To the Forum:
I am an associate at a 50-person general practice firm in New York City with a practice in real estate law and litigation. Every day I receive numerous letters, faxes and emails from clients and adversaries, which I always try to answer. My practice is to also use letters or email when it is necessary for me to communicate with an adversary on an important subject. But although I try to be diligent, for reasons that no one has been able to explain, it seems that my adversaries ignore my correspondence, especially emails. Do adversaries have an obligation to respond to my letters and email? How much time do they have to respond to us? Is there anything we can do if our adversaries don’t respond? On a related topic, I learned in law school that lawyers have an obligation to communicate with clients and answer their questions. But, my problem is that I get so many telephone calls and emails and that I can’t seem to keep up with them. What are my obligations to my clients? How much time do I have to respond? A friend told me that there is a 24-hour rule but I can’t seem to find it. Finally, while I am on the topic, I find that many lawyers in our firm use text messaging and email to communicate with us. These communications should be protected by attorney-client privilege but I am concerned that the emails may get to the wrong person and that I could be criticized for not protecting my client’s confidences. Is it proper to communicate with clients electronically?

Sincerely,

Communication Challenged

Dear Communication Challenged:
You raise a few separate but related issues: (1) Do adversaries owe each other a duty to communicate? (2) What are lawyers’ communication obligations to their clients? (3) Are emails, text messages, and other digital forms of communication with clients protected by attorney-client privilege? and (4) What happens if a privileged communication in digital form, such as an email, is accidentally disclosed to someone outside the attorney-client relationship?

Our Duties to Our Adversaries
The New York Rules of Professional Responsibility (the Rules) do not explicitly impose on lawyers an obligation to promptly communicate with adversaries. However, Rule 1.3(b) states that lawyers “shall not neglect a legal matter entrusted” to them, and Rule 3.4(a)(6) states that lawyers shall not knowingly engage in conduct contrary to the Rules; together, these Rules do impose a duty on lawyers to communicate with adversaries in a reasonably prompt fashion.

Some practitioners might quibble with the idea that Rule 1.3(b) imposes a duty to an adversary, arguing that because Rule 1.3’s other subsections specifically describe duties lawyers owe to clients, the spirit of Rule 1.3(b), if not its explicit text, likewise describes a duty owed to clients. This idea splits hairs unnecessarily; ignoring communications from (or refusing to communicate with) an adversary constitutes neglect of a legal matter and is a breach of the lawyer’s duty of diligence, regardless of whether the duty is owed to the client or the adversary. Moreover, under Rule 3.4, lawyers do owe their adversaries the duty of fairness, and engaging in conduct contrary to the Rules – such as neglecting a legal matter – constitutes a breach of Rule 3.4(a)(6). Certainly, there is no doubt that attorneys who fail to communicate with adversaries can face disciplinary action by the Bar,1 and therefore, whether the obligation stems directly from Rule 1.3(b) or indirectly through Rule 3.4(a)(6), it behooves all lawyers to be diligent in their communications with their adversaries.

Additionally, it is worth noting that Rule 3.2 prohibits lawyers from using means that have no substantial purpose other than to delay or prolong litigation. To the extent an adversary refuses to communicate or takes an excessive amount of time to respond to communications for no apparent purpose other than to delay litigation, that lawyer is breaching his or her ethical obligations under the Rules.

This brings us the related questions you asked: How long does an adversary have to respond, and what can you do if he or she does not respond?

Unfortunately, there is no easy answer to the first of these questions. Lawyers should give their adversaries a reasonable amount of time to respond to a communication, but the amount of time that is reasonable will depend on the nature of the communication and the relationship between the parties. For example, a reasonable time to respond to a request for comments on a draft agreement to settle a complex commercial litigation matter will be much longer than the reasonable time needed to respond to a request to videotape an upcoming deposition. Additionally, if your adversary has previously notified you that he or she is in the midst of a trial on another matter, it is reasonable to expect it will
take the adversary longer to respond to your communications than it would if he or she was in the office.

As for the second related question, there is a series of best-practice steps you should follow to encourage your adversary to communicate with you. First, try a variety of means of communications, and document all of your attempts to reach your adversary. If your voicemail message has fallen on deaf ears, follow up with an email; if your emails are going unanswered, try a phone call instead. If your adversary has communicated with you in a prompt fashion in the past, give him or her the benefit of the doubt; even if your adversary has a history of poor communication, always be civil in your own communications. After all, it is possible your adversary is suffering not from a communication failure, but a technology failure: perhaps the office email server has gone down and the attorney is only available by phone; or maybe he or she is travelling and accidentally activated the out-of-office message only for email and not voicemail.

Second, if voicemails and emails alike do not spur a response, send your adversary a letter detailing the issue(s) about which you need to communicate and describing your attempts to make contact. If your adversary has a history of failing to communicate with you, you may want to take a sterner tone and suggest you will seek intervention from the judge if your adversary continues to be unresponsive.

Third, if your adversary continues to ignore you, it is appropriate to seek help from the court. The form of the intervention you seek will depend on the stage of litigation, your relationship with your adversary, and your client’s goals. For example, if you have had a relatively cordial relationship with your adversary and the lack of communication appears to be out of character, a simple letter to the judge (copying your adversary, of course) describing the situation and requesting a conference call to resolve the issue may be all that is necessary to spur your adversary to resume communications with you. Similarly, if your adversary seems to go “radio silent” with respect to only one issue – for example, if he or she suddenly stops answering emails whenever you bring up scheduling depositions but is otherwise responsive to your communications – a letter to the judge is appropriate. In other situations you may want to consider more drastic measures. For example, if your adversary is the plaintiff, and the plaintiff has neither responded to your discovery requests nor initiated any discovery of his or her own, a motion to dismiss for failure to prosecute may be a more suitable action to take.

**Our Communication Obligations to Our Clients**

There is no doubt that lawyers have a duty to communicate with their clients with reasonable diligence and promptness. These obligations are set forth in Rules 1.3(a), 1.3(b), and 1.4. The Rules do not impose strict time limits; the 24-hour rule about which you’ve heard is what one Disney pirate would say is “more what you’d call a guideline than an actual rule.” The Rules require you to act with reasonable diligence and promptness in representing your client and communicating with him or her, but they do not specify particular deadlines by which you must respond to your client.

Certain circumstances do require you to act with more swiftness than others. Under Rules 1.4(a)(1) and (4), you must promptly communicate with your client about (1) any circumstances requiring your client’s consent; (2) any information that a court rule or other law requires you communicate to your client; (3) material developments in the case, including settlement or plea offers; and (4) any reasonable request for information from your client. Other circumstances only require you to reasonably consult with your client, such as case strategy (Rule 1.4(a)(2)), the status of the case (Rule 1.4(a)(3)) and limitations on your conduct imposed by the Rules or other law (Rule 1.4(a)(5)).

What constitutes “prompt communication” or “reasonable time” will vary depending on the circumstances of the case and the nature of your relationship with your client. The 24-hour rule is a solid guideline and one we recommend you follow whenever possible. Even if you cannot respond to your client substantively within one day’s time (for example, if your client emails you a question that will involve substantial research before you can provide guidance on the issue), you should let your client know that you’ve received her communication, will look into the matter and will provide a substantive response within a specified period.

If there is ever a time when you will not be able to provide even a cursory response within 24 hours – for example, if you are traveling in an area without reliable mobile communication access, or if you are on trial – you should notify your clients ahead of time and (1) tell them why you will be unavailable, (2) tell them the dates you will be unreachable, and (3) give them contact information for the person or people who will be available to assist your clients in the event of an emergency. Clients are much more likely to understand and forgive a delay in communication if you have informed them ahead of time that you will be unavailable for a short period or that you cannot answer their questions right away because you need to do some research first. They are not as likely to understand if you just fail to respond to them for days or even weeks. Actively managing your clients’ expectations and your relationships with your clients through prompt communication will enable you to fulfill your ethical obligations and keep your clients happy with your service.

**Digital Communication and the Attorney-Client Privilege**

Under Rule 1.6(a), lawyers have a duty to protect their clients’ confidential information, which includes information protected by the attorney-client privilege. Privileged information is also protected from disclosure under CPLR 3101(b) and 4503(a)(1). The Rules and the CPLR use broad terms...
such as “confidential information” or “confidential communication” when describing privileged information. This word choice is deliberate: the Rules and the CPLR mean to capture every form privileged information may take, whether that be an oral conversation, a letter, a voicemail recording, a text message, an email, or any other form in which information can be communicated.

There is nothing wrong with using electronic communication with your clients and, as long as the communications otherwise satisfy the privilege standard – a communication between attorney and client, made and kept in confidence, for the purposes of obtaining or providing legal advice – they will be privileged documents and will be shielded from discovery. In fact, CPLR 4548 specifies that an otherwise privileged document will not lose its privilege just because it was communicated electronically. However, you may want to consider stating in your engagement letter that you may use digital communications, including but not limited to email, to communicate with your client and that by countersigning the engagement letter, the client consents to such communication.

There is one important caveat to note when using electronic communication with clients: if someone outside the attorney-client relationship has access to the email account or mobile device, the expectation of confidentiality may be destroyed. For example, if your client is an individual and she emails you from her work email account, and her employer’s company policy gives the employer the right to access that work email account, a court may find that your client’s emails to you were not privileged because her employer could access them. A wise lawyer will counsel clients to avoid contacting the lawyer through any device that could be monitored or accessed by a third party.

You also have a duty to keep your digital communications with your client confidential, and you should take steps to ensure that your digital information is protected. For example, you should not send or receive confidential text messages if anyone else has access to your phone, nor should you send or receive confidential emails through an email account to which someone else has access. You should protect your digital files with the same diligence you protect your paper files: under lock and key. The difference with digital files, of course, is that the lock and key will also be digital, that is, firewalls and other protections to ensure unauthorized persons cannot access the files.

Accidental Disclosure

Inadvertent disclosure of confidential or privileged documents is every lawyer’s fear, and the risk of such a disclosure is greater as electronic communication becomes easier, because a single mistyped email address or accidental “reply all” can send documents outside the attorney-client sphere.

You can take certain steps to reduce the likelihood of inadvertent disclosure and to minimize the consequences if disclosure occurs. Simply taking the time to double-check email addresses and the numbers to which you are texting or faxing information will help reduce the chances that you will accidentally send confidential information to an adversary or third party. Additionally, ensuring that your electronic files are properly protected behind firewalls and antivirus software will help prevent unauthorized parties from accessing them.

If you do realize that you have accidentally sent confidential materials to an adversary or third party, you should notify that party immediately, inform them of the situation, and request that they destroy, sequester, or return the documents. If the recipient is a lawyer, Rule 4.4(b) requires the attorney to notify you that he or she received your confidential materials, but the Rule does not currently require the recipient to take any further action. Therefore, in case your adversary or the third party resists returning or destroying the materials, you should continue to make every effort to protect your client’s confidential information.

First, you should document your position to the recipient in writing (either an email or a letter, whichever you deem appropriate), and set forth your justification for your request that the inadvertently disclosed documents be returned, sequestered, or destroyed. Second, if the recipient refuses to cooperate, request a meet-and-confer to discuss the matter and hear the recipient’s justification for the position that he or she need not comply with your request. Finally, if the matter still cannot be resolved, you should then consider court intervention, such as a conference call with the judge to resolve the dispute or a motion for a protective order.

The NYSBA’s Committee on Attorney Professionalism has proposed revisions to Rule 4.4(b). If enacted, the proposed rule would, as a matter of professional ethics, protect confidential client information by requiring the recipient to (1) stop reading the document once he or she realizes it is an inadvertently disclosed confidential document; (2) notify the sender of its receipt; (3) return, sequester, or destroy the document; (4) refrain from using the information in the document; and (5) take reasonable steps to retrieve any copies the recipient circulated before realizing its confidential nature. We recommend that attorneys follow these best-practices steps if they receive inadvertently disclosed confidential material even though they are not yet a part of the Rules.

Conclusion

Good communication skills are a hallmark of the effective professional. Lawyers have an ethical obligation to communicate promptly with their adversaries and clients and to avoid unnecessarily delaying a legal matter. Lawyers should strive to reply to their adversaries and clients within 24 hours whenever possible, and, when we will be unavailable for periods of time, to inform our clients and adversaries of that fact in order to avoid the appearance of being unresponsive.
While electronic communication is permissible, and is often the desired mode of communication, we should take care to protect our clients’ confidential information, however communicated, including informing our clients not to use their work computers to contact us and taking all reasonable necessary steps to claw back confidential material that was inadvertently disclosed.

The Forum, by
Vincent J. Syracuse, Esq. and
Amy S. Beard, Esq.
Tannenbaum Helpern Syracuse
& Hirschtitt LLP
New York, New York

1. See, e.g., In re Berkman, 55 A.D.3d 114 (2d Dep’t 2008) (noting the respondent had “an extensive prior disciplinary record” for, among other things, “failure to adequately communicate with his clients or with adversaries”).
2. Scott v. Beth Israel Med. Ctr. Inc., 17 Misc. 3d 934 (Sup. Ct., N.Y. Co. 2007) (where employer had constructive notice of employer’s policy forbidding personal use of company computers and email and providing for employer monitoring of email, employee’s communications with his attorney using his work email account were not privileged because the employee had no expectation of privacy). Courts outside New York have held similarly. Holmes v. Petrovich Dev. Co., LLC, 191 Cal. App. 4th 1047 (2011) (where company’s policy stated that the company would monitor computer and email usage and personal email was strictly forbidden, employee’s communications with her attorney using her work computer were not privileged because there was no expectation of confidentiality); see also City of Ontario v. Quin, 560 U.S. ___ , 130 S. Ct. 2619 (2010) (where city’s email policy permitted auditing of employee emails, and where city informed employees that text messages would be treated like emails, search of police officer’s personal text messages on his department pager for non-investigatory work-related purposes was reasonable).

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:
I represent Client Alpha and Client Beta in unrelated matters. Client Beta is a federal agency. Client Alpha’s matter requires me to seek discovery from a third party that is bankrupt and in receivership with Client Beta. Does this discovery request put me in conflict with Client Beta? If so, is this a waivable conflict? Can I avoid the conflict by having another firm seek the discovery on my firm’s behalf?

Sincerely,
A. M. I. Conflicted
To the Forum:
I am a partner in a 10-person law firm and I regularly see prospective clients for initial consultations, which I provide at no charge. We do not take every case presented to us. When we decline a representation, do we have a duty to provide a non-engagement letter or to warn the person about statutes of limitations that may apply to his or her case? What is our risk of malpractice exposure, if we decline a representation although the person did have a viable claim and, if the person later pursues it on his/her own, finds that the claim is time-barred? Finally, if a prospective client provides me or one of my partners with confidential information during that initial consultation and I do not take the case, am I obligated to keep the person’s confidential information confidential, and can information acquired that way create a conflict that would prohibit me from taking some future litigation? Recently, we had a situation where one of my partners met someone at a Friday evening cocktail party who talked with her about a potential litigation. By coincidence, I had met the opposing party and had set up a meeting in our office to take the case. We ended up deciding not to take on the matter which we thought was the only possible decision that we could make. Were we correct?

Sincerely,
W.E. Declined

Dear W.E. Declined:
Every attorney faces, at one time or another, the situation you describe. It is important to know that attorneys owe certain duties to prospective clients under the Rules of Professional Conduct and they should also be aware of any issues which may arise concerning the receipt of confidential information from a prospective client as well as the potential for imputation of conflicts of interests that almost certainly will come up in connection with such a representation.

