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Game, Set, Match: It's Not Whether You Win or Lose…Yes, It Is!

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It has long been a truism that every business, every litigator, and every client wishes to "win," whether in the marketplace, in investments, in negotiations, in pre-trial litigation, or at trial. While the free market in theory encourages that attitude, culture, society, and governmental bodies have erected guard rails for the purpose of reining in those whose drive to succeed is not tempered by internal restraints.

Counsel—both in-house and outside—play a critical, yet conflicted, role. On the one hand, counsel are engaged and charged to represent and assist a client in his, her, or its goals, by providing representation, advice, counsel, and representation in negotiations and litigation. As such, they typically are "part of the team" that strives to achieve the client's objectives.

By the same token, those same attorneys are bound by numerous restraints. They are, by dint of profession and training, guided and limited by "the law." As members of the bar, when in litigation, they must work within limits set by statute and court rules. In some contexts, they face other statutory and regulatory obligations. As attorneys licensed by state bars, they are also guided and restrained by the Rules of Professional Conduct. Yet, perhaps most importantly, counsel bring experience and knowledge about legal (and factual) risks, ramifications, and rewards, which often become part of guiding the business side and clients.

In this context, many question the wisdom and efficacy of the oft-quoted admonition attributed to Grantland Rice, "It's not whether you win or lose, it's how you play the game." Nay-sayers range from the direct[1] to the oblique.[2] Among the influences that might cause one to adopt a less "fair play" approach, are that lawyers are urged to "zealously advocate" for a client,[3] and situations in which, for whatever reason, client expectations may be somewhat inflated. At the end of the day, our system expects that through competing advocacy by experienced and skilled counsel, a just outcome may be achieved.[4]

In-House Counsel's Conundrums

In-house counsel are regularly faced with competing obligations, duties, and loyalties. The lawyer is an employee or officer of the company and, like any other employee, owes a duty of loyalty to his employer.[5] As with anyone else hired, counsel also has a self-interest in continued employment and all that that provides.

At the same time, however, because he or she is an attorney and member of the bar, the Rules of Professional Responsibility govern conduct. While it has been debated, it is now well-accepted that even if the Rules were primarily drafted for lawyers in practice, they apply to in-house legal staff as well.[6]

Rule 1.13 of the Model Rules is addressed to "lawyers employed by or retained by an organization." Rule 1.13(a). As noted, where an attorney is in such a relationship, he or she represents not the Chief Executive Officer, nor the Treasurer, not the Board, but instead "the organization acting

through its duly authorized constituents." Rule 1.13(a). As noted in the Commentary, while the organization is a legal entity, it can only act "through its officers, directors, employees, shareholders and other constituents."[7] Notwithstanding, the constituents are *not* the lawyer's client.

As a result, there are multiple potential conflicts and a need for constant, careful discernment and discretion that can only be touched on in this paper. Indeed, the need to clear conflicts arises even before employment begins; outside counsel looking to move in-house should review, disclose, and clear conflicts that might arise from representations that occurred prior to being employed.[8]

Once engaged as in-house counsel, the Model Rules instruct counsel regarding their obligations, some of which may create disturbances within the company and are part of the reason in-house legal departments are sometimes labelled "The Department of 'No.'" As noted in the Commentary, decisions made by constituents of the entity "ordinarily must be accepted by the lawyer even If their utility or prudence is doubtful."[9] Not only is it the case, then, that in-house counsel is not to second guess such decisions, but the Commentary goes further: "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[10]

This does not mean, however, that in-house counsel can turn a blind eye, or avoid learning of information that is problematic. While "knowledge" is defined as "actual knowledge of the fact in question" (Model Rule 1.0(g)), knowledge "may be inferred form circumstances." *Id.* Thus, where the lawyer knows the constituent's actions may injure his client – the organization – by virtue of either violating obligations to the organization, or violations of law that might implicate the company, the lawyer must act in the best interests of the company.

