



Attorney Professionalism Forum

A collection of the columns from the Forum's debut in February of 2003, through the November/December, 2004 issue

Prepared by
Committee on Attorney Professionalism
of the New York State Bar Association



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New York State Bar Association *Journal*

Attorney Professionalism Forum

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Prepared by Committee on Attorney Professionalism
of the
New York State Bar Association

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Dedication

John Stuart Smith, Esq.

John Stuart Smith graduated from Harvard College and Harvard Law School with high honors. He joined the Rochester, New York, firm of Nixon, Hargrave, Devans & Doyle in 1968, presently known as Nixon Peabody. He retired from that firm in 2002.

Mr. Smith took a leadership role in the New York State Bar Association, and as Chair of the NYSBA's Committee on Attorney Professionalism, he sought to improve the level of civility and ethical behavior by lawyers. Mr. Smith was a member of the Committee from June 1996 through May 2002 and served as its Chair from June 1, 2000 to May 31, 2002.

Among his many initiatives, Mr. Smith was a leading force in encouraging the publication of a regular column on attorney professionalism. "Attorney Professionalism Forum" is now published in each issue of the New York State Bar Association *Journal*. The fruit of his efforts is compiled in this booklet, which collects the columns from the Forum's first appearance in February 2003 through the November/December 2004 issue of the *Journal*.

A lifelong interest in the law and the movies led Mr. Smith to create an innovative CLE ethics program, which is given annually across the state by NYSBA and on occasion at the Annual Meeting. The program uses clips from famous law-related movies to teach ethical and professional conduct. A movie particularly appropriate for these programs, and one of his favorites, was *To Kill a Mockingbird*.

Upon his retirement as Chair of the Committee on Attorney Professionalism, the Committee honored him with a plaque, inscribed as follows:

Presented . . . with great respect and deep appreciation for his strong leadership, his inspired and innovative vision, his creative contributions to our work, his profound faith in the importance of professionalism, and his grace and good humor throughout. To borrow a sentiment from one of his favorite films, "Stand up. A real professional is passing by."

John Stuart Smith died peacefully at his home on June 13, 2003.

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ATTORNEY PROFESSIONALISM FORUM

With this issue, the Journal begins a column that addresses, in question-and-answer format, professional dilemmas that are a fact of life in modern practice. Although basic principles in the Code of Professional Responsibility are available to guide the practitioner, there often is no clear-cut answer to the situation encountered. Rather, the attorney must apply his or her own judgment, interpretation and conscience in coming to an answer that is consistent with a lawyer's obligations to colleagues, clients and the public. With the first column, we illustrate this point by printing two responses with different conclusions to the issue presented.

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The Committee on Attorney Professionalism welcomes these articles and invites the membership to send in comments or alternatives to the responses printed below. We also invite additional questions and answers to be considered for future columns. Send your comments or your own questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to barjournal@nysba.org.

To the Forum:

I represent a client seeking to lease a large commercial facility. During the course of the negotiations the base annual rent for the first five years of the term was agreed upon by the parties to be \$55,000 per month. The final draft of the Lease document was prepared by the landlord's attorney and was sent to me for approval before execution by the parties. It fixes the monthly rent during the first five years, incorrectly, at \$50,000.

In reviewing the draft with my client I called the error to his attention. He said that I should not say anything to the landlord's attorney about it, so that if he or his client didn't discover it before the document was signed he would have the benefit of the lower rental for the first five years of the Lease.

May I call the error to the landlord's attorney's attention prior to signing, notwithstanding my client's request, or must I adhere to his instructions?

Perplexed in Poughkeepsie

Dear Perplexed:

No wonder you are perplexed. A review of the New York Code of Professional Conduct discloses no clear an-

swer and several conflicting guidelines.

DR 1-102(A)(4) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Under this provision, if you had contacted the attorney for the landlord to advise him of his error before speaking to your client, you would have been on safe ground. This is because the two clients had arrived at a meeting of the minds on the amount of rent, and the nature of your representation was to obtain a written Lease for your client that accurately reflected the agreement of the parties.

Therefore, even if keeping silent would not amount to a "dishonesty, fraud or deceit," your duty to obtain a binding and accurate agreement would justify correcting the error by making the necessary disclosure to the landlord's attorney.

Further, EC 7-10 provides that the "duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." Permitting the Lease to be signed with the error in rent could harm the land-

lord, in that if your client refused to correct the error after its discovery by the landlord after signing, it would impose on the landlord the necessity of seeking judicial relief from the error, and the chances of success in such a proceeding are not certain.

Another factor is at work, however. As you have indicated, you have advised your client of the error and he has requested that you say nothing. DR 4-101(A) defines a "secret" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Except when permitted under DR 4-101(C) (not applicable here), an attorney "shall not knowingly: (1) Reveal a confidence or secret of a client"; or (2) "Use a confidence or secret of a client to the disadvantage of the client" (DR 4-101(B)).

While EC 4-2 provides that the obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when necessary to perform the lawyer's professional employment, this may not be a sufficient basis for disclosure where the client has specifi-

cally requested that disclosure not be made. And the provision of DR 7-101(B) that a lawyer may, “[w]here permissible, exercise professional judgment to waive or fail to assert a right or position of the client” also provides little comfort in the face of a specific request for non-disclosure.

If you cannot persuade the client to retract his instruction, as indeed I believe you should try to do, and you are uncomfortable with continuing the representation, DR 2-110(C)(1)(e) permits you to withdraw from the representation. DR 2-110(C)(1)(e) provides that a lawyer may withdraw if a client “[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.”

Of course, if the client’s conduct is deemed fraudulent (and that determination is beyond the scope of this column), you would be subject to DR 7-102(A)(7), which provides that a lawyer shall not “counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.” Then, of course, your withdrawal would be mandatory (DR 2-110(B)(2)).

The Forum, by
M. David Tell

Wormser, Kiely, Galef & Jacobs LLP

Dear Perplexed:

With all due respect to Mr. Tell, his distinction between “client secrets” and “confidence” (attorney-client privilege) seems unworkable, and contrary to the purpose and spirit of the Disciplinary Rules and Canons of Ethics.

Ethical Canon 4-2 provides: “A lawyer must always be sensitive to the rights and wishes of a client and act scrupulously in the making of decisions which may involve the disclosure of information *obtained in a professional relationship.*” The discovery of the error was not obtained by you in your professional relationship with the client, but rather by a more careful proofreading of the proposed contract. The correct amount of rent was not a

secret or a confidence that you obtained in the representation of the client; it was known to both parties and both lawyers and agreed to after what I can assume was intensive negotiation.

Inasmuch as DR 1-102(A)(4) provides that a lawyer should not “[e]ngage in conduct involving . . . misrepresentation,” as the amount of the lease is clearly a misrepresentation, wouldn’t a failure to correct it result in a violation of this Disciplinary Rule?

How long do you suppose that it will be before the landlord and his lawyer become aware of the error, and the fact that you knew of the error and said nothing? What do you suppose this would do to your reputation and standing in the community? Wouldn’t this also contribute to the unfortunate view held by many in the public that lawyers are slick and unscrupulous, and more than willing to obtain an unfair advantage when the opportunity presents itself? Rest assured, it will be the lawyer and not the client who will be criticized. The fact that you found an obvious error and talked to your client about it does not transform it into the sanctity of a “secret” or a “confidence.”

In short, you don’t have an ethical dilemma. You have a typo.

The Forum, by
Grace Marie Ange
Ange & Ange
Buffalo, NY

TO BE ADDRESSED IN THE NEXT COLUMN:

To the Forum:

I am a lawyer who has represented other attorneys with disciplinary problems or ethical concerns. Now I have a problem of my own. Recently, I was consulted by a personal injury lawyer who has had an offer to participate in a group lawyer advertising program for which O.J. Simpson is a speaker.

She wanted to know whether her participation in the program was ethical and, if not, whether her participation could be tailored so that it could

be made ethical. As a business matter she is very interested, because she believes (rightly or wrongly) that O.J.’s endorsement will help her obtain clients in the minority community, where she is trying to develop a client base. However, she does not want to run afoul of any Disciplinary Rule or her local Grievance Committee.

I reviewed the proposed TV advertisements at her request. They currently contain some misleading statements that would have to be changed, or removed altogether, in order to avoid disciplinary problems. But even if they are changed, I am concerned about my own representation of this attorney becoming public, since some lawyers might think I had helped a client engage in what they would consider (and I would agree) to be unseemly advertising that damages the image of lawyers as a whole. Given my concerns, can I take on the representation? Should I?

Ethicist with an Ethical Dilemma

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a lawyer who has developed a certain reputation for having expertise in legal ethics, and represent other attorneys with disciplinary problems or ethical concerns. Now I've got a problem of my own. Recently, I was consulted by a personal injury lawyer who has had an offer to participate in a group lawyer advertising program for which O.J. Simpson is a speaker.

She wanted to know whether her participation in the program was ethical and, if not, whether her participation could be tailored so that it could be made ethical. As a business matter she is very interested, because she believes (rightly or wrongly) that O.J.'s endorsement will help her obtain clients in minority communities, where she is trying to develop a client base. However, she does not want to run afoul of any disciplinary rule or her local Grievance Committee.

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Sincerely,

Ethicist with an Ethical Dilemma

Dear Ethicist:

Even a doctor can have trouble diagnosing his own symptoms.

There is no clear-cut answer to your question. At most, I can give you some issues to think about—but, as with so many ethical questions containing shades of gray, only you can decide

what to do. In this case, it sounds as if what you decide may have an impact not only on the profession, but on your own self-esteem as well.

First, and perhaps foremost, you are not obligated to accept the proposed representation. Other than with court-appointed representation or representation of unpopular clients who cannot find another lawyer, an attorney is under no moral or professional obligation to accept any particular employment. And here, another factor may be at work that militates against a voluntary engagement. If your distaste for O.J. Simpson's endorsement of personal injury attorneys is so great that you cannot exercise impartial legal judgment on behalf of your prospective client, you may have a conflict of interest; and absent the client's consent after full disclosure, you must decline the representation (*See* DR 5-101(A)).

However, if your feelings are not so strong as to rise to the level of a conflict of interest, you should bear in mind that, as an ethical matter, attorneys are not "responsible" for the views of their clients. Just as criminal defense attorneys should not be viewed as morally accountable for the acts of those they represent, you are not endorsing the moral appropriateness of these ads should your potential client participate in the program, against your advice. On the other hand, even without a clear conflict of interest you simply may decide, as a matter of your own moral or professional views, that you do not want to lend your assistance to this enterprise by advising a client who clearly wants to participate.

There is yet another factor to consider. Before recoiling from what is personally and professionally distasteful, bear in mind that your potential client will surely find another lawyer to take on the representation. Therefore, do not believe that by declining the representation you can prevent the advertising program from going for-

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ward, or even slow it down. Indeed, your presence may be more beneficial than your absence, because another lawyer might not bring your ethical expertise or professionalism concerns to the table. Thus, an opportunity might be lost to shape the thinking of your prospective client concerning the issues presented by the ads. Ethical Consideration 7-8 is very instructive in this regard. Among other things, it tells us that a lawyer should advise not only on the legal issues, but also on the effect each legal alternative may have—and that the lawyer may emphasize the moral aspects of the client's decision-making.

What this means is that it would be more than just ethically permissible to advise your client of your own concerns; it would be wholly consistent with a guiding Ethical Consideration. So long as you respect your prospective client's right to disagree and to make the ultimate determination, ex-

pressing your own views on this matter would be carrying out the highest ideals of the profession.

—The Forum, by
James M. Altman
Bryan Cave LLP
New York City

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a litigator who practices with a small firm. I am involved in a federal case in which my relationship with my adversary, a partner in a large, national firm, has taken a turn for the worse. I requested her consent to a two-week adjournment of a summary judgment

motion so that I could go on a previously-scheduled family vacation. No trial date had been set, and I therefore didn't see a problem. However, after (purportedly) consulting with her client, my adversary called me back and advised that although she would have been willing to agree to the adjournment, her client refused to give his consent.

As it turned out, I was still able to join my family for the vacation, but not without working nights and weekends in order to comply with the motion schedule. Not long after this incident, the same lawyer telephoned me to request an adjournment of another motion in the case, based on her own per-

sonal health. She declined to specify the health problem. I was angry that I had to make personal sacrifices because of my adversary's intransigence; I was suspicious of the *bona fides* of her health problem; and I was inclined to repay her lack of civility in kind. On the other hand, there was still no scheduled trial date in the case and no demonstrable prejudice to my client by the requested adjournment. Ultimately, I gave consent, but I feel more than a bit used. This is likely to come up again—if not with her, then with someone else—so my question is this: What were my professional obligations to my adversary?