Rules 1.18(a) defines a prospective client as “[a] person who discusses with a lawyer the possibility of forming a client lawyer relationship with respect to a matter....” Under the Rules, there is no specific duty to provide a non-engagement letter to a prospective client that does not retain an attorney, however, best practice suggests that the issuance of a non-engagement letter to the prospective client which you describe (who we’ll refer to as “AA”) is an appropriate way of confirming that an attorney-client relationship has not been created. In addition, the non-engagement letter should spell out any potential statute of limitations issues arising from AA’s potential claim.

With regard to confidential information that the prospective client has communicated to the attorney, Rule 1.18(b) states: “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” Although Rule 1.9 does not expressly set forth duties owed to prospective clients, pursuant to Rule 1.9(a), “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the

It is also stated in Rule 1.18(c) that [a] lawyer subject to paragraph (b) [of Rule 1.18] shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the

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matters, except as provided in paragraph (d) of Rule 1.18. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) of Rule 1.18.

Moreover, Rule 1.18(d) provides that when the lawyer has received disqualifying information as defined in paragraph (c) of Rule 1.18, representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is appor tioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

It was entirely proper for your firm to pass on representing the opposing party that your partner had met at the cocktail party (we’ll refer to the opposing party as “BB”). Rule 1.10(e) requires all lawyers to maintain “a written record of its engagements.” With respect to prospective clients, the Rule states that “lawyers shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter.” Although Rule 1.10(e) uses the words “proposed engagements” in contrast to Rule 1.18’s use of the words “prospective client,” it would seem that the best practice in the situation you describe would be to implement a system at your firm which records all such contacts in your firm’s records to deal with a conflict as soon as possible and allow for screening.

Since you are part of a relatively smaller firm, setting up screening mechanisms to deal with potential conflicts of interest requires greater diligence since information within a smaller firm environment could easily be communicated to all attorneys and staff of the firm. Comments [7B] and [7C] to Rule 1.18 contain an extensive discussion on the establishment of appropriate screening mechanisms, with a particular emphasis on establishing screening mechanisms in a small firm environment. One of the factors in determining if disqualification would be appropriate under Rule 1.18(c) is if the information learned from the prospective client would be “significantly harmful” to that prospective client. Although Rule 1.18(d) could potentially allow a firm to represent BB even if the information previously received from AA was significantly harmful to AA’s interest, the fact that you are at a smaller firm would suggest that unless you established very clear and detailed screening mechanisms, it would be significantly more difficult to screen out any attorney who receives information from someone in AA’s position who does not retain your firm.

Sincerely,
The Forum by Vincent J. Syracuse, Esq., and Mathew R. Maron, Esq., Tannenbaum Helpern Syracuse & Hirschtritt LLP

To the Forum:
My client is currently engaged in a child-support action against her former husband. She is trying to get $300/month more in child support. At her deposition, my client testified that she had no income other than the support that her former husband was providing. I had been planning on negotiating with my adversary to see if we could settle the case before an upcoming child support hearing, and I had called my client for some final settlement authority.

On the call, my client told me that she now “remembers” something she “forgot” to mention at her deposition. Previously, she had testified that she had no other source of funds besides the child support she received. Now she remembers she had received $50,000 from her recently deceased uncle a few weeks before her deposition when his estate was distributed based on his will. She does not want me to tell her ex-husband or the court about the $50,000 since she wants her ex-husband to suffer for cheating on her during their marriage. Still, she’s worried that the court might find out about the $50,000 since her uncle’s will is a matter of public record. So, she’d settle for an additional $150/month.

Meanwhile, the private investigator I had previously hired just reported to me that the former husband’s statement in his affidavit that he is unable to work because he is injured is false. In fact, the former husband has been working off the books as a messenger at the law firm of his attorney, Fraud U. Lent. By my calculation, if my client’s former husband had reported the additional income, the court would order him to pay $300/month more in child support.

CONTINUED ON PAGE 58
The Academy of Women Leaders. Between Resolution (CPR). She also chairs the Institute for Conflict Prevention and resolution Committee of the International on Diversity in ADR and the Arbitra-
tion. She is a member of the Executive practice and alternative dispute resolu-
tion. She is a member of the Executive

Editor's Note:

We received the following from Ken Kamlet, author of “Land Banking, TIF Amendments, and the Tax Cap,” which appeared in the May 2012 Journal.

Tucked among the endnotes in my article on land banking, tax increment financing, and the tax cap, was the important news that, as part of this year’s budget amendments, the Governor and legislative leaders amended the TIF law to correct its most glaring defect – by authorizing school districts to opt-in to and participate in TIF-funded redevelopment plans. It is now up to the municipalities, developers, and attorneys who spent many years fighting for this change to make sure that this newly invigorated law is put to good use. TIF financing is especially useful to pay for infrastructure improvements and site preparation costs on blighted properties – including brownfield sites (and Brownfield Opportunity Areas), land bank holdings, and flood-damaged infrastructure.

Kenneth S. Kamlet
Binghamton, NY

Can I settle the case without admitting that my client had received the $50,000 from her uncle? If the case does not settle, and I am unable to convince my client not to correct her testimony, am I obligated to withdraw from her representation? Am I permitted to disclose the $50,000 to the court?

In addition, the other side has offered to pay $250/month in additional support. May I tell my adversary that I am aware that his client’s affidavit is false to try to get $300/month?

May I tell Mr. Lent that I will not file a disciplinary grievance against him based on his role drafting the false affidavit if his client will just pay an additional $300/month instead of the $250/month that he offered on behalf of his client?

May I tell opposing counsel that my client will pursue criminal perjury charges against her former husband if she doesn’t pay $300/month in child support?

Sincerely,

A. Lot Goingon
To the Forum:
I was retained by a company that was sued in a trademark infringement case. The plaintiff company’s Vice President for Marketing and Sales was recently deposed, and I chatted amicably with him during several breaks. Parenthetically, the Vice President is also an attorney (non-practicing) and he is the plaintiff’s primary decision maker.

The plaintiff-company’s lawyers have been very accusatory and difficult to deal with. I do not believe that it will be possible to settle the case with them, or that they have communicated my settlement offer to their client.

Can I speak with the Vice President directly after the deposition phase and advise him of the settlement offer? Would it make a difference if the Vice President was also the plaintiff-company’s general counsel? What if the Vice President calls me after the deposition phase (without informing his company’s attorney) to discuss settlement? Should I take the call? What if my client seeks my advice about directly approaching the plaintiff-company to settle the matter (and bypass the attorneys)?

In addition, I have been regularly using email to communicate with my adversary during the course of settlement negotiations. Recently, I received an email from my adversary with a “cc” to the Vice President. The email misstated my settlement offer and I saw this as a golden opportunity to communicate with the Vice President. I pressed “reply all” and sent an email that responded to my adversary’s email and stated my settlement position. Opposing counsel went ballistic and accused me of communicating with his client in violation of the Rules of Professional Conduct. Since I was responding to a communication that had “cc’d” the plaintiff, I believe that opposing counsel invited the use of “reply all” and implicitly gave his prior consent.

Who is right?
Sincerely,
What A. Mess

Dear What A. Mess:
Rule 4.2 (the “no-contact rule”) of the Rules of Professional Conduct (RPC) governs communications with persons represented by counsel. While the “no-contact rule” seems relatively straightforward on its face, it has been subject to extensive review and discussion and can often be tricky.

The answer to your question whether you may bypass your adversary and communicate settlement offers directly to an adverse party will depend on the actual role played by the opposing party’s Vice President for Marketing and Sales (VPMS) in the pending litigation. Rule 4.2(a) states that “[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.” Although the VPMS happens to be an attorney, the circumstances described suggest that he is not acting in that capacity and that you would be precluded from having direct contact with him. It is probable that the acts committed by the person in charge of marketing and sales for a plaintiff in a trademark action are directly related to the subject matter at issue. See Niesig v. Team I, 76 N.Y.2d 363, 374 (1990) (contact by opposing counsel is prohibited “with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation’s lawyer, or any member of the organization whose own interests are directly at stake in a representation”). However, if the VPMS also happened to serve as part of the organization’s in-house legal department (with a “counsel” title), there may be certain circumstances that would permit direct contact. Put in simple terms, is the VPMS acting as a “business person” or is he acting as a “lawyer”?

Prior to the RPC, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (Committee) issued a formal opinion as to the applicability of the prior “no-contact rule” (the former DR 7-104 under the previous Code of Professional Responsibility (Code)) to contacts with in-house counsel. See N.Y. City Bar Op. 2007-1 (2007). In its 2007 opinion, the Committee suggested that contact with an organization’s in-house counsel is permissible so long as the in-house counsel was “acting as a lawyer for the entity, though not necessarily with respect to . . . the communication at issue . . .”. Id. The Committee further suggested that “the contacting lawyer must have a good faith belief based on objective evidence that the in-house counsel is acting as a lawyer representing the organization, and not merely as outside counsel’s client.” Id. To this end, the Committee proposed five objective indicia that may establish that in-house counsel is acting as a “lawyer” for the organization in question (although with the caveat that the indicia “will vary from case to case”). These may include:

(1) Job title. Certain titles (e.g., “General Counsel,” whether alone or conjoined with an officer title

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such as “Senior Vice President and General Counsel”) presumptively signify that the person acts as lawyer for the organization, unless there is notice to the contrary. By contrast, other titles, such as “Director of Legal and Corporate Affairs” or “Director of Compliance” are ambiguous as to the role performed by the titleholder in a particular matter, and would not, standing alone, give rise to the same presumption.

(2) Court papers. If the matter in question is a litigation, papers filed in the case may list the in-house counsel as “Of Counsel.” Such a reference would reasonably entitle another lawyer in the case to assume that the listed person is acting as a lawyer.

(3) Course of conduct. In both litigation and transactional matters, the course of conduct between the in-house counsel and the lawyer who wishes to contact him or her may give rise to the reasonable presumption that in-house counsel is acting as a lawyer. Course of conduct may also include prior, related, or similar proceedings; if in-house counsel actively represented the organization in such a proceeding, one could fairly presume that he or she is fulfilling the same role in the current proceeding as well.

(4) Membership in an in-house legal department. Corporations often maintain a legal department whose attorneys serve the needs of the business from a centralized location. In those instances, the similarity of the in-house lawyer’s role to that of a member of an outside law firm is most pronounced, and ordinarily would indicate that the members of the department are serving the entity as lawyers.

(5) Inquiry. A lawyer who wishes to communicate with in-house counsel of another party can ask the in-house counsel if he or she is acting as attorney for the organization. In-house counsel should exercise candor in clarifying their role to opposing counsel and a lawyer who makes such inquiry can ordinarily rely on the response. Id. (internal citations omitted).

More likely than not, the VPMS wore his “business person” hat and would not meet the stated objective indicia which the Committee proposed in N.Y. City 2007-1, allowing you to directly communicate with him. Moreover, since he was previously deposed as a “fact” witness, Rule 3.7(a) may provide some guidance. It states that “[a] lawyer shall not act as advocate before a tribunal in a manner in which the lawyer is likely to be a witness on a significant issue of fact . . .” except under certain circumstances. Therefore, under Rule 3.7(a), it appears that the VPMS would not be acting as a “lawyer” in this scenario, and you would not be able to directly communicate with him.

With regard to your question concerning communicating settlement offers, it would be inappropriate for you to go around your adversary and communicate a settlement offer to an opposing party “absent the other lawyer’s consent or specific legal authority to do so.” N.Y. City Bar Op. 2009-1 (2009) (citing ABA Formal Op. 92-362). Even if the VPMS calls you on his own after the deposition to discuss the settlement offer you had previously communicated, the best practice would be to advise him that since his employer is represented by counsel, all communications should go through the organization’s outside counsel.

In response to your inquiry whether you may advise your client to directly communicate with the plaintiff-company regarding settlement, Rule 4.2(b) states that “[n]otwithstanding the prohibitions of paragraph (a) [of Rule 4.2], and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.” Comment [11] to Rule 4.2 states that “[p]ersons represented in a matter may communicate directly with each other” and that “[a] lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b) [of Rule 4.2].” Although direct communications between the clients are permitted by the rule, a lawyer cannot counsel a client to have direct communications with the opposing party unless the lawyer first gives reasonable advance notice to opposing counsel. This notice should always be given in writing or confirmed in writing if the notice is given orally. See Roy Simon, Simon’s New York Rules of Professional Conduct Annotated at 845 (2012 ed.). The advance notice protocol contained in the Rule is not a request for consent or an invitation for an objection so you may proceed once you have given advance notice, even if your adversary should voice an objection.

It is unfortunately a sad reality that from time to time we encounter adversaries who act in a manner which may prevent the resolution of a case that should ultimately be settled. Some have suggested that if an attorney believes his adversary is not communicating offers of settlement to his client, then the attorney may request a settlement conference before the court with the client required to be at the conference, so that a settlement offer may be openly discussed before a judge. See Simon at 828.

Turning to your next question regarding email communications, the use of the “reply all” button is a convenient way of communicating with multiple parties but at times can be problematic, especially when attorneys “cc” their clients on an email to opposing counsel. The handful of ethics opinions that specifically discuss “reply all” emails in the context of the “no-contact rule” offer no clear-cut answer. While the opinions suggest that there may be situations where consent may be implied, the best practice is to avoid the minefield by resisting the temptation.
to use “reply all” when responding to opposing counsel’s email. N.Y. City 2009-1 (which dealt with DR 7-104(A) (1) under the former Code), discusses at length criteria for a finding of “prior consent” when clients are copied on letters and emails sent to opposing counsel. As the Committee observed, “consent to ‘reply to all’ communications may sometimes be inferred from the facts and circumstances presented.” Id. The Committee addressed two important considerations: “(1) how the group communication is-initiated and (2) whether the communication occurs in an adversarial setting.” Id. Other jurisdictions have suggested additional factors, including the formality of the communication, since “[i]n more formal the communication, the less likely it is that consent may be implied.” See State Bar of Calif. Standing Comm. on Prof. Resp. and Conduct Formal Op. No. 2011-181.

It can reasonably be argued that your adversary’s email invited a discussion of the settlement offer. When he incorrectly stated the terms in an email and copied the client, a reasonable attorney could believe that he not only “consented” to your use of “reply all,” but actually invited the discussion. As a result, your adversary’s accusation that your “reply all” email violated the RPC is in our view a non-starter. In the words of the Committee “the absence of express consent does not necessarily establish a violation [of the ethics rules] if the represented person’s lawyer otherwise has manifested her consent to the communication.” Id. The case can be made that by sending the client a “cc” of the email to you, your adversary gave some form of consent permitting you to use “reply all” and copy the opposing party on your response. Your response with a copy to the opposing party certainly gave opposing counsel an opportunity to object and thereby cease future communications or, conversely, consent if the client continues to get a “cc” on further emails. Nonetheless, the contentious nature of the litigation should have put you on the prudent tack of not using “reply all.” Why steer a course through uncharted waters and run the risk? Your dealings with opposing counsel should have led you to anticipate your adversary’s reaction to your email or, at the very least, should have prompted you to think about whether you should ask for consent from opposing counsel (likely a futile gesture) before pressing “reply all.”