Rule 1.13(b), while lengthy, highlights the issues and instructs counsel regarding their behavior:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Implications In Dealing With Business Colleagues

Rule 1.13(b) (along with its successor, Rule 1.13(c)) describes the approach to be taken where in-house counsel is aware that executives, officers, employees, and even directors have taken or intend to take or refrain from actions that may be harmful to the company. Critically, it does not open the door to general "second guessing" of business decisions – even where counsel believes there is greater risk than others may perceive. Instead, the Rule is triggered based upon the lawyer's "knowledge" that the

actions are likely to injure his client – the company – in violation either of legal obligations to the entity, or of laws in a way that "might" be imputed to the company.

Hence, a disagreement with ownership or a Board about a change in management would alone seem unlikely to require counsel to take action. On the other hand, a Board's vote to change management for reasons that are likely in violation of law[11] is more likely to require counsel's actions. Similarly, a particularly off-color or aggressive marketing campaign is unlikely to require counsel to do more than shrug his shoulders; but one which falsely misrepresents the features of the company's products is another thing.

The difficult question involves discernment of where "the line" may be. Aggressive marketing, design choices made with an eye towards cost rather than elements which might be optimal but are not required by engineering, or investments that have some degree of uncertainty would seem to fall within the "second guessing" category. By the same token, if that aggressive marketing includes clear violations of trademark, antitrust, or unfair competition laws, or the cost-cutting design choices create clear product liability risks, in-house counsel may need to look more closely at Rule 1.13(b).

What counsel (both inside and outside) must remember is "who is the 'client'." While the means of addressing concerns may differ,[12] it remains the case that counsel is engaged by the entity to represent and protect its interests. As such, once counsel "knows" that a person associated with company has acted or intends to act in a manner antithetical to that of the organization, or which is likely to result in legal violations imputed to the entity, and which is "likely" to result in "substantial injury" to the client, the obligation to protect the organization is triggered.

Thus, while business success – whether measured in profitability, competitive success in the market, in potential upside to investments, or otherwise – is always a critical goal, counsel should be keep in mind whether a particular course may require consideration of the reporting requirements of Rule 1.13(b). Of at least equal importance, as well, are the obligations imposed by numerous statutes, regulations, and case law, all of which warrant that counsel stay current.

What is Knowledge?

The obligations under Rule 1.13(b) arise when the lawyer "knows" of conduct by a "constituent" that is antithetical to the interests of the client entity. The Rule does not, however, clearly define "knowledge." While Rule 1.0(g) in theory defines knowledge as "actual knowledge of the fact in question," whatever clarity that might provide is blurred by the next sentence: "A person's knowledge may be inferred from circumstances." *Id.*

As has been noted, then, "the Model Rules of Professional Conduct and the authorities interpreting it do a poor job of defining 'knowledge"; of explaining or justifying the use of the knowledge standard in the rules; and of relating the knowledge requirement to . . . other ethical and legal requirements."[13] While it has been suggested that the definition is intended to eliminate a duty of inquiry (which might arise from a "reasonable knowledge" standard),[14] one still faces the question of degrees; that is, if lack of knowledge arises because the facts are buried deeply within the vaults and storage warehouses of the organization, or because the attorney is intentionally turning a "blind eye."

At least one commentator has explored whether a "duty to investigate" exists under the Model Rules, and if so, its scope.[15] After reviewing related obligations (including competence) under the Model Rules and other applicable law, the author concludes that a "reasonable" duty to investigate may be discerned. From this, and the potential that a failure to investigate may both violate the duty of competence and also itself give rise to "circumstantial evidence supporting actual knowledge,"[16] counsel would be ill-advised to try to avoid gaining "knowledge" in order to theoretically not trigger obligations under Rule 1.13(b). Instead, prudence warrants taking reasonable steps to investigate at an early instance. While this may cause some friction with others in the organization whose efforts are the subject of inquiry, it must be recalled that the "client" for counsel—in-house or outside—is the entity. As the commentary to Rule 1.13 states, "knowledge can be inferred from circumstances, *and a lawyer cannot ignore the obvious*." (emphasis added)

In-House Counsel and Multiple Clients

Friction may arise for both in-house and (perhaps to a lesser degree) outside counsel when faced with conflicts between two different constituents or constituent groups. Whether it is a chief executive officer who takes actions that do not seem to be predominantly intended to benefit the company; a conflict between officers and the Board of Directors; or marketing employees who initiate a campaign without reflection upon all legal and ethical considerations, counsel must navigate through potential conflicts between representing the company while hopefully remaining a valued part of the "team."

