ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work as an assistant general counsel for MegaCorp, the largest manufacturer of widgets in the United States. We began growing concerned that our competitors are slowly chipping away at our market share, which may cause MegaCorp to lose its place as the largest manufacturer in the widget industry. Therefore, the company's executives decided to purchase the fourth and fifth largest widget manufacturers, thereby eliminating its top competitors. Because of these potential acquisitions, MegaCorp has begun to face scrutiny from antitrust regulators. In addition, the company has been advised that the due diligence reviews of the company's records by these antitrust regulators have uncovered a potential issue concerning improper waste disposal at one of the company's manufacturing facilities, which has been referred for further investigation by the Environmental Protection Agency. I, of course, have been tasked by the company's general counsel to handle MegaCorp's compliance with federal and state environmental laws and regulations.

What are my ethical obligations pertaining to this particular situation? Specifically, if federal regulators attempt to interview me as part of their investigation concerning the waste disposal matter, do I have to comply with their interview request? And if I do submit to an interview, what I can disclose? Finally, if the company is ever sued by the government as a result of the investigation, and I am subpoenaed to testify at trial, what am I allowed to disclose?

Sincerely,

Quentin Questioned

Dear Quentin Questioned:

A recent ethics opinion issued by the NYSBA Committee on Professional Ethics (the Committee) addressed a situation close to what you have described. The Committee, in Opinion 1045, found that in-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client where the facts to be disclosed by the lawyer will not constitute confidential information. N.Y. State Bar Op. 1045. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule. *Id.*

The pertinent section of the advocate-witness rule (officially referred to as Rule 3.7(a) of the New York Rules of Professional Conduct (the Rules)) states:

> 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:
> (1) the testimony relates solely to an uncontested issue;
> (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.

The term "tribunal" is defined in Rule 1.0(w) to include

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

One has to remember that application of the advocate-witness rule is often very fact-driven. As further explained in Comment [4] to Rule 3.7 (which specifically relates to paragraph (a)(3)),

> a balancing is required among the interests of the client, of the tribunal, and of the opposing party. 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 probable 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. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rule 1.7, 1.9 and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

As an initial matter, if federal regulators from the Environmental Protection Agency (the EPA) attempt to interview you as part of their investigation of a waste disposal matter, we expect that you would in all likelihood comply with the request and that you would engage

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.**

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counsel to be present for the interview. Noncompliance may raise issues under Rule 1.1(c)(2) which states that "[a] lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules."

Next, if you consent to the investigatory interview, the question arises whether you are permitted to discuss the contents of the company's records concerning the waste disposal issue and what (if any) confidentiality issues may arise. As we have noted many times before, Rule 1.6 prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). "Confidential information consists of information gained during the representation of a client that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential." N.Y. State Bar Op. 1045.

Since the information concerning your company's waste disposal practices is likely to be embarrassing or detrimental to MegaCorp, or if your superiors request that you not disclose this information in the interview, then you may not voluntarily disclose it without the company's informed consent.

As to the interview forum, even though the interview is with an administrative agency (in this case, the EPA), at this stage, the EPA is exercising its investigative functions, rather than acting in an "adjudicative capacity." *See, e.g.*, N.Y. State Bar Op. 1045. Consequently, the advocate-witness rule would not apply at this stage of the game. That being said, if the EPA determines to bring a formal complaint against the company following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if you are "likely" to be a witness on a significant issue of fact (such as your knowledge of the company's waste disposal practices), Rule 3.7(c) will come into play, and you would not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. *See* N.Y. State Bar Op. 1045 ("lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated" (internal citation omitted)).

If the agency determines to bring charges against MegaCorp and you are subpoenaed to testify at trial, you will then need to determine if you are likely to be a witness on a significant issue of fact. This requires, among other things, evaluating other available testimony. *Id.* In *MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), the court (in making its analysis under the former Code of Professional Responsibility) held that "[a]n additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." The court found in *MacArthur* that an independent lawyer would likely call the other lawyer, "both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary." N.Y. State Bar Op. 1045 (quoting *MacArthur*, 524 F. Supp. at 1209) (internal citation omitted).