In any event, this situation is a good lesson for any lawyer when communicating with an adversary. We suggest that the better practice would be for the attorney to separately forward emails to his client, instead of sending a “cc.” In so doing the lawyer will clearly prevent anyone from using “reply all” as a way of directly communicating with a client.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My firm has long represented Edward Entrepreneur (Eddie).

Eddie calls one day and tells me that he and Paul Partner want to set up a hedge fund. Eddie and Paul tell me that they do not want to incur the expense of hiring multiple lawyers to draw up the agreements, and because I am the preeminent lawyer in the field, they want me to draft them all. Are there any problems with this request? If so, can I fix them and how?

During the representation, Eddie asks my firm to set up Hedge Fund GP, in which Eddie and Paul are equal partners. My firm draws up the papers for Hedge Fund GP to become the general partner of an onshore fund that my firm has organized called Hedge Fund Partners. Because of my firm’s long relationship with Eddie, I saw no need to send Eddie an engagement letter for this work, and I chose not to run a conflict check. (1) What are the consequences of the failure to run a conflict check or to send an engagement letter under these circumstances; and (2) what should the engagement letter have said?

Lastly, during the course of our representation of Hedge Fund GP, Hedge Fund Partners, and Eddie, I have participated in hundreds of confidential communications. The hedge fund has now run into some trouble. Investors have sued, naming Hedge Fund GP, Hedge Fund Partners, Eddie and Paul as defendants. The SEC has commenced an investigation, and Eddie and Paul have stopped speaking with each other. Can I represent any of the defendants in the investor suit? If so, are there any limitations on the representation? What would I write in such an engagement letter? Also, can I represent any of the parties in the SEC investigation? If so, do I need a separate engagement letter for that representation and what should it provide? To whom does the attorney-client privilege for those confidential conversations belong?

Help! Sincerely,
I. Needa Lawyer

MOVING? let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

OCA Attorney Registration
PO BOX 2806, Church Street Station
New York, New York 10008
TEL 212.428.2800
FAX 212.428.2804
Email attyreg@courts.state.ny.us

New York State Bar Association
MIS Department, One Elk Street
Albany, NY 12207
TEL 518.463.3200
FAX 518.487.5579
Email mis@nysba.org
To the Forum:

My firm has long represented Edward Entrepreneur (Eddie).

Eddie calls one day and tells me that he and Paul Partner (Paul) want to set up a hedge fund. Eddie and Paul tell me that they do not want to incur the expense of multiple lawyers to draw up the agreements, and because you are the preeminent lawyer in the field, they want you to draft them all. Are there any problems with this request? If so, can I fix them and how?

During the representation, Eddie asks my firm to set up Hedge Fund GP, in which Eddie and Paul are equal partners. My firm draws up the papers for Hedge Fund GP to become the general partner of an onshore fund that my firm has organized called Hedge Fund Partners. Because of my firm’s long relationship with Eddie, I saw no need to send Eddie an engagement letter for this work, and I chose not to run a conflict check. (1) What are the consequences of the failure to run a conflict check or to send an engagement letter under these circumstances; and (2) what should the engagement letter have said?

Lastly, during the course of my firm’s representation of Eddie and Paul, I participated in numerous confidential communications with each of them pertaining to their joint venture. To whom does the attorney-client privilege for those communications belong? Eddie has asked me to keep certain confidential information which he has disclosed to me secret from Paul. Is this a problem? What if the information relates to work that I performed for Eddie concerning his other business ventures?

Sincerely,
I. Needa Lawyer

Dear I. Needa Lawyer:

Joint Representation of Multiple Clients

The joint representation of Eddie and Paul implicates Rule 1.7 (Conflict of interest: current clients) of the New York Rules of Professional Conduct (NYRPC). Under Rule 1.7(a)(1), a lawyer shall not represent multiple clients if the clients have “differing interests.” Rule 1.0(f) broadly defines “differing interests” to include “every interest that will adversely affect the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” The main purpose of this rule is to prevent a lawyer from taking on a new client or new matter that may require the lawyer to take certain steps or positions on behalf of one client that could be materially adverse to the interests of another client, unless the lawyer can satisfy all the terms of Rule 1.7(b). See Roy D. Simon, Simon’s New York Rules of Professional Conduct Annotated 240 (2012 ed.) (Simon’s NYRPC).

Rule 1.7(b) permits a representation despite a concurrent conflict under Rule 1.7(a) if (1) the lawyer “reasonably believes” that the he or she can provide “competent and diligent” representation to each affected client, (2) the representation is not prohibited by law, (3) “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal,” and (4) “each affected client gives informed consent, confirmed in writing.”

The first issue that must be considered is whether the joint representation of Eddie and Paul involves “differing interests” under Rule 1.7(a)(1). Even though the creation of their partnership and the hedge fund is a common goal shared by both Eddie and Paul, and even though the common representation involves a transactional matter, not litigation, it is possible that your clients may have potentially different interests now or in the future.

In view of the fact that you appear to have a potential conflict within the meaning of Rule 1.7(a)(1), the analysis shifts to whether it is consentable under Rule 1.7(b)(1). In other words, do you reasonably believe that you can provide “competent and diligent representation” to both clients, particularly in light of your firm’s long-standing relationship with Eddie? The answer is fact specific and will depend on the circumstances. Rule 1.7, Comment 28. As counsel, you must determine whether your loyalty to Eddie, as a result of the firm’s prior relationship, will impair your competence and diligence on behalf of the new client Paul, and, vice versa, whether your loyalty to Paul as a new client might impair your competence and diligence on behalf of Eddie. For example, do you have confidential information in your possession from the firm’s prior representations of Eddie that would in any way adversely affect your independent professional judgment in representing Paul? Should you determine, at any point, that your continuing duty of confidentiality to Eddie would prevent you from providing competent and diligent representation to Paul, then the conflict is non-consentable and you would be required to withdraw from the common representation.
If you “reasonably believe” that you can provide competent and diligent representation to both Eddie and Paul, the common representation would fall within the category of a consentable conflict. Comment 28 of Rule 1.7 gives an illustration that provides guidance here. It states that while a lawyer may not represent multiple parties in a negotiation if their interests are fundamentally antagonistic to one another, common representation is permissible where the clients are generally aligned in interest, even though there may be some difference in interest among them such as when the lawyer is helping to organize a business in which two or more clients are entrepreneurs. See also Rule 1.7, Comment 29 and N.Y.C. Bar Ass’n, Comm. on Prof. and Jud. Ethics Op. No. 2001-2 (stating that “[i]n a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer’s independent professional judgment is significantly mitigated” and opining that a lawyer may represent multiple parties in a single transaction where interests of represented clients are generally aligned or not directly adverse, with disclosure and informed consent, so long as the “disinterested lawyer” test is satisfied).

Your joint representation of Eddie and Paul appears to be a consentable conflict; as long as an actual conflict has not yet arisen between them, you may be able to rectify the situation and avoid future difficulties if you immediately take steps to obtain the “informed consent” of both clients, confirmed in writing. Obviously, the best practice here would have been to get informed consent before the joint representation began, or within a reasonable time thereafter. That ship has sailed, but you cannot ignore the problem. You must act to obtain informed consent and a waiver of any conflicts as between these clients at this time before the representation proceeds any further.

To obtain the “informed consent” of Eddie and Paul under Rule 1.7(b)(4), means that you must explain the implications of the common representation, which should include a discussion about the advantages and risks involved, the effect on the attorney-client privilege, and the material and reasonably foreseeable ways that the conflict could affect the interests of each client. See Rule 1.7, Comment 18. As part of the discussion, you should advise the affected clients that in the event a dispute were to arise between themselves, there would be no expectation of privacy as to any privileged communications they had with you in connection with this matter. See Restatement (Third) of the Governing Lawyers § 75. Further, you should address how you and the affected clients would proceed in the event that an actual conflict arose between them or in the event either client changed his mind and revoked consent. Absent the informed consent of each affected client in such circumstances, you may be forced to withdraw from representing all affected clients pursuant to Rule 1.9(a) (Duties to Former Clients) and Rule 1.7(a)(1).

Significantly, the rules do not require that the informed consent and/or conflict waiver be signed by the client; they simply require that the informed consent be confirmed in writing. Rule 1.0(e) provides an attorney with a choice of three methods to memorialize the informed consent: (i) the lawyer may obtain a writing from the client confirming that the client has given consent; (ii) the lawyer may promptly transmit a writing to the client memorializing the client’s oral consent; or (iii) the lawyer may obtain a statement by the client made on the record of any proceeding before a tribunal. Under Rule 1.0(x), an electronic transmission constitutes a writing.

It is possible that you have already discussed the risks and advantages of this common representation with both clients and have advised Paul of your prior representation of Eddie. If that is the case, we suggest that you immediately confirm those conversations and the clients’ agreement to waive any conflicts in writing. If you have not had any such discussions, we recommend that you do so now, and that you confirm the discussions contemporaneously in writing and obtain the appropriate conflict waivers. You may consider using the following or similar language to confirm the informed consent and conflict waivers of the affected clients in writing:

Mr. Edward Entrepreneur and Mr. Paul Partner:

As you know, our Firm has in the past represented and currently represents Mr. Entrepreneur, in connection with matters unrelated to your venture to set up Hedge Fund Venture GP and Hedge Fund Partners (the “Hedge Fund Venture”). As we have indicated to you, your interests may currently and in the future be adverse for purposes of the ethics rules by which lawyers are bound, and pursuant to those rules we would be unable to represent you in connection with the Hedge Fund Venture unless you both consent to this representation.

Pursuant to my discussions with you both, Mr. Partner has consented to the Firm’s representation of him and Mr. Entrepreneur in connection with your partnership and Hedge Fund Venture even though we have represented Mr. Entrepreneur in the past and may continue to represent him in the future. While we will act in a manner which we believe to be in your best interests, we have advised you that you should consider consulting separate counsel in connection with the Hedge Fund Venture as your interests may be better served by independent counsel.

You both acknowledge and agree that: (1) you have been informed of the potential conflicts of interest that may arise in our joint representation of Mr. Entrepreneur and Mr. Partner generally, and in connection with your partnership and Hedge Fund Venture specifically, and we have advised you that retaining separate counsel may better represent your interests; (2) you waive those potential conflicts; (3) we will continue to represent Mr. Entrepreneur in connection with matters unrelated to the partnership and Hedge Fund Venture;
(4) if your respective interests come into conflict with each other, we may continue as counsel to Mr. Entrepreneur; and (5) any confidential information that either of you provides to the firm in connection with this representation will be shared with the other client and may not be protected by the attorney-client privilege, as against the other, and that disclosure of such information may be compelled in any future litigation between you.

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The Failure to Issue an Engagement Letter or Run a Conflict Check

The failure to issue an engagement letter or run a conflict check is a potentially serious problem. Both the NYRPC and the joint rules of the Appellate Division require that lawyers have written engagement letters and fee agreements with clients. Part 1215 of the joint Appellate Division rules (Part 1215), which became effective on March 2, 2002, provides that

- an engagement letter is required for any client who first became a client after March 2, 2002;
- an engagement letter must explain the scope of the legal services to be provided, the fees and expenses to be charged, billing practices to be followed, and the right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator;
- the letter must be issued to the client before the commencement of the representation, or within a reasonable time thereafter;
- the letter is not required where the expected fee is less than $3,000 or where the attorney's services are of the “same general kind” as services previously rendered to and paid for by the client;
- the letter is required, even for existing clients, “[w]here there is a significant change in the scope of representation” (e.g., an existing corporate client became a litigation client, etc.), or “the fee to be charged” (e.g., fees based on hourly rates to a fixed fee, etc.); and
- a written retainer agreement will suffice if the agreement addresses the required matters.

Although as originally enacted it did not create an ethical obligation, that changed in April 2009 when New York adopted the Rules of Professional Conduct and a lawyer’s obligation to issue an engagement letter became a matter of professional responsibility. See Rule 1.5(b).

Under these rules, you were required to issue an engagement or retainer letter to Eddie and Paul. As to the consequences for non-compliance with these rules, Part 1215 is silent as to what penalty, if any, should be assessed. Seth Rubenstein, P.C. v. Ganea, 41 A.D.3d 54, 61 (2d Dep’t 2007). In practice, however, a lawyer’s failure to abide by this rule has resulted in dismissal of fee collection claims based on a breach of contract theory, but courts have usually allowed recovery on a quantum meruit or account stated basis (see id.; Miller v. Nadler, 60 A.D.3d 499, 500 (1st Dep’t 2009) (allowing recovery of legal fees under theories of account stated and quantum meruit, despite plaintiff’s failure to comply with the rules on retainer agreements); Egnorovitch v. Katten Muchin Zavis & Roseman LLP, 55 A.D.3d 462, 464 (1st Dep’t 2008); see also Constantine Cannon LLP v. Parsons, 2010 N.Y. Slip Op. 31956U, at *17 (Sup. Ct., N.Y. Co. July 22, 2010) (holding that an attorney’s “failure to comply with 22 NYCRR § 1215.1 is not, in and of itself, a basis for disgorgement” or a bar to an attorney’s recovery for services properly rendered to the client)).

As the court in Seth Rubenstein, P.C., explained, attorneys have “every incentive” to comply with Part 1215 and are at a “marked disadvantage” if they fail to do so, because absent a letter of engagement or written retainer agreement, attorneys will have greater difficulty “meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon.” Id. at 64. Absent a clearly written engagement or retainer agreement, there is no “guarantee . . . that the fact finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned” under a clearly written agreement. Id. Additionally, under Rule 1.5(b) of the NYRPC, a lawyer who fails to issue an engagement letter has committed an ethical violation that can be the subject of disciplinary action and may also jeopardize the right to collect a fee.

Your failure to run a conflict check also raises ethical issues. Rule 1.7(a) (addressed above) and Rule 1.10(e) of the NYRPC are implicated here. Rule 1.10(e) provides:

A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

- (1) the firm agrees to represent a new client;
- (2) the firm agrees to represent an existing client in a new matter; . . .

Id. This rule requires law firms to make a written record of each new engagement “promptly” (i.e., at or near the time of the new engagement), because otherwise a conflicts check made between the time the new engagement commences and the time the engagement is recorded may miss a conflict with the new matter. Simon’s NYRPC at 496. Moreover, the rule requires the law firm to implement and maintain a system for checking for conflicts of interest for each proposed engagement each time the firm agrees to represent a new client or agrees to represent an existing client in a new matter. See Rule 1.10(e), Comment 9.

Under Rule 1.10(f), a substantial failure to keep adequate records or to implement a conflict check under Rule 1.10(e) may subject the law firm as well as the attorney to professional discipline regardless of whether an improper conflict occurs. See also Rule 1.10(g) (“Where a violation of paragraph (e) by a law firm is a substantial factor in
causing a violation of paragraph (a) by a lawyer, the law firm as well as the individual lawyer, shall be responsible for the violation of paragraph (a).”). Therefore, if the phrase “no harm, no foul” was ever applicable with respect to checking for conflicts of interests, it is no longer true today under the new rules. See Simon’s NYRPC at 510.

