----,” as one lawyer infamously did during a legal battle some years ago. See Roger E. Schechter, Changing Law Schools to Make Less Nasty Lawyers, 10 GEO. J. LEGAL ETHICS 367, 379 n.43 (1997). We know as a matter of civility and decorum that such an outburst is ill-advised and unprofessional, but is this the type of behavior that could violate the professional responsibility rules and subject an attorney to professional discipline? Does an attorney violate the professional conduct rules by instructing a witness not to answer a question during a deposition, failing to correct a false interrogatory answer or false deposition testimony, or requesting that someone other than a client not speak with the opposing party?

The professional responsibility rules cover the full panoply of a lawyer’s conduct during discovery, including taking and defending depositions, propounding and answering interrogatories and requests for production of documents, and obtaining discovery responses from the opposing party. The American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”) provide guidance regarding an attorney’s professional responsibilities during discovery.<sup>2</sup> The following Rules may be implicated during discovery:

- Model Rule 3.4(a) (prohibits lawyer from unlawfully obstructing another party’s access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value);
- Model Rule 3.4(c) (requires lawyer to obey rules of tribunal);
- Model Rule 3.4(d) (prohibits lawyer from making frivolous discovery requests or failing to make reasonably diligent effort to comply with legally proper discovery requests by an opposing party);

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<sup>1</sup> The author extends her appreciation to Thomas Alderson and Virginia Browne for their assistance in preparing this paper.

<sup>2</sup>The ABA Model Rules form the basis for most every other jurisdictions’ professional conduct rules, and thus are a useful guide in discussing professional responsibility issues that may arise in discovery.

- Model Rule 3.4(f) (prohibits lawyer from requesting a person other than a client to refrain from voluntarily providing relevant information to another party);
- Model Rule 3.3(a)(1) (prohibits lawyer from making false statements of material fact or law to a tribunal and requires lawyer to correct the falsity);
- Model Rule 3.3(a)(3) (prohibits lawyer from offering material evidence to a tribunal lawyer knows to be false and must take remedial measure if she does so);
- Model Rule 3.5(d) (prohibits lawyer from engaging in conduct intended to disrupt a tribunal);
- Model Rule 4.4(a) (prohibits lawyer from using 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 others);
- Model Rule 4.4(b) (requires lawyer who receives a document relating to the representation of lawyer's client that lawyer knows or reasonably should know was inadvertently sent to promptly notify the sender);
- Model Rule 8.4(c) (prohibits lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation);
- Model Rule 8.4(d) (prohibits lawyer from engaging conduct prejudicial to the administration of justice).

Many of these Rules (and their state counterparts) have been the basis for attorney discipline for conduct such as intimidating and demeaning witnesses, using profanity and racial slurs during depositions, propounding overburdensome discovery requests or obtaining an opposing party's privileged information. This paper will provide a general discussion of these Rules and the types of discovery conduct that may violate the Rules and subject an attorney to professional discipline.<sup>3</sup>

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<sup>3</sup> Some federal courts have imposed aspirational goals for lawyer conduct during discovery. The Seventh Circuit, for example, adopted Standards of Professional Conduct binding on all lawyers appearing in federal court in that circuit. See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992); McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486-87 (5th Cir. 1990) (commending Texas State Court for adopting standards for attorney conduct.).

## II. The Model Rules

### A. Model Rule 3.4: Fairness to Opposing Party and Counsel

The intent of Rule 3.4 is to ensure fair treatment of opposing party and counsel. Comment [1] to Rule 3.4 provides that:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. [1]. Model Rule 3.4 contains various subparts, several of which directly apply to a lawyer's conduct during discovery. In particular, Rule 3.4(a) and (d) provide that:

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;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009). Lawyers have been sanctioned pursuant to these Rules for, among other things, requesting needless discovery extensions, seeking unnecessary and voluminous discovery and failing to respond to discovery requests. See In re Boone, 7 P.3d 270, 282 (Kan. 2000) (lawyer given two years of supervised probation for violating Rule 3.4(d) (and other Rules) by filing requests to extend time for discovery without plans to conduct discovery); In re Caranchini, 956 S.W.2d 910, 915 (Mo. 1997) (lawyer disbarred for violating Rules 3.4(a) and (d) by inter alia, pursuing baseless claims, seeking voluminous unnecessary discovery, using a forged document and failing to take remedial action to correct these actions); Columbus Bar Ass'n v. Finneran, 687 N.E.2d 405, 407 (Ohio 1997) (indefinite suspension warranted where attorney flouted his discovery obligations for purposes of delaying proceedings in multiple cases, even going so far as to dismiss and refile those cases, violating Rule 3.4(d)); see also Ct Eth. Op. 97-33 (1997) (lawyer who received altered expert witness report that had been redacted by transmitting attorney in violation of Rule 3.4(a) had an