Rule 1.13(g) envisions that counsel may represent both the organization and its constituents, but expressly reminds that in doing so, the conflict of interest provisions of Rule 1.7 apply. As a result, where an officer requests that counsel undertake personal legal work that may benefit him, his family, or his other interests (rather than those of the company), a conflict may arise. Conflicts may affect the approach by counsel where he must investigate and potentially report regarding "rogue" marketing or other strategies that have the potential to harm the company itself, especially if the employees involved did so in violation of company policy or law.

Thus, at the outset, prudence warrants consideration of whether a conflict may arise between the client company and others who might assume in-house counsel will represent them. In addition to those resulting from the actions of individuals, Boards, or departments, larger organizations with subsidiaries or other affiliates may inadvertently create a situation where counsel for the umbrella organization cannot at the same time represent an affiliate.[17] Treading carefully may avoid later privilege waivers and/or disciplinary actions. And, of course, where counsel concludes that her representation of the organization may be (or may become) adverse to another constituent, an *Upjohn* Warning is required, and "the lawyer should advise any [such] constituent ... that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation." Rule 1.13 Commentary. In doing so, however, the commentators admonish to ensure that the recipient understands she will not be represented by the company's lawyer and that communications with the company's lawyer may not be privileged.

In-House Counsel and Marketing

Aggressive marketing is the hallmark of many companies.[18] While this approach may be viewed as a "winning" strategy, ill-considered advertising may itself lead to legal ramifications. False or unsupported claims, inaccurate comparison claims, or other deceptive advertising may give rise to liability under a host of trademark and unfair competition laws, as well as scrutiny by Federal agencies such as the Fair Trade Commission. Use of another's "works" in the entity's marketing has the potential to raise copyright concerns. Potential adversaries include consumers, competitors, regulators, and (should there be a material impact on the company resulting from the deceptive advertising) shareholders.

While in-house counsel typically does not write advertising or marketing copy, their role may arise when she becomes aware that an officer or employee has or intends to act in a manner that is "a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization." Rule 1.13(b). While mere disagreement—even if strongly held—with the policy or approach of a marketing strategy does not itself trigger the is duty to the organization,[19] where counsel knows of actions or proposals that are a violation of law and reasonably likely to injure the organization, the lawyer must proceed to protect the organization. Because, as discussed above, this "knowledge" element may, under the circumstances, go beyond matters brought to counsel's attention in the ordinary course, prudence warrants considering the implementation of more proactive steps to both fulfill the ethical duties and to avoid having to constantly capture rhetorical horses after they have left the barn. By the same token, because in-house counsel is employed by his client and presumably wishes to be considered a part (rather than an adversary) of the company's business and success, there likely is an understandable desire not to overly rock the boat. Notwithstanding, counsel must set aside this impulse when she becomes aware that the proposed marketing strategy is both legally problematic and is "likely" to harm the company.

Negotiations

Settlement negotiations are, as clients and practitioners know, an art. To be successful, they require preparation, listening, observation, effective communication, problem solving, intuition, and often a willingness to compromise. They may, at times, also require selectivity regarding what facts are presented, and how they are communicated.

There are, however, some who may approach settlement negotiations with an "all's fair in love, war, and settlement negotiations" attitude. This can manifest itself by omission of relevant information, deception, and outright falsehoods, perhaps undertaken because of a belief that there will be no adverse consequences if the matter resolves, and that communications may be protected under Rule 408 of the Federal Rules of Evidence or its state analogues.

In point of fact, the Model Rules do not condone that approach. Rule 8.4(c) defines Professional Misconduct to include "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." This broad provision does not, of course, directly address negotiations with third parties.