Steamed in Syracuse

ATTORNEY PROFESSIONALISM FORUM

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Steamed in Syracuse

Dear Steamed:

It sounds to me that you successfully resisted a gut instinct to teach your adversary a lesson. The question is, what kind of a lesson would that have been?

Although Canon 7 of the Lawyer's Code of Professional Responsibility requires that, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," the Ethical Considerations should give pause to the overly zealous. Ethical Consideration 7-38 provides that, "A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters *which do not prejudice the rights of the client.*" (Emphasis added.) Your adversary properly considered the rights and needs of her client in determining whether or not to consent to your request for an adjournment. However, your adversary not only consulted with her client, but also delegated to him the exercise of professional judgment as to whether or not the requested adjournment would be prejudicial to his rights.

In this regard, I think your adversary erred. A judgment as to whether or not an adjournment should be granted must be made by the attorney, not by a lay person. By way of illustration, if a client instructed his attorney to disregard certain local customs of courtesy or practice – for example, not to return phone calls promptly – that attorney would be duty-bound, under the Code, to disregard the instruction. Likewise in your case. Although the attorney's client had an interest in expeditious resolution of the matter, the case was not yet on the trial calendar, and there would have been no obvious harm in granting the adjournment.

That being said, it does not fully answer your question, because you were on the receiving end of the discourteous act. I think you did the right thing in not responding in kind. Both you – and especially your adversary – might want to consider the New York State Standards of Civility, announced by the Office of Court Administration in

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September 1997, which are guidelines intended to encourage lawyers to observe principles of civility and decorum. Paragraph III recites that "A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests." The New York State Bar Association Guidelines on Civility in Litigation has a similar guideline. Under ordinary circumstances, this means that a lawyer should agree to reasonable requests for adjournments, or for a waiver of formalities, when the legitimate interests of the client will not be compromised.

You candidly acknowledged that the case was not yet on the trial calendar, and that there was no pressing reason not to grant your adversary's request, aside from your adversary's prior discourtesy. Under the circumstances, it is apparent that you properly granted the adjournment, however distasteful that might have been

for you. As one commentator has wisely observed in this magazine: "The fact is that you cannot control how opposing counsel will act, but you can always control how you act."¹ I hope that your courtesy contributes to a softening of the relationship between you and opposing counsel. And you may get a different response the next time you ask for an adjournment.

The Forum, by
Barry R. Temkin
Jacobowitz, Garfinkel & Lesman
New York City

1. John Stuart Smith, *Civility in the Courtroom from a Litigator's Perspective*, N.Y. St. B.J., Vol. 69, No. 4, at 28, 30 (May/June 1997).

**QUESTION FOR NEXT ATTORNEY
PROFESSIONALISM FORUM:
To the Forum:**

I have a client who is in a heated dispute with Mr. Vulnerable, a former business partner. My client has requested that to induce a settlement of the dispute, I pose the threat of a lawsuit by sending a draft complaint to counsel that has been retained by Mr. Vulnerable. My client asked me to include a cause of action that is based upon specious allegations that will be embarrassing to Mr. Vulnerable. To put even more pressure on Mr. Vulnerable, my client wants me to suggest to my adversary that my client has knowledge that Mr. Vulnerable engaged in tax fraud which we will report to the authorities (including a grievance committee since Mr. Vulnerable also

happens to be an attorney) unless they accede to the proposed settlement. Finally, my client asked me to advise my adversary that it would be in his client's best interest to settle the dispute so that his client's fraudulent representations during the initial negotiations do not come to the attention of a disciplinary committee.

Sensing my uncertainty concerning his directions and suggestions about strategy, my client asked me if he should negotiate directly with Mr. Vulnerable rather than involving counsel.

I am having trouble determining whether my client's directives constitute zealous representation or unethical conduct.

Sincerely,
Confused in Canarsie

ATTORNEY PROFESSIONALISM FORUM

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Sensing my uncertainty concerning his directions and suggestions about strategy, my client asked me if he should negotiate directly with Mr. Vulnerable rather than involving counsel.

I am having trouble determining whether my client's directives constitute zealous representation or unethical conduct.

Sincerely,

Confused in Canarsie

Dear Confused in Canarsie:

DR 7-101 of the Code of Professional Responsibility requires a lawyer to zealously represent a client, which includes seeking the client's lawful objectives. However, it isn't "anything goes" – DR 7-102 limits zealous representation by requiring that it stay within the bounds of the law. This limitation prohibits a lawyer from filing a suit, asserting a position or taking any

action that serves merely to harass or maliciously injure another party (DR 7-102(A)(1)).

Nevertheless, it is fair to say that in the negotiation arena, a lawyer enjoys greater latitude than he or she might once formal litigation begins. Puffery and personal opinion may enter into discussions more easily. In addition, it is acceptable to place pressure on an adversary by forwarding a proposed complaint in a civil action to demonstrate the strength of your position. Therefore, your client's request that you send a draft complaint to your adversary, standing alone, does not run afoul of ethical or professional guidelines.

However, your client's request to include specious allegations is problematic. Because the allegations are arguably included simply to harass Mr. Vulnerable, it may violate DR 7-102. More important, DR 7-102(A)(5) precludes a lawyer from knowingly making a false statement of fact during the representation of a client. Accordingly, zealous representation does not permit the inclusion of an allegation in the proposed complaint which you know to be false.

The threat of criminal prosecution is likewise inadvisable, as a lawyer may not use such a threat to gain an advantage in a civil matter (DR 7-105). Even an implicit threat could be a basis for a disciplinary investigation against the attorney, including the threat of a disciplinary prosecution against another member of the bar (Nassau Cty. Bar Op. 98-12 (1998)). This is why mentioning a disciplinary grievance would be prohibited.

Finally, and notwithstanding your client's zeal, you may not authorize him to use self-help in lieu of your own advocacy. Although a client can contact the other side if his or her lawyer is not involved, DR 7-104(B) prohibits a lawyer from directing a client to con-

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tact another represented party without notice to such other party's attorney. Even if the client contacts the other party with consent of the other attorney, the lawyer may not direct a client to engage in conduct that the attorney himself could not pursue, *e.g.*, threaten a criminal prosecution. This is because the attorney cannot circumvent the Code through the actions of another (*see* DR 1-102(A)(2)). Of course, you are not responsible for actions by your client taken without your advice, knowledge or direction.

In sum, you can and should zealously represent your client against Mr. Vulnerable, but this cannot include strategies that violate the Code of Professional Responsibility, or are otherwise unprofessional.

The Forum, by

Richard M. Maltz, Esq.

Benjamin, Brodmann & Maltz, LP

New York City

CONTINUED ON PAGE 53

**QUESTION FOR THE NEXT
ATTORNEY PROFESSIONALISM
FORM:**

To the Forum:

I am a litigator in private practice, currently engaged in a heated lawsuit in federal court. I recently received a facsimile from my adversary that was addressed not to me, but to his client. My curiosity piqued, I lifted the facsimile transmission cover sheet and learned that the body of the transmission was a letter from adversary counsel to his client discussing counsel's view of the strengths and weaknesses of their case. The letter further discussed the credibility of a key non-party witness whose testimony would

be favorable to their side. This non-party witness had not previously been disclosed to me.

Feeling frozen like the proverbial deer-in-the-headlights, I don't know what to do. I have not told my adversary or my own client that I have received this information. I wish to be a zealous advocate for my client, and I believe that this information could be useful to that representation. On the other hand, it is clear that I was not the intended recipient of the fax, and I question whether the proper thing to do might be to notify my adversary. What is your advice?

Sincerely,
Perplexed in Poughkeepsie

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a litigator in private practice, currently engaged in a heated lawsuit in federal court. I recently received a facsimile from my adversary that was addressed not to me, but to his client. My curiosity piqued, I lifted the facsimile transmission cover sheet and learned that the body of the transmission was a letter from adversary counsel to his client discussing counsel's view of the strengths and weaknesses of their case. The letter further discussed the credibility of a key non-party witness whose testimony would be favorable to their side. This non-party witness had not previously been disclosed to me.

Feeling frozen like the proverbial deer in the headlights, I don't know what to do. I have not told my adversary or my own client that I have received this information. I wish to be a zealous advocate for my client, and I believe that this information could be useful to the representation. On the other hand, it is clear that I was not the intended recipient of the fax, and I question whether the proper thing to do might be to notify my adversary. What is your advice?

Sincerely,

Perplexed in Poughkeepsie

Dear Perplexed:

During the American Civil War, Union Army soldiers discovered a copy of General Robert E. Lee's battle plans for an invasion of the North wrapped around three cigars. This enabled the Union Army to thwart a rebel advance at the Battle of Antietam. While such inadvertent discoveries can certainly be beneficial, and though litigation has often been compared to war, you are not in the same position as an actual soldier – your behavior is subject to regulation under the Lawyer's Code of Professional Responsibility (Code).

The duty of zealous advocacy to your client, as embodied in DR 7-101 and EC 7-19 of the Code, should be tempered by ethical and moral consid-

erations. In this era of high-speed electronic communication, the errant fax or e-mail is all but inevitable. Unfortunately, no clear guidance is furnished by the Code, as there is no Disciplinary Rule or Ethical Consideration which directly addresses the inadvertent discovery of confidential material. Thus, it is unlikely that you would be subject to formal discipline for sneaking a peek at your adversary's game plan. However, that does not necessarily make it right, and indeed your question correctly identifies a tension between zealous advocacy and a lawyer's obligation of courtesy and fairness to others.

The American Bar Association Committee on Ethics and Professional Responsibility in Formal Opinion 92-368, has opined that a lawyer who receives obviously privileged or confidential information should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them. The ABA opinion was based upon the ABA Model Rules of Professional Conduct. The New York County Lawyers' Association Committee on Professional Ethics recently reached a similar conclusion in an opinion based upon the Code. In NYCLA Ethics Opinion 730 (2002 WL 31962702), the NYCLA Ethics Committee found that a "lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information." *Id.* at *3. Thus, the NYCLA concluded that a lawyer receiving "secrets, confidences or other privileged matter" that she believes were not intended for her eyes should notify the sender and abide by his instructions for its return or destruction.

While other authorities are not in total agreement with this approach (*see, e.g.,* Monroe Freedman, *The Errant Fax*, 1/23/1995 Legal Times 26), the Code provides a sound basis for the NYCLA/ABA opinions. For example, the Code suggests that in the absence of explicit guidance, a lawyer should act "in a manner that promotes public con-

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fidence in the integrity and efficiency of the legal system and the legal profession." (EC 9-2.) The Code further directs, particularly in a litigation setting, that an attorney should comply "with known local customs of courtesy or practice" in the governing tribunal unless prior notice is given to the adversary. (DR 7-106(C)(5); EC 7-38.) And the Ethical Considerations exhort us all to be courteous to opposing counsel, in addition to following local customs of courtesy or practice. (EC 7-38.) Moreover, DR 9-102 governs a lawyer's obligations upon receipt of funds or other property belonging to a client or another person. It obligates a lawyer to "promptly notify a client or third person of the receipt of funds, securities or other properties in which the client or a third person has an interest." (DR 9-102(C).) While the Code does not define the phrase "other properties," it is not an unreasonable stretch of the imagination to include intellectual properties or attorney work product in its definition.

No matter how careful we try to be, we all make mistakes, and any one of us could have committed the same error as your adversary. In a nutshell, the question you pose is whether you should pounce and exploit the error, or as a matter of professional courtesy help your adversary to recover from the erroneous transmission by disclosing the mistake and following his instructions with regard to the document. Of course, you should then proceed thereafter to do your best to win the case in a fair fight. There is certainly enough room for contentiousness in the ordinary practice of law without turning it into a free-for-all.

In the final analysis, your client will not be deprived of a substantial right if you decide not to exploit this obvious error, as our system does not give clients the right to peek into the minds of adversaries. Rather, by returning or destroying the errant fax, you would be merely preserving the clear right of your adversary to keep communications with his client confidential, and by so doing would be promoting the integrity of the legal system as a whole.

The Forum, by
Barry R. Temkin, Esq.
Jacobwitz Garfinkel & Lesman
New York City

LETTERS TO THE FORUM:

We received the following letter in response to the previous issue's Forum. The question is reprinted for your convenience.