If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The Rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. *Id*.

If you are subpoenaed to testify in an EPA proceeding brought against MegaCorp, you cannot overlook your obligations not to disclose confidential information under Rule 1.6 unless one of the conditions previously discussed above is satisfied.

Forcing an attorney off a case is never an easy decision. It is a matter that must be carefully analyzed. Professor Roy Simon points out that before an attorney-witness should be taken off of a case, it is necessary to determine if he or she has acquired distinctive value in that particular matter. *See* Simon's New York Rules of Professional Conduct Annotated at 1106 (2014 ed.). Indeed, we agree with Professor Simon's analysis that a lawyer has distinctive value in a particular case only if "[t]he lawyer has spent a lot of time on the litigation itself or the events giving rise to the litigation, and the client . . . would suffer undue delay finding a new lawyer or waiting for the new lawyer to learn the facts." *Id.* Therefore, before assessing what your distinctive value might be, we must know how long you were involved with the waste disposal matter, and what burden MegaCorp might suffer if you were off the case. As we pointed out at the outset of this Forum, a determination under the advocate-witness rule is often fact-specific, and these questions concerning what your distinctive value might be fall within this premise.

So, in the end, what are you permitted to do if you could not give testimony in the EPA proceeding? You could still participate in the case outside the courtroom by, for example, directing outside counsel. *See* N.Y. State Bar Op. 1045 citing Rule 3.7(a) (lawyer shall not act as advocate before a tribunal); ABA Inf. Op. 89-1529 (1989). Although this may not be an ideal position, it is better than being completely walled off from participating in the matter if, in fact, the EPA chooses to pursue charges against MegaCorp, and will allow you to continue to act in some capacity to protect MegaCorp in defending any charges brought by the EPA.

Knowledge of the advocate-witness rule is critical for in-house counsel. It could mean the difference for an inside lawyer either being in the middle of

the action or left behind and unable to fully assist his or her company.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a mid-level associate at a prominent New York law firm. Two years ago, I served as the foreperson of the jury in a medical malpractice trial in Manhattan Supreme Court. After the conclusion of the trial, we returned a verdict in favor of the defendant. I recall that as everyone was filing out of court, the plaintiff's counsel (Peter Perturbed) approached me and began to speak in a harsh manner as to his and his client's dissatisfaction with the verdict. We then walked in different directions out of court and I wrote Peter's behavior off as just sour grapes from another obnoxious lawyer.

Last month, the partner in charge of my department came into my office and said he received a long-winded email from Peter that accused me of lying during the voir dire process prior to trial and being unfairly biased towards his client. As much as I know that my superiors honestly believe that I would not act in the manner claimed by Peter, I am deeply disturbed by the scurrilous accusations made against me and I am concerned that it could damage my professional reputation in other avenues of the legal community.

My question to the Forum: Could Peter be subject to discipline if I report him, and if so, what level of punishment could he receive?

Sincerely,

Heather Harassed

Your burden in moving for a directed verdict is that your adversary hasn't made out its prima facie case.[18]

Not moving for a directed verdict means that you believe, or are conceding, that the jury must resolve an issue of fact.[19]

On a motion for a directed verdict, a court must consider "the facts adduced at trial in the light most favorable to the non-moving party and the non-moving party is entitled to every favorable inference that may be properly drawn from those facts."[20]

In granting a directed verdict during a jury trial, a judge must be "convinced that the jury could not find for the other party by any rational process; when, in support of the party against whom it proposes to order judgment, the court can find 'no evidence and no substantial inferences.'"[21] A judge will likely grant your motion for a directed verdict "when reasonable minds reacting to the evidence could not differ and would have to conclude just one way."[22] In deciding a motion for a directed verdict, "[t]he court must accept as true all of the evidence offered by the [non-moving] party against whom the motion for judgment aims, and must even resolve in that [non-moving] party's favor all questions relating to the credibility of witnesses."[23]

The court may not grant a motion for a directed verdict if "question[s] of fact and credibility [exist] for the jury."[24] The "proper procedure . . . [is] to reserve decision on the motion and submit the case to the jury."[25]

