ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am currently 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 just 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 toward 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

Dear Heather Harassed:

The simple answer to your question is "yes." Peter may be subject to discipline. In fact, in *In re Panetta*, 127 A.D.3d 99 (2d Dep't 2015), the Appellate Division, Second Department recently dealt with a situation similar to what you describe. In that case, rather than issue a private sanction, the court unanimously held that a public censure was the appropriate sanction for harassing conduct toward a jury foreperson, who also was an attorney.

The situation you describe is governed by Rule 3.5 of the New York Rules of Professional Conduct (RPC), Maintaining and Preserving the Impartiality of Tribunals and Jurors. While lawyers are strictly prohibited from having any direct or indirect communication with a juror during trial under Rule 3.5(a)(4), post-trial contact with jurors is a different matter. Generally, post-trial communications and contact with jurors are permissible after the jury has been discharged under Rule 3.5(a)(5) unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5); *see also* NYSBA Comm. on Prof'l Ethics, Op. 246 (1972) (following discharge of a jury, lawyers may communicate with jurors concerning the verdict and case); Am. Bar Ass'n Ethical Consideration 7-29 ("After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases.").

Here, Peter Perturbed appears to be in violation of Rule 3.5(a)(5)(iii), communicating with a juror after the jury has been discharged, by a communication that involves harassment. Peter also appears to have violated Rule 8.4(h) of the RPC (formerly Disciplinary Rule 1-02(A)(7)), which provides that a lawyer or law firm shall not "engage in any conduct that adversely reflects on the lawyer's fitness as a lawyer."

As stated at the outset, *In re Panetta* illustrates our point. The attorney's client in the underlying case sued the city after she suffered a fractured foot, allegedly due to a defect in the sidewalk. One of the jurors, who at the time was a first-year associate at a law firm, was selected as the foreperson of the jury. After a trial in 2008, the jury returned a unanimous verdict in favor of the city. The trial judge permitted the attorneys to approach the jurors and, if they wanted to, to talk about the outcome of the case. The attorney spoke with the lawyer/foreperson, stating, in sum and substance, that "the verdict doesn't make any sense," and asked how she arrived at the decision to find for the defendant. The lawyer/foreperson did not want to discuss the case, telling the attorney she felt "attacked" by his approach.

Thereafter, the attorney "had a hunch" that the lawyer/foreperson had "lied" during the voir dire of the jury panel and also believed that she had improperly influenced the jury in its deliberations. As a result, he researched her background and discovered that she was a first-year associate at a law firm. He then called her firm and confirmed that the firm defends litigants when they are sued by others. Although the attorney believed that there was a violation of Rule 3.5(d) of the RPC, which prohibits misconduct by lawyers on juries or in voir dire, he put the matter aside in 2008 and did not make a complaint. Unfortunately, he did not let the matter end there. Four years later, the attorney revisited his grievances against the lawyer/foreperson, who was now a partner at another firm. He sent this email:

> SUBJECT: ALL THESE YEARS LATER I WILL NEVER FORGET . . . THE LIAR . . .
>
> After numerous multi-million dollar verdicts and success beyond anything you will ever attain in your lifetime, I will never forget you: the bloated Jury [Foreman] that I couldn't get rid of and that misled and hijacked my jury. You lied, said you had no involvement in defense – no biases. It was all bullshit. You deprived a very nice lady, [Patty] Hartman, from recovering in a smoking gun liability case. You either had no idea of what the concept of probable cause meant or you misled the jurors because you were defense oriented.

The attorney also went on to disparage the city's attorney, writing, "You rooted for the underdog, a totally incompetent corporate counsel, out-

gunned and stupid. I will never forget the high-fives after the trial you tanked[,] between you and a clueless [corporation] counsel." The attorney's message concluded with '"I feel attacked.' Well you should get attacked you A-hole. Good Luck in Hell."

When the Grievance Committee ultimately questioned him about his behavior, the attorney expressed remorse and explained that he was going through an emotional "roller coaster" due to a family illness and financial pressures when he sent the email. In reviewing the totality of the circumstances, the Second Department found the isolated nature of the attorney's conduct, the "stressors" that the attorney was facing in his personal life around the time he sent it, and his expressions of regret and remorse, to be mitigating factors in his punishment. *Panetta*, 127 A.D.3d at 102. The court ultimately concluded, however, that the attorney's "email . . . was designed to harass [the lawyer/foreperson], and his conduct adversely reflects on his fitness as a lawyer," in violation of Rules 3.5(a)(5)(iii) and 8.4(h), and determined that the attorney was to be publicly censured for his professional misconduct.