To the Forum:

I have a client who is in a heated dispute with Mr. Vulnerable, a former business partner. My client has requested that to induce a settlement of the dispute, I pose the threat of a lawsuit by sending a draft complaint to counsel that has been retained by Mr. Vulnerable. My client asked me to include a cause of action that is based upon specious allegations that will be embarrassing to Mr. Vulnerable. To put even more pressure on Mr. Vulnerable, my client wants me to suggest to my adversary that my client has knowledge that Mr. Vulnerable engaged in tax

fraud which we will report to the authorities (including a grievance committee since Mr. Vulnerable also happens to be an attorney) unless they accede to the proposed settlement. Finally, my client asked me to advise my adversary that it would be in his client's best interest to settle the dispute so that his client's fraudulent representations during the initial negotiations do not come to the attention of a disciplinary committee.

Sensing my uncertainty concerning his directions and suggestions about strategy, my client asked me if he should negotiate directly with Mr. Vulnerable rather than involving counsel.

I am having trouble determining whether my client's directives constitute zealous representation or unethical conduct.

Sincerely,
Confused in Canarsie

To the Forum:

This concerns the letter about "Mr. Vulnerable" in the last issue of the *Journal* ("Confused in Canarsie").

Counsel from Canarsie asks if his client is asking him to represent him zealously or to do something unethical by asking Counsel to write to opposing counsel for Mr. Vulnerable that Counsel will file a complaint asserting (a) tax fraud, and (b) other "specious allegations that will prove embarrassing to Mr. Vulnerable."

There is nothing unethical about sending opposing Counsel a copy of a proposed form of a complaint, *provided* the allegations contained therein are meritorious. Threatening legal action can rise to extortion, and using the mails can violate both state and federal laws, if done solely to secure a financial or other benefit. As Counsel from Canarsie knows that the allegations are specious, one must consider whether Counsel now becomes part of a RICO conspiracy.

Is this beyond mere zealous representation? Most certainly. Is the revelation of tax fraud unethical if it is true? No. However, Counsel must also consider, since the parties are "partners,"

and very few lead absolutely squeaky clean lives when it comes to paying taxes, whether his client exposes himself to liability for unpaid taxes as well. As my father used to say, don't throw stones if you live in a glass house.

Dealing with the dissolution of this partnership because the marriage has ended should be the prime objective, without seeking to get an upper hand. Unless Mr. Vulnerable has been stealing from the business or diverting business opportunities, a clean dissolution of the partnership should be the key objective so that the parties may get on with their lives.

Martin L. Bearg, Esq. LL.M. (Tax)
Alpert Butler Sanders Norton
& Bearg, P.C.
West Orange, N.J.

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a sole practitioner with a busy, suburban law practice devoted largely to real estate, trusts and estates and civil litigation. Two months ago, I suffered a heart attack, had bypass surgery and was unable to work full time for about six weeks. Fortunately, my two paralegals and secretary carried the ball and averted any crisis with my ongoing matters. I am 61 years old and although I planned to retire at age 65, my recent bout of ill health and developing addiction to the golf channel has me thinking otherwise. However, I am concerned that if prior to my planned retirement I become ill again and unable to service my clients, that I will be in violation of an ethical rule or regulation. Does the Code of Professional Responsibility impose specific requirements upon sole practitioners to plan in advance for a sudden inability to work? What are my professional responsibilities, if any, to my clients? Although I have taken the required CLE credits in ethics, none of the courses that I've attended have covered this topic.

Sincerely,
Anxious in Amityville

ATTORNEY PROFESSIONALISM FORUM

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I am a sole practitioner with a busy, suburban law practice devoted largely to real estate, trusts and estates, and civil litigation. Two months ago, I suffered a heart attack, had bypass surgery and was unable to work full time for about six weeks. Fortunately, my two paralegals and secretary carried the ball and averted any crisis with my ongoing matters. I am 61 years old and although I planned to retire at age 65, my recent bout of ill health and developing addiction to the golf channel have me thinking otherwise. However, I am concerned that if prior to my planned retirement I become ill again and am unable to service my clients, I will be in violation of an ethical rule or regulation. Does the Code of Professional Responsibility impose specific requirements upon sole practitioners to plan in advance for a sudden inability to work? What are my professional responsibilities, if any, to my clients? Although I have taken the required CLE credits in ethics, none of the courses that I've attended have covered this topic.

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Dear Anxious:

The Code of Professional Responsibility does not impose a specific requirement on a sole (or any) practitioner to protect clients in the event of a sudden inability to continue in practice. However, several rules and ethical considerations, along with general principles of attorney professionalism, are relevant to your concerns.

Under DR 2-110(B)(3), a lawyer must withdraw from representing a client where his "mental or physical condition renders it unreasonably difficult to carry out the employment effectively." The withdrawing lawyer is advised by EC 2-32 to minimize harm to a client by giving him or her due notice of the withdrawal, suggesting al-

ternative counsel, and returning the client's property, including unearned compensation. Of course, a problem can arise where your inability to conduct your practice is unexpected – e.g., a heart attack – which renders you unable to take the steps suggested by EC 2-32. The practical solution is to plan in advance and appoint another attorney to take such steps for you.

Canon 6 advises a lawyer to represent a client competently (EC 6-1), and to use proper care to safeguard the interests of the client (EC 6-4). Under DR 6-101, the lawyer who "neglects a legal matter" fails to act competently. Should you suddenly be unable to conduct your practice because of illness or death, your clients' matters could be neglected, and their interests seriously prejudiced as a result. A court date could be missed; a statute of limitations could expire; a closing could be delayed because funds in your escrow account could not be withdrawn. Arranging for coverage in the event of an unforeseen inability to work therefore appears necessary under the Code. By failing to make such arrangements in advance, the inference could be drawn that you are not fulfilling your obligations to represent competently, and to protect, your clients and their interests.

Further, a lawyer has the obligation to protect the confidences and secrets of his or her clients (DR 4-101(B)). If you were to appoint another attorney as your agent to inventory your files and to notify your clients in the event of your unavailability, you would be helping to minimize disclosure of privileged information. An attorney who reviews your files will be aware of the requirement to maintain the clients' confidences that appear in the files. A family member or other non-attorney reviewing your clients' files may, on the other hand, inadvertently reveal privileged information since he or she will be unaware of a lawyer's obligation to protect such information. You

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may even want to authorize that attorney to represent your clients. This could be accomplished by obtaining your clients' consent to such an arrangement in advance, either in a retainer agreement or letter of engagement. Taking these steps could avoid a claim that you had failed to protect client confidences.

You also have responsibilities with respect to clients' funds and other property that may have come into your hands. Failure to attend to such property during your disability could be deemed a violation of your fiduciary responsibilities under DR 9-102. Not opening mail containing estate checks or checks in settlement of litigation delays the payment of those funds to your clients, and therefore may violate DR 9-102(C)(4). That section requires the attorney to "promptly pay or deliver to the client . . . funds . . . in the possession of the lawyer which the client . . . is entitled to receive." Subsection (D) of DR 9-102, which imposes

requirements regarding bookkeeping records, is also implicated if you suddenly are unable to practice. There is no provision in the Code relieving a lawyer of the duty imposed by DR 9-102(D) to keep certain bookkeeping records for seven years based on an unexpected cessation of practice. Given that fact, and in view of DR 9-102(H), which requires a law firm upon dissolution to make arrangements for maintaining the records required to be kept under DR 9-102(D), it may be inferred that you have an obligation to designate another attorney to review your files so that the bookkeeping and storage requirements of 9-102(D) are complied with if you are unable to continue practicing law.

Attorney professionalism is often equated with dedication of service to clients, competence and the display of good judgment. By formulating a plan today to insure that your clients will not be harmed by an unexpected inability to practice law in the future, you will not only be insuring compli-

ance with the Code – you will also be exhibiting attorney professionalism.

The Forum, by
Susan F. Gibraltar
Bertine, Hufnagel, Headley, Zeltner,
Drummond & Dohn, LLP
Scarsdale, New York

**QUESTION FOR THE NEXT
ATTORNEY PROFESSIONALISM
FORUM:**

To the Forum:

I am a second-year law student and hope to concentrate my practice in family law.

My sister, Mary, had her divorce finalized about a year ago. She tells me that throughout the legal process of her divorce she was very impressed by her husband's attorney, Mr. Hans Summ. She says that he was very polite, organized and efficient at all the depositions and conferences that she attended and seemed incredibly knowledgeable and sophisticated throughout the proceedings.

Mary believes that Mr. Summ's expertise and professionalism resulted in

getting her volatile ex-husband to come to an agreement and thus spared her the trauma of a trial.

As part of Mary's property settlement she received their summer home in Lake Chautauqua in upstate New York. Mary has now decided to sell the summer home and she called Mr. Summ to represent her in the sale. Mr. Summ not only agreed to do so but also asked Mary to go to dinner with him. I know my sister has been very lonely and depressed as a result of her divorce and she was both surprised and delighted at Mr. Summ's invitation.

Somehow, although I am not sure why, Mr. Summ's agreeing to represent her on the sale of the property and inviting her to dinner don't seem right to me.

Is it proper for Mr. Summ to represent my sister? Is there anything wrong with his asking my sister out to dinner?

Sincerely,
Worried in Williamsville

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Sincerely,
Worried in Williamsville

Dear Worried:

Your sense that something is "not right" with Mr. Summ's response to your sister is justified.

It is, after all, that indefinable sense of unease that can motivate even an at-

torney who has practiced for many years to re-examine the situation that gives rise to the feeling. Mr. Summ appears to be an experienced matrimonial attorney. That being so, he would know, as would any attorney who practices matrimonial law, that the trauma of a divorce can make a client feel "lonely and depressed," as your sister apparently now does. This can be all the more intense in women whose lives have been devoted to being wives, mothers and homemakers. Not surprisingly, such women often have looked chiefly to their husbands for social and emotional support, and have had few outside contacts other than with family members and friends, most of whom have known them only as part of a married couple. Obviously, not all women who stay at home fit this profile; however, reading between the lines of your description, Mary might.

Further, even clients who have functioned as professionals or in other demanding positions throughout the marriage find themselves apprehensive, anxious, and unsettled, and have difficulty coping in their personal lives.

It therefore is not surprising that an "organized," "efficient," "incredibly knowledgeable and sophisticated" attorney would seem to be the very sort of take-charge person who could provide the solution to the unhappy condition of the recently divorced.

Mr. Summ is well aware, or certainly should be aware, of the dynamics at play in your sister's case. If he needs any additional clue, he should ask himself why a prospective client, who knows him only as a matrimonial lawyer, would ask him to handle a real estate matter. The guess here is that he knows very well why – hence the invitation to dinner. Under these circumstances, an experienced matrimonial attorney might well be overstepping the bounds of proper conduct by encouraging the personal relationship.

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The Code of Professional Responsibility provides some guidance. EC 7-11 teaches that the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, and DR 5-111(B)(3) provides that in domestic relations matters, a lawyer shall not have sexual relations with a client during the course of the lawyer's representation of the client.

Of course, Mary wasn't his client, and the matrimonial matter has been concluded. However, Mary's husband *was* his client and DR 4-101 and DR 5-108(A) prohibit a lawyer from revealing confidences and secrets of a client. This includes any information gained in the professional relationship, that would be embarrassing or detrimental to the client. Is it unreasonable for Mary's ex-husband to fear that his revelations to Mr. Summ might slip out as pillow talk with Mary?

Perhaps certain confidences imparted to Mr. Summ by Mary's ex-hus-

band, which may have had no bearing on his case, but which some matrimonial clients feel the need to disclose, will never cross Mr. Summ's lips. Perhaps Mr. Summ has no motive other than to enjoy Mary's company at dinner, at which time he will give Mary the names of competent real estate attorneys. Perhaps, but unlikely.

In any event, EC 9-6 provides that attorneys must strive to avoid not only professional impropriety but also the appearance of impropriety. Coming so close on the heels of the divorce, and the property to be sold by Mary having been the fruit of that litigation, the potential relationship you describe between Mary and her ex-husband's attorney might be seen as creating such an appearance.

Mary should be encouraged to get out more, join community groups and to call her local bar association's lawyer referral service for a real estate attorney to handle the sale of her property. Mr. Summ should reconsider.