obligation under Rule 8.3 to report the infraction).<sup>4</sup>

Another provision, Model Rule 3.4(c), requires that an attorney follow the rules of the tribunal, except for an open refusal asserting no valid obligation exists. See MODEL RULES OF PROF'L CONDUCT R. 3.4(C) (2009). The rules of the tribunal would include a court order, the court's local rules and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 26-37 (especially Rule 26 setting out the general provisions governing discovery and the duty of disclosure; Rule 30 on depositions; Rule 33 on interrogatories; Rule 34 on document production and electronic records; and Rule 36 on requests for admissions). Therefore, an attorney who runs afoul of a court's order, the local rules or the Federal Rules of Civil Procedure likewise may violate her professional responsibilities and may be subject to discipline. See In re Boone, 7 P.3d at 280 (attorney sanctioned for violating court orders); see also Terrell v. Mississippi Bar, 635 So. 2d 1377, 1387 (Miss. 1994) (lawyer suspended for a year for failing to follow court's order to comply with discovery requests, in violation of Rule 3.4(c)).

Finally, Model Rule 3.4(f) provides that a lawyer shall not:

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or an agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

SEE MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2009). The Rule on its face makes clear that a lawyer may not request a third party who is not the client's agent or employee to refrain from communicating with opposing counsel, and lawyers have been disciplined under this Rule for discouraging a third party from speaking with the opposing party. See, e.g., Briggs v. McWeeny, 796 A.2d 516, 533 (Conn. 2002) (disqualifying lawyer from case when lawyer instructed witness

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<sup>4</sup> Although not citing to the professional conduct rules, the following are types of conduct that also may run afoul of Rule 3.4(a). See In re Smith, No. 00-02375, 05-9085, 2006 WL 3000071, at \* 2 (Bankr. N.D. Iowa Oct. 17, 2006) (unpublished) ("Abusive discovery tactics, such as those characterized by a party's repetitive, frivolous, obstructionist, boilerplate objections [in depositions], will not be countenanced."); Parret v. UNICCO Service Co., No. Civ-01-1432-HE, 2006 WL 752877, at \*4 n.13 (W.D. Okla. Mar. 21, 2006) (unpublished) (where court's review of the evidence revealed repeated instances of abusive deposition tactics by plaintiff's counsel, most often involving insertion of an "asked and answered" objection in circumstances where a legitimate followup question was asked, then bickering about it so vigorously that the deposition, along with every participant's thought process, was disrupted, plaintiff's counsel was admonished for inappropriate conduct).

and his counsel not to discuss damaging engineering report with anyone); In re Smith, 848 P.2d 612, 615 (Or. 1993) (suspending lawyer for 35 days for sending letter to examining physician threatening to sue him and insurer if doctor expressed particular medical opinion in course of the compensation proceedings).

The question arises regarding what an attorney may say to a non-employee, non-relative or non-agent third party who may be interviewed by opposing counsel. At least one authority has suggested that it is permissible for an attorney to inform such a third party that he or she is not required to speak with opposing counsel if he or she does not want to do so and that he or she may place conditions on the interview. See Restatement of the Law (Third) of The Law Governing Lawyers § 116 cmt. e. The Restatement of the Law (Third) of The Law Governing Lawyers provides that:

A lawyer may inform any person of the right not to be interviewed by any other party, but a lawyer may not request that a person exercise that right or attempt otherwise to induce noncooperation, except as permitted under Subsection (4). A lawyer may also advise of the right to insist on conditions, such as that the lawyer or the person's own lawyer be present during any interview or that the interview be recorded.

Restatement of the Law (Third) of The Law Governing Lawyers § 116 cmt. e. In addition, if any privacy laws and/or applicable privileges impose legal limitations on the scope of information that the non-employee, non-relative, or non-agent third party may disclose, an attorney may demand that the third party comply with legal confidentiality obligations and inform him or her of the client's position regarding the extent of those obligations. See Restatement of the Law (Third) of The Law Governing Lawyers § 116 cmt. a ("A lawyer may properly demand that a person who is not otherwise excepted from the Subsection observe a legal obligation of confidentiality to the lawyer's client. For example, a physician or member of the clergy who is considered to be an independent contractor may nonetheless owe a legal duty of confidentiality to the client, which the client's lawyer may properly insist that the person observe.").