More on point, however, Rule 4.1 mandates truthfulness in statements to others. In particular, it

imposes a restriction on affirmative statements, prohibiting counsel from "mak[ing] a false statement of material fact or law to a third person" (Rule 4.1(a)). The Commentary explains, however, that this does not create an affirmative duty to inform an opponent of relevant facts, but it will be implicated by affirmation of a client's false statements, or by "partially true but misleading statements or omissions." An affirmative duty to disclose arises only when a failure to do so "is necessary to avoid assisting a criminal or fraudulent act…".[20] Rule 4.1(b).

As a practical matter, where a statement is made which is material to the negotiations, it should be true. While a party need not confess to facts or information that are harmful to its position, omitted information which renders the affirmative statement misleading will be problematic. In addition, if there are changes in circumstances,[21] they may create a duty to supplement.

Notwithstanding, it is not uncommon to be concerned that some adversaries may be "selective" with the facts they present or may include information or positions that have little tethering with the truth. Recognizing this mandates that counsel and clients include in their preparation evaluation of the adversary's reputation for truthfulness. Then (and especially if one is dealing with a problematic opponent), during the process, close and skeptical evaluation of every statement is important, followed by development of persuasive means to address the less-than-fully-honest statements or arguments, whether with the adversary or with a mediator.[22] Throughout the process, close observation of body language and "tells" may signal where one must challenge the assertions or promptly offer supplements to address incomplete, misleading information. Especially in the context of a mediation, credibility remains critical, and thus deception, even when not necessarily in violation of the Model Rules, if effectively called out or countered, may in the final analysis adversely affect the resolution sought by the misrepresenting party.

"Rambo" Litigation

Finally, it has long been recognized that some members of the litigation bar believe that the use of aggression, intimidation, threats, discourteousness, and in some cases unethical or illegal tactics is warranted to best "zealously advocate" for their clients. As Judge Paul Friedman wrote over 20 years ago:

> Although the "modern age" of the legal profession has witnessed progress in opening its doors wider to women and minorities and others who were previously excluded, this age has also opened its doors to the "Rambo litigator" which has spawned a generation of lawyers, too many of whom think they are more effective when they are more abrasive. I am here to tell you that neither my colleagues on the Bench nor I agree with that view. When it comes to issues of civility, professionalism and common courtesy, there has been an unfortunate sea change in the culture of the profession.[23]

The tactics used by "Rambo" litigators include bullying, insults, personal attacks, threats (whether of motions, sanctions, financial ruin, or physical harm), interruptions, and dismissive and prejudiced statements. They also include obstruction, repetitive motions, discovery abuse (both from the standpoint of excessive demands and of incomplete or delayed responses), and misleading offers to "facilitate" discovery. Depositions may be filled with speaking objections and witness coaching, sound-

bite questions designed not to elicit facts, but instead out-of-context prejudicial snippets to be played to a jury. Rambo trial lawyers may give argumentative or otherwise improper opening statements, refer to "facts" not in (or even contrary to) the record, include in questions "facts" that could never be established for the purpose of putting them before the jury, appeal to the jury's emotion using "Reptile Theory" techniques, and otherwise use various techniques intended to sway the jury notwithstanding the admissible evidence and law.

One example of a "Rambo" litigator is discussed in a 1999 opinion from New York.[24] There, defense counsel accused a plaintiff witness of perjury (and suggested plaintiff's counsel had approved of the false statements).[25] Defense counsel sent a (not-terribly) veiled threat to plaintiff's counsel that either the suit should be dismissed, or he and the witness would face perjury charges.[26] The Court granted plaintiff's counsel's motion for sanctions, ruling that the "letter was part of a calculated, deliberate strategy designed to harass plaintiff into folding its litigation hand, lest the wrath of this former Assistant District Attorney be unleashed," adding that defense counsel's "conduct crosses the line and cannot be tolerated."[27]

Such conduct is, of course, subject to well-known limiting rules. First, Federal Rules of Civil Procedure Rule 11 imposes upon a signing (or advocating) attorney and her client that the submission is warranted, has support, and is not interposed for improper purposes.[28] The Rule is permissive (Rule 11(c)(1)), but perhaps most importantly, it expressly does not apply to discovery (Rule 11(d)). Still, in the right context, it can serve as a restriction on "win-at-all-costs" pleading procedures.