You seem to have violated Rule 1.10(e) on three separate grounds. First, from the facts provided, it does not appear that you made a written or electronic record of the new engagement, which would allow the members of your firm to check whether any of the firm’s former, current or prospective clients have any conflict with Eddie or Paul either presently or going forward. Second, although you have taken on a new client under Rule 1.10(e)(1) with Paul, you have not run a conflict check to determine whether (1) the firm is currently opposed to Paul in any matter, (2) Paul is opposed to any of the firm’s former clients in a substantially related matter; and (3) Paul will be a co-plaintiff or co-defendant in any contemplated or ongoing litigations with any of the firm’s current or former clients. As discussed below, this will present serious consequences for you and potentially for the firm under the imputation rules of Rule 1.10(a) if it is ultimately determined that Paul has conflicting interests with either a former or current client of the firm. Third, notwithstanding the firm’s long relationship with Eddie, Rule 1.10(e)(2) requires that whenever an existing client brings a new matter to the firm, that new matter needs to be checked for conflicts against every pending and past matter in the firm’s database. These checks are essential because, absent the proper conflict check, you and your firm will be unable to determine whether the firm has a conflict under, inter alia, Rules 1.7(a) and 1.9(a)–(b) (involving duties to former clients), or whether any conflict arising under Rule 1.7(a) is non-consentable under Rule 1.7(b)(1)–(3). Moreover, absent the proper conflict check, your firm would lack the information necessary to obtain “informed consent” to the conflict from each affected client under Rule 1.7(b)(1) and (4).

While we have not seen any authority analyzing the penalties for a violation of Rule 1.10(e), one can infer that the penalties applied to lawyers who have failed to detect a conflict and have continued to represent conflicting interests under Rule 1.7(a) without having obtained the appropriate conflict waiver would also be applicable here. The most common consequence likely to be encountered is disqualification of the lawyer and firm from representing any of the affected clients. See Alcantara v. Mendez, 303 A.D.2d 337, 338 (2d Dep’t 2003) (disqualifying attorney from continuing to represent any plaintiffs in the action). In addition, the attorney’s ethical violation may jeopardize the firm’s ability to recover its fees. An illustrative case is Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012), where the Ninth Circuit recently held that a law firm which represented multiple clients with conflicting interests, but which neglected to obtain a conflict waiver from them, was deprived of all compensation for the representation, notwithstanding that the firm achieved a $49 million recovery for its clients, and notwithstanding that the law firm’s ethical breach appeared to have caused no damage to any of the clients. Id. at 655, 658 (applying federal law; reasoning that the “representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees”); see also Silbiger v. Prudential Bonds Corp., 180 F.2d 917, 920 (2d Cir. 1950) (the usual consequence where an attorney represents opposed interests “has been that he is debarred from receiving any fee from either [client], no matter how successful his labors”); Quinn v. Walsh, 18 A.D.3d 638 (2d Dep’t 2005) (denying an attorney legal fees for services rendered during his conflicted representation of plaintiffs, in violation of DR 5-105(a) (now, Rule 1.7)). Other risks you may face for failing to detect and disclose a conflicting representation include liability for breach of your fiduciary duty to the client (see Schlissel v. Subramanian, 25 Misc. 3d 1219(A), 2009 N.Y. Misc. LEXIS 2954, at *24–25 (Sup. Ct., Kings Co. 2009); Macnish-Lenox, LLC v. Simpson, 17 Misc. 3d 1118(A), 2007 N.Y. Misc. LEXIS 7138, at *21–23 (Sup. Ct., Kings Co. 2007)) and/or a potential complaint to the Grievance Committee and public censure (see In re Drysdale, 27 A.D.3d 196, 199 (2d Dep’t 2006) (attorney censured for professional misconduct for engaging in a pattern of impermissible conflicts of interest)).

Accordingly, you would be well-advised to run the necessary conflict checks for the new matter and new client immediately and deal with the consequences of its results, rather than ignore the conflict check process and face even more dire consequences in the future.

There Is No Expectation of Confidentiality Between Joint Clients

In response to your question concerning the attorney-client privilege for communications in a common representation, the prevailing rule is that, while those confidential communications are generally protected from disclosure to third parties, as between jointly represented clients, no privilege attaches. In other words, if a litigation were to ensue between Eddie and Paul arising from the partnership and hedge fund venture, there would be no privilege as between Eddie and Paul and neither should have any expectation of privacy. See Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 137 (1996) (“where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients”).

Moreover, if one client asks the lawyer not to disclose information to the other client relevant to the joint representation, this is generally inappropriate because the lawyer has an
equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interest and also has the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4; see also Rule 1.7, Comment 31. Therefore, the lawyer will be required to withdraw if one client insists that information material to the joint representation should be kept secret from the other. Rule 1.7, Comment 31 (“as part of the process of obtaining each client’s informed consent, the lawyer should advise each client that . . . the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other”). In certain limited circumstances, the lawyer may proceed with the representation if the affected clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the jointly represented clients. See id. In other words, the lawyer must obtain the other client’s informed consent before doing so.

Based on the foregoing, Eddie’s request that you keep certain information secret from Paul does present a problem and may require you to withdraw from the representation if the information is material to the partnership and hedge fund venture. However, the confidential information relates solely to Eddie’s other business ventures and does not adversely affect your representation of Paul and Eddie in connection with the partnership and hedge fund venture, you may be able to oblige Eddie’s request. See id. (“lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients”). However, you must inform Paul of the circumstances without divulging Eddie’s confidential information, and confirm his consent in writing. Lacking Paul’s informed consent, you would have to withdraw from the common representation. For the future, this is one of the areas that you should address in your engagement letter when representing multiple clients (see supra) and for which you should obtain the appropriate waivers.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq., and
Maryann C. Stallone, Esq.,
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY
PROFESSIONALISM FORUM:

I represent Wishful Thinking Development (WTD). In 2007, WTD took out a multi-million dollar mortgage on a piece of commercial real property which it owns in midtown Manhattan.

After approximately four years, WTD ceased paying its mortgage and the lender instituted a foreclosure action by filing a summons and complaint in Manhattan Supreme Court in early 2012.

The complaint was personally served upon Inover Hishead (IH), the principal of WTD, at his office in downtown Manhattan on February 1, 2012. On the morning of February 13, IH called to inform me that he was previously served with the complaint, and I advised him that we needed to respond to the complaint within 20 days, which would require a response by February 21, 2012. The complaint contained 10 separate causes of action against WTD, which consisted of nearly 200 paragraphs of allegations. Because of the complexity of these allegations, I consulted with IH and we decided that it would be appropriate to request a 30-day extension of time from the lender’s counsel so that we could respond to the foreclosure complaint. In addition, I needed an extension of time as well because last fall I was scheduled to begin a weeklong trial in federal court in California on February 16.

Later that day, I telephoned opposing counsel and advised him that I was just retained to represent WTD and requested a 30-day extension to respond to the complaint both because of the time required to address the complex nature of the lender’s allegations in the complaint as well as my upcoming trial on the West Coast. The lender’s counsel informed me that his client wanted to aggressively pursue this action and foreclose on the property immediately. In short, I was informed by my adversary that the lender wanted a “take no prisoners” approach in the case and was instructed by his client not to grant any requests to extend deadlines or courtesies to me or my client. Although I explained to opposing counsel that an extension of time is a basic courtesy and would not prejudice the lender, he responded that his client was “sick and tired of lawyers being nice to each other” and told me that my request for an extension was denied. He further informed me that if I did not answer or move to dismiss the complaint by February 21, 2012, then he would immediately file a motion for a default judgment against WTD.

Isn’t my adversary’s conduct a violation of the Rules of Professional Responsibility and the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel’s conduct warrant or require a report to the Disciplinary Committee?

Sincerely,

Concerned Counsel
To the Forum:
I recently received a $10,000 retainer to represent a client (Daniel Developer) in a real property development project. I anticipate the project will take about a year to 18 months to complete. I will be billing on an hourly basis every two months. It has been my practice to put these retainers in my escrow account but in discussing the matter with a couple of fellow attorneys, one expressed the opinion that these retainers should not be put into the escrow account and instead should be deposited into our firm’s operating account. The other attorney said that the retainer payment belongs to the client and must be put into an escrow account. Which is it?

In addition, could I enter into a “flat fee” or “minimum fee” payment arrangement with Daniel Developer?

With regard to fee amounts, it has been my firm’s practice to increase billing rates at the beginning of each calendar year. Am I required to inform Daniel Developer once our new billing rates take effect?

Last, if for some reason I do not use up the retainer given to me by Daniel Developer, am I required to refund the remaining amount to him?

Sincerely,
Andrew Advocate

Dear Andrew Advocate:

As set forth below, the New York Rules of Professional Conduct require that all financial transactions with clients be handled carefully by lawyers and law firms who must keep contemporaneous records. Moreover, be it for fees or other funds received from or on behalf of clients, lawyers and law firms must communicate what services they will provide, or have provided, to the client, as well as funds received from or disbursed on behalf of clients. Having said that, as long as the lawyer or law firm advises the client that the retainer payment will be treated as if it were earned at the time of the payment and that any unearned portion will be refunded to the client, New York allows the fees to be deposited into an operating account.

By far, the proper handling of client funds is one of the most sensitive ethical issues that attorneys face every day. Attorneys are reminded time and time again — from the moment they are admitted to practice — that there are strict procedures in place governing how an attorney handles money received from a client and, in particular, retainer fees meant to pay for legal services. Although attorneys should be intimately familiar with each and every part of the Rules of Professional Conduct, special attention must be given to Rule 1.15, which deals with, among other things, preserving identity of funds and property of others, fiduciary responsibility, and the prohibition against commingling and misappropriation of client funds or property. To use the words of Professor Roy Simon, “Rule 1.15 is the longest and most strictly enforced rule in New York’s Rules of Professional Conduct.” See Simon’s New York Rules of Professional Conduct Annotated 598 (2012).

Rule 1.15(a) prohibits commingling and misappropriation of client funds or property and states that “[a] lawyer in possession of any funds or other property 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 property or commingle such funds or property with his or her own.” The lawyer must maintain separate accounts for funds that are the client’s property. See Rule 1.15(b). Generally speaking, retainers paid to an attorney are not considered a client’s property, which means that retainers should not be deposited into an escrow account. As stated by one commentator, to the contrary New York “requires a lawyer to deposit advance retainer fees in the lawyer’s own account (or the law firm’s operating account) unless the lawyer and client have agreed that the lawyer may deposit them in the lawyer’s or law firm’s trust account.” See Simon at 600 (emphasis added); see also N.Y. St. Bar Ass’n Op. 816 (2007). Opinion 816 is instructive since the Committee on Professional Ethics found that “[i]f the parties agree to treat advance payment of fees as the lawyer’s own, the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling.” id.

Accordingly, the payment you received from Daniel Developer for his upcoming real estate project appears to be an advance retainer, and therefore belongs to you and no longer to him. The attorney you spoke with who said that the retainer should be placed in your firm’s operating account is correct, and you should no longer be depositing retainer payments into your firm’s escrow account. Once the retainer is deposited in the operating account, the funds are outside the control of the

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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.
client and its creditors and are under the control of the lawyer. The obligation to return an unearned part of a retainer is a separate matter (which we will address below). In essence, there is a debtor/creditor relationship between lawyer and client. But, as they say, “the devil is always in the details” so that isn’t necessarily the end of our answer.

Perhaps this engenders some controversy, but it has been suggested that lawyers should open a third account dedicated to retainers. While it is important that we emphasize again and again that a third account is not required and that it is perfectly acceptable to deposit retainers in the operating account, a third “retainers only” account may have certain advantages that outweigh any additional bookkeeping burdens it may create. There are always bookkeeping issues when funds are deposited into an escrow account or an operating account. More often than not when an attorney deposits retainers into an escrow account (which should not be done), the attorney may lose track of which are the retainer funds and which are client escrow funds and before you know it the attorney is dipping into his or her account because the attorney believes these really are the retainer funds when in fact they are not. This sort of comingling would also constitute the misappropriation of client funds. The problem of putting retainer funds into the general operating account is, again, a bookkeeping issue. Funds in an operating account usually get spent – particularly by the small firm or single-practitioner firm. These funds get used for taxes, payroll, whatever. Granted attorneys should have the discipline not to do that but, they often lose track of which are the retainer funds and which are not. As seen in the example, if in fact the attorney is “fired” after a couple of weeks, he or she has to return the unused retainer. If the retainer funds have been spent out of the operating account, the attorney may not have the money to return unused retainer fees to the client.

The benefit of the third account is that funds are put in that account and withdrawn only as earned. Furthermore, the client has no control over these funds (as opposed to an escrow account), so if the attorney and client “split up” and the disenchanted client tells the attorney that the attorney cannot pay himself or herself, the attorney would be permitted to retain such funds as payment for services rendered. Retainers deposited in an escrow account are, arguably, client funds. They are “off limits” to the lawyer once the client says no you cannot pay yourself from the retainer, thus sacrificing the whole idea of having a retainer. If the retainer funds are deposited in the third type of account, the funds remain the attorney’s and, pursuant to the well-drafted retainer agreement, the attorney may pay himself or herself. And, as opposed to putting retainer funds in a general operating account and perhaps having them dissipated, the balance of funds will be there to return to the client.

Your question mentioned escrow accounts, so it is important to point out the recent decision by the Court of Appeals in In re Galasso, 19 N.Y.3d 688 (2012). There various disciplinary charges were upheld against a lawyer who failed to detect the looting of his firm’s escrow account by the firm’s bookkeeper – who also happened to be his brother. The Court faulted the attorney for breaching his fiduciary duty to pay or deliver escrow funds, failing to supervise a non-lawyer employee, being unjustly enriched by the use of clients’ funds for his personal benefit and failing to provide appropriate accounting to his firm’s clients. “[A]lthough [the attorney] himself did not steal the money and his conduct was not venal, his acts in setting in place the firm’s procedures, as well as his ensuing omissions, permitted his [brother] to do so”; and “[h]e ceded an unacceptable level of control over the firm accounts to his brother, thereby creating the opportunity for the misuse of client funds.” Id. In light of Galasso, we cannot stress enough the need for attorneys to implement and maintain strict financial controls and consistently maintaining those controls through regular supervision of the firm’s staff, especially in matters involving the financial affairs of both the law firm and the clients it represents.

Your remaining questions provide us with an opportunity to discuss Rule 1.5, which governs fees and division of fees. Rule 1.5(a) states:

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

Furthermore, Rule 1.5(d)(4) provides:

(d) A lawyer shall not enter into an arrangement for, charge or collect:
1. a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable
minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated...

We should first turn to your questions whether it is appropriate to enter into a “minimum fee” payment arrangement with Daniel Developer and whether you are required to return to him the unused portions of the fee received from him. Rule 1.5(d)(4) incorporates, amongst other things, the finding by the Court of Appeals in In re Cooperman, 83 N.Y.2d 465 (1994) which essentially put an end to nonrefundable fees in New York holding that they generally violate a lawyer's obligation to return any unearned fee upon withdrawal. Although nonrefundable retainers are not permitted, Cooperman allows lawyers to charge a minimum fee “as long as the minimum fee is refunded if the work is not completed.” Id.

The $10,000 payment you have received from Daniel Developer for his real estate project would be reasonable depending on the scope of the project and how much time it will take you to complete the tasks necessary to fulfill the objectives of your representation. If it is reasonable to expect that the legal services required to achieve your client’s objectives would cost $10,000, then qualifying the $10,000 payment as a minimum fee would be reasonable under these circumstances. The factors outlined above as per Rule 1.5(a) are instructive in the determination of what would qualify as a reasonable fee. However, if for some reason Daniel Developer terminated your representation or you decided to withdraw from the representation before completing the project or triggering payment of the minimum fee, then you must refund whatever part of the minimum fee has not been earned, because nonrefundable retainer fees are prohibited.