### **B. Model Rule 3.3: Candor Toward the Tribunal**

Model Rule 3.3 states in pertinent part:

(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 in the tribunal by the lawyer;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyers'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.

MODEL RULES OF PROF'L CONDUCT R. 3.3 (a) (2009).

Although the Rule governs candor toward the "tribunal," it is important to bear in mind that "tribunal" is defined broadly, and includes ancillary proceedings such as a deposition. *Id.*, cmt. [1] ("[The Rule] applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false."<sup>5</sup>). Therefore, your duty of candor applies with equal force in a deposition.

Model Rule 3.3(a)(1) applies to a lawyer's statements to the tribunal. Attorneys have been sanctioned under this provision of the Rule for making misrepresentation to the court regarding discovery or hiding material sought in discovery. See *Sprauve v. Mastromonico*, 86 F. Supp. 2d 519, 528 (D.V.I. 1999) (attorney disbarred for, *inter alia*, willfully refusing to attend his depositions without sufficient justification, knowingly misrepresenting material facts in his filing seeking a protective order for his failure to attend the deposition, and knowingly misstating material facts concerning his reasons for not attending his deposition); *People v. Poll*, 65 P.3d 483, 486 (Colo. 2003) (lawyer disbarred for, *inter alia*, falsely implying that clients were to blame for discovery delays); *In re Disciplinary Action Against Edwardson*, 647 N.W.2d 126, 132 (N.D. 2002) (court found attorney violated state counterpart to Rule 3.3(a)(1) when she falsely represented to the court the reason for her client's failure to respond to discovery and gave her a 60 day suspension).

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<sup>5</sup> Under Model Rule 1.0(m), "tribunal" is defined as follows:

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

MODEL RULES OF PROF'L CONDUCT R. 1.0 (m) (2009).

Model Rule 3.3(a)(3) applies to evidence that an attorney provides to a tribunal including testimony, sworn statements (affidavits and declarations), and interrogatory responses of the attorney, client and third parties. Accordingly, an attorney who fails to correct a deposition transcript containing false material evidence may be sanctioned under Rule 3.3(a)(3).<sup>6</sup> See In re Mack, 519 N.W.2d 900, 901-02 (Minn. 1994) (court suspended attorney for, inter alia, failing to correct false deposition testimony); N.Y.C. Law. Ass'n. Comm. Prof. Eth. Op. 741 (2010) (a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstrating with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. Rule 3.3(a)(3)); Philadelphia Bar Ass'n Prof'l Guidance Committee Op. 95-3 (1995) (in a case where a client may have given misleading answers in a deposition, the opinion states: "As the Comment to Rule 3.3 makes clear, the duties of loyalty and confidentiality owed to the lawyer's client require exploration of options short of outright disclosure. Thus, the lawyer's first step might be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client's wrongdoing or breaching the client's confidences, depending upon the rules of the jurisdiction and the nature of the false evidence. For example, answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal.").

Attorneys also have been sanctioned for submitting false interrogatory answers. See Matter of Shannon, 876 P.2d 548, 560 (Ariz. 1994) (court found attorney violated Arizona counterpart of Rule 3.3(a)(1), among other rules, by knowingly submitting interrogatory answers that did not correctly reflect his client's position even though the attorney thought the answers were correct. "The false statement or false evidence that Respondent offered to the court was that

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<sup>6</sup> Whether a false statement is material is a factor in determining whether an attorney needs to take remedial measures to correct a falsity. Generally, attorneys should bear in mind that the Model Rules do not contain a definition of materiality, and that courts have defined the term differently. Compare Daniels v. Alander, 818 A.2d 106, 115 (Conn. 2003) (court concluded that an attorney's opinion about whether the court was the proper forum for the case was material; "it was important to the court's decision when the court made it a subject of its inquiry"); Cohn v. Commission for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) ("[M]ateriality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.") with Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Lane, 642 N.W.2d 296, 301 (Iowa 2002) ("[E]thics is not a matter of degree of misstatement – any knowing misstatement to the court being unethical.").

the answers he submitted represented Client A's position. Respondent was well aware that the 'revised' answers he submitted as Client's A's did not represent Client A's position.").

The ABA has opined that an attorney should correct erroneous deposition testimony, interrogatory answers and responses to document requests even if the discovery is not presented to the court. See ABA Committee on Ethics and Professional Responsibility Formal Op. 93-376 at 2-3 (1993) ("Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer's duty to take reasonable remedial measures . . . including disclosure if necessary"; false interrogatories also must be corrected).