Second, Rule 37 of the Federal Rules of Civil Procedure[29] provides sanctions for discovery misconduct. Rule 37 is intended to address disclosure or discovery issues in general, including by issuing orders compelling disclosures or responses, requiring deposition questions to be answered, and providing relief in the event of evasive or incomplete responses. Rule 37(a)(5) in theory[30] requires the trial court to award to a successful movant its reasonable expenses incurred in making a motion addressed to discovery noncompliance and to similarly award expenses to a party against whom a motion is filed if the motion is denied. Courts are more likely to impose significant sanctions when the obstructive party fails to comply with a prior order; under those circumstances, the court is authorized to "issue further just orders," F.R.C.P. Rule 37(b)(2), which may include an adverse factual determination, preclusion of evidence or other proof, striking pleadings, staying proceedings until the order is obeyed, dismissal or default, or a contempt citation. The Rules further address payment of expenses,[31] and specific sanctions addressed to particular discovery issues.

These sanctions are available to restrain the "Rambo Litigator" whose tactics include discovery abuse. For those who believe that they may disregard even these sanctions, the courts are empowered to impose a terminal sanction, but will not typically do so absent egregious circumstances. While the Supreme Court, in *Société Internationale v. Rogers*,[32] cautioned against dismissal of a complaint under Rule 37 unless the plaintiff is shown to have acted willfully, in bad faith, or through its own fault, courts have, in fact, issued a "death penalty" sanction when noncompliance has been done with a "culpable state of mind," including where it has resulted in the loss of potential critical evidence.[33]

Third, 28 U.S.C. § 1927 affords courts authority to monetarily sanction attorneys[34] for conduct before

them. It provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This provision does not address incompetent or negligent conduct; instead, it requires a showing that the accused attorney acted both unreasonably and vexatiously, *and* that his actions or inactions multiplied the proceedings. There must be a clear showing of bad faith conduct,[35] and in some courts, this must be willful.

Section 1927 sanctions have been awarded for (i) the filing of meritless motions which relied upon rejected case law and sought to unreasonably expand what should have been a simple case;[36] (ii) continued assertion of meritless claims after repeated warnings by the trial court;[37] (iii) false representations concerning discovery compliance;[38] (iv) trial counsel's continuous obfuscation and hyperbole;[39] (v) trial counsel's pattern of asserting a frivolous challenge to the venire panel, misrepresentations about learning of an 11th-hour witness, giving an improper summation, and other discrepancies during trial;[40] and (vi) persistent patterns intended to prevent meaningful discovery, even after a Federal Special Master was appointed.[41] Success at trial is no guarantee that the means of achieving such victory may not result in sanctions.[42] Still, this provision is limited to expense shifting and cannot be used to secure a dismissal or default.[43]

Fourth, the inherent powers of the court allow the trial court to address bad-faith conduct that cannot adequately be addressed through the statutes or Rules. Where it is shown that the accused[44] acted entirely without merit, and for improper purposes, courts may not only shift costs and fees but also "fashion an appropriate sanction" addressing that conduct. This has included adverse inference instructions,[45] evidence preclusion,[46] verdict set-asides,[47] and dismissals and defaults.[48] Other sanctions have included orders intended to cure unprofessional conduct,[49] "shaming sanctions,"[50] and even filing injunctions.[51]

The bad faith standard is, of course, a sliding scale, as can be seen in some courts' rulings. For example, in a recent ruling from the United States Bankruptcy Court for the Eastern District of New York, the court denied a motion for sanctions, finding that the Trustee failed to show that opposing counsel had acted in bad faith.[52] The attorney in that action made five statements about the Trustee to which the Trustee objected:

1. The Trustee had "gotten money from the sons, he could extract more, he has begun his extortionist journey again,"

2. "As stated earlier, Trustee wants to threaten a family into further submission,"

3. "They had sued the sons and settled with them. Seeing the promptness of the settlement, [the Trustee] has to devise ways to reach deeper to extort more settlement,"

