ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

Although the majority of my practice is in litigation, I recently represented a longtime client in negotiating the purchase of real property with a number of environmental regulatory issues. After entering into the contract, however, a dispute arose when a third party claimed it was entitled to purchase the property. They commenced an action claiming irregularities with the contract and closing and I appeared for my client in the litigation. The plaintiff issued a subpoena to me regarding the transaction – demanding both documents and a deposition – and is moving to have me disqualified as counsel. I don't think the plaintiff's complaint has much merit and that the subpoena may be a litigation tactic to frustrate my client.

Shortly after receiving the subpoena and motion to disqualify, I also received a request to submit to a voluntary interview with an environmental agency investigating a claim alleged against my client with respect to the sale of the property. While the agency hasn't served an administrative complaint against my client yet, based upon my knowledge of the transaction and property, I think there is a strong possibility that an administrative complaint may be filed after their investigation is complete.

As an attorney in the litigation, can the other side subpoena me to testify about the transaction? Isn't my involvement in the transaction protected by an attorney-client privilege? If the court requires me to respond to the subpoena and appear at the deposition, will I also have to be disqualified as counsel? If I am disqualified, may someone from my firm step in to continue representing my client in the litigation? This client is very comfortable with our firm and we are the only attorneys they have had for many years.

If I appear for the voluntary administrative interview, will that create a basis for the agency to later seek to have me disqualified if an administrative complaint is filed?

Going forward, if I do transactional work in the future, are there any actions I should take to avoid disqualification motions and becoming a potential fact witness?

Sincerely,
Ina Jam

Dear Ina Jam:

The first issue you need to tackle is whether the documents and testimony at issue are protected by the attorney-client privilege. In a recent decision, *Vanderbilt Brookland LLC v. Vanderbilt Myrtle Inc.*, Index No. 500522/14, (Sup. Ct., Kings Co. Dec. 23, 2016) (Knipel, J.), the court grappled with a similar situation. In *Vanderbilt*, an attorney, acting as a corporate representative of her client, negotiated and entered into a contract to purchase certain real property. *Id.* at 7. After entering into the contract, the buyer then assigned the contract to another party which attempted to purchase the property. *Id.* at 2–3. The plaintiff, a third-party beneficiary to the contract (which agreed to be bound by the original contract), then questioned the validity of the assignment and whether the assignee was a good faith purchaser. *Id.* at 5. The plaintiff subpoenaed the original buyer's attorney seeking documents regarding the communications between the attorney and the title company. *Id.* at 4. When the attorney did not respond to the subpoena, plaintiff moved to compel discovery and disqualify counsel. *Id.* at 1–2.

The court ruled that the disclosure sought was not protected by the attorney-client privilege because "[i]n order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice or services." *Id.* at 13, citing *North State Autobahn v. Progressive Ins. Group*, 84 A.D.3d 1329, 924 N.Y.S.2d 295 (2d Dep't 2011), quoting *Priest v. Hennessy*, 51 N.Y.2d 62, 69, 431 N.Y.S.2d 511 (1980). Further, documents that are not primarily of a legal character, and address non-legal concerns, are not privileged. *See Vanderbilt* at 13, citing *Bertalo's Rest. v. Exch. Ins. Co.*, 240 A.D.2d 452, 454, 658 N.Y.S.2d 656 (2d Dep't 1997), *appeal dismissed*, 91 N.Y.2d 848, 667 N.Y.S.2d 683 (1997). Therefore, the court held that any of the attorney's *business transaction* communications, conducted in her capacity as a corporate representative of her client, were not protected by the attorney-client privilege. *Id.* at 14. In other words, plaintiff was entitled to disclosure of the buyer's attorney's communications with the title company and the seller.

The case teaches that when responding to a subpoena and deposition demand and determining whether the attorney-client privilege applies, you must first consider your role in the transaction. In other words, were you giving legal advice or were you simply acting as a negotiator on the client's behalf? If you were giving legal advice to your client with respect to the regulatory issues implicated by the terms of the sale, you have a strong basis for asserting the attorney-client privilege as to those communications. On the other hand, if you were involved in the actual negotiations and closing of the purchase and sale with the seller, your

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 email 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.

involvement on the business side of the transaction and communications with the seller would not be protected by the attorney-client privilege.