Your letter mentions that it is your firm’s practice to increase billing rates at the beginning of each calendar year (like many firms) and asks if you are required to inform Daniel Developer of any fee increases by your firm. Rule 1.5(b) states:

A lawyer shall communicate to a client the scope of the representation, and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Comment [2] to Rule 1.5 provides:

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

As Comment [2] suggests, the length of time of the relationship between the lawyer and client is a primary factor in determining the required level of understanding between the lawyer and client as to what fees and expenses will be incurred in connection with a given representation. If Daniel Developer happened to be a longtime client of your firm, then there should be a regular understanding between him and your firm as to the scope of the representation and the basis or rate of the fee and expenses for which he will ultimately be responsible. If, however, Daniel Developer is a new client, you must almost immediately establish a written understanding as to fees and expenses, which may be done by way of the required letter of engagement prescribed in 22 N.Y.C.R.R. part 1215.

In any case, when firms have a practice of annually increasing rates during the course of a representation, the firm should give advance notice to the client in the retainer agreement or engagement letter sent to the client at the outset of the representation by using language such as the following:

We review our rates from time to time and may adjust them periodically, without notice to our client, based upon our determination of the value of each individual’s services in the legal marketplace in which we serve our clients.

This puts the client on notice of your firm’s practice and opens the door to a negotiation for a different arrangement if the client objects to the practice. Since you anticipate that Daniel Developer’s project will take a year to 18 months to complete, we believe that your firm’s practice of raising rates annually must be disclosed in the engagement letter or retainer agreement sent to Daniel Developer.

Sincerely,
The Forum by Vincent J. Syracuse, Esq., Matthew R. Maron, Esq., Tannenbaum Helpern Syracuse & Hirschtitt LLP, and Peter V. Coffey, Esq., Englert, Coffey, McHugh & Fantauzzi, LLP

CONTINUED ON PAGE 56
I arrived at my office early one morning last week and found an unsolicited email on my server from Dr. Adam Zappel. In the email, Dr. Zappel wrote that a friend gave him my email address, and that he needs my help. Dr. Zappel had sought my representation in a prospective medical malpractice case and included information incriminating himself in the misdiagnosis of a 14-year-old, Tim Trouble, who as it turned out had been regularly indulging in his parents’ liquor cabinet. What he thought was a simple case of alcohol poisoning, turned out to be an untreated burst appendix, which if not removed, could have resulted in Tim’s death. Dr. Zappel wrote in his email to me that he had a drug problem at the time and had been regularly taking painkillers when he made the error. Worse, Nurse Hailey Honest witnessed the event and has said she will testify against him if the suit arises. This occurred where Zappel is in current residence, St. James Infirmary.

Currently, I represent Our Savior Hospital, where Dr. Zappel previously worked. Our Savior’s administrator suspects Dr. Zappel may be planning a qui tam case alleging that Our Savior is engaged in up-coding cases of the common swine-flu to a more deadly flesh-eating disease.

I believe that it would be in Our Savior’s interest to know that Dr. Zappel may be embroiled in litigation and had a substance-abuse problem. I am also worried that the unsolicited information in the email may conflict me out of defending the qui tam case.

I checked the Rules of Professional Conduct under Rule 1.18 which states that I cannot represent a client with interests materially adverse to those of a prospective client in a substantially related matter if I received information from the prospective client that could be “significantly harmful” to the prospective client. But, I also read that a person who gives adverse information without “any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client.”

I believe that the information I learned about Dr. Zappel could be harmful to him, and that the cases are substantially related since they both concern alleged misdiagnoses. My question to the Forum: is Dr. Zappel a prospective client?

Sincerely,
Vera Decent

In Memoriam

Joseph A. Baum
Flushing, NY

William S. Calli
Utica, NY

Luanda E. Cavaco
Broad Brook, CT

Benjamin S. Clark
West Corners, CT

Morris A. Cohen
Tucson, AZ

Raymond J. DeSilva
Jamesville, NY

Allan B. Ecker
Houston, TX

William N. Ellison
Watkins Glen, NY

Dana Mora Feldman
Collegeville, TX

Andre L. Ferencz
Roslyn, NY

Lucia A. Ferrara
Cohoes, NY

Frank T. Gaglione
Williamsville, NY

Jackie Gallers
Bronx, NY

Drayton Grant
Rhinebeck, NY

William E. Griffin
Bronxville, NY

Robert A. Harlem
Ononta, NY

Lionel G. Hest
New York, NY

Theodore T. Jones
Albany, NY

Charles Chulwoni
Kleyn

Martin Lerner
Metville, NY

Leonard Lustig
Islandia, NY

Alan Marcus
Forest Hills, NY

Dennis A. Maychur
East Rutherford, NJ

Gary A. Munneke
White Plains, NY

Daniel J. O’Neil
Poughkeepsie, NY

Stuart M. Pearls
Vestal, NY

Arnold J. Rabinov
Lido Beach, NY

Norman Robbins
Rosedale Heights, NY

James E. Reilis
Buffalo, NY

Maria Salapska
Phoenix, AZ

John Joseph Slavin
Floral Park, NY

Jock M. Smith
Taylorsville, AL

David L. Snyder
Tarrytown, NY

Thomas W. Stanisci
Huntington, NY

Jack M. Steingart
East Rockaway, NY

Harold Stern
Hartsdale, NY

Sol M. Wasserman
Yonkers, NY
To the Forum:
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I believe that it would be in Our Savior’s interest to know that Dr. Zappel may be embroiled in litigation and had a substance abuse problem. I am also worried that the unsolicited information in the email may conflict me out of defending the qui tam case.

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I believe that the information I learned about Dr. Zappel could be harmful to him, and that the cases are substantially related since they both concern alleged misdiagnoses. My question to the Forum: Is Dr. Zappel a prospective client?

Sincerely,
Vera Decent

Dear Vera Decent:
The question whether a person is a “prospective client” is governed by Rule 1.18(e) of the Rules of Professional Conduct (RPC). Put in simple terms, not every person who contacts a lawyer regarding a potential engagement is a prospective client. The following persons are not prospective clients:

A person who:
(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or
(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a) [of Rule 1.18].

It seems pretty clear that unless you entered into an email exchange with Dr. Zappel, his email to you was an unsolicited unilateral communication. Nevertheless, Dr. Zappel could be deemed a prospective client if he had a reasonable expectation that you would discuss the possibility of being retained as his counsel in connection with the malpractice action. Whether he had a reasonable expectation could depend on a variety of factors. What is your area of practice? Have you ever represented a party in a medical malpractice action? Could Dr. Zappel have looked you up on the Internet to find out your area of practice? If you have not held yourself out as an attorney who handles medical malpractice litigation, then you have a pretty strong argument that Dr. Zappel had no reasonable expectation that you would be willing to discuss the possibility of forming a client-lawyer relationship to defend him if he were sued for medical malpractice. Although it would seem that under these circumstances Dr. Zappel would not be deemed a prospective client under Rule 1.18(e)(1), that is not necessarily the only line of inquiry.

If it can be established that Dr. Zappel intended to provide you with confidential information so that he could potentially disqualify you from representing Our Savior if in the event he brought a qui tam action against the hospital, then he would not be entitled to the protection given to prospective clients. As a former employee of Our Savior, Dr. Zappel may have known that you have been the hospital’s legal counsel in certain matters. In my view the language of his email creates a

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suspicion that disqualification in the planned litigation may have been the real motive here. He claims that a “friend” gave him your email address. Who is this “friend”? Why is he soliciting your services by email? Couldn’t he have just picked up the phone and called you? Why did he send you such a detailed initial communication outlining his potential legal problems?

Law firms should have established, internal procedures that deal with unsolicited email from persons allegedly seeking legal counsel. Although Comment [4] to Rule 1.18 outlines some suggestions for implementing procedures necessary to protect an attorney from receiving disqualifying information (i.e., “limit[ing] the initial interview to only such information as reasonably appears necessary for that purpose”), it would be best if your firm establishes clear procedures in the event anyone in your office receives unsolicited inquiries for legal counsel. For example, when unsolicited communications such as Dr. Zappel’s email are received, it might be advisable for the firm to promptly issue a response declining the representation. In addition, if Dr. Zappel were considered a prospective client and you became conflicted because of your receipt of his email, then your firm could still represent the hospital if the appropriate screening mechanisms as prescribed in Rule 1.18(d)(2) are followed.

You have also asked whether the information contained in Dr. Zappel’s email can be passed on to Our Savior, your existing client. As stated above, we believe that Dr. Zappel may have been trying to create a basis for your disqualification when he contacted you and does not enjoy the protection of a prospective client. But having said that, how do you, as a responsible lawyer, handle the confidential information that now, regrettably, is in your possession?

Comment [2] to Rule 1.18 states:

Not all persons who communicate information to a lawyer are entitled to protection under [Rule 1.18]. As provided in paragraph (e) [of Rule 1.18], a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming(302,874),(602,893) a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a) [of Rule 1.18]. Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. . . .

There is some authority which suggests that no privilege attaches to information contained in unsolicited communications sent to an attorney from a person who is not deemed a “prospective client.” See N.Y City Bar Ass’n Formal Op. 2001-1. Having said that, it is safe to say that if one wanted to minimize the risk of disqualification, it may be best if the information Dr. Zappel disclosed to you is not communicated to Our Savior. As Rule 1.2(e) states, “[a] lawyer may exercise professional judgment to waive or fail to assert a right or position of the client . . . when doing so does not prejudice the rights of the client.” In addition, Comment [7] to Rule 1.4 suggests that information may be withheld from a client under certain circumstances, specifically “when the client would be likely to react imprudently to an immediate communication.” This Comment further states that withholding certain information is permitted as long as its purpose is not “to serve the lawyer’s own interest or convenience or the interests or convenience of another person.” Id.

In deciding whether to disclose, one must also consider Rule 1.1(c), which says:

A lawyer shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

According to Professor Roy Simon, Rule 1.1(c)(1) “essentially obligates a lawyer to use all legal and ethical means reasonably available to seek the client’s objectives.” See Simon’s New York Rules of Professional Conduct Annotated 67 (2012). Based upon this provision of the RPC, there could be an argument that you may be required to advise Our Savior as to the information contained in Dr. Zappel’s email because information concerning the doctor’s professional conduct may be relevant to the hospital as part of its defense against the qui tam action. Although the answer is not necessarily clear, you would not have to disclose the information communicated to you by Dr. Zappel if you conclude that Our Savior would not be prejudiced. As will be discussed further below, you can probably learn more about Dr. Zappel’s prior conduct through your own independent investigation as counsel to Our Savior.

The reason for the overabundance of caution with regard to what Dr. Zappel told you is mostly because the contents of his email contain admissions – particularly the fact that he was under the influence of drugs while engaged in professional activities. This information most likely would not be generally known. Although normally we would look at such information under the provisions of Rule 1.6, which defines what constitutes “confidential information,” in this case you may have a duty to protect the confidentiality of a potentially opposing party, namely Dr. Zappel. See generally James M. Altman, Inadvertent Disclosure and Rule 4.4(b)”s Erosion of Attorney Professionalism, N.Y. St. B.J. (Nov./Dec. 2010), p. 24 (internal citations omitted). Dr. Zappel could be considered a potential opposing party if you knew that he was considering commencing a qui tam case against your client. There also may be an argument that you owe Dr. Zappel (as a potentially opposing party not represented by counsel) a heightened obligation not to disclose the information.
he communicated to you. Therefore, your conduct in dealing with him as an unrepresented party also may trigger obligations under Rule 3.4(a)(6) to conduct yourself in a manner that is not contrary to the RPC, which would include not disclosing the information that Dr. Zappel communicated to you.

Given the circumstances you have described, if the qui tam case against Our Savior does go forward, you can do your own independent investigation of Dr. Zappel (and any other doctors currently or formerly employed by Our Savior for that matter) to determine if in fact the hospital was encouraging its staff to “up-code” cases as well as any other relevant conduct that could expose the hospital to liability, including potential acts of malpractice as a result of misdiagnoses of patients.

This leads to a potentially more difficult question: Are the malpractice and qui tam cases substantially related? If it can be established that there is a connection between Dr. Zappel’s own professional conduct at his current employer, St. James Infirmary, as well as in his prior employment at Our Savior, then his conduct may be relevant to the qui tam action and the matters become substantially related. In all likelihood, Dr. Zappel would be deposed if he commenced the qui tam case against the hospital and would almost certainly be subject to lines of questioning concerning his own professional conduct, including anything that could affect his conduct as a physician (such as an addiction to drugs).

It is also important to address here your obligations as counsel to Our Savior. Rule 1.13 of the RPC governs a lawyer’s obligations when representing an organization as a client. Specifically, Rule 1.13(b) states:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

Could Dr. Zappel qualify as a “person associated with the organization,” and would you be required to inform Our Savior of the information contained in his email? Under this premise, since he is a former employee of Our Savior, the answer would most likely be no. That being said, you still possess knowledge concerning Dr. Zappel that would be of significant interest to Our Savior (i.e. his prior professional conduct while under the influence of drugs). Such conduct would almost certainly go to issues concerning the doctor’s credibility in the context of the qui tam action. Although none of the information communicated to you by Dr. Zappel would be entitled to the protections given for confidential information as defined under Rule 1.6, the information should still not be disseminated to your client. As noted above, we would suggest that in the course of preparing to defend a potential qui tam action, you conduct your own independent investigation of former and current doctors and staff of the hospital. We believe that such an investigation would likely reveal if, in fact, certain employees had issues which would put their credibility into question – like Dr. Zappel.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

I serve as outside counsel to a large multinational company. Jacob Sladder, the company’s in-house counsel, has asked me to become involved in a matter involving a disgruntled former employee who claims that she was fired from the company after reporting that she was harassed by a number of her religious beliefs.

Sladder advised me that the company had received a claim letter from an attorney for the former employee, asserting that the company has a culture that promotes religious discrimination, demanding a fat settlement, and threatening suit if the matter is not resolved promptly. He explains, obviously within the boundaries of the attorney-client privilege, that he is concerned that the former employee’s discrimination claims may have merit, both with respect to the individual complaining ex-employee and other potentially aggrieved employees. In particular, Sladder worries that company emails, both recent and extending back as far as five years, may include incriminating material. He explains that although he has not examined the emails and does not know whether they contain any smoking guns, statements to him from corporate employees lead him to believe that the contents of some messages may be problematic.

From my work with the company over the years, I am aware that under its records retention protocol, each month the company’s management information system (MIS) personnel remove from the company’s active system emails sent during the same month a year earlier, and that emails for each such purged month are retained on backup tapes, with a separate tape for each month. Because of the company’s large-scale, worldwide operations, each month the company thus removes thousands of email mes-
sages. Inside counsel has asked me whether, on the basis of the letter from the lawyer for the former employee threatening litigation, the company has any obligation to alter its purge-and-retention procedure. What should I tell him?

The company’s MIS personnel further informed me that as long as emails remain on the company’s active system (that is, are less than a year old), they may be located and searched by author, recipient, or any words or combination of words that appear in the text. Once, however, they have been purged from the system and stored on tape, they are in effect “read only” and may not be searched by any of the means available for current emails.