4. "This Trustee . . . has been known to never file estate closure reports on an expeditious basis but for keeping it open. Why? Unexpected accretion!" and

5. The Trustee "brought a lawsuit against the sons of the debtors . . . on grounds very frivolous. This settlement became a source of inspiration to [the Trustee] to dig more."[53]

The court declared that the central question was whether the attorney's statements were made in bad faith and ultimately concluded that they were not—the statements, the court noted, "contain strong and provocative labels and descriptions, including 'extortionist,' 'threaten into further submission,' 'unexpected accretion,' 'frivolous,' and 'dig more,'" but determined that these terms were simply examples of expressing the attorney's position "in strong terms."[54]

Finally, the Rules of Professional Responsibility offer some additional disincentives to bad-faith conduct. Model Rule 3.1 prohibits counsel from asserting claims or defenses "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 referral of existing law." Rule 3.2 requires that counsel "make reasonable efforts to expedite litigation," albeit with the limitation that this must be "consistent with the interests of the client." Rule 3.3 prohibits counsel from, *inter alia*, knowingly making false statement of fact or law to the tribunal (Rule 3.3(a)(1)), failing to correct a false statement (*id.*), failing to disclose legal authority in the controlling jurisdiction known to be directly adverse to the client and not disclosed by the adversary (Rule 3.3(a)(2); and offering evidence known to be false (Rule 3.3(a)(3). Rule 3.4 requires fairness to the opposing party and counsel and provides a list of prohibited conduct.[55] Rule 4.1 (discussed above) requires counsel not to make false statements of material fact or law. Finally, the "misconduct" catch-all of Rule 8.4 may be applicable. Still, while these Model Rules in theory should prevent or deter "Rambo Litigators" from crossing the line, they are ethical rules, not statutes or court rules, and thus are most likely to only deter or punish in the context of grievance proceedings.

While the foregoing may help, in real-time they may not be fully effective to defend against adverse counsel and clients whose desire to win goes egregiously beyond what is "fair." In such circumstances, the best approaches include:

- Following the admonition, "Never wrestle with a pig; the pig likes it and you both get dirty." If the Rambo litigator raises his voice, stay calm. If he engages in paper discovery or deposition abuse, do not respond in kind. Instead, calmly make your record, and when ready, file targeted and well-supported motions, recognizing that the court is likely to refrain from granting you truly useful relief until it has previously ruled several times against your adversary.
- Constantly make a record for your filings. If the Rambo litigator is nonresponsive, follow up with emails, letters, and phone calls (which you confirm by email). If you reach an agreement on an issue or discovery, document it. Ensure that all proceedings at depositions and hearings are on the record, and perhaps videographically recorded. And, because all of this is being developed to serve as exhibits in your motions, be sure that you and your client remain calm and "above the fray" throughout.
- Be judicious in your motions and submissions. You are looking to convince the judge that your adversary is unreasonable and acting in bad faith. If she is experienced, she is likely to have

facially appealing responses (and demeanor) to your accusations. Thus, pick your fights, and ensure that those you do file have a high likelihood not only of success, but are ones where the adversary can't distract or dazzle to avoid the real issue.

- Prepare your client. If, as the case begins, you learn that the adversary is known for Rambo conduct, or for litigation approaches that are provocative, warn the client at the outset. (And, if you are counsel appearing pro hac vice for the client, ask your local counsel about the adversary's reputation.) Then, when preparing witnesses, warn them again. When the adversary takes an action or files a motion that confirms his reputation, remind your client of what you told them. Because your goal is to keep the client focused and calm, confirmation that the adverse tactics are as predicted will facilitate that desire.
- When faced with a trial or live hearing against a Rambo litigator, you will need to be thinking about creating a record of their abusive and sanctionable behavior while at the same time zealously advocating for your client and responding substantively. Optimally, if handled calmly, the antics of the adversary may serve to alienate the court and the trier of fact. If, however, there is an adverse outcome, you will have created the bases for post-trial motions, appeals, and, perhaps, grievance proceedings.