If you disclosed your regulatory analysis with the seller or seller's attorney, those communications and the analysis are unlikely to be protected by the attorney client-privilege even if the buyer and seller were working together toward a common goal of complying with statutory regulations. The Court of Appeals in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), recently addressed this issue and limited the scope of the common-interest privilege, an exception to the general rule that disclosure to a third party constitutes a waiver of the attorney-client privilege, to situations where 1) the parties share a common interest, 2) the communications are made in furtherance of the common interest and 3) the communications relate to a pending or reasonably anticipated litigation. *Id.* at 620. Accordingly, if your client and the seller were merely aware of regulatory issues that needed to be addressed as part of completing the transaction, but did not reasonably anticipate litigation concerning those issues, the common-interest privilege is unlikely to apply to any of your communications with the seller or seller's attorney and any disclosure of your analysis would likely constitute a waiver of the attorney work product and attorney-client privilege.

From the details you have given, you do not appear to have a sufficient basis to rely solely on the attorney-client privilege to resist complying with the subpoena and deposition. Unless you are able to demonstrate that the documents and information sought in the subpoena are not material and necessary to the action, as is required under CPLR 3101(a), or that the plaintiff's claims should be dismissed in their entirety before completing discovery, you will need to respond to the subpoena and be deposed.

That gets us to the next question, should you be disqualified? Whether you may continue to appear for your client before the court, and whether the plaintiff has any basis for your disqualification as counsel, turns on the application of Rule 3.7 of the New York Rules of Professional Conduct (RPC), also known as the Advocate-Witness Rule:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
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> (1) the testimony relates solely to an uncontested issue;
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> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
>
> (3) disqualification of the lawyer would work substantial hardship on the client;
>
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
>
> (5) the testimony is authorized by the tribunal.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
>
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
>
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Telling a litigant that he or she must change counsel is not a trivial matter. An attorney's disqualification "rests within the sound discretion of the trial court." *Vanderbilt* at 16, quoting *Bajohr v. Berg*, 143 A.D.3d 849, 39 N.Y.S.3d 241 (2d Dep't 2016). The right to select counsel is a valued right, which means that someone seeking disqualification must satisfy a heavy burden to demonstrate that disqualification is warranted. *See Vanderbilt* at 16. The court in *Vanderbilt* also noted that "[d]isqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests." *Id.* at 17, quoting *Ullman-Schneider v. Lacher & Lovell-Taylor PC*, 110 A.D.3d 469, 469–70, 973 N.Y.S.2d 57 (1st Dep't 2013).

Professor Roy Simon identifies three public policy purposes for the Advocate-Witness Rule:

1. avoid confusion on the part of the fact finder;
2. minimize prejudice to adversaries; and
3. avert conflicts between attorney and client.

Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1207 (2016 ed.).

Even before you consider opposing the disqualification motion, you should consider whether your testimony may be adverse to your client and therefore create a conflict of interest with your client. Comment 6 to RPC 3.7 addresses this issue:

> In determining whether it is permissible to act as advocate before a tribunal in which the lawyer will be a witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9. . . . Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent.

RPC 3.7, Comment 6. Comment 4 to RPC 3.7 also provides guidance in determining whether disqualification is necessary:

> Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probably tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

RPC 3.7, Comment 4. In *Vanderbilt*, the court disqualified the buyer's attorney because she "participated in negotiating the subject transactions and is likely to be a witness with respect to significant factual issues in [the] litigation" that were "hotly contested." *Vanderbilt* at 17–18.