In a bench trial, a judge "must view the evidence in its most favorable light for the non-moving party."[26]

In a jury or bench trial, a judge deciding a motion for a directed verdict may not weigh the evidence.[27]

A court may grant a motion for a directed verdict on "parts of a [party's] claim that ha[ve] not been supported by evidence adduced at trial."[28] The court may, thus, grant your motion for a directed verdict if the plaintiff has failed to prove its damages for its past lost wages but deny your motion if the plaintiff proved its damages for past medical expenses.[29]

Generally, issues such as whether a party was negligent or whether an act was foreseeable — "subject of varying inferences"[30] — are for a fact finder to resolve. A jury need not decide every negligence action; the evidence a party presents at trial is key: "[I]t is just as much error to submit a case to the jury where no question of fact is involved as it is to deny a litigant his right to a determination by the jury where a question of fact has been presented."[31]

Although proximate cause is a question for the fact finder, "when only one conclusion may be drawn from the established facts, the question of legal cause may be decided [by the court] as a matter of law."[32]

You "do[] not waive trial by jury or the right to present further evidence" if the court denies your motion.[33] At one time, moving for a directed verdict was "deemed a concession that no fact issue existed. This meant that even if the motion was denied, the moving by its mere making was held to waive all further right to trial by jury. That is no longer the case."[34]

If issues of comparative fault exist, "presentation of all evidence must be completed before a directed verdict for plaintiff is proper."[35]

Move for a directed verdict if the plaintiff sought punitive damages in its complaint but doesn't prove punitive damages at trial.[36]

A court may reserve ruling on a motion for a directed verdict until after the jury has returned a verdict.[37] If a court grants a motion for a directed verdict after a jury returns the verdict and the court is reversed on appeal, the jury's verdict may be reinstated.[38] A new trial isn't necessary.[39] If the court grants a directed verdict before a jury returns the verdict and the court is reversed on appeal, "there is no jury verdict to reinstate and no alternative [exists for the appellate court] but to order a new trial."[40]

A trial court commits error if a jury can't reach a verdict (hung jury) and the court grants a directed verdict for the defendant.[41]

In opposing a motion for a directed verdict, explain that you've made out your prima facie case. Demonstrate to the court that issues of fact exist for the fact finder to decide. Point out all the issues of fact. You should also apply the standard, set forth above, to your case: After taking the facts in the light most favorable to you (the non-moving party), the court must make every favorable inference in your favor. Explain the facts in the light most favorable to you. Point out the favorable inference the court must draw. If any credibility issues exist, remind the court that the fact finder must assess those credibility issues.

A court that grants a directed verdict under CPLR 4401 is a decision on the merits. Res judicata applies.[42]

Motion for a Continuance

A court may order a continuance, or a trial adjournment, "at any time during [a] trial, on [a] motion of any party . . . 'in the interest of justice on such terms as may be just.'"[43]

Move for a continuance to adjourn the trial for a "brief period."[44] A party moves for a continuance when it is "presenting evidence . . . [and] a witness or other item of evidence is temporarily unavailable, and the party is unable to go forward."[45] A continuance might be appropriate if a witness, or a party, doesn't appear in time, can't appear for a few days or is temporarily ill.[46] A continuance might also be appropriate if a party's "[c]ounsel has withdrawn or been discharged."[47]

Practitioners usually move orally for a continuance.

Make an offer of proof: If you're moving for a continuance because a witness is unavailable, tell the court what the witness will say.[48] Explain why the witness's testimony is important to your case.[49] Also explain how you've been diligent in attempting to produce the witness timely.[50]

A court has discretion in deciding a motion for a continuance. The court "'must indulge in a balanced consideration of all relevant factors.'"[51] A court

will consider (1) the length of the continuance you're seeking; (2) the materiality of the evidence you're seeking to procure; (3) whether your request for a continuance is designed merely to delay the trial; and (4) whether your need for the continuance was caused by your lack of diligence.[52] Courts will grant a motion for a continuance to give a party the opportunity to obtain material evidence and to prevent miscarriages of justice.[53]

A court that refuses to adjourn a trial "when it is reasonable to do so will meet appellate censure."