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[1] "Whoever said, 'It's not whether you win or lose that counts,' probably lost." Attributed to Martina Navratilova.
[2] "Winning isn't everything, it's the only thing. If you can shrug off a loss, you can never be a winner." Attributed to Vince Lombardi.
[3] ABA Model Rules of Professional Responsibility ("Model Rules"), Preamble (2). The Model Rules can be found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/
[4] Model Rules, Preamble (8).
[5] *Amphenol Corp. v. Paul,* 993 F. Supp.2d 100, 113 (D. Conn. 2014).
[6] *See, e.g.,* J. Tanner, "Top Ten Things In-House Lawyers Need to Know About Ethics," Association of Corporate Counsel, Jan. 16, 2015, found at https://www.acc.com/resource-library/top-ten-things-house-lawyers-need-know-about-ethics
[7] This latter group is persons in positions equivalent to officers, directors, employees and shareholders. Rule 1.13 Commentary (1).
[8] For example, a lawyer who in private practice representing a component parts manufacturer might find himself conflicted if that entity is a supplier for the corporation for whom he becomes in-house counsel, and a commercial dispute arises between them. Prudence suggests that during intake, a broad view of potential conflicts be followed to identify possible issues and, if possible, secure clearances and waivers.
[9] Model Rule 1.13, Commentary (3).
[10] Id.
[11] This could include, for instance, discriminatory conduct against protected groups or whistleblower retaliation.
[12] While outside counsel may as a practical matter find it less simple to directly approach higher-level officers (as opposed to the in-house counsel client contact), the obligations under Rule 1.13(b) remain.
[13] Cohen, George M., "The State of Lawyer Knowledge Under the Model Rules of Professional Conduct," American University Business Law Review, Vol. 3, No. 1 (2018) (hereinafter, "Cohen"), pp. 115-16.
[14] *Id.* at 116.
[15] Cohen, *supra,* pp. 126-33.
[16] Cohen., p. 132.
[17] *See In re Teleglobe Comm'n Corp.,* 493 F.3 345 (3rd Cir. 2007).
[18] *See* Rachelle Gordon, "Turn It Up: Aggressive Marketing Strategies for Startups in Any Industry," Jan. 22, 2024,

https://www.business.com/articles/5-aggressive-marketing-strategies-for-startups-in-any-industry/#

[19] "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Rule 1.13, Commentary.

[20] This requirement is, however, further limited by the prohibitions of Rule 1.6 (relating to confidentiality).

[21] For example, if the parties are negotiating a settlement of a matter involving the sale of real estate based significantly upon the value of the property, and during the negotiations, the seller learns of significant but previously unknown underground contamination, failure to advise the buyer's counsel of this material change is likely to create exposure under Rule 4.1(b).

[22] A lengthy dissertation on lying in negotiations, and defensive self-help measures, can be found at Peter Reilly, "Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help," 24 Ohio St. J. on Disp. Resol. 481 (2008), available at: https://scholarship.law.tamu.edu/facscholar/196

[23] Hon. Paul L. Friedman, United States District Court for the District of Columbia, March 13, 1998, as reported in "Fostering Civility: A Professional Obligation," ABA Section of Public Contract Law, March 29, 2011. https://www.americanbar.org/groups/public_contract_law/resources/significant_documents/fostering_civilit y/

[24] *Jalor Color Graphics, Inc. v. Universal Advertising Sys., Inc.,* 703 N.Y.S.3d 370 (Civ. Ct. of N.Y. 1999).

[25] *Id.* at 371-72.

[26] *Id.* In doing so, the defense attorney strongly suggested that his connections with the new York County District Attorney's Office could result in criminal charges, and he attached several criminal statutes with highlights related to potential felony convictions for perjury. *Id.*

[27] *Id.* at 373-74.

[28] Rule 11(b) provides:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

[29] *See also* Rule 38 of the Federal Rules of Appellate Procedure, which allows an appellate court to "award just damages and single or double costs to the appellee" when an appeal is frivolous. In *Angiodynamics, Inc. v. Biolitec AG,* 880 F.3d 600, 600-01 (1st Cir. 2018), the United States Court of Appeals for the First Circuit observed that "[a]n attorney's duty to represent a client zealously is not a license to harass," commenting that "[w]hen counsel ;'crosses the line' from zealous advocacy to vexatious advocacy, needlessly multiplying the proceedings, it is appropriate to sanction the attorney personally for the excess costs, expense and attorneys' fees reasonably incurred."