The Forum, by
Grace Marie Ange
Ange & Ange
Buffalo

**QUESTION FOR THE NEXT
ATTORNEY PROFESSIONALISM
FORUM:**

To the Forum:

I have a couple of friends who live in the Albany area, as I do. For over 30 years we have gone fishing at Tom's vacation place up in Vermont. We get to fish in a great stream, with the best equipment (and go broke in the process). Tom is retiring to Florida and wants to sell his property. Bob, another friend in the group, wants to buy it. Bob and Tom are close friends and have asked me to represent both of them.

I have something of a familiarity with Vermont property, but am not licensed in the state and I have never handled a real estate transaction there; in fact, real estate is not my strength, as I am a negligence attorney. This particular transaction involves a very substantial purchase price, and has a number of complexities, including substantial environmental questions and arcane Vermont rules regarding riparian owners – such as what qualifies a person as a riparian owner in the first place.

On the other hand, Bob and Tom have never had any problems with each other, and I can order a title insurance policy which will take care of most of the legal questions, leaving only the review of the policy. I am concerned that if I decline the matter, Bob may be reluctant to invite me back once he owns the place, thereby ending a 30-year tradition of which I am extremely fond. "Moonlight in Vermont" is more than just a song to me. I am not getting a fee, but I think Bob and Tom will agree to cover my out-of-pocket expenses, such as court fees and costs, the title search, and the like. I know from my own practice that the client ultimately must remain responsible for the expenses of litigation. But I am not certain whether or not an attorney in a real estate matter can pay for the type of expenses that I will encounter in a circumstance such as this, where there is no adversarial relationship between the seller and buyer.

I need to know whether I am ethically prohibited from undertaking the representation.

Sincerely,

The Fisherman from Fonda

ATTORNEY PROFESSIONALISM FORUM

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I have a couple of friends who live in the Albany area, as I do. For over 30 years we have gone fishing at Tom's vacation place up in Vermont. We get to fish in a great stream, with the best equipment (and go broke in the process). Tom is retiring to Florida and wants to sell his property. Bob, another friend in the group, wants to buy it. Bob and Tom are close friends and have asked me to represent both of them.

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Sincerely,
The Fisherman from Fonda

Dear Fisherman:

I hope you have enjoyed Vermont, and that you have some pictures – because the advice here is to think Catskills. You should not undertake what you propose, for a number of reasons.

The first problem concerns the lawyer's responsibility to exercise independent professional judgment. This issue is specifically addressed in DR 5-101, "Conflicts of Interest – Lawyer's Own Interest." This Disciplinary Rule restricts you from representing a client if financial, business, property or *personal* interests may interfere with your professional judgment. Your love of fishing with your Vermont comrades, and your resulting personal desire that Bob purchase the property, is likely to cloud your judgment in negotiating the terms of the sale.

A second problem is the dual representation itself. This is addressed by DR 5-105 – "Conflicts of Interest: Simultaneous Representation." How can you negotiate the best possible deal for Bob, the purchaser, at the same time that you are negotiating the best possible deal for Tom, the seller? This also leads us back to the independent professional judgment issue, which is specifically mentioned again in DR 5-105, as it forms another reason for declining a dual representation. It should be noted that there are no ethics opinions or court decisions directly prohibiting a lawyer from representing both a buyer and a seller in a real estate transaction – but there are some cases sanctioning a lawyer who got in trouble doing so.

Both DRs do permit dual representation if "a disinterested lawyer" opines that it is not a problem. (This exception replaced the old standard,

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which was an "obviousness" test. The latter was a subjective standard in which the lawyer involved made his or her own decision that the representation was okay. It is "obvious" why the older standard was replaced. Often, as in this case, the only thing that is "obvious" is the attorney's own desires – in your case, a desire for trout.) In addition to the opinion of a disinterested attorney, DR 5-105(C) requires the lawyer to discuss the matter thoroughly with his or her clients and to obtain their consent. However, even if an attorney decides to go this route, which is *not* being recommended here, be aware that additional protection is needed. It would be best, and perhaps it is even essential, that you get the opinion of the disinterested lawyer and the consent of the client(s) in writing.

Then there is the question of competency. DR 6-101 – "Failing to Act Competently" – states that a lawyer shall not "handle a legal matter which the lawyer knows or should know that

he or she is not competent to handle, without associating with a lawyer who is competent to handle it.” When Thomas Jefferson was asked why it took so long for him to become a lawyer, compared to Patrick Henry, who took only one year to be admitted to practice, Jefferson noted that Henry was qualified only to try cases. In your case, one may conclude that a negligence lawyer is not qualified to handle a potentially complex real estate transaction in a foreign jurisdiction (or for that matter, even in New York).

This aspect of your question brings us to the larger issue of how far afield a New York lawyer can wander. This is an extremely vexatious area of professional regulation, which currently carries the innocuous title of “multi-jurisdictional practice.” The American Bar, the New York State Bar, and many other Bar Associations have undertaken studies, made reports, and drafted proposals addressing this issue. At present, the law in New York is as stated in a 1957 Court of Appeals decision, which itself involved a two-judge dissent. In *In re Roel* (3 N.Y.2d 224, 165 N.Y.S.2d 31), Judge Froessel, speaking for the majority, stated that “[w]hen counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign state . . . [m]oreover, the conduct of the attorneys admitted here may be regulated by our courts and . . . dealt with when they engage in unethical practices; they may not plead in defense that since the matter involved related to the law in New Jersey or Connecticut or anywhere outside of our jurisdiction, they were not practicing law and were therefore immune from disciplinary action.” *Id.* at 232.

However, a much more recent case, and one that has the entire national legal community abuzz (and likely motivated the Bar activity noted above) is *Birbrower, Montalbano, Condon, and Frank, P.C.*, 17 Cal. 4th 119, 949

P.2d 1, 70 Cal. Rptr. 2d 304 (1998). In this case the California Supreme Court issued the most stinging rebuke possible – it denied fees. A New York law firm got nothing for its work, at least to the extent its fees covered activity in California, as the firm was found to be practicing law without a license.

Notwithstanding the foregoing, it is difficult to conclude that you would be involved in the unlawful practice of law, given that both prospective clients are New Yorkers, and that the work could all be done here. However, it is also difficult to give a definitive answer as to how far an attorney licensed in New York can go in representing New York residents in transactions involving activities and law in a sister state – and there can be serious consequences if a court or Grievance Committee finds that you went too far.

DR 3-101(B) states that “[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” If it is determined in Vermont that you were practicing law in that state without a license, you can be disciplined in New York by our own Grievance Committees. And it gets even worse. According to DR 1-105, even if Vermont concludes that you were not practicing law there without a license, you can still be found to have done so under New York rules. In other words, you can be disciplined in New York even for activities that did not occur in New York, and that are not a violation of Vermont rules. This is called getting you coming and going.

The best discussion of your problem is probably that of Harry G. Myer in his article “A Little Learning is a Dang’rous Thing; Drink Deep, or Taste Not the Pierian Spring” (Alexander Pope, 1688–1744 – ‘An Essay on Criticism’), published in the *New York Real Property Law Journal*, Summer 2003. Mr. Myer talks about taking care of property in Florida as a convenience to long-time clients and established friends while they are “up North” for the summer. He mentions that is easy to copy from a former deed, to down-

load a title insurance company form, or to have a new deed typed. Easy, yes, but he cautions that “we may have a false sense of security that imaginary concepts known as ‘state lines’ can be ignored.” He then gives some very specific examples of why they cannot. Mr. Myer concludes, “Practical advice: Consult with capable counsel where a property is located to avoid embarrassing yourself.”

The advice here goes even further – just don’t take the case.

The Forum, by
Peter Coffey, Esq.
Englert Coffey & McHugh
Schenectady

LETTERS TO THE FORUM:

We received the following letter in response to the previous issue’s Forum. The question is reprinted for your convenience.

To the Forum:

I am a second-year law student and hope to concentrate my practice in family law.

My sister, Mary, had her divorce finalized about a year ago. She tells me that throughout the legal process of her divorce she was very impressed by her husband’s attorney, Mr. Hans Summ. She says that he was very polite, organized and efficient at all the depositions and conferences that she attended and seemed incredibly knowledgeable and sophisticated throughout the proceedings.

Mary believes that Mr. Summ’s expertise and professionalism resulted in getting her volatile ex-husband to come to an agreement and thus spared her the trauma of a trial.

As part of Mary’s property settlement she received their summer home in Lake Chautauqua in upstate New York. Mary has now decided to sell the summer home and she called Mr. Summ to represent her in the sale. Mr. Summ not only agreed to do so but also asked Mary to go to dinner with him. I know my sister has been very lonely and depressed as a result of her divorce and she was both surprised

and delighted at Mr. Summ's invitation.

Somehow, although I am not sure why, Mr. Summ's agreeing to represent her on the sale of the property and inviting her to dinner don't seem right to me.

Is it proper for Mr. Summ to represent my sister? Is there anything wrong with his asking my sister out to dinner?

Sincerely,

Worried in Williamsville

To the Forum:

Re: Worried in Williamsville

You're kidding, right? We are lawyers. We do not provide advice for the lovelorn. There is absolutely nothing wrong with an attorney having dinner with an opposing spouse one year after the conclusion of a divorce matter. In fact, there is nothing wrong with him having sex with her or, Heavens, representing her in a real estate transaction. While a law student may have some reservations about the motives of the attorney, it has nothing to do with attorney professionalism.

Sure some women, and some men, feel lonely and depressed after a divorce. So what? Sister Mary is obviously attracted to an organized, efficient, knowledgeable, sophisticated lawyer. That's nice. DR 5-111 provides a lawyer shall not require or demand sexual relations with a client or third party incident to or as a condition of any professional representation or enter into sexual relations with a client during the course of the lawyer's representation of the client in a domestic relations matter. It is hard to imagine Mr. Wonderful, Esq. is going to require or demand sexual relations before representing Mary in the sale of a summer home. So, in answer to the questions:

1. Yes, it is proper for the attorney to represent your sister in the sale of property one year after concluding his representation of your sister's husband.

2. There is nothing wrong with the attorney asking your sister out to dinner. She is obviously delighted with

the invitation, and you should be happy for her.

So, Worried in Williamsville, study hard at law school, and stop worrying about your sister's social life.

Michael P. Friedman, Esq.

Friedman & Molinsek PC

Delmar, N.Y.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I really need an answer on this one, and soon. Next month I have to make a sizable payment on my son's college tuition for the spring semester. I just do not have the cash on hand. My credit cards are pretty much maxed out. There is more than enough money in my attorney trust account to cover the payment, and most of those funds are escrowed until a business closing occurs for one of my clients – which is definitely not going to occur for at least

two months, probably three. I have settlements on five cases pending. The money for one of them will definitely come in at the end of next month, and would cover the tuition. Two of the others are likely at that time as well. Unfortunately, the tuition is due a few weeks earlier, and my son's college is very strict about timely payment. I don't want him to be embarrassed, or, worse, prevented from registering for his classes.

What I would like to do is borrow just enough to cover the tuition from the trust account for a very brief period, no more than those few weeks, giving the trust account a promissory note in exchange. The note will absolutely be good and will be paid promptly from the settlement proceeds. Is this going to create any problems for me?

Thanks for your advice.

Sincerely,

Maxed Out in Mechanicville

ATTORNEY PROFESSIONALISM FORUM

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Thanks for your advice.

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Maxed Out in Mechanicville

Dear Maxed Out:

What you propose is a perfect example of a seemingly victimless act that appears unlikely to have any consequences either for you or for any of your clients. In fact, based on the assumptions you've made there's even a chance that you might "get away" with taking the loan. But before you pick up your check-writing pen, you should read DR 9-102, which clearly prohibits the transaction you contem-

plate. To be clear: you simply may not do it.

DR 9-102(A) states that "A lawyer in possession of any funds . . . belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds . . . or commingle such funds . . . with his or her own." The rule requires that trust funds be held "separate from any business or personal accounts of the lawyer or the lawyer's firm" (DR 9-102(B)(1)). The rule goes on to provide for disciplinary proceedings in the event of a violation (DR 9-102(J)).

There are few provisions in the Disciplinary Rules containing language that is more clear than the prohibition set forth in DR 9-102. The N.Y.S. Committee on Professional Ethics has opined that the "obvious intended core purpose" behind DR 9-102 is "to maintain the integrity of a client's funds for the benefit of that client only, until payment of those funds to, for or on behalf of that client" (State Bar Ethics Opinion No. 737 (22-00)). Without question, a loan of the type you describe would be contrary to the language of, and the purpose behind, this rule. Even the "safeguards" you mention – the anticipated short term of the loan, the planned rapid repayment through a "definite" settlement payment, and the issuance of a personal promissory note to the trust account – do nothing to make the proposed conduct less of a violation.

