

## When Does Zealous Advocacy Become Obstruction?

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Most cases can be won or lost in discovery. Nonetheless, the actual discovery process is intended to be subject to minimal judicial control and attorneys are essentially left to operate on the honor system.

Too often attorneys are under pressure to prove to their clients that they will win at almost any cost. The question can arise of when does zealous advocacy cross the line into obstruction?

### Unlawful obstruction

The Rules of Civil Procedure and the adversary system are structured such that evidence in a case is shepherded competitively by the contending parties. Fair competition in the adversary system is ensured by prohibitions against obstructive tactics during the discovery process. The Rules of Professional Conduct encompass these prohibitions.

Rule 3.4(a) of the Minnesota Rules of Professional Conduct prohibits an attorney from unlawfully obstructing another party's access to evidence. Comment 2 to the rule states:

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.

The clearest violation of Rule 3.4(a) occurs when an attorney alters or destroys evidence or counsels a client to do the same.

The rule also can be violated when an attorney denies access to a witness or wrongfully attempts to dissuade a witness from providing information to the opposing party or the court.

For example, in one reciprocal discipline case,<sup>[Ftn1](#)</sup> an attorney was suspended for sending a letter to a potential witness that attempted to obstruct another party's access to evidence in violation of Rule 3.4(a). The attorney represented the husband in a divorce action involving a bitter custody dispute. The trial court judge appointed a guardian ad litem to complete a custody study. As part of the evaluation, the GAL asked both parties for names of individuals who could provide comments on the children's circumstances. The wife named her cousin, who filled out a questionnaire and returned it to the GAL. The attorney subsequently deposed the cousin and determined that some of the cousin's responses were inaccurate. The

attorney then sent the cousin a letter claiming that the cousin had defamed her client by making false and malicious statements. The attorney attached a copy of the cousin's questionnaire, which contained redacted statements the attorney deemed acceptable to her client. The attorney demanded that all other statements were to be corrected and the failure to do so would result in the attorney pursuing a defamation claim. Since the cousin's statements were answers given in response to a GAL's questionnaire and as such were made in the context of a judicial proceeding, the statements were privileged and could not serve as the basis of a defamation claim. The attorney's attempt to dissuade the cousin from providing certain information to the court was found to violate Rule 3.4(a).[Ftn2](#)

### **Obstructionist tactics**

Obstructionist tactics are not always as apparent on their face as when an attorney destroys or conceals evidence.

One of the most common tactics encountered during the discovery process is what is referred to as a "speaking or coaching objection." Speaking objections occur when the attorney representing a witness interrupts the deposition with speech versus a succinct objection referencing a rule or point of evidence.

Coaching objections occur when the attorney representing a witness coaches the witness by attempting in the course of articulating the objection to direct the witness's attention to what the "right" answer should be.

Both speaking and coaching objections fail to comply with Rule 103 of the Minnesota Rules of Evidence. Furthermore, if the conduct rises to the level of interference of deposition testimony, it can cross over to obstruction and implicate MRPC 3.4(a).

What about an attorney who refuses to turn over evidence sought through a discovery request?

Rule 3.4(a) prohibits an attorney from concealing potential evidence "unlawfully." The use of the word "unlawfully" implies that if the attorney already had an obligation to disclose the evidence, then failure to do so could violate the rule. Thus, if an attorney is obligated under the Rules of Civil Procedure to provide information sought in a discovery request, barring an evidentiary privilege, the attorney's failure to do so could violate Rule 3.4(a). Whether an attorney's refusal to comply with a valid discovery request violates the rule will depend upon the unique facts of the matter.

What about a case where the attorney's refusal to comply with a discovery request is based upon a misunderstanding of the applicable law? Even inadvertent failures by an attorney to comply with the applicable procedural rules have resulted in discipline.

In one matter, the Supreme Court addressed an attorney's failure to comply with various rules of civil and appellate procedure. The attorney argued that his conduct was not unethical because it was what he labeled an inadvertent mistake. In rejecting this argument the court stated that:

[If] the procedural errors were simply inadvertent mistakes, they reflect adversely on respondent's competence to practice law. If they were intended to further harass [the opposing party] and her attorney by drawing out the litigation, they reflect adversely on respondent's fitness as a lawyer.

The attorney's failure to comply with the applicable procedural rules was found to constitute harassment of the opposing party.<sup>Ftn3</sup>

Not every failure of an attorney to comply with the discovery rules raises concerns that the attorney is engaging in obstructionist tactics. Nevertheless, an attorney's improper refusal to respond to a discovery request, even if based upon a misunderstanding of the relevant law, can frustrate the opposing party's access to evidence, delay the course of the litigation and increase the cost of the litigation to the parties. Therefore, attorneys should be mindful of their obligations not only under paragraph (a) of Rule 3.4 but also paragraph (d) which prohibits attorneys from failing "to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

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<sup>1</sup> See Rule 12(d), Minnesota Rules on Lawyers Professional Responsibility.

<sup>2</sup> *In re Dvorak*, 620 N.W.2d 908 (Minn. 2001); *In re Disciplinary Action Against Dvorak*, 611 N.W.2d 147 (N.D. 2000).

<sup>3</sup> *In re Jensen*, 542 N.W.2d 627 (Minn. 1996).