The net result is that if litigation begins and the company is called upon to disgorge its relevant emails, the cost to search currently-maintained messages will be far less than the burden of searching the historical messages stored on the monthly tapes. I know that the company’s emails include many items subject to the attorney-client privilege, and others that, although non-privileged, nonetheless contain sensitive business information that is unrelated to the claims asserted by the former employee and that the company does not want outsiders to see.

Accordingly, Sladder suggests that perhaps it is time to alter the company’s records retention policy to provide for purging of emails, and storage on backup tapes, after six months or three months, not one year. If nothing else, he said, changing the policy would make it more difficult for this ex-employee, and other potential underfunded claimants, to get access to company emails. What advice do I give him?

Sincerely,
Noah Zark

Like what you’re reading? To regularly receive issues of the NYSBA Journal, join the New York State Bar Association (attorneys only).
To the Forum:
I am always conscious about running up unnecessary legal fees in litigation matters and I am acutely aware that, in this current economic climate, clients scrutinize legal bills more than ever. I recently succeeded in winning summary judgment on liability for my client in a breach of contract matter and the trial court subsequently directed a hearing on damages in which my adversary, David Delayer (Delayer), moved for a stay in the appellate court. The stay was granted, however, on the condition that Delayer’s client post an undertaking. The day after the stay was granted, I emailed Delayer asking if his client would be posting the undertaking directed by the appellate court. His response was, “We have not made that determination as of yet.” A few days later, at a conference before the trial court, Delayer said that his clients “were not seeking to obtain an undertaking.” Since Delayer represented that he was not going to seek an undertaking, the trial court scheduled a damages hearing at the conference to occur in 30 days. The day after the conference and in preparation for the hearing, I served a document subpoena upon Delayer, which he moved to quash. That motion was argued a few days before the damages hearing and was granted in part by the trial court. The following morning, I was informed by Delayer that his client had posted the undertaking directed by the appellate court which it had required in order to stay the damages hearing. That afternoon, counsel for the insurance company (which issued the undertaking) informed me that Delayer had applied for the bond “weeks earlier.” This is the first I had heard about the timing of the application for the bond, and from past experience I know that a bond is usually issued in a matter of days (if not the same day). Had I known that Delayer had applied for the bond weeks ago (and assuming it was issued shortly after he applied for it), then I would not have been forced to spend unnecessary time opposing his motion to quash since he likely knew weeks prior that the bond was issued, thereby staying the damages hearing.

I believe that Delayer’s actions are unprofessional. At a minimum, Delayer’s behavior is a clear example of uncivil (perhaps unethical) conduct motivated solely for the purpose of increasing my client’s litigation expenses.

My questions for the Forum: Did my adversary act unprofessionally? Is Delayer’s conduct sanctionable?

Sincerely,
A. Barrister

Dear A. Barrister:
What constitutes sanctionable conduct is one of the most hotly debated matters faced by the bench and the bar. Section 130-1 of the Rules of the Chief Administrator of the Courts, 22 N.Y.C.R.R. 130-1 (Rule 130-1 or Part 130) sets forth the provisions governing how costs and sanctions may be awarded by a court when it finds that a party or its attorney has acted in a manner warranting the imposition of costs or sanctions. Specifically, Rule 130-1.1 states:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor’s office, legal aid society or public defender’s office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:
(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

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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(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court’s own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Although a full discussion of what constitutes sanctionable conduct could take up volumes of this Journal, it appears that the situation which you have described focuses primarily on the question of whether a potentially expensive delay caused by an adversary rises to the level of frivolous conduct and should be sanctioned. Rule 130-1.1(c)(2) notes that frivolous conduct includes actions which are “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.” Rule 130-1.1(c)(2). One example of sanctionable delay involved a law firm which had hindered the resolution of a litigation by twice moving for additional time to submit an appeal brief while withholding for many months information regarding a related settlement in another state that mooted the appeal and of the firm’s intention to move to dismiss the appeal on that ground. See Naposki v. First National Bank of Atlanta, 18 A.D.3d 835 (2d Dep’t 2005).

Of course, an analysis as to what constitutes sanctionable conduct would be incomplete without mentioning Rule 11 of the Federal Rules of Civil Procedure. Although the federal courts are often hesitant to order sanctions when faced with the allegation that a party or its counsel engaged in conduct intended to “cause unnecessary delay, or needlessly increase the cost of litigation . . . .” (see Fed R. Civ. P. 11(b)(1)), Rule 11 is not by itself the only weapon to combat delay tactics by an attorney. 28 U.S.C.A. § 1927 states that

[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

In Wechsler v. Hunt Health Systems, Ltd., 216 F. Supp. 2d 347 (S.D.N.Y. 2002), the District Court granted sanctions pursuant to both Rule 11 and 28 U.S.C. § 1927 against a defense counsel who “on the eve of [a] . . . pre-trial conference to set a trial date . . . sought [a] procedurally unsound motion for summary judgment.” Id. at 357. The court in Wechsler noted that such conduct by defense counsel “sought to needlessly delay th[e] action.” Id. at 358.

Naposki and Wechsler show just two examples of how courts view delay tactics – they are not taken lightly. While we all know that delay and expense are often inevitable in litigation, smart lawyers recognize that they only create problems for themselves when they engage in delay tactics that include unnecessary motion practice (as seen in Wechsler) or discovery “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.” See Rule 130-1.1(c)(2).

We are sure that there are many members of our profession who would consider completely unprofessional Delayer’s failure to inform you about the status of the bond in a timely manner. Certainly, many would view Delayer’s conduct as violations of multiple provisions of the Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A). Part VI of the Standards provides that “[a] lawyer should not use any aspect of the litigation process . . . for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.” Furthermore, Part IX of the Standards states that “[l]awyers shall not mislead another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel’s statements or conduct.”

You mentioned that you had emailed Delayer the day after the stay was granted by the appellate court asking if his client would be posting the undertaking directed by the appellate court and that Delayer claimed he had not made that determination. As you noted above, Delayer thereafter made a representation before the trial court that his clients “were not seeking to obtain an undertaking.” It is entirely possible that Delayer misrepresented his position concerning the undertaking in his exchange with you (a potential violation of Rule 4.1 of the New York Rules of Professional Conduct (the RPC) which requires that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person”). Of greater concern is that Delayer may have misrepresented himself before the trial court concerning the status of the undertaking. Such misstatement could amount to a violation of Rule 3.3(a)(1) of the RPC which states that “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal . . . .”

If you had known that Delayer had actually received the undertaking earlier in time than he later told you, then you would not have had to operate under the assumption that the damages hearing was going forward as previously scheduled by the trial court and you would not have been forced to engage in an unnecessary discovery dispute in advance of the previously scheduled hearing date. By keeping you in the dark as to the status of the undertaking,
Delayer’s conduct likely caused you to incur unnecessary litigation expenses (a violation of Part VI of the Standards) and the position he took as to the undertaking may have been both misleading and contrary to what he represented to you in prior conversations (a violation of Part IX of the Standards).

Now, was Delayer’s conduct sanctionable? Perhaps wanting to go in the other direction, one court recently answered this question in the negative. Conason v. Megan Holding, LLC, N.Y.L.J., May 7, 2013, at 22 (Sup. Ct., N.Y. Co. Apr. 18, 2013), was an action for alleged rent overcharges. The plaintiffs won summary judgment on liability. The court directed an assessment of damages by way of a hearing and ordered an award of attorney fees for the plaintiffs. The defendants sought a stay of the damages hearing in the Appellate Division and further perfected their appeal. The Appellate Division stayed the damages hearing on the condition that the defendants post an undertaking. The plaintiffs thereafter moved for costs in the form of attorney fees, claiming that the defendants failed to inform them they were applying for a bond, thus causing the plaintiffs unnecessary work in litigating a subpoena, among other motion practice. The court addressed the issue of whether a party could be sanctioned for failing to save its adversary money, noting doing so would cause no prejudice to itself. In the end, the court denied the plaintiffs’ motion for costs and found that the conduct at issue was not sanctionable. The court stated that while Part 130 could expressly provide that failing to save an adversary money was sanctionable, it did not, and questioned where “to draw the line between mere discourtesy and sanctionable misconduct.” In addition, the court found that a code of conduct prohibiting causing an adversary to waste money would be difficult to interpret and enforce.

The court in Conason apparently felt constrained by the fact that (unlike in Rule 11) there is no express language in Part 130 permitting an award of costs and sanctions when attorneys engage in conduct that unnecessarily adds to the cost of a case. Nevertheless the court expressed the view that attorneys potentially have both a moral duty and a heightened ethical duty not to engage in conduct that could result in one’s adversary being forced to incur unnecessary litigation expenses. In the words of the court, “the day may come when the law takes a more moralistic, one might say ‘holistic,’ approach,” adding that “we all gain when nobody is allowed gratuitously to cause another’s loss.” Id. Furthermore, the court embraced the idea that “[i]n normal civil society, the failure to save someone else money is bad form” and that “[w]hat in normal civil society is common courtesy may some day in law become ethical obligation.” Id.

While counsel’s tactics in Conason may not have risen to the level of sanctionable conduct, we can think of situations that might warrant a different result. Consider, for example, the adversary who insists that a deposition must be scheduled in a distant location on a holiday week, claiming that is the only place and time the witness will be available for the next six months. The fact, as discovered when the deposition is taken, is that the attorney knew full well that the witness was available in the adversary’s home city for much of that time and there was no reason for the out-of-town deposition. Was the concealment of this fact frivolous conduct within the meaning of Part 130? We are sure that many of us would view it as such.

Although Delayer’s conduct (which bears a striking resemblance to the conduct at issue in Conason) may not, at least in the view of one judge, have been sanctionable, it should be a cautionary tale for attorneys in their dealings with opposing counsel. The lesson to be learned is that the case law may not always keep pace with the conduct. Lawyers take a great risk when they engage in practices which delay cases and cause unnecessary litigation expense.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschttrit LLP

I.A.M. Able, Esq.

Like what you’re reading? To regularly receive issues of the NYSBA Journal, join the New York State Bar Association (attorneys only).
To the Forum:
I have always been curious about what conduct outside of legal practice could potentially affect my ability to practice law. Recently, for whatever reason, I have done a number of things that some people have told me are unbecoming. For example, last year my home suffered damage after Super Storm Sandy. My insurance claim listed not only items of direct loss, but also some items that needed repair even before the storm, but which “may” have been exacerbated by it. In addition, I currently own real estate for investment. Several of these properties display numerous building code violations and fines. Lastly, a month or so ago, I submitted an application for a bank loan, and I may have said on the application that I attended Yale Law School, rather than my true alma mater, “Yala” Law School.

My question for the Forum: Do any of these constitute violations of the Rules of Professional Conduct that could lead to disciplinary charges?

Sincerely,
Risk E. Behavior

Dear Risk E. Behavior:
Although we suspect that there are some who may believe that a firm divide should exist between the personal and professional lives of an attorney, the fact is that we are officers of the Court with specific ethical and legal responsibilities. Attorneys should know that they are representatives of our profession and that conduct outside the practice of law can result in disciplinary action.

While this may seem basic, lawyers should be mindful of Rule 8.4 of the Rules of Professional Conduct which states that “a lawyer or law firm shall not engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer . . . ” See Rule 8.4(b). Furthermore, “a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .” See Rule 8.4(c).

The question whether an attorney’s conduct outside of a professional practice can be subject to disciplinary action has been subject to much debate. In New York, conduct or dishonesty in an attorney’s business or personal dealings may give rise to a level warranting professional discipline. See Hal R. Lieberman, Disciplining Private Conduct: Rationale and Recent Trends, N.Y.L.J., Feb 19, 2013, p. 3, which gives several examples where attorneys were disciplined for certain acts of misconduct outside of their respective legal practices, including:

- falsely accusing a state trooper of having uttered anti-Semitic slurs against him, and reaffirming those accusations on more than one occasion, in an attempt to get out of a speeding ticket;
- willfully refusing, in violation of court orders, to timely pay child support;
- pursuing vexation litigation as a “party-litigant, not as an attorney”;
- telling the coexecutor under a will executed by the lawyer’s uncle that the lawyer needed a power of attorney (“POA”) from the uncle to reinstate dormant bank accounts but instead used the POA to restructure, and to attempt to restructure, his uncle’s accounts for the lawyer’s personal benefit; and
- fraudulently occupying a rent-regulated apartment for two years after the death of the tenant of record.

Id. (internal citations omitted).

Suspensions were deemed an appropriate sanction for an attorney who pled guilty to possessing and engaging in the distribution of narcotics (see In re Silberman, 83 A.D.3d 95 (1st Dep’t 2009)) as well as for another attorney who pled guilty to operating a motor vehicle under the influence of alcohol and leaving the scene of an accident (see In re Clarey, 55 A.D.3d 209 (2d Dep’t 2008), cited in Lieberman, supra, at p. 3). A more drastic penalty – immediate disbarment – was imposed where an attorney was convicted of forging a medical prescription form (see In re Felsen, 40 A.D.3d 1257 (3d Dep’t 2007)); in another case an attorney’s conviction for felony assault resulted in automatic disbarment (see In re Uguweshe, 60 A.D.3d 125 (1st Dep’t 2009)). Lieberman, supra.

This year, an attorney was disciplined for impersonating someone on a dating website that resulted in criminal charges (see In re O’Hare, 968 N.Y.S.2d 394 (1st Dep’t July 17, 2013)), and another for disregarding an order of protection by sending text messages to an estranged spouse (see In re Knudsen, 109 A.D.3d 94 (1st Dep’t 2013)). Outside of this state, one disciplinary authority cited an attorney for violating the equivalent of Rule 8.4(c) by misrepresenting the condition of his home in connection with alleged water damage which occurred in his basement. See Edward J. Cleary, Accountability or Overkill: Disciplining Private Behavior, available...
The situations presented in your inquiry, though perhaps not as egregious as the conduct noted above, could potentially subject you to disciplinary action. Here’s why.

“[A]ny lawyer who commits a ‘serious crime,’ as defined in the statute, is subject to professional discipline whether or not the conviction has anything to do with the attorney’s law practice.” See Hal R. Lieberman and Richard Supple, Private Conduct and Professional Discipline, N.Y.L.J., July 23, 2002, p. 20; see also Judiciary Law § 90(4)(d).

Judiciary Law § 90(4)(d) defines the term “serious crime” as any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

Inflated insurance claims are likely a crime under New York Penal Law §§ 176.00 – 176.35. Whether it is a misdemeanor or a felony will depend on the amount of money involved but should you be convicted of a felony, you would be subject to automatic disbarment under Judiciary Law § 90(4)(a). At a minimum, there is also the possibility of automatic suspension from practice under Judiciary Law § 90(4)(f), which provides that [a]ny attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Lawyers should not submit inflated insurance claims. It subjects you to possible disciplinary action, almost certainly jeopardizing your professional career in the short term and possibly permanently.

Turning to your real estate with numerous building code violations and fines, although your obvious neglect of these properties may not be something that would get you prosecuted for a serious crime, why are you taking the risk that someone might file a complaint against you? The kind of conduct you describe could be viewed as conduct reflecting on your “honesty, trustworthiness or fitness as a lawyer.” Therefore, if you do engage in a business which would subject you to scrutiny by administrative authorities, you would be well advised to comply with all necessary regulations, especially building codes.