Finally, in considering one's candor obligations, a lawyer should be aware that courts have recognized a broad general duty of candor required to protect the integrity of the judicial process above and beyond the requirements set forth in the rules of professional conduct. See United States v. Shaffer Equipment Co., 11 F.3d 450, 458 (4th Cir. 1993) ("While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision making process . . . this rule nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process."); accord Eagen by Keith v. Jackson, 855 F. Supp. 765, 789 (E.D. Pa. 1994) ("Even beyond the requirements of Rule 3.3(d), an attorney, as an officer of the Court, has an overarching duty of candor to the Court."). Thus, even if some conduct does not violate the Rule specifically, a court may, nonetheless, conclude that an attorney has violated her obligations.

### **C. Model Rule 4.4: Respect for Rights of Third Persons**

#### **1. Rule 4.4(a)**

Model Rule 4.4(a) states in pertinent part that: "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[.]" MODEL RULES OF PROF'L CONDUCT R. 4.4 (a) (2009).<sup>7</sup> Attorneys have been disciplined for violating Rule 4.4(a) when they engage in persistent unprofessional conduct toward opposing counsel and third parties. See, e.g., Matter of Vincenti, 704 A.2d 927, 944 (N.J. 1998) (respondent's many years of noxious and unprofessional abuse of opposing counsel and witnesses "left a trail of injuries and wounds that may never heal;" offending attorney disbarred).

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<sup>7</sup> Similarly, "Rule 26(c) specifically permits a court to take actions 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense' by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 595 n.13 (2007) (Stevens, J., dissenting, and Ginsburg, J., joined in part); see also Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 145 (D. Md. 1997) (stating same).

“Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys.” In re Anonymous Member of South Carolina Bar, 552 S.E.2d 10, 18 (S.C. 2001) (citing A. Darby Dickerson, The Law and Ethics of Civil Depositions, 57 MD. L.REV. 273, 277 (1998)). Courts and bar authorities have admonished and even suspended attorneys for their inappropriate conduct during a deposition. See Matter of Golden, 496 S.E.2d 619, 622 (S.C. 1998) (lawyer made insulting and degrading comments to witness and adverse party during depositions in violation of Rule 4.4; this conduct, inter alia, warranted a public reprimand); In re Estiverne, 741 So. 2d 649, 654 (La. 1999) (suspending attorney for over a year for threatening another lawyer with a firearm during a deposition); In re Williams, 414 N.W.2d 394, 398 (Minn. 1987) (reprimanding and suspending attorney for six months for using anti-Semitic epithets at a deposition); Parret v. UNICCO Service Co., No. Civ-01-1432-HE, 2006 WL 752877, at \*4 n.13 (W.D. Okla. Mar. 21, 2006) (unpublished) (where court’s review of the evidence revealed repeated instances of abusive deposition tactics by plaintiff’s counsel, most often involving insertion of an “asked and answered” objection in circumstances where a legitimate followup question was asked, then bickering about it so vigorously that the deposition, along with every participant’s thought process, was disrupted, plaintiff’s counsel was admonished for inappropriate conduct).<sup>8</sup>

The second clause of Rule 4.4(a) provides that: “In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a person.” MODEL RULES OF PROF’L CONDUCT R. 4.4 (a) (2009). The “evidence” contemplated by the Rule includes information protected by the attorney-client privilege and the work product doctrine. Id. (“It is impractical to catalogue all such rights [under the Rule], but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-408 n.14 (1997) (gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation may violate Model Rule 4.4 and other Rules and also may result in court-imposed sanctions.).

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<sup>8</sup> Attorneys also may run afoul of Model Rule 3.5(d) for engaging in inappropriate conduct during a deposition. Model Rule 3.5(d) provides: A lawyer shall not “engage in conduct intended to disrupt a tribunal.” MODEL RULES OF PROF’L CONDUCT R. 3.5(d) (2009); Paramount Communications, Inc. v. QVC Network Inc., 637 A.2d 34, 53 (Del. 1994) (finding that lawyer’s conduct during a deposition “was extraordinarily rude, uncivil, and vulgar, and . . . obstructed the ability of the questioner to elicit testimony to assist the court in this matter.” Even though the offending lawyer was not a member of the Delaware bar and so not subject to the Delaware rules, the court sua sponte issued an admonitory opinion saying that, if anyone moved for sanctions against this attorney, they would be granted, relying on Rule 3.5 of the Delaware Rules of Professional Conduct Delaware Rule 3.5(d)).