And, on a practical note, what if something goes wrong? What if the client for whom you are working on the business closing decides not to proceed, and demands immediate tender of his escrowed funds? What if one of the settlement checks you expect does not arrive, or does not clear? These possibilities may seem remote, but as can be seen from even a cursory review of attorney discipline case law, they do happen — and when they do,

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they provide no defense to a violation of DR 9-102.

Try to think of this from another perspective. While you or your son may face some embarrassment regarding your inability to make that tuition payment exactly on schedule, which would you find easier — to speak to the university about making a late payment arrangement, or to contact your clients and ask each of them to lend you some money to close the gap? My hunch is that you would never consider asking your clients for a loan (DR 5-104 puts significant restrictions on your ability to do so, in any event). So what makes it acceptable simply to borrow their money – held in your trust account – without their knowledge or permission?

Lest you consider taking the loan anyway, perhaps on the theory that no one will find out, consider the requirements of DR 9-102(D). That section places a duty on you to maintain detailed records of all activity and trans-

actions relating to your escrow account and your law firm operating account. Unless you are considering violating this section as well (and note that under DR 9-102(J) failure to maintain the records for the trust account subjects you to the same discipline as misusing the funds themselves), the paperwork created by your loan will remain as permanent proof of your misconduct. In the event that your escrow account is ever reviewed by a Grievance Committee, even on an unrelated matter, the proof of your illegal loan will be right there for it to find.

Finally, consider this: while there may be a number of Disciplinary Rule violations that can result in action by a local Grievance Committee or an Appellate Division, there is no act more likely to lead to significant discipline than misusing or mishandling attorney trust funds (*see, e.g., In re Ford*, 287 A.D.2d 870, 732 N.Y.S.2d 115 (3d Dep't 2001); *In re Abbatine*, 263 A.D.2d 228, 700 N.Y.S.2d 211 (2d Dep't 1999); *In re Ferguson*, 259 A.D.2d 186, 694 N.Y.S.2d 113 (2d Dep't 1999); *In re Joyce*, 236 A.D.2d 116, 665 N.Y.S.2d 430 (2d Dep't 1997)).

Find another way to pay that tuition bill.

The Forum, by
Robert T. Schofield, Esq.
Whiteman Osterman & Hanna LLP
Albany, N.Y.

LETTERS TO THE FORUM:

We also received the following reader response to the question from "Maxed Out in Mechanicville":

Dear Maxed Out:

I really cannot believe that you wrote that letter, and I am even more amazed at the *Bar Journal* for publishing it. I would have thought this to be a fairly easy question on a law school exam.

The short answer is that you cannot touch those funds in your trust account for three reasons:

1. It is unethical.
2. It is immoral.

3. It is S-T-U-P-I-D.

I will let others explain the appropriate Disciplinary Rules regarding trust accounts and just point out that if you are basically unfamiliar with most Disciplinary Rules, those dealing with escrow accounts should be memorized, at least the basics.

I would like to address the last two items. When I said that it is immoral, I was not being facetious or hyperbolic. The money in your trust account is not your money – no way, no how, for nothing. Other people are depending upon you to safeguard their money. Attorneys do not have a lot of duties that can be labeled a sacred trust, but, if this is not one of them, it comes awfully close. Even if the rules were to let you do it, it would still be wrong.

It would also be extremely stupid. Why? Because Max Bailystock is not a good role model (if you do not catch the reference, watch the movie or Broadway version of *The Producers*). When you talk about the note being "absolutely" good and being paid promptly from a settlement, you are deluding yourself. In the legal business nothing goes as expected. If you have been in practice long enough to have a child in college, you must know that depending upon deadlines for real estate matters and litigation settlements is a tenuous proposition at best. In something of a correlation to Murphy's Law, things will always fall apart at the most inconvenient time possible.

At this point, you should ask yourself one simple question. Do you like practicing law? If the answer is "yes," try to imagine what it would be like to be on the outside looking in, because if anything does go wrong, that is a very real possibility. Aside from the shame of being suspended or disbarred, getting another job will probably not be that easy. I have not taken a survey, but my gut reaction is that "uses other people's money as his own" is not one of the employee characteristics sought by most employers.

And, if you are not concerned with yourself, at least think of your family.

If anything goes wrong, all will become public. Do you think that your son would be real happy to know that his college education was made possible, in part, by your wrongdoing?

If the answer to the question of whether you like to practice law is "no," or "it's a job," the fact that you are asking if you can borrow against trust funds is probably an indication that it is time to change careers, or at least to consider a salaried position. You are starting to show signs that it is all getting to be a bit too much and you should do something constructive before disaster strikes.

To reiterate:

DON'T DO IT.

Sincerely,

Thomas Hegeman, Esq.
Oneonta, N.Y.

We received another reader response to the question from "Worried in Williamsville," about her sister dating her ex-husband's divorce attorney.

To the Forum:

Your November-December issue featured an inquiry by "Worried in Williamsville" who was concerned about the situation in which her sister, after a divorce, having been very impressed by her husband's attorney asked the attorney to represent her in the sale of her summer home. He also invited her to go to dinner with him, obviously the beginning of a social relationship. The writer wanted to know if there were any improprieties involved.

As a retired Justice of the Supreme Court, New York County, I refer the writer and readers to a decision I issued in 1993 in the case of *Sanders v. Rosen*, 605 N.Y.S.2d 805. In that case, a woman's former divorce lawyer, two years after the divorce was finalized, began a social relationship with her, prepared a new will for her, and jointly purchased a summer house, with the lawyer handling the details of the loan and closing. After they broke up the woman sued her former attorney and lover for malpractice, violations of the

Code of Professional Responsibility, and a host of other charges.

In my opinion I included a lengthy section on "Lawyers as Lovers." It distinguished between cases of an attorney abusing his position in dealing with a current client who is dependent and vulnerable. It was held, however, that

Once an attorney-client relationship is ended . . . an attorney is certainly free to occupy the position of friend or lover.

It was also noted that

Although some may doubt, attorneys are human beings, and they may seek and pursue relationships with persons they have met on vacation, at social affairs, or even in the office.

It is the relationship with a *current* client which may be proscribed. The guidelines for attorney behavior were clearly set forth:

A lawyer, like any other person, may in his private life be a cad or a king, an inconstant lover or a rock of stability, gracious or a grouch, but in his professional life he may not overstep the bounds and abuse his position of trust as counsel, confidant, champion and fiduciary.

I concur entirely with the response of Michael P. Friedman, Esquire, that there is nothing wrong in the situation described. I just thought your readers should know that there is a judicial opinion with authorities backing up that response.

Very truly yours,
Edward J. Greenfield
J.S.C. (ret'd)
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

In my capacity as a solo practitioner, I recently drafted and filed a federal civil rights complaint. It was verified by my client on the basis of her direct and personal knowledge regarding defendants' acts of misconduct and malfeasance. The causes of action and constitutional issues raised are complex, and are extremely sensitive because they touch on a continuing scandal involving these same defendants (I do not wish to be more specific than that), some of whom are attorneys.

Within a month after filing the complaint, I was approached by a non-party attorney for the defendants. He engaged in what I can only describe as an attempted act of extortion. In my client's presence, he threatened that I would be subjected to substantial disciplinary sanctions if we did not withdraw the complaint, which, as noted, she had verified, and which I had researched extensively as to issues of law. He also stated that he had connections with our local Grievance Committee in a further attempt to intimidate me, as well as my client.

My client, however, is not easily intimidated. She does not want to withdraw her complaint, nor to find another lawyer to represent her.

I now fear banishment from the legal profession that I have served for over 30 years, because of the threats that were made. Am I overreacting? And should I respond in some fashion?

Sincerely,
Traumatized in Troy

ATTORNEY PROFESSIONALISM FORUM

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Dear Traumatized:

When we take our oath as officers of the Court we swear that we will "support the constitutions of the United States and of the state of New York." (CPLR 9406(1)). In addition, we are bound by the 10 statements set forth in the Statement of Client's Rights, which

we are required to display prominently in our law offices.

If we agree, as attorneys, to undertake the representation of a client whose lawful claims involve federal constitutional rights, the Statement of Client's Rights requires us to engage in ethical and professional conduct that adheres to the federal Constitution as well as to the Code of Professional Responsibility.

Notwithstanding your concerns, including your fear of banishment from the legal profession to which you have demonstrated continuing devotion and service for over 30 years, you should be commended for standing firm in order to protect your client's First Amendment rights and interests, and in accordance with your own First Amendment duties. By so doing, you also avoid a violation of the Disciplinary Rules, which specifically state that a lawyer shall not "[a]ccept from one other than the client any thing of value related to his or her representation of or employment by the client" (DR 5-107(a)(2)). An attorney's professional reputation and law practice are a "thing of value."

There is no doubt that the temptation to avoid substantial disciplinary consequences tested your professional integrity. If you had acceded to intimidation and extortion by the offending attorney, you would have personally and knowingly received a benefit, namely, a "thing of value," to the detriment and prejudice of your client's interests, contrary to the purpose of DR 5-107(a), and the economic value of your reputation and law practice would have been preserved in large part, except for the loss of a valued client.

Moreover, if you had disregarded your client's instructions and withdrawn her complaint, or your representation of her as counsel, for your own advantage (which you have not done), you would have violated DR 7-

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101(a) by not following the lawful objectives and interests of your client, and for failing to represent her zealously in accordance with her constitutional rights. This is what John Adams refused to do in agreeing to defend the British soldiers in Boston when no one else would take their case.

Finally, if you had given in you would have violated DR 5-101 because you would have put your own "financial, business, property, or personal interests" above the legitimate objectives of your client, which are set forth as remedies in her verified complaint. However, as you stood firm, the sticky wicket in this scenario involves the acts of the offending attorney.

Based upon your fact pattern the one who should be concerned about the filing of a complaint with the Disciplinary Committee is not you, but the attorney who made the threats. Such a filing pursuant to DR 1-103 may be in order because, at first blush, it appears that the offending attorney may

have violated DR 1-102(a)(4), (5) and (7), although this is subject to interpretation. These provisions are of particular importance because they expressly state that a lawyer or law firm shall not violate a disciplinary rule or engage in prohibited conduct. There also may be a violation of DR 7-105 if the offending attorney's threat of a grievance complaint was akin to presenting criminal charges solely to gain advantage in a civil matter. If you conclude that a complaint is in order, the allegations must be specific and factual to avoid unsubstantiated statements which could be defamatory.

In conclusion, your fitness as a lawyer should be commended. You ethically performed your professional responsibilities by representing your client's lawful objectives zealously as is required by DR 7-101, by declining to acquiesce to the threats of the of-

fending attorney, and by declining to engage in conduct that would have been prejudicial to the administration of justice, or that would have involved dishonesty, fraud, deceit or misrepresentation, as proscribed by DR 1-102(a)(4), (5) and (7).

The Forum, by
Joan C. Lipin
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

For two years, I have diligently represented a client in a litigated matter, preparing numerous documents and reviewing endless correspondence, fielding telephone calls at all hours of the night and on weekends. Now that much of the work is complete, my

client has discharged me in favor of another attorney, who is being compensated on a very hefty contingency fee basis. My fees have been paid in full. Since no substitution of counsel has been filed, I am still the attorney of record, and I am awaiting instructions on transfer of the file.

While still licking my wounds from my unceremonious discharge, I am outraged by the fee being charged by incoming counsel, especially since so much of the work is complete. While it is my wish to inform my erstwhile client that she is being overcharged by incoming counsel, I do not want to create the impression of being ungracious or a sore loser. On the other hand, I do not wish my client to be taken for a ride. What should I do?

Sincerely,
Fired in Flushing

ATTORNEY PROFESSIONALISM FORUM

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Sincerely,
Fired in Flushing

Dear Fired:

While it is never fun to be fired, it is important to separate your bruised ego from your professional duties to your client, as your emotions may affect your judgment. Of course, under the Lawyer's Code of Professional Responsibility, the client's discharge requires your mandatory withdrawal from the case (*see* DR 2-110(B)(4)). As is true of all withdrawals, you must take reasonable steps "to avoid foreseeable prejudice to the rights of the client," including the delivery of all papers and property to which the client is entitled (DR 2-110(A)(2)).