You need to consider the position your adversary is taking in the litigation, whether there are contested factual issues about which you have personal knowledge, and whether your testimony would be adverse to your client's position. If your testimony would solely involve an uncontested factual issue that is consistent with your client's position, disqualification would not be necessary under RPC 3.7(a)(1). *See In re Florio*, 39 Misc. 3d 1225(A) (Sur. Ct., Nassau Co. 2013) (McCarty III, Surr.) ("An attorney should not be disqualified where his testimony relates solely to an uncontested issue."). If your testimony relates to a contested issue, however, a court may disqualify you unless one of the other exceptions found in RPC 3.7(2)–(5) are applicable.

The fact that you may be disqualified under 3.7(a), however, does not mean that you would be prevented from continuing to represent your client *outside* the courtroom on the matter – a point that is often overlooked when one seeks the disqualification of another lawyer. Professor Simon notes:

> Even where no exception [to the advocate-witness rule] applies, a lawyer may continue to work on the case in any capacity *outside the courtroom*. Thus, even if Rule 3.7(a) compels a lawyer to withdraw as counsel of record before a court or administrative agency, the lawyer may continue to advise the client's own courtroom advocate – including another lawyer in the disqualified lawyer's own firm – and may continue to counsel the client, to investigate the facts, research the law, to assist the advocate in preparing for trial, and otherwise work on the matter outside the courtroom.

Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1216. Therefore, even if you are disqualified as counsel of record based on your anticipated testimony, you may continue to advise your client in preparing motions, conducting legal research, and trial preparation absent any conflict of interest. *See id.* at 1216–17; RPC 3.7, Comment 5.

There are times when another lawyer from your firm would be permitted to substitute as counsel in the litigation if you are disqualified. As noted in Comment 5 to RPC 3.7, "[t]he tribunal is not likely to be misled when a lawyer acts as advocate before a tribunal in a matter in which another lawyer in the lawyer's firm testifies as a witness." RPC 3.7, Comment 5. If, however, you have a conflict of interest or you will be called as a witness on a significant issue for another party which can be prejudicial to your client, then your firm may not be able to continue representing the client under RPC 3.7(b). In *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009), the Second Circuit defined "prejudice" to mean testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." *Id.* at 178, quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531, (2d Cir. 1989). As Professor Simon notes, "[w]hether particular testimony meets that standard will depend on all of the facts and circumstances." Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1220.

If you consider all of the facts and circumstances of your case, and determine that your firm will have a conflict of interest with your client, or that you will give testimony adverse to your client when you are called as a witness by another party, another attorney from your firm will not be permitted to take over the representation. *See* RPC 3.7(b). If this is the case, you should promptly advise your client that her or she will need to obtain new counsel.

With respect to the voluntary environmental agency interview, the New York State Bar Association (NYSBA) Committee on Professional Ethics addressed a similar issue in NYSBA Comm. on Prof'l Ethics, Op. 1045 (2015). In that opinion, an in-house counsel was asked to submit to a voluntary interview by an administrative agency investigating a charge by a third party of wrongdoing by the client. The interview would address a meeting between the client and a third party in which the in-house counsel was present and would not require the attorney to disclose confidential information. *See* NYSBA Comm. on Prof'l Ethics, Op. 1045 (2015). The committee opined that although RPC 1.0(w) defines "tribunal" to include an administrative agency acting in an adjudicative capacity, RPC 3.7(a) was not yet implicated because the agency was only exercising its investigative function. *See id.* The committee further noted, however, that if the administrative agency did bring formal charges against the client, then the in-house counsel would need to consider whether he was likely to be a witness on a significant issue of fact under RPC 3.7 in determining whether he could advocate before the tribunal. *See id.*

As long as you are not divulging your client's confidential information in the interview, as is prohibited under RPC 1.6, your participation in the voluntary administrative agency meeting is permissible without consideration of RPC 3.7. We do not believe that your participation in the interview would create any additional basis for your disqualification if an administrative complaint is ultimately filed. If you choose not to participate in the interview, the agency could still call you as a witness which would still require the same RPC 3.7 analysis based on your expected testimony of the underlying facts. Under such circumstances, the scope of the agency's questioning may be even broader due to its lack of information from you and could possibly increase the likelihood of disqualification under a RPC 3.7 analysis.