The court's "'discretion is limited and narrowly construed when the . . . continuance requested is brief and made with a showing of movant's diligence and good faith to secure the attendance of a crucial witness.'"[54] The length of the continuance is within the court's discretion.[55]

If the court denies your motion for a continuance — and the basis for your motion was that you wanted to secure a witness — "be absolutely certain that . . . no other evidence [exists that] you can present before resting."[56] If another witness exists, call that witness to testify.[57]

A court that refuses to adjourn a trial "when it is reasonable to do so will meet appellate censure."[58]

Your poor trial preparation isn't a good ground for moving for a continuance.[59]

Consider whether to oppose your adversary's motion for a continuance. If your adversary's request is reasonable and the court will likely grant the request, you might want to consent to the continuance.[60] In deciding whether to oppose your adversary's motion, consider that you might also need a continuance during the trial (if you haven't yet presented your case) and likewise you'd want your adversary to consent to your request.[61] But if your client will be prejudiced by a continuance, oppose the motion.[62] Explain how your client will be prejudiced if the court were to grant a continuance.[63] If your adversary seeks a lengthy continuance, explain how the delay will prejudice your client. If your adversary seeks a continuance to secure evidence, explain how that evidence isn't material. If your adversary's motion for a continuance is designed merely to delay the trial, explain the circumstances to the court. Also, tell the court about your adversary's lack of diligence, if any exists.

Motion to Strike

Move to strike when you want the court to "remove evidence from the record."[64] Practitioners usually move orally to strike.

Move to strike if your adversary asked an improper question but you didn't respond quickly enough with an objection and the witness already answered the question.[65]

Move to strike if your adversary asked a proper question but the witness's answer was unresponsive or "contained inadmissible [information] or material."[66]

Move to strike when a witness's answer to a question "initially appeared proper, but later was shown to have been improper."[67]

Move to strike if the court admits a witness's testimony subject to connection but your adversary never connects that witness's testimony.[68]

Move to strike when a witness testifies on direct examination but is unavailable for cross-examination.[69]

Move to strike when a witness's testimony goes beyond the pleadings.[70]

Move to strike when a witness's testimony is "incredible as a matter of law."[71]

Move to strike "as soon as possible after the improper[] . . . testimony becomes evident" to you.[72]

Move to strike an expert's opinion "based on facts not in evidence."[73]

Move to strike your adversary's question.[74] Move to strike a witness's answer. Move to strike a witness' testimony in its entirety, or move to strike only a portion.

Consider whether you'll oppose the motion to strike. Sometimes the court will rule so quickly on a motion to strike that you don't even have an opportunity to oppose the motion.[75] You won't want to oppose a motion that's "well founded," such as when a witness's answer to a question is "blatant hearsay."[76] If your adversary seeks to strike evidence that's important to you, oppose the motion.

In opposing a motion to strike, argue that the evidence is proper.[77] Argue that striking the evidence from the record would prejudice your client. Ask the court for an opportunity to "lay further foundation for the evidence."[78] You might want to move for a "short continuance to obtain further evidence or witnesses."[79] If you need the evidence to prove your prima facie case, explain that to the court.[80] Explain "what steps you would take, if the court allowed, [for the court] to render the evidence admissible."[81]

Make sure that all your grounds in opposing the motion to strike are on the record. Preserve the record for an appeal.

A court that grants your motion to strike will give a curative instruction to the jury. It will tell the jury to disregard the evidence that was stricken and not consider it during deliberations.[82] If the court doesn't give a curative instruction to the jury on its own, ask the court to give one.[83] A court's striking of the evidence and giving a curative instruction "may adequately serve the purpose."[84]

A court's curative instruction to a jury to disregard improper evidence might not be enough. Asking a jury to disregard what it has seen or heard is like trying to "'unring a bell.'"[85] Move for a mistrial if the evidence is highly prejudicial to your client.[86] Consider moving for a mistrial even if the court strikes the evidence from the record and gives a curative instruction.[87] Moving for a mistrial will preserve your objection for the record on appeal.