Therefore, an attorney who intentionally obtains an opponent's privileged information by reviewing an opponent's privileged documents or speaking with an opponent's former employee or expert witness may run afoul of Rule 4.4(a). See e.g., Arnold v. Cargill Inc., No. 01-2086 (DWF/AJB), 2004 WL 2203410 (D. Minn. 2004) (unpublished) (firm disqualified for impermissibly obtaining privileged information from opponent in violation of Rule 4.4; lawyer who had worked for Cargill brought privileged information to firm litigating against Cargill; court explicitly found a violation of 4.4, violating "the legal rights of a non-client"); Valassis v. Samuelson, 143 F.R.D. 118, 122 (E.D. Mich. 1992) (Rule 4.4 prohibits lawyer from asking opponent's former employee to disclose or testify about privileged information); Utah Ethics Op. 99-03 (1999) (opining that obtaining privileged information from an expert would run afoul of Rule 4.4(a)).

## 2. Rule 4.4(b)

Rule 4.4(b) provides that:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

MODEL RULES OF PROF'L CONDUCT R. 4.4 (b) (2009).

Comments [2] and [3] expand upon this obligation:

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that

it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Id., cmt. [2] and [3]; see also Fla. State Bar Ass'n Eth. Op. 07-1 (2007) (lawyer whose client provides the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue, as directed by Rule 4.4(b). If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation).

#### **D. Model Rule 8.4: Misconduct**

Model Rule 8.4 states in pertinent part:

It is professional misconduct to:

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

(d) engage in conduct that is prejudicial to the administration of justice[.]

MODEL RULES OF PROF'L CONDUCT R. 8.4 (2009).

The prohibition on conduct involving "dishonesty, fraud, deceit or misrepresentation" is broad and covers conduct both in and outside the practice of law. See ABA Formal Ethics Op. 97-407 (1997) (lawyer who served as an expert witness was subject to discipline under Rule 8.4(c) for testifying falsely). The Rule has been applied in disciplinary cases of discovery abuse. See In re Forrest, 730 A.2d 340, 344 (N.J. 1999) (lawyer failed to disclose that client died, and mislead opposing counsel through the discovery and negotiation process).

Rule 8.4(d) prohibits a lawyer from engaging in conduct "prejudicial to the administration of justice." This phrase is not defined in the Rules or comments; however, courts have determined that attorney's conduct constituted conduct that was prejudicial to the administration of justice when the attorney's conduct impeded the court from determining the truth or prejudiced the system of justice as a whole. See Attorney Grievance Com'n of Maryland v. Reinhardt, 892 A.2d 533, 540 (Md. 2006) ("Behavior that may seriously impair public confidence in the entire profession, without extenuating circumstances, may be conduct prejudicial to the administration of justice.").

In the discovery context, courts have found violations of Rule 8.4(d) in relation to lawyers' relationships with opposing parties, their counsel, or witnesses. See In re Fletcher, 424 F.3d 783, 791, 795 (8th Cir. 2005) (lawyer engaged in pattern of unprofessional conduct, violating Missouri Rule 8.4(d), "in an attempt to harass, humiliate and intimidate deponents and their counsel" by "selectively quoting deposition testimony in a way that grossly mischaracterized deponents' statements."); People v. Genchi, 824 P.2d 815, 817 (Colo. 1992) (in deposing the treating physician and attorney's expert witness in a slip and fall case, it became clear that physician's testimony would not be favorable to attorney's client; after the deposition concluded, attorney and the physician "exchanged uncomplimentary observations and physical threats[,] and, when attorney left the deposition room and proceeded down a hallway towards the reception, attorney shoved the physician's wife, "who had also confronted [attorney;]" attorney's conduct was found prejudicial to the administration of justice in violation of DR 1-102(A) (predecessor to Rule 8.4) and adversely reflected on attorney's fitness to practice law warranting public censure and six months suspension).

In the discovery context, courts also have found that an attorney violated Model Rule 8.4(d) in addition to or based upon the violation of another Model Rule that may more specifically define and proscribe the attorney's conduct. See Matter of Golden, 496 S.E.2d at 623 (demeaning comments aimed at opposing counsel are prejudicial to the administration of justice), and Matter of Vincenti, 704 A.2d at 939 (delaying and deceptive tricks aimed at thwarting the Special Master's investigation violated Rule 8.4(d)).

### **III. Conclusion**

Every attorney is required to follow the Rules of Professional Conduct of her state of licensure. Lawyers conducting discovery must remain mindful that, although discovery is not conducted in a courtroom in front of a judge, it is nonetheless conducted under judicial authority by officers of the court. Professionalism and civil courtesy in all relations with opposing counsel is never a losing strategy. A lack of courtesy, taken too far, can be.