Other courts have similarly stated that post-verdict communications with jurors that are abusive or harassing in any way would violate their state's ethical rules of conduct and would expose the attorneys to sanctions. *See, e.g.*, *Struski v. Big Y Foods, Inc.*, 2000 WL 1429478, at *5 (Conn. Super. Ct., Sept. 11, 2000); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998) (holding that the state may regulate an attorney's post-verdict communications with jurors to prevent juror harassment); *Lind v. Medevac, Inc.*, 219 Cal. App. 3d 516 (Cal. Ct. App. 1990) (attorney's letter to members of jury after trial asserting that fellow member of bar may employ "sharp investigative tactics" to "impeach" jury's verdict and have it set aside as "improper" violates the RPC).

Even judges can be sanctioned for improper post-verdict jury communications. *In re Mathesius*, 188 N.J. 496 (2006), is an example. In that disciplinary proceeding, a judge's post-verdict remarks to jurors, which were critical of the jurors for their verdict and were viewed as "insulting and denigrating" to them, were found to violate various provisions of New Jersey's Code of Judicial Conduct. *Id.* at 503–05. Because the judge was cited for numerous other incidents of misconduct and was found to have violated various canons of New Jersey's Code of Judicial Conduct, he was ultimately suspended for 30 days without pay from his judicial duties. *Id*. at 505–15, 528.

Your question raises issues similar to those in *Panetta*. Peter Perturbed here has communicated with your employer and has made accusations about you two years after the trial in what appears to be an attempt to harass or embarrass you. Without the benefit of all the facts, it is unclear whether Peter's conduct rises to the level of public censure or some other form of discipline, such as a monetary fine, suspension or some other private sanction. There are several factors that must be considered, including, *inter alia*:

1. Was this an isolated incident of Peter's misconduct?
2. Has Peter contacted other jurors in this case or in other cases?
3. Has Peter been involved in other incidents of misconduct? Etc.

What is clear, however, is that communications that harass jurors violate Rule 3.5(a)(5)(iii) and may also be a violation of Rule 8.4(h) (conduct that adversely reflects on the lawyer's fitness as a lawyer). It should be obvious to any attorney that this kind of contact with a juror is inappropriate and is likely to get one in trouble. Harassing a juror goes to the very integrity of the judicial system since it serves to intimidate jurors and discourage jury service. If an attorney has a legitimate belief that a juror has somehow acted inappropriately, he or she has a remedy. Under Rule 3.5(d), the attorney must promptly report such impropriety or misconduct by the juror to the court. That is the correct way to address any concern an attorney may have with respect to a juror's purported bias or dishonesty during the process. Attorneys should not take matters into their own hands and send accusatory communications to a juror. *See* N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (May 18, 2011) ("In the event the lawyer learns of juror misconduct . . . the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.").

Should you report this kind of conduct? We think that reporting this conduct is appropriate. Under Rules 3.5(d) and 8.3 of the RPC, you may be ethically bound to report the misconduct you have described. Rule 3.5(d) states, "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or juror, *or by another toward a member of the venire or a juror* or a member of his or her family of which the lawyer has knowledge" (emphasis added). Moreover, Rule 8.3, "Reporting Professional Misconduct," expressly provides that "(a) A lawyer

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who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that 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" (emphasis added). Here, in our view, Peter has crossed the line, and this type of inappropriate behavior should not be tolerated.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I'm a commercial litigator in New York. I recently was asked to mediate a commercial contract case, which is pending in the Commercial Division in the Supreme Court of New York, for one of my clients who is the defendant in the action. The morning right before commencement of the mediation, my client informed me that his business has been doing "lousy" and that even if the parties were to reach a settlement, he nevertheless intends to file for bankruptcy before the settlement payment becomes due. During that conversation, he emphasized that this information is confidential and cannot be disclosed to anyone. During the mediation, plaintiff's counsel communicated a final demand to my client, which my client indicated he was willing to accept. I did not disclose the information that my client shared with me, either to the mediator or plaintiff's counsel.

My question to the Forum: Did I have an obligation to disclose my client's confidences under the circumstances? What should I have done? Is there anything I should do at this time?

Sincerely,
Concerned Counsel