In summary, when performing transactional work for your clients, it can be difficult to anticipate which transactions will result in litigation.

If you sense a higher likelihood of litigation on the horizon, and that your skills as a litigator may be more beneficial to your client down the road than your involvement in the transaction, you may want to consider having another attorney from your firm represent your client in the transaction. The more directly you are involved with the business side negotiations of the transaction, the more likely you will become a fact witness if litigation arises. Fortunately, the right to select your own counsel is highly valued and any restrictions by the court are carefully scrutinized. Even if you are ultimately disqualified because you are a likely witness in the dispute, as noted above, in many cases it does not mean that you are prohibited from advising your client and otherwise contributing in submissions to the court. You cannot simply appear.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I keep hearing stories of hackers breaking into the computer networks of law firms to steal confidential customer information. I am the managing partner of a 50-attorney firm and I must say this is keeping me up at night. I would appreciate some guidance on what a law firm's ethical obligations are with respect to guarding against the consequences of a cyberattack. Do we have any obligations with respect to the various vendors we hire?

Sincerely,

Sleepless in New York

BURDEN OF PROOF

CONTINUED FROM PAGE 63

private defendant is permitted. However, the current practice of Court of Claims judges to take account of the reduction in Supreme Court to account for the State's negligence because "as a practical matter, Court of Claims judges are 'attentive' to the reduction of a plaintiff's Supreme Court verdict to account for the State's supposed negligence and are less likely under those circumstances to accept the State's argument that it is not liable at all,"[15] will be extinguished since there will no longer be apportionment against the State in the Supreme Court actions.

In the Supreme Court action, apportionment against the State is not permitted, and the private defendant will have to bring a claim for contribution against the State in the Court of Claims.[16]

We reconvene in June, so have a wonderful Memorial Day weekend and start to the summer.

1. 2017 N.Y. Slip Op. 01145 (Feb. 14, 2017).
2. Judge Wilson took no part.
3. 2017 N.Y. Slip Op. 01145 at *1.
4. CPLR 1601(1) was amended in 1996 to add the final sentence addressing apportionment in actions where a third-party action could not be commenced because of the Grave Injury amendment to the Workers' Compensation Law.
5. The other three sections are CPLR 1600 "Definitions," CPLR 1602 "Application," and CPLR 1603 "Burdens of Proof."
6. CPLR 1601(2) provides: "Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law."
7. 96 N.Y.2d 42, 725 N.Y.S.2d 611 (2001).
8. The State concedes that any finding of culpability against it in Supreme Court is not binding on the Court of Claims, but notes that, as a practical matter, Court of Claims judges are "attentive" to the reduction of a plaintiff's Supreme Court verdict to account for the State's supposed negligence and are less likely under those circumstances to accept the State's argument that it is not liable at all. 2017 N.Y. Slip Op. 01145 at n. 1.
9. 2017 N.Y. Slip Op. 01145 at *3.
10. 41 N.Y.2d 71, 74, 390 N.Y.S.2d 875 (1976).
11. 2017 N.Y. Slip Op. 01145 at *5–6.
12. *Id*.
13. The majority opinion noted it did not ignore the word "or:" "We do not ignore the meaning of the word "or" in the statute (citation omitted), but recognize that the disparate language in CPLR 1601 regarding "action[s]," on the one hand, and "claim[s] against the state," on the other, has disparate implications for private tortfeasors, as opposed to state tortfeasors."
14. 2017 N.Y. Slip Op. 01145 at *11.
15. *Id*.
16. *See, e.g., Bay Ridge Air Rights, Inc. v. State*, 44 N.Y.2d 49, 404 N.Y.S.2d 73 (1978). *Bay Ridge* involved the date of accrual of a claim against the State for contribution. The case history is notable for the fact that the Court of Claims dismissed the claim as untimely, whereas, on appeal, the Appellate Division modified the dismissal to be without prejudice since it concluded the action for contribution was premature. The Court of Appeals agreed that the action was premature because a claim for contribution accrued on the date payment is made.

"Too much going on in the world for us to hibernate."