[30] In fact, the exceptions outlined in provide ample justification for those courts which, for whatever reason, are disinclined to award expenses. *See* F.R.C.P. Rule 37(a)(5)(A) and (a)(5)(B).

[31] F.R.C.P. Rule 37(b)(2)(C).

[32] 357 U.S. 197 (1958).

[33] *See West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779080 (2d Cir. 1999); *see also Austin Air Systems, Ltd. v. Sager Electrical Supply Company, Inc.*, 2022 WL 18859513,**7-8 (W.D.N.Y. 2022).

[34] While generally Section 1927 does not apply to clients and non-attorneys, *see Williams v. The BluePRINT, LLC, 952 F.Supp.2d 209, 212 (D.D.C. 2013); Matta v. May, 118 F.3d 410 (5th Cir. 1997); U.S. v. Int'l Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 948 F.2d 1338 (2d Cir. 1991);* some courts have imposed sanctions where it is shown that the client was jointly responsible, *Ransmeier v. Mariani,* 718 F.3d 64 (2d Cir. 2013).

[35] *Pacific Dunlop Holdings, Inc. v. Barosh,* 22 F.3d 113 (7th Cir. 1994); *E.E.O.C. v. U.S. Steel Corp.,* 877 F.Supp.2d 278 (W.D. Pa. 2012). Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184 (3rd Cir. 1989).

[36] *Hunt v. Moore Brothers, Inc.*, 861 F.3d 655 (7th Cir. 2017); *see also Ramirez v. Arlequin*, 491 F.Supp.2d 202 (D. P.R. 2006).
[37] *Gollomp v. Spitzer*, 568 F.2d 355 (2d Cir. 2009).
[38] *Haeger v. Goodyear Tire & Rubber Co.,* 906 F.Supp.2d 938 (D. Ariz. 2012).
[39] *Cruz v. Savage*, 896 F.2d 626 (1st Cir. 1990).
[40] *Veliz v. Crown Lift Trucks,* 714 F.Supp. 49 (E.D.N.Y. 1989).
[41] *In re Robert A. Bonito*, 124 F.3d 210 (9th Cir. 1997).
[42] *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999).
[43] *Smith v. Psychiatric Solutions, Inc*., 864 F.Supp.2d 1241 (N.D. Fla. 2012); aff'd 750 F.3d 1253 (11th Cir. 2014).
[44] This can include not just an obstructive attorney, but also the party itself. *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986).
[45] *South Dakota Wheat Growers Assn' v. Chief Industries, Inc,* 337 F.Supp.3d 891, 913-14 (D.S.Dak. 2018).
[46] *Spencer v. Pottstown School Dist.*, 292 F.Supp.3d 635 (E.D. Pa. 2018).
[47] *Fuery v. City of Chicago*, 900 F.3d 450 (7th Cir. 2018).
[48] *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 134 (S.D. Fla. 1987); 71 *Sarco Creek Ranch v. Greeson*, 167 F.Supp.3d 835 (S.D. Tex. 2016); 72 *Anglodynamics, Inc. v. Biolitec AG*, 991 F.Supp.2d 283 (D. Mass. 2014).
[49] This has included requiring attendance at professionalism courses, requiring the submission of bar articles, and temporary suspension of the ability to file cases.
[50] One court required the offending lawyer to provide a copy of its sanctions order to potential clients for two years. *Law Solutions Chicago, LLC v. United States Trustee*, 592 B.R. 624 (W.D. La. 2018).
[51] *In re Martin-Trigona,* 573 F.Supp. 1245, 1266 (D. Conn. 1983).
[52] *In Re: Brizinova,* 575 B.R. 488, 505-06 (E.D.N.Y. 2017).
[53] *Id.* at 492.
[54] *Id.* at 505.
[55] Model Rule 3.4 states, "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;
(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;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(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 other 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."