Turning to your specific concerns, it is interesting that you do not question

the competence or legal skill of incoming counsel, but merely the excessive nature of the fee, which is governed by DR 2-106 of the Code. Under Section A of that Rule, a lawyer is prohibited from charging an excessive fee. The reasonableness of an attorney's fee depends on such factors as the time and labor required, the amount of money involved, the result obtained, the time limitations imposed by the client and the legal skills of the attorney (*see* DR 2-106(B)). While some of these factors are objective, others are subjective.

If you feel strongly that incoming counsel may be overcharging your client, you may address this issue with her, provided that you do so in a dispassionate and professional manner. Do not try to dissuade the client from making a decision with which you presumably disagree, and about which you may not be fully objective. Under the Ethical Considerations of the Code, a lawyer is encouraged "to ensure that decisions of the client are made only after the client has been informed of relevant considerations" (EC 7-8). A lawyer is encouraged to initiate a decision-making process, and her advice to the client "need not be confined to purely legal considerations" (*id.*).

The Nassau County Bar Association Committee on Professional Ethics recently considered a delicate situation in which two lawyers were representing the same client in a criminal case, yet one wished to criticize the other to the client (Nassau Co. Op. 02-2). The Committee reasoned that a client retains an attorney not only for the attorney's legal skill, but for his or her professional judgment and opinions as well, and that these opinions may extend to "the capability of the other attorney in the case." Thus, the Committee concluded that "the inquiring attorney may inform the client of his or her opinion with regard to the other attorney" (*id.*).

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In your case, it would be best to put aside any personal feelings you may have as a result of your client's decision to terminate your services, and to consider her best interests. You should also consider the likely effect of your advice on the client, and whether she would perceive your advice as an attempt to put undue pressure on her to continue the professional relationship with you. Remember also that this might be your final contact with this client regarding this matter, and you do not want to leave the lasting impression that you are a sore loser, or are motivated by the taste of sour grapes. Moreover, your perception that the fee of incoming counsel is unreasonable within the meaning of DR 2-106 may be open to question, as there are a number of factors that can affect the reasonableness of a fee – some of which, as mentioned, are highly subjective. Finally, remember that you have been discharged, and although

you are still the attorney of record, you are at best a lame duck.

If, after weighing and considering all of the above, you are still persuaded that the incoming attorney is charging an excessive fee, you may tactfully give that opinion to the client. In doing so, however, you should make it clear that you are not attempting to change the client's mind about your discharge, but are merely rendering advice about the fee. Be prepared to step aside gracefully, if, as is likely, the client rejects this last piece of advice from you. Remember, the client presumably had a reason, whether valid or not, for looking elsewhere for legal representation.

The Forum, by
Barry R. Temkin
New York, NY

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I just graduated from law school and plan to take the bar exam in July, after which I will start a job as an associate in a firm that specializes in family and matrimonial law.

On a recent study break I tuned in to an episode of "The Sopranos," which raised the type of ethical issue that one doesn't ordinarily see on a television program known primarily for mob hits, cement overshoes and exotic dancers.

Tony Soprano and his long-suffering wife, Carmella, have separated. Carmella approached a number of attorneys to represent her in seeking a divorce, but was turned down by one after another. It seems that Tony had preemptively consulted with several of the more prominent matrimonial lawyers in town, and these attorneys refused to represent her – presumably because Tony had, in the process, disclosed to them confidential information about himself. I had the impression that Tony's purpose in consulting with these high-priced attorneys was to disqualify them from representing his wife in their upcoming divorce.

While it was not clear whether this idea was Tony's or his lawyer's, it made me wonder about this strategy in the "real world." If a person is advised by counsel to preemptively "poison" other matrimonial attorneys so that they could not represent that person's spouse, would this violate any ethical principle? My instincts tell me that the answer is "yes."

Please advise.

Sincerely,

Wondering About a Wise Guy

Dear Wondering:

Your instincts are good. Any matrimonial lawyer who gives such advice would be stretching the principle of zealous representation within the bounds of the law, as stated in Canon 7

of the Lawyer's Code of Professional Responsibility ("Code"), to the point of distortion.

Lawyers are custodians of our adversary system of justice. They have a professional obligation to preserve the virtues of that system and, if possible, to improve it. The system aspires to achieve impartial justice through fair procedures. Even though this cannot always be achieved, it ill behooves a lawyer to help a client manipulate that system to achieve a result through an unfair process.

Cynical manipulation of the type you describe jeopardizes justice not only in the particular case – here, possibly causing a mismatch between counsel – but also besmirches the reputation of lawyers generally. Those whose perceptions would be adversely affected would include the opposing spouse, the disqualified lawyers, knowledgeable observers and even the "successful" client who knows that, with the help of a scheming lawyer, he or she has achieved the desired result unfairly. This undermines the very system of justice attorneys are supposed to protect. For that reason, it is unprofessional and contrary to the best traditions of the law for an attorney to counsel a client to engage in this tactic.

If you are asking whether such conduct violates a particular provision of the Code the answer is less clear, but ultimately must be in the affirmative as well.

Tactical disqualification is nothing new. Courts adjudicating disqualification motions acknowledge it regularly. In the 1970s, it was well known that some corporations placed high-profile securities lawyers on retainer primarily to prevent corporate opponents from hiring one of these attorneys to take action against them. A corporation's payment of an annual retainer to a lawyer or law firm to prevent their working for the enemy does not, *ipso*

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facto, violate the Code. In any event, in a large metropolitan area, it is hard to imagine such tactics resulting in the disqualification of all highly qualified lawyers.

In certain circumstances, however, tactical disqualification may threaten to take all of the very best lawyers out of circulation. For example, in a small town upstate, or even in New York City in a very esoteric area of the law, the number of qualified lawyers may be limited, and the use of such tactics may disqualify all the top-tier lawyers in the area. In that context, the use of such tactical disqualification would run afoul of a lawyer's duty to assist in

making qualified lawyers fully available to those seeking legal services (Ethical Considerations 2-1, 2-26, 2-31, 2-33).

In addition, and of more serious import, the lawyer who counsels a client to disguise tactical disqualification as a bona fide preliminary consultation is, in effect, counseling a fraud. In that case, the suggested preliminary consultations are simply a charade. The client is being advised to deceive the other matrimonial lawyers into thinking that they are being considered for hire when, in fact, the client has already hired someone else, and is being counseled by that attorney to impart confidences and secrets for the sole purpose of ensuring another attorney's disqualification.

The lawyer who counsels a client to engage in such deceit will thereby be violating DR 7-102(A)(7), which provides that in representing a client a lawyer shall not "counsel or assist the client in conduct that the lawyer knows to be . . . fraudulent." In response to those who would question whether this type of client conduct rises to the level of fraud, DR 1-102(A)(4) provides more generally that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." That the lawyer personally has avoided making any deceitful comments or misrepresentations to the other lawyers consulted is no defense. DR 1-102(A)(2) provides that a lawyer shall not "circumvent a Disciplinary Rule through the actions of another." Therefore, a lawyer who counsels a client to engage in deceitful conduct intended to result in a tactical disqualification cannot avoid the thrust of DR 1-102(A)(4) by contending that the client was the perpetrator of the fraud.

In short, counseling such tactical disqualification is not only unprofessional; it also violates the Code.

The Forum, by
James M. Altman
Bryan Cave LLP
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I recently had an unsettling experience in a litigated matter, in which I felt that my client was interfering with the exercise of my professional judgment.

I represent a corporate client in a highly technical and specialized area of the law. We were served with a discovery request that called for the production of numerous confidential documents. Procedural principles unique to this practice area require the court to conduct a tedious, lengthy *in camera* inspection of each individual document prior to its production. Technically, such a hearing is scheduled upon a motion to compel discovery or on a motion for a protective order. As a practical matter, however, there is no legal or factual basis for opposing the former or making the latter, because no relief will be granted to either side without the hearing. In fact, research and experience has taught me that such hearings are invariably ordered in every case, and that no judge has ever failed to do so.

Reaching the conclusion that a hearing to review the confidential documents was inevitable, I consented to one without a motion being made, and because I viewed such motion practice as a mere technical formality I did not consult my client in advance. To be clear, I did not stipulate to the production or admissibility of any documents at the hearing, nor did I waive any applicable privilege. However, my client vociferously objected, and threatened to take its future business elsewhere.

While I aspire to high standards of professionalism, including the waiver of mere formalities (see EC 7-38), I am concerned that my client is trying to pull the steering wheel out of my hands. Further, I am concerned that my relationship with this client may have been irreparably damaged. Was I right in waiving unnecessary motion practice?

Sincerely,
Baffled

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Sincerely,
Baffled

Dear Baffled:

You are both right and wrong.

At first blush, your unilateral decision to waive a procedural formality without consulting your client probably did not affect the merits of the case, nor did it substantively prejudice your client's rights within the meaning of the Code of Professional Responsibility. To that extent, you did nothing wrong. However, there is more to the issue than that. Indeed, your question highlights the tension between the client's right to make substantive decisions, and the exercise of a lawyer's professional judgment regarding strategy and procedure.

Under the Code of Professional Responsibility, a lawyer is obligated "to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules . . ." DR 7-101(A)(1). The duty of zealous advocacy has been called "the fundamental principle of the law of lawyering."¹ Moreover, the Ethical Considerations provide that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer" (EC 7-7).

On the other hand, as pointed out by Professor Roy Simon of Hofstra University School of Law, the Code permits a lawyer "to do six unzealous things" without violating the duty of zealous representation.² For example, a lawyer is permitted to "exercise professional judgment to waive or fail to assert a right or position of the client," may refuse to participate in conduct the lawyer views as illegal, and may accede to reasonable requests by opposing counsel that would not prejudice the rights of the client (see DR 7-101(B)). The Ethical Considerations urge a lawyer to waive "procedural formalities, and similar matters which do not prejudice the rights of the

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client" (EC 7-38). Moreover, the Code encourages lawyers to "follow local customs of courtesy or practice," and to be courteous and respectful to adversaries and others (see EC 7-36, 7-37, 7-38).

In short, a lawyer is entitled to make procedural decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client" (EC 7-7), but the client is entitled to make substantive decisions – preferably, with the benefit of the lawyer's advice, experience and counsel.

Your question suggests that you did not consent to the production of confi-

dential documents. Rather, you did no more than to waive the formality of a pointless motion, which you had no legitimate ground to oppose (*see* DR 7-102(A)(1) [frivolous or dilatory actions taken merely to harass or injure another proscribed]), in favor of a hearing at which you presumably would vigorously advocate your client's interests. Thus, at least within the letter of the foregoing sections of the Code, you were right.

However, in the broader realm of attorney professionalism, which incorporates not only competence, good judgment and integrity, but also dedicated service to clients, you get a somewhat lower grade. The fact that you may have been within the strictures of the Code in waiving a procedural formality seems to have been of little comfort to the client, who disagreed with you about whether to waive the procedural formality of a hearing. Because the client insisted on the motion practice, and in so doing was advancing an objective that was neither illegal nor prohibited by principles of substantive law, you probably should have discussed the issue with the client before making the decision.

The Code's Ethical Considerations urge a lawyer to "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations" (EC 7-8), and also provide that a lawyer "may urge any permissible construction of the law favorable to the client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail" (EC 7-4). In view of these concepts, it is preferable to communicate with the client about procedural matters, even concerning decisions that appear to fall within the lawyer's professional judgment.

Once your client is convinced that he or she has been included in discussions of even procedural questions, that client may ultimately decide that your judgment can be trusted and that regular contact on such subjects is no

longer necessary. That would leave the steering wheel in your hands when procedural issues arise, which is where you clearly want it to be.

The Forum, by
Barry R. Temkin
Fiedelman Garfinkel & Lesman
New York, NY

1. Monroe Freedman, *The Errant Fax*, *Legal Times* 26 (Jan. 23, 1995) (quoting Geoffrey C. Hazard, *The Law of Lawyering*).
2. Roy Simon, *Simon's New York Code of Professional Responsibility* Anno. (2003) at 700.

LETTERS TO THE FORUM:

We received the following reader response to the June question and answer, "Wondering About a Wise Guy":

To the Forum:

I read with interest the letter printed in the June 2004 *Journal* concerning the *Sopranos* episode wherein a matrimonial attorney told Carmella Soprano that he could not represent her because he had previously met with Tony about a possible divorce.

Let's go one step further. Let's assume that Tony "poisoned" a number of specialists in the field and Carmella was therefore deprived of her choice of competent counsel, and let's further assume that one or more of the "poisoned" counsel were not part of a scheme or plot with Tony. How can they free themselves from the constraints of disqualification and offer counsel to those seeking legal services within EC 2-1, 2-26, 2-31 and 2-33?