The false statement in your loan application that you went to Yale Law School instead of “Yala” Law School is something that you most certainly realize was not the right thing to do. Obviously, you know that you had an obligation to be completely accurate when you applied for a loan and that any material misstatement in the application could be a federal criminal offense (see 18 U.S.C § 1014 (2013)), which would be likely to result in disciplinary action. Furthermore, as discussed above, at a minimum, an act of misrepresentation, fraud or deceit qualifies as a serious crime under Judiciary Law § 90(4)(f) that would subject you to automatic suspension from practice and could even result in automatic disbarment under Judiciary Law § 90(4)(a). As we have stated above, you would be wise not to engage in any action of misrepresentation, fraud or deceit, such as misstating where you went to law school, since it would place your professional career at risk.

Although this should go without saying, an attorney should never make any inaccurate disclosure of information concerning himself or herself because even an attorney’s misrepresentation of his or her own professional background can result in discipline. Indeed, one jurisdiction has disciplined an attorney for misrepresenting which law school he attended on the resume he sent to a prospective employer. In re Hadzi-Antich, 497 A.2d 1062 (D.C. 1985). In another jurisdiction, an attorney was suspended from practice for three years for falsifying grades on his law school transcript. In re Loren Elliott Friedman, 2009 Ill. Atty. Reg. Disc. LEXIS 75, aff’d, 2010 Ill. Atty. Reg. Disc. LEXIS 126 (Ill. 2010).

Attorneys “should know better” even when acting outside the office. We are not setting an unreachable bar, but only wish to remind attorneys that when dealing with others, even outside of the attorney-client relationship, it is necessary for attorneys to always act with common sense and candor in their dealings outside of their professional world.

Sincerely,

The Forum by

Vincent J. Syracuse, Esq. and Matthew R. Maron, Esq., Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,

Conscious Counsel
ATTORNEY PROFESSIONALISM FORUM

To the Forum:
I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,
Conscious Counsel

Dear Conscious Counsel:
There are two types of attorneys one will find in a deposition; the ones who know the rules and the ones who do not. Unfortunately, it is the ones who do not know the rules that often become fodder for judges intent on putting the bar on notice that obstructionist and uncivil conduct will not be tolerated in the deposition forum.

Part 221 of the Uniform Rules for the New York State Trial Courts sets forth the Uniform Rules for the Conduct of Depositions (Part 221). The Advisory Committee on Civil Practice’s purpose behind the enactment of Part 221 was to “ensure that depositions [were] conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum.” See 2006 Report of the Advisory Comm. on Civil Practice, p. 50, available at http://www.nycourts.gov/ip/judiciarslegislative/CivilPractice_06.pdf.

Part 221 states as follows:
§ 221.1 Objections at Depositions
(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
(b) Speaking objections restricted.
Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity.

§ 221.2 Refusal to answer when objection is made
A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the deponent
An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Many experienced counsel often bring a copy of Part 221 to depositions so that it is readily available should the need arise. Although the tactic of having the rule with you at a deposition is not a novel idea (see Patrick M. Connors and Thomas F. Gleason, New York Practice; Uniform Rules for Conduct of Depositions, N.Y.L.J., Sept. 18, 2006, at 3), Part 221 is just seven years old. Therefore, it is important to continually spread the word that attorneys must abide by this important regulation, which was intended to promote good behavior and curtail conduct that left unchecked interferes with depositions.

New York judges have never been shy to call out attorneys for behaving badly in depositions. One court even went so far as to give a brief yet pointed analysis of how poor attorney behavior reflects badly on the entire legal profession:

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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In this court’s view, this sort of gratuitous, sardonic and wholly inappropriate comment at a deposition is precisely the type of conduct that served to enhance the deterioration of professionalism and civility in civil litigation that has unfortunately become a hallmark of contemporary trial practice. See Adams v. Rizzo, 13 Misc. 3d 1235(A), 831 N.Y.S.2d 351 (Sup. Ct., Onodaga Co. 2006), n.26.

Some notable decisions from the 1990s still to this day serve as cautionary tales for attorneys conducting and defending depositions. In Principe v. Assay Partners, 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992), a male attorney defending a deposition was sanctioned for calling the opposing female attorney conducting a deposition such choice words as “little lady,” “young girl,” and “little girl.” Id. at 704. In In re Schiff, 190 A.D.2d 293 (1st Dep’t 1993), the First Department held that public censure of an attorney was appropriate where the attorney engaged in conduct directed at a female opposing counsel during a deposition that was “unduly intimidating and abusive toward the defendant’s counsel, [where he directed] vulgar, obscene and sexist epithets toward her anatomy and gender.” Id. at 294. Another example is Corsini v. U-Haul Int’l, 212 A.D.2d 288 (1st Dep’t 1995), where the First Department dismissed a case because of bad behavior displayed by the plaintiff (who also happened to be an attorney), examples of which included calling opposing counsel during a deposition “scummy,” “slimy” and a “scared little man” practicing “in the sewer.” Id. at 289. More recently, the court in Cioffi v. Habbersstad, 22 Misc. 3d 839 (Sup. Ct., Nassau Co. 2008), relying on Part 221, chose to sanction counsel on both sides of the action to varying degrees as a result of their “unprofessional, condescending, rude, insulting and obstructive” conduct in depositions. Id. at 845.

Outside of New York, two cases highlighting poor behavior by attorneys during depositions stand out. In Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 51–56 (Del. 1994), a nationally known attorney was found to have conducted himself during a deposition in an “extraordinarily rude, uncivil, and vulgar” manner where such conduct “demonstrate[d] such an astonishing lack of professionalism and civility that it [was] worthy of special note . . . as a lesson for the future – a lesson of conduct not to be tolerated or repeated.” While some of the words used by the offending attorney are not suitable for print in this Journal we can offer one: it probably would not be a good idea to repeat his suggestion that opposing counsel “could gag a maggot off a meat wagon.” In another case, an attorney became well-known in the blogosphere when he was found to have engaged in “deplorable behavior” by scheduling depositions at the local Dunkin’ Donuts, conducting those depositions dressed in a t-shirt and shorts, and playing video games and making inappropriate drawings of opposing counsel during deposition testimony. See Bedoya v. Aventura Limousine & Transportation Service, Inc., 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012).

The New York Rules of Professional Conduct (the RPC) do not expressly state how lawyers should behave at a deposition. However, certain provisions of both the RPC and the American Bar Association’s Model Rules of Professional Conduct (the Model Rules) offer guidance as to the ethical considerations that come into play when conducting or defending depositions. For example, it has been suggested that a lawyer defending a deposition who “interpose[s] the statement ‘if you know’ before the [witness] answers a question, thereby signaling that the witness should deny any knowledge or recollection” may violate Rule 3.5 of the Model Rules, “which prohibits conduct that disrupts a proceeding.” See Arthur D. Berger, When the Other Lawyer Is a Bully: Choosing the Professional High Road Goes Beyond Manners. It’s Also the Ethical Thing to Do, N.Y.L.J., Dec. 12, 2005 (LEXIS, NY Library, NYLAW File).

Rule 8.4(g) of the RPC, which prohibits unlawful discrimination “in the practice of law, including . . . in determining conditions of employment,” is also relevant here. As noted by Professor Roy Simon, “some courts have construed the rule also to prohibit racist and sexist comments in the practice of law during trials or depositions.” See Simon’s New York Rules of Professional Conduct Annotated at 1607 (2013 ed.). Professor Simon noted that in Laddcap Value Partners, LP v. Lowenstein Sandler P.C., 18 Misc. 3d 1130(A) (Sup. Ct., N.Y. Co. Dec. 5, 2007), plaintiff’s counsel’s conduct during a deposition, which included, amongst other things, referring to a female opposing counsel as “hon” or “girl” and questioning her marital status constituted “contumacious, abusive, and strident conduct” in violation of former Disciplinary Rule 1-102(A)(6) (the precursor to the current Rule 8.4(g) of the RPC), resulted in the court ordering a referee to supervise further depositions in the case. Id. at *3. The Laddcap decision also relied on Part 221 to support its finding that court-supervised discovery was necessary because of the behavior of the offending attorney in the case. Id. at *10–12.

We also suggest that lawyers take a careful look at the Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A) which contain several provisions about proper deposition behavior. Part VII of the Standards states that “[i]n depositions . . . lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.” Part VII of the Standards offers a series of guidelines which are meant to encourage lawyers to act appropriately in depositions. These include:

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

CONTINUED ON PAGE 56
C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.
D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

See Standards Part VII.

It is our view that taking the “high road” when confronted with an opposing counsel who acts inappropriately (and not engaging in behavior similar to that of the attorneys mentioned here) is always the best course of action. We believe that if more attorneys are knowledgeable of the rules and procedures governing deposition conduct, then disputes will be resolved more efficiently. Unfortunately, bad behavior by attorneys is a constant problem not only for the courts, but for the bar as well. In the end, such conduct only serves to hurt the profession as a whole.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern
Syracuse & Hirschtritt LLP

Are you feeling overwhelmed?
The New York State Bar Association’s Lawyer Assistance Program can help.

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NEW YORK STATE BAR ASSOCIATION LAWYER ASSISTANCE PROGRAM

Kirk, Spock and McCoy were playing with on Star Trek. It’s all unnecessary.”

Last week, Uncle Lou told me that Ted Techno, an attorney from a firm with whom he was working on a case, was repeatedly using emails and text messages to set up conferences to discuss strategy for an upcoming trial set to occur in three weeks. Uncle Lou boasted that he informed Ted that he doesn’t read or write emails and his “policy” was to have his secretary look at his emails “no more than twice a week” and for her alone to “occasionally” reply to emails intended for Lou. Uncle Lou also told me that he had decided to take a vacation in Bali and didn’t plan on returning stateside until the evening before the trial. He also said he told Ted Techno that he will be “completely unreachable” while he is away and “not even his secretary would be able to get a hold of him for any reason.”

I have been taught that good communication and responsiveness are essential practice skills for all lawyers and that one cannot practice law without using email. I very fond of my Uncle Lou and think that I should speak with him. I know that I am a novice in our profession especially when compared to my uncle, which is why I would appreciate some guidance from The Forum about whether he is behaving in a professional and ethical manner.

Sincerely,
Concerned Nephew
To the Forum:
Jonathan Entrepreneur (Jonathan) had been a long-time client of my firm. Back in 2011, he decided that he wanted to set up a hedge fund with his friend, Paul Partner (“Paul”). At Jonathan’s request, my firm did the work that resulted in the creation of Hedge Fund GP, in which Jonathan and Paul became equal partners. My firm also prepared the papers for Hedge Fund GP to become the general partner of Hedge Fund Partners, an onshore fund my firm organized. Because of my firm’s long-standing relationship with Jonathan, we did not issue an engagement letter for this work. In addition, Jonathan asked that our firm also represent Paul in the formation of the fund entities, and we were happy to grant his request.

My firm generated a bill each month for legal services rendered to Hedge Fund GP, to Hedge Fund Partners, to Jonathan, and to Paul and addressed the bills only to Hedge Fund GP.

Hedge Fund GP was always behind on paying its bills. However, earlier this year, Hedge Fund GP ran into trouble and completely stopped paying our firm’s bills.

We want to commence an action against Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul to collect the fees that are owed. I have heard different views from several people on whether we were required to issue engagement letters to Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul if they were all to be responsible for our fees, but I have been unable to get a definitive answer. What are the rules on engagement letters and is the absence of an engagement letter fatal to my firm’s claim for unpaid legal fees?

Sincerely,
I.N. Confusion

Dear I.N. Confusion:
Attorneys should be familiar with the rules requiring written engagement letters. 22 N.Y.C.R.R. Part 1215 (Part 1215) contains several rules that no lawyer can or should overlook:

§ 1215.1. Requirements
(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter
(1) if otherwise impracticable or
(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.
(b) The letter of engagement shall address the following matters:
(1) Explanation of the scope of the legal services to be provided;
(2) Explanation of attorney’s fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§ 1215.2. Exceptions
This section shall not apply to:
(a) representation of a client where the fee to be charged is expected to be less than $3,000,
(b) representation where the attorney’s services are of the same general kind as previously rendered to and paid for by the client, or
(c) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R.), or
(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As originally enacted, the requirement that attorneys issue written engagement letters was a court rule and not a matter of professional responsibility or legal ethics. That changed in April 2009 when New York adopted the Rules of Professional Conduct (RPC). Rule 1.5(b), which essentially incorporated Part 1215, makes written engagement letters an ethical obligation:
A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Prior to 2009, the penalty for not having a written engagement letter was arguably, at best, the loss of a breach of contract claim in an action to collect fees. See Brown Rudnick Berlack Israels LLP v. Zelmanovitch, 11 Misc. 3d 1090(A), 2006 N.Y. Slip Op. 50800(U) (Sup. Ct., Kings Co. Mar. 14, 2006). Rule 1.5(b) takes the engagement letter rule beyond the realm of fee collection matters and can potentially expose an attorney to disciplinary action. Although this is uncharted territory, there is a risk that cases interpreting Part 1215 in the fee collection context (which we discuss below) will be applied in the disciplinary forum.

Many lawyers believe that there is a safe harbor which makes engagement letters unnecessary when they get new work from existing clients. So the question is, what would be considered new work? And, which existing clients would fall within the scope of the exception? It is true that Rule 1.5(b) says that engagement letters are not necessary for “a regularly represented client” where there is no change in the fee arrangement and the engagement is for “services that are of the same general kind as previously rendered.” Id. The problem is that there is no definition of “regularly represented client,” and there may be a difference in the two rules because Part 1215 does not use the words “regularly represented client” or even the words “existing client.” Comment [2] to Rule 1.5 reminds all of us that it is best to always issue an engagement letter and avoid the risks associated with not having one.

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

Another issue that is worth avoiding is whether a new engagement involves “services that are of the same general kind” as the services that the firm has been providing. In the words of one commentator, “if it’s a close call as to whether the new services are the ‘same general kind’ as prior matters, it will take less time to send a written engagement letter than to analyze Rule 1.5(b).” See Simon’s New York Rules of Professional Conduct Annotated at 171 (2014 ed.).

You don’t have an engagement letter and want to recover your fees, so what can you do about your non-paying client? Since the enactment of Part 1215, although the absence of a written engagement letter may be fatal to a breach of contract claim, several courts have ruled that a law firm’s failure to comply with the written engagement letter rule “does not preclude it from suing to recover legal fees for the services it provided.” See Miller v. Nadler, 60 A.D.3d 499, 500 (1st Dep’t 2009) (citing Seth Rubenstein, P.C. v. Ganea, 41 A.D.3d 54, 63-64 (2d Dep’t 2007)). One court has also held that the caselaw does not distinguish between the recovery of fees under a theory of quantum meruit or an account stated. Instead, this Court has held that [22 N.Y.C.R.R. § 1215.1] contains no provision stating that failure to comply with its requirements bars a fee collection action. Indeed, the regulation is silent as to what penalty, if any, should be assessed against an attorney who fails to abide by the rule.