I can think of (1) seek an opinion from the appropriate Bar Association Committee, (2) a Court order or (3) apply an equitable remedy – *i.e.*, "take a chance" and let the opponent move to disqualify.

Any guidance you can offer will be helpful to those in this situation.

Very truly yours,
Gerald Goldstein
Davidoff Malito & Hutcher LLP
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am General Counsel to a major University. A former graduate student (I shall call her Ms. Fortune), who was academically dismissed from the science program in which she was enrolled, has initiated a *pro se* lawsuit. In a rambling and verbose complaint, she claims a breach of contract, along with a number of other convoluted and inartfully stated causes of action. For example, Ms. Fortune claims bad academic advising, unfair grading, prejudices of various sorts, an incompetent science department generally and an unwillingness to make accommodation for a reading disability. In addition to naming the University as a defendant, she has named 14 faculty members and two administrators as individual defendants, citing various wrongs they allegedly committed against her during her academic career.

Needless to say, these persons are extremely upset at being targeted in the action, and several have demanded that the University allow them to hire private attorneys, whose fees are to be paid by the University. Not only might this result in an enormous expense for the University, but I personally would have to deal with up to 16 separate attorneys, as well as the *pro se* plaintiff herself.

We (that is, the relevant officers of the University and I) believe the complaint to be unfounded. In simple terms, Ms. Fortune did not fulfill graduate requirements and her time for doing so expired. Further, the faculty involved believed that she would not be successful, even if her time to complete the program had been extended. In short, it appears that the University has a strong defense to this suit. That, however, does not solve my immediate problem about the requests for outside counsel.

I have asked the individual defendants to postpone any decision about

hiring their own attorneys, to let me respond to the complaint for everyone, and to conduct the litigation alone, at least for the present. I have explained that should it appear, at any time, that the interests of an individual defendant (or defendants) are different from those of the University, I would so advise that person or persons, who would then be free to hire individual counsel. I also told them that whether the University would cover the cost of outside counsel would be determined on the facts as they emerged during the litigation.

My question: Is this a fair, logical, fiscally responsible and ethical way to handle the requests for individual representation?

Thanking you in advance for your reply, I remain,

Fiscally and Ethically Concerned

***Questions, comments, alternate views?
Contact us at journal@nysba.org.***

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Thanking you in advance for your reply, I remain,

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Dear Fiscally and Ethically Concerned:

The course of conduct that you propose is fraught with peril, and should not be pursued.

EC 5-1 advises that the professional judgment of a lawyer should be exercised solely for the benefit of the client, free of compromising influences and loyalties. While your client, the University, and the individual faculty members and administrators named as defendants certainly have interests in common (in that they all want the plaintiff's claims dismissed), those interests may diverge quickly if one or more of the individuals are found liable, or even if it appears that this might happen. Some or all them may then wish to pursue their own claims against one or more of the others, including your client – for example, in contribution or indemnification, or both.

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EC 5-14 explains that this problem of conflicting loyalties arises "whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." Any doubt should be resolved against the propriety of the representation (EC 5-14). EC 5-15 further admonishes that a lawyer "should never represent in litigation multiple clients with differing interests . . . there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a

lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the lawyer refuse the employment initially.”

In addition, your role as the University’s General Counsel carries with it ethical implications relevant to this issue. A “lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity” (EC 5-18; DR 5-109). In a sense, this will relegate the individuals to a “second tier” of allegiance, and create an inherent conflict as you attempt to exercise your best judgment on behalf of the University and these individuals.

DR 5-105(A) is clear: “A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests.” As the previous discussion indicates, it will be difficult for you not to run afoul of this Disciplinary Rule.

There is yet another potential problem. In representing multiple clients, an attorney might be privy to a confidence or learn a secret from one client that is potentially useful to another client, to the advantage of the latter, or which might work to the detriment of the client from whom the confidence or secret was obtained. The use of the information is prohibited by DR 4-101(B), unless informed consent is given.

Finally, although the decision of the University regarding payment for outside counsel touches on matters of policy and strategy that are beyond the scope of the Forum, your expression of concern for the University’s financial well-being certainly constitutes an

interest of another client (*i.e.*, the University) that could affect your independent judgment in determining whether it would be proper for you to represent the individuals in this matter (DR 5-101(A)).

If a disinterested lawyer would believe that the lawyer can competently represent the interest of each potential client, and if each consents to the representation after full disclosure of the implications of the simultaneous representation, including the advantages and risks involved, the lawyer can proceed with the dual or multiple representation (DR5-105(C)). In that regard, a lawyer also should heed EC 5-16, which provides that “it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free from any potential conflict and to obtain other counsel if the client so desires.”

If, however, a disinterested lawyer would conclude that a client *should not* agree, you should not undertake the representation, even if the client *does* agree (EC 5-16). And this situation warrants your declining the multiple representation – in other words, the client should be advised *not* to agree.

Should you elect to proceed notwithstanding the foregoing cautions, be sure to consider that if a conflict develops you may be required to withdraw from representing all defendants – including the University (*see* DR 2-110). On a related note, consider the strictures of DR 5-107 in connection with the University compensating you for the representation of the other defendants; under sections (A)(1) and (2), attorneys are prohibited from accepting compensation or “any thing of value” related to the subject matter of the employment from anyone other than the client, absent full disclosure and consent of the client.

Quite aside from all the potential problems that can arise during the course of a multiple representation, you may trip over another, more general ethical issue at the very beginning. It is one thing for a potential client to

ask you to represent him or her; it is entirely different for you to ask that individual, in effect, to employ you. Such direct solicitation may violate DR 2-103(A)(1) and other provisions of law (Judiciary Law § 479). This is of special concern where, as here, you indicate that several individuals have already indicated their desire for separate counsel.

One last practical note: it is not clear from your self-description as “General Counsel” whether you are employed as in-house counsel or have an independent practice, and are not an employee. If you are an employee of the University, and proceed in the defense of all the parties you mention, you must be especially careful that your actions on behalf of the individual defendants will be covered by professional liability insurance.

The Forum, by
M. David Tell
Wormser, Kiely, Galef & Jacobs LLP
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

Over the past 15 years, I have handled a variety of matters for a married couple – let me call them Mr. and Mrs. Andrews – and their two adult children, John and Betty (also fictitious names). Two years ago, Mr. Andrews died and I was engaged by the family to settle his estate. About one year later (a year ago), I was retained by Betty to represent her in a divorce proceeding. Most recently, John, who is a successful contractor and developer of luxury homes, engaged my services to convert his business from a partnership to a limited liability company, and to defend him in a rather complex construction litigation filed by a homeowner. John paid me a retainer on account for the litigation, and I anticipate a substantial legal fee by the time the action is concluded.

CONTINUED ON PAGE 58

ATTORNEY PROFESSIONALISM FORUM
CONTINUED FROM PAGE 49

John just called and has put me in an awkward position. He told me that since his father's death, his mother's health has been deteriorating (she has Parkinson's disease) and he has been totally responsible for her care. This includes paying her bills, maintaining her house, and driving her to all her doctor appointments. His sister Betty moved to California after her divorce, and is unable to share this burden. John has also advised me that although his mother's physical health has declined, her intellect has not, and she refuses to move to an assisted-living facility.

After describing his "caretaker" role, John told me that his mother wanted a new will prepared that gave her house to John (in gratitude for all that he was doing) and her remaining property (consisting of a minimal amount of cash) to him and his sister in equal shares. Also, since Betty now

resided in California, his mother felt that it would be more practical if I, rather than Betty, served as co-executor with him under this will. He then ended the conversation by telling me that he would pick up a draft of the will next week, when he comes by for his EBT preparation. He also instructed that under no circumstances did he want me to bill his mother, given her limited income, and that he would take care of my fee.

I am confused. First, can I even represent Mrs. Andrews in this matter at the same time I represent her son? If I can represent both of them, shouldn't Mrs. Andrews herself have contacted me? What are my ethical and professional obligations in this situation?

Sincerely,
Willing But Worried

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Sincerely,
Willing But Worried

Dear Willing:

Lawyers who represent couples or families in trusts and estates matters often face the basic but always important question of which person is the actual client. It is not uncommon for a husband to consult an attorney to prepare a will for his wife, or, as in your case, for an adult child to engage an attorney to prepare a will for an elderly parent. In these situations, the attorney must be able to clearly identify the client, avoid potential conflicts of interest, and at all times strive to maintain independence of judgment on behalf of that client.

John has asked you to prepare his mother's will. Nevertheless, it is she, and not her son, with whom you must confer regarding her testamentary intentions. Although John may have correctly communicated her wishes, your responsibility is to elicit directly from her the information necessary to prepare the will, including the identity of the persons to whom she desires to leave her property, and her directions regarding their respective shares. In the process, you should also assess her testamentary capacity. All of this may seem obvious, but you may be inclined to do otherwise given your long-standing relationship with the entire family

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and your present representation of John.

Your first step should be to confirm that Mrs. Andrews actually wants to change her will, and, relatedly, to retain your services to do so. You seem uncomfortable with pursuing the representation, perhaps because you view it as an impermissible form of solicitation. However, since you indicate that Mrs. Andrews is a former client, it is not prohibited under DR 2-103(A) (solicitation of employment from prospective clients in person or by telephone barred except from "close friend, relative, former client or current client"). It is not unusual for a

client whose spouse has died to update a will, and by calling her to confirm that she wants to do so you demonstrate that you are both conscientious and sensitive to her legal needs.

Assuming that Mrs. Andrews engages your services, Canon 5 (“A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”) must be kept in mind throughout the representation. Neither John’s directives regarding the terms of his mother’s will, nor your desire to please John and maintain him as a client, are permissible interests for you to consider in advising Mrs. Andrews. “The professional judgment of a lawyer should be exercised . . . solely for the benefit of the client and free of compromising influence and loyalties. Neither the lawyer’s personal interests, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client” (EC 5-1).

Simultaneously representing John on a commercial litigation and his mother in the preparation of a will are unrelated matters and would not necessarily violate DR 5-105 (Conflict of Interest; Simultaneous Representation), but if you think that John’s sentiments will compromise your duty to independently represent Mrs. Andrews in any way, then you must decline the representation (see DR 5-107(B) (“ . . . [a] lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services . . . ”; accord ABA Formal Op. 02-428).

You also should be aware of any potential conflicts of interest stemming from your prior representation of Betty, Mrs. Andrews’ daughter. Since your representation of Betty was in connection with a divorce, which is not the “same or a substantially related matter” as your work for Mrs. Andrews, you are not required to obtain Betty’s consent to represent her mother (DR 5-108(A)(1)). However, you cannot reveal any confidential

information previously imparted by Betty as you advise her mother, without first obtaining Betty’s consent (DR 5-108(A)(2)).

John’s offer to pay your fee is another factor that could impinge on your ability to exercise independent judgment in representing Mrs. Andrews. As noted by EC 5-22, “if a lawyer is compensated from a source other than the client, the lawyer may feel a sense of responsibility to someone other than the client.” Accordingly, DR 5-107(A) expressly prohibits the lawyer from accepting payment from one other than the client unless the client agrees. Therefore, you must disclose to Mrs. Andrews her son’s offer to pay your fee, and obtain her consent prior to accepting payment from him. Of course, John’s generous offer may be withdrawn after you advise him that you cannot prepare the will based on his directives, but rather only upon consultation with his mother.

If Mrs. Andrews engages your services, be certain to avoid any suggestion that she appoint you as a fiduciary under the will, notwithstanding John’s advice that you name yourself as co-executor. EC 5-6 cautions that “[a] lawyer should not consciously influence a client to name the lawyer as executor, trustee, or lawyer in an instrument.” Even where an appointment is made without any such influence, “care should be taken by the lawyer to avoid even the appearance of impropriety.” If of her own accord Mrs. Andrews asks you to serve as an executor, remember to advise her of the financial impact (statutory commissions and legal fees), and prepare an acknowledgment of your disclosure in accordance with SCPA 2307-a.

Finally, you should reject John’s offer to deliver a draft of the will to his mother, unless authorized in advance by Mrs. Andrews. Allowing him to serve as a courier will give him access to the confidences of your client, which is proscribed by DR 4-101(B)(1) (“[a] lawyer shall not knowingly reveal a confidence or secret of a client”).

Similarly, if John makes inquiry about his mother’s will, do not discuss the terms of the instrument since the information you will be disclosing may be confidential. Of course, if Mrs. Andrews insists upon the presence of John at meetings with you, or gives you permission to discuss her will with him, you would not be violating your obligation to protect the client’s confidences (DR 4-101(C)(1)).

In short, if you are confident that you can exercise your professional judgment solely for the benefit of Mrs. Andrews, devoid of any influence by John, and are aware of the issues that often arise in the context of family representation, politely thank John for the lead but advise him of your obligation to confer directly with his mother on this matter. By doing so, you will be fulfilling your duty of loyalty to your client, and will be exhibiting attorney professionalism.

The Forum, by
Susan F. Gibraltar
Bertine, Headley, Zeltner,
Drummond & Dohn, LLP
Scarsdale, NY

LETTERS TO THE FORUM:

We received the following letter in response to the Forum published in the July/August issue of the Journal. The question is reprinted for your convenience.

To the Forum:

I recently had an unsettling experience in a litigated matter, in which I felt that my client was interfering with the exercise of my professional judgment.

I represent a corporate client in a highly technical and specialized area of the law. We were served with a discovery request that called for the production of numerous confidential documents. Procedural principles unique to this practice area require the court to conduct a tedious, lengthy *in camera* inspection of each individual document prior to its production. Technically, such a hearing is scheduled upon a motion to compel discov-

CONTINUED ON PAGE 52

ery or on a motion for a protective order. As a practical matter, however, there is no legal or factual basis for opposing the former or making the latter, because no relief will be granted to either side without the hearing. In fact, research and experience has taught me that such hearings are invariably ordered in every case, and that no judge has ever failed to do so.

Reaching the conclusion that a hearing to review the confidential documents was inevitable, I consented to one without a motion being made, and because I viewed such motion practice as a mere technical formality I did not consult my client in advance. To be clear, I did not stipulate to the production or admissibility of any documents at the hearing, nor did I waive any applicable privilege. However, my client vociferously objected, and threatened to take its future business elsewhere.

While I aspire to high standards of professionalism, including the waiver of mere formalities (see EC 7-38), I am concerned that my client is trying to pull the steering wheel out of my hands. Further, I am concerned that my relationship with this client may have been irreparably damaged. Was I right in waiving unnecessary motion practice?

Sincerely,
Baffled

To the Forum:

Re: Baffled
Gentlemen:

Would the client accept being billed for motion practice which the attorney believes is unproductive, and could result in sanctions or antagonizing the judge? Must the lawyer discuss with the client a matter which pertains to the lawyer's ethical obligation to avoid vexatious litigation, particularly where there is no advantage to the client?

For Baffled, please consider that the client may be seeking a way of settling the litigation, while blaming you for the outcome and reducing your fee.

Very truly yours,
David M. Goldberg
Brooklyn, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a new (*i.e.*, lowly) associate in a large firm. We represent a large corporation that has been sued by a person injured on its property, and I have been assigned to the case. The injured person is represented by a law firm in another state. One of the members of the plaintiff's firm is admitted in New York, and he is the one who signs the pleadings and discovery documents in the matter. However, it is the firm's non-New York lawyers who contact me regarding case status, evaluation, scheduling, etc.

A few days ago I was working late, reviewing the plaintiff's responses to our discovery demands. The plaintiff had included a stack of documents (employment records, medical records, accident reports, etc.) as part of those responses. These documents were held together by rubber bands, and were not bound in any other manner.

The last two pages clearly got into that stack unintentionally, and just as clearly were not supposed to be disclosed. They constituted a letter from the plaintiff himself to his attorneys, and it was addressed to the attorney in the firm who is admitted in New York. The letter detailed the financial hardship the plaintiff was having resulting from his inability to work. He asked the New York attorney for an "additional" loan because he had exhausted the "first" loan made to him by another member of the firm (one who is not admitted in New York).

The contents of the letter shocked me. However, because it was late I could not find a partner to give me some guidance, and I had a client meeting scheduled for the first thing in the morning to discuss the plaintiff's responses. That meeting took place, and although I was not altogether comfortable in doing so, I decided not to tell the client's representative about the letter because I had not talked to one of my superiors first.

After the meeting I got a chance to discuss the matter with a partner in my firm. He told me not to tell the client. He also directed me to write a letter to the plaintiff's counsel in the near future, advising that we would report his conduct to the Ethics Committee unless he agreed to reduce the initial settlement demand that had been made some time before.

I am not comfortable with keeping the information from the client, nor am I comfortable with threatening the plaintiff's attorney in this manner. In addition, don't I have an individual obligation under the disciplinary rules to report unethical conduct to the Ethics Committee once I become aware of it? One other small matter: I am afraid I will be fired if I disobey a partner's directive. Some advice would be most welcome.

Signed,
Frustrated First-Year Associate

ATTORNEY PROFESSIONALISM FORUM

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Dear Frustrated:

Your frustration is understandable, as you find yourself caught between what you believe is the proper course of action and what a superior has told you to do.

A few general principles should be stated at the outset. You may be new to the profession, but you are a lawyer, and therefore are bound by the rules of professional conduct. As you are now a member of a self-regulating profession, in which everyone has a duty to adhere to those rules, you must do your part to ensure that your professional colleagues comply. That may take the form of encouragement, assistance, and, if necessary, enforcement through the reporting of violations. In addition, you are bound by the rules notwithstanding the fact that you may act at the direction of another person, in this case your superior at the firm.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

Having said that, you will not be in violation of your ethical obligations if you act in accord with a supervising lawyer's directive – provided the directive represents a reasonable response to a question of professional duty that has more than one possible answer. DR 1-104(F). If that is not the case (*i.e.*, the response is clearly wrong), following such a directive would mean that you have violated your own duty to comply with the rules.

The first step in your particular dilemma is to identify the nature of your responsibility. Disciplinary Rule

1-103(A) provides that “[a] lawyer possessing knowledge, . . . not protected as a confidence or a secret, of a violation . . . that raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

The circumstances under which you learned of your adversary’s conduct bears on this issue. It appears that the letter from the plaintiff to his attorney was inadvertently disclosed, and that you did not realize that the letter was a confidential communication until you read it. New York City Ethics Opinion 2003-04 holds that a lawyer who receives a misdirected communication containing confidences should promptly notify the sender and refrain from further reading the communication. Nevertheless, the opinion goes on to state that “the receiving attorney is not prohibited . . . from using the information to which the attorney was exposed before knowing or having reason to know the communication was inadvertently sent.” There are, however, restrictions; you may not exploit the information in such a way that it will undermine the administration of justice. DR 1-102(A)(5).

Next, you must determine if you have an obligation to report your adversary’s conduct. This conduct clearly violates a Disciplinary Rule and therefore calls into question your adversary’s fitness as a lawyer. Because you have knowledge of that conduct, you have an obligation to report it. Disciplinary Rule 5-103(B) states, “While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that . . . [a] lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evi-

dence, provided the client remains ultimately liable for such expenses.”

The issue was addressed in *In re Arensberg*, 159 A.D.2d 797, 553 N.Y.S.2d 859 (3d Dep’t 1990). The respondents were charged with advancing financial assistance to clients in violation of DR 5-103(B). In their answer, they admitted that they were advancing funds to clients in addition to litigation expenses and were, in fact, aiding such clients in meeting personal financial obligations. The respondents claimed, however, that their conduct did not cause them to obtain a proprietary interest in their clients’ cases, that the sums paid to the clients were interest free, were not to be repaid in the event of an unsuccessful result in the case, and that the alleged misconduct was pervasive in personal injury litigation. The court upheld the determination that the conduct violated DR 5-103(B) nonetheless.

New York State Bar Association Ethics Opinions are similarly clear. Ethics Opinion 133 states, “It is the opinion of this Committee that a lawyer may neither loan money or guarantee the notes of a negligence client except for those purposes specifically authorized by DR 5-103(B).” The prohibition extends beyond negligence cases. Ethics Opinion 553 reiterated the prohibition in a matrimonial case and Ethics Opinion 600 addressed the prohibition in the real estate context. In your particular case, the fact that the initial loan was made by a non-New York lawyer should not have any bearing on your assessment of the conduct. Most jurisdictions adhere to the same basic ethical standards. Further, by engaging in practice in New York, and by having a New York lawyer sign papers on its behalf, the plaintiff’s firm has agreed to be bound by New York’s professional obligations. *See, e.g.*, 22 N.Y.C.R.R. § 603.1(a) (“any attorney from another state . . . who participates in any action or proceeding in

this judicial department, shall be subject to [the Appellate Division rules governing conduct of attorneys]”).

The final issue, and undoubtedly the trickiest one for you, is the direction you received from the partner in the firm. He suggested that you use the information to coerce your adversary into reducing the settlement demand. Unfortunately, he has placed you in a difficult position because this directive, if followed, would constitute misconduct on your part. As noted earlier, you may not engage in conduct that is prejudicial to the administration of justice. Your adversary’s violation of the rule against providing financial assistance to a client has nothing to do with the merits of the plaintiff’s underlying case. Consequently, making use of that misconduct to influence the outcome of the litigation would be prejudicial to the plaintiff. Whether or not you should tell your own client is a judgment call, but if you choose to do so you should also let the client know that you will not allow the professional misconduct to influence your handling of the case.

As to your fear of retaliation within your firm, the suggestion here is that you discuss the matter with a partner who is not involved in this litigation. Better still, if your firm has an ethics committee present the matter to them. However, if you are ultimately directed to undertake a course of action that you believe is unethical, remember that your ethics are your own. The reputation you develop today is the reputation you will live with for the rest of your career.

The Forum

By: Theresa Joan Puleo
Goldberg Segalla LLP
Albany, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a sole practitioner in a small town. About a year and a half ago, a client came to me seeking representation in a property line dispute with his neighbor. My client previously had been using an attorney who had been less than diligent in moving the case forward, and my client had reported that attorney to the local disciplinary committee. His former lawyer had put the case in suit, and a settlement proposal had been sent to the neighbor's attorney. However, nothing further had been done for some time.

Shortly after I got involved, I contacted the neighbor's attorney to discuss the status of the case. Although our conversation was cordial, he didn't seem terribly well informed about the facts, so I offered to meet with him and attempt to work out a resolution of the matter. He indicated that he was interested in doing so, but would have to get back to me with dates. Several weeks elapsed without any communication from him, so I made attempts to contact him to arrange the meeting. After several more weeks went by it appeared to me that he was not interested in settling the case, and I served discovery demands on him.

The time to respond to the discovery came and went and I attempted to contact him to find out when I might receive responses to my demands. Once more those communications went unanswered. Following my obligations under the Uniform Rules, I began to create a record of my good-faith effort to resolve the discovery issues, but after several more weeks of silence I realized that my only recourse would be to contact the court. I did so and a discovery conference was scheduled. On the literal eve of the conference, the attorney called me and asked if I would consider arbitrating the case. Knowing that arbitration would likely lead to a resolution more quickly than

waiting for a trial on our busy local docket, I accepted the offer and indicated that I would bring an arbitration agreement with me to the conference the next day.

My opposing counsel did not attend the conference, but instead sent a young associate from his office. The associate confirmed the understanding to arbitrate to the judge, but indicated that she had not been authorized to execute the agreement and that the attorney of record would arrange with me to have the document signed.

Several more weeks elapsed while I attempted to get opposing counsel's signature on the agreement. He fell completely out of contact. I have heard rumors in the local community that he is dealing with a serious personal situation involving a member of his family, but his office will not confirm that and he will not return any telephone calls or letters. I am now at a loss as to how to proceed. It has been several months since we agreed to arbitrate the matter, but the agreement to arbitrate has never been signed, and having taken the matter off the court's calendar I have no ability to move the matter forward in that forum.

My instinct is to bring an application to compel arbitration and for sanctions against my adversary because of his willful delay of this matter; my client has sustained unnecessary expenses because I have had to hound this attorney at every turn. My client also has been prevented from selling his property for nearly three years as a result of this unresolved litigation. Indeed, my client and I both believe that even his defendant neighbor is frustrated at the lack of progress. To make matters worse, my client's prior experience with the disciplinary committee has led him to urge me to report my opposing counsel for the delays.

I don't feel good about doing either of these things – I work in a small community and have always tried to maintain a cordial and civil relationship with the attorneys in the area. I feel

particularly bad in light of the rumors I have heard about my opposing counsel's personal difficulties, but this case is important to my client and it needs to move forward. What should I do?

Sincerely,
Conflicted