The fact that you did not issue an engagement letter to Jonathan and thereafter sent invoices exclusively to Hedge Fund GP does not in our view prevent you from pursuing a legal fee claim against either Jonathan or Paul, or their related entities. But, as suggested in one case, this may not be an easy road and you may face certain obstacles in your attempt to collect fees. See Davidoff Malito & Hutcher, LLP v. Scheiner, 38 Misc. 3d 1201(A), 966 N.Y.S.2d 345 (Sup. Ct., Queens Co. Dec. 11, 2012) (law firm’s motion for summary judgment on its quantum meruit and account stated claims denied where issues of fact existed arising from the law firm’s failure to enter into a written fee agreement with its client).

The better practice would have been to issue an engagement letter to all individuals and entities involved in connection with the formation of Hedge Fund GP and Hedge Fund Partners. Furthermore, because your firm appeared to represent both Jonathan and Paul in connection with this matter, one way your firm could have drafted the engagement letter was to set forth clear language about
of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or that the fact-finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement. Id. at 64.

We hope that this gives you an understanding of the rules, their potential impact on fee collection cases, and the possible issues that may arise when law firms fail to issue engagement letters. It should come as no surprise that we believe that lawyers should err on the side of caution when it comes to engagement letters. Borrowing from Professor Simon, if you need to spend time thinking about whether an engagement letter is required, it’s probably a good idea to simply send one.

Sincerely,
The Forum by Vincent J. Syracuse, Esq. and Matthew R. Maron, Esq., Tannenbaum Helpern Syracuse & Hirschtritt LLP

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My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company’s ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,
I. Need Help

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company’s ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,
I. Need Help
To the Forum:
I represent one of the defendants in an action brought against a number of parties in an unfair competition case involving various employees who left their employer to work for a competitor. The plaintiff has sued its former employees and their current employer (my client). It is a high-stakes litigation involving huge sums of money, and it has gotten to the boiling point. Plaintiff’s counsel and the attorney for one of the employees have been exchanging what I consider to be vulgar and horrifying emails. The level of insults hurled between these two individuals and the language of their exchanges would make schoolyard talk look like dialogue from the Victorian age. One insult by plaintiff’s counsel included a reference to the death of opposing counsel’s child; another email made a remark about the disabled child of one of the lawyers. I am astounded that two members of the bar would engage in such disgusting behavior or think that their conduct is effective advocacy. Thankfully, none of the attacks have been directed to me. I am trying to represent my client to the best of my ability and have kept out of the fray.

My question for the Forum: How am I supposed to handle this kind of bad behavior?
Sincerely,
Donald Disgusted

Dear Donald Disgusted:
Your question raises issues strikingly similar to those recently confronted by a Florida court. Craig v. Volkswagen of America, Inc., Case No. 07-7823 C17 (Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida) proceeded just as many litigations do; after the case was filed and issue was joined, there were motions and court conferences followed by the beginning of discovery. For reasons that are at best unclear, it was discovered that some of the lawyers to turn to the dark side.

It began with a protracted email exchange among counsel concerning the scheduling of discovery motions. Plaintiff’s counsel threw the first stone by insulting defense counsel, his firm and his hearing preparation tactics. In response, defense counsel referred to his adversary as “Junior” and asked him to stop sending “absurd emails,” which in turn was answered with an email that called defense counsel an “Old Hack” admonishing him to “[l]earn to litigate professionally.” Later, as the parties were attempting to schedule depositions, plaintiff’s counsel (who had apparently failed to propose deposition dates) wrote that defense counsel could not “deal with the pressure of litigating . . .” and that “if [his adversary could not] take the heat then [he should] get out of the kitchen . . . .” The response was quick. Defense counsel’s email again called his adversary “Junior” and accused him of being both on “drugs” and a “little punk” whom he then referred to as a “bottom feeding/ scum sucking/ loser . . . .” who had a “NOTHING life . . . .” and was told to go back to his “single wide trailer . . . .” This obviously did not sit well with plaintiff’s counsel whose retort to defense counsel was that “God [had] blessed him with a great life” and that he allowed himself ample time for various hobbies, such as traveling, riding “dirt bikes and atvs” and his “motorcycle.” This could have easily been ignored but, no, defense counsel had to have the last word, so this is what he put in an email:

[J]The fact that you are married means that there is truly someone for everyone even a short/ hairless jerk!!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization!!!

If you think it could not get any worse, guess again. Approximately three months later, plaintiff’s counsel wrote an email that characterized opposing counsel as a “lying, dilatory mentally handicapped person” adding in another email that opposing counsel (whom he called “Corky”) had a type of “retardism” [sic] resulting from counsel’s “closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality . . . .” These statements apparently hit a nerve with defense counsel who then disclosed to his adversary that he had a son with a birth defect but then went on to make various ad hominem attacks against plaintiff’s counsel’s family members and questioned the legitimacy of his adversary’s children. If you still think it could not get any worse, it did.

In his response to that email, plaintiff’s counsel said the following:
Three things Corky:
(1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot [sic] sometimes retards can produce normal kids, sometimes they produce F***s up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitively know the kid is yours.
(2) You are confusing realities [sic] again the retard love story you describe taking place in a pinto

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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And finally, the last exchange between these two “professionals” concluded with plaintiff’s counsel referring to his adversary once again as an “a** clown” who should be tended to his “retarded son and his 600th surgery . . . .” He concludes by stating that he heard “the little retards [sic] monosyllabic grunts now; Yep I can make [sic] just barely make it out; he is calling for his a** clown. How sweet.”

It should be no surprise that both attorneys were brought up on disciplinary charges, including violations of Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice) and 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic) of the Rules Regulating the Florida Bar. See Complaint, The Florida Bar v. Mitchell, TFB No. 2009-10,487(13C), Supreme Court of Florida, and Complaint, The Florida Bar v. Mooney, TFB No. 2009-10,745(13C), Supreme Court of Florida.

The result was that plaintiff’s counsel was suspended from practice for 10 days, ordered to attend an anger management workshop and pay $2,000 in costs. See The Florida Bar v. Mitchell, 46 So. 3d 1003 (Fla. 2010). In addition, plaintiff’s counsel was subject to reciprocal discipline in both the District of Columbia and Pennsylvania as a result of the Florida disciplinary decision. See In re Mitchell, 21 A.3d 1004 (D.C. App. 2011) and In re Mitchell, 2011 Pa. LEXIS 2308 (Pa. 2011). Defense counsel was given a public reprimand as a result of his conduct and had to pay $2,500 in costs. See The Florida Bar v. Mooney, 49 So. 3d 748 (Fla. 2010).

Craig makes it easy to answer your question: always take the “high road” and never go “shot for shot” when an adversary tries to drag you into the fray. As officers of the court, we should be civil to each other and must always act in a manner that is consistent with our ethical obligations. To that end, you (and more important, the attorneys on your case) should take note of the Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A) in connection with your duties toward other lawyers. Section I of the Standards provides that “[l]awyers should be courteous and civil in all professional dealings with other persons” and further notes, in part,

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

See Standards (l).

The Standards have been in place since 1997, and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. It should not be necessary to remind the members of our profession that the rules that govern our conduct apply to emails; lawyers do not get a pass when bad behavior manifests itself in email. Your question and Craig tell us that while most lawyers get it, there will always be a few who give in to temptation, especially when using email to communicate. The lawyers in your case fall into this category and appear to have acted in contravention of the recommended behavior under the Standards. Moreover, based on what we have described with regard to the attorneys in Craig, they could be subject to disciplinary action under the New York Rules of
Professional Conduct (the RPC). As stated in other Forums, while the RPC does not directly address civility, several rules deal with “overly aggressive behavior” by attorneys, including Rule 3.1 (Non-meritorious Claims and Contentions), 3.2 (Delay of Litigation), 3.3 (Conduct Before a Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 8.4(d) (“engage in conduct that is prejudicial to the administration of justice”). See Anthony E. Davis, Replacing Zealousness With Civility, N.Y.L.J., Sept. 4, 2012, at 3, col. 1. (See Vincent J. Syracuse and Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., Nov/Dec. 2012, Vol. 84, No. 9.) The conduct by both counsel in your action (like the attorneys in Craig) could qualify as “overly aggressive behavior.”

In addition, the email exchange that you have called to our attention could be viewed as “conduct that is prejudicial to the administration of justice” (see Rule. 8.4(d)) and runs contrary to the concept of effective advocacy. Comment [3] states that the Rule “is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice . . . .” and that conduct “must be seriously inconsistent with a lawyer’s responsibility as an officer of the court.” See id. (emphasis added). There can be severe consequences for behavior that runs afoul of these rules. Here in New York, attorneys have been suspended from practice for making offensive remarks to adversaries, clients and even court personnel. See, e.g., In re Chiofalo, 78 A.D.3d 9 (1st Dep't 2010) (attorney suspended for two years for using obscene, insulting, sexist, anti-Semitic language, ethnic slurs, and threats in correspondence to his former wife's attorneys and others involved in his matrimonial action. The attorney also filed a meritless federal lawsuit against 29 defendants, including his former wife, her attorneys, judges, and others. The attorney continued to send derogatory and sexist email correspondence to his former wife’s attorneys during the pendency of his disciplinary proceeding, indicating a pattern of offensive behavior and a failure to appreciate the seriousness of his actions); In re Kahn, 16 A.D.3d 7 (1st Dep't 2005) (attorney suspended for engaging in a pattern of offensive remarks, including abusive, vulgar and demeaning comments to female adversaries, which included comments about a juvenile client); In re Brecker, 309 A.D.2d 77 (2d Dep’t 2003) (attorney suspended for two years based on his use of “crude, vulgar and abusive language” in multiple telephone calls and messages to a client and a court examiner over the course of a few hours. The attorney had also been convicted of criminal contempt and had a prior admonition.). Moreover, there have been instances where attorneys’ uncivil conduct has resulted in decisions that had detrimental consequences for their clients in civil litigation. In Corsini v. U-Haul Int'l, 212 A.D.2d 288 (1st Dep’t 2005), the court found that the attorney’s conduct at his own deposition was so lacking in professionalism and civility that the court ordered dismissal of his pro se action as “the only appropriate remedy.” “Discovery abuse, here in the form of extreme incivility by an attorney, is not to be tolerated. . . . CPLR 3126 provides various sanctions for such misconduct, the most drastic of which is dismissal of the offending party’s pleading.” See also Sholes v. Meagher, 98 N.Y.2d 754 (2002) (the Court denied leave to appeal on procedural grounds for that portion of a case where an attorney was sanctioned and a mistrial granted due to the attorney’s lack of decorum by looks of disbelief, sneering, shaking of her head and various expressions designed to indicate to the Court her displeasure); Heller v. Provenzano, 257 A.D.2d 378 (1st Dep’t 1999) (sanctions awarded against the plaintiff, an attorney, and his counsel because of improper conduct both before and during trial, which included Heller’s entering the jury selection room and speaking with jurors without all attorneys present, ignoring the trial judge’s warnings not to wander around the courtroom during trial and not to mention another fatal accident which occurred in the same elevator, and referring to the fact that his wife was Hispanic and that he spoke Spanish fluently in an effort to influence Hispanic jury members. Plaintiff’s attorney was also sanctioned because he asked disparaging questions of an expert without a factual basis); and Dwyer v. Nicholson et al., 193 A.D.2d 70 (2d Dep’t 1993), appeal dismissed, 220 A.D.2d 555 (2d Dep’t 1995), appeal denied, 87 N.Y.2d 808, reargument denied, 88 N.Y.2d 963 (1996). (A new trial was ordered based, in part, on counsel’s “sarcastic, rude, vulgar, pompous, and intemperate utterances on hundreds of pages of the transcript,” which were found to be “grossly disrespectful to the court and a violation of accepted and proper courtroom decorum.”)

As we have stated both here and previously in this Forum, it is always smart to take the high road when opposing counsel acts inappropriately. Never answer bad behavior with bad (and perhaps worse) behavior.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsfirm.com) and
Matthew R. Maron, Esq.
(maron@thsfirm.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY
PROFESSIONALISM FORUM

I just left a position at a large law firm to start work as an in-house attorney for a well-known multinational conglomerate. I am curious about the ground rules that apply to lawyers who make the switch from law firm practice to in-house counsel. Are there any particular ethical rules that I should be concerned with as I am transitioning to this new position? Have there been any recent developments applicable to in-house lawyers that I should know about?

Sincerely,
Moving Inside
To the Forum:

My colleagues and I always try to be civil in our dealings with adversaries and judges. However, I have found that bullying typical of what I imagine occurs with kids is occurring more and more in the legal profession. I have seen this kind of behavior not only in depositions but also in court and at settlement meetings (where clients are often present). One of my colleagues (Bullied Ben) has been on the receiving end of repeated harassment by an adversary in contentious litigation in court, in settlement meetings and in all of the depositions taken in the case. I am seeing this adversary’s persistent bullying beginning to take a psychological toll on this person. It is affecting his performance in the office, and I’ve been told his home life is a mess.

What should I tell him to do in order to help him address this situation?

Sincerely,
Friend of Bullied Ben

Dear Friend of Bullied Ben:

Although many believe that bullying is something that happens only in the schoolyard, the sad reality is that many of us have at times experienced bullying in our practices. We have indirectly touched upon this topic in a couple of Forums where we addressed the issue of uncivil conduct in communications between adversaries (see Vincent J. Syracuse and Matthew R. Maron, Attorney Professionalism Forum, New York State Bar Association Journal, Jul./Aug. 2014, Vol. 86, No. 6) and in depositions (see Syracuse and Maron, Attorney Professionalism Forum, Nov./Dec. 2013, Vol. 85, No. 9). Your question causes us to drill down on the subject once more.

We suspect that bullying by lawyers is not something new and has probably occurred ever since barristers in Britain first donned wigs. Bullying can have severe consequences, affecting the mental health of all involved. It is an unfortunate statistic that lawyers are 3.6 times more likely to suffer from depression than non-lawyers. See Why Are Lawyers Killing Themselves?, CNN.COM, http://www.cnn.com/2014/01/19/us/lawyer-suicides/ (last visited Feb. 23, 2015). Various bar associations have responded to this serious problem by adding a “mental health” component to mandatory legal continuing education. A recent American Bar Association program brought together a panel consisting of practicing attorneys, a judge and a psychologist to discuss the growing concern over bullying in the legal profession. One of the panelists noted that bullies act to devalue and dehumanize their target for their own psychological needs, based upon their own feelings of envy, hatred and inadequacy. Peter Graham, PhD, Acumen Assessment LLC, Bullying by and of Lawyers: Why It Happens and What to Do About It (ABA Webinar, Sept. 16, 2014).

Dr. William Gentry, a Senior Research Scientist at the Center for Creative Leadership, has this to say about bullying:

Bullying may be seen as an effective way to get things done if used infrequently, strategically, and for short-term improvements. But, in the long run, bullying will not pay off. Bullying is a detriment to job satisfaction, increases anxiety at work, and causes stress, which can ultimately lead to health problems. And, bullying will eventually catch up with the bully himself or herself. In fact, the research shows that one of the top reasons managers derail (get demoted, fired, or [do] not fulfill early career potential) is because they have problems with interpersonal relationships – they are cold, arrogant, aloof, dictatorial, and order people around – they are bullies.

So how does one respond to bullying? Certainly, responding in kind is not the answer. What you should do will, of course, depend on the given situation. But, our basic suggestions are that you do not take the bait by engaging in similar conduct, that you stay as calm as possible, that you ignore their tactics, and you resist the opportunity to yell back. We also suggest that you draw lines you believe should not be crossed, outline the consequences and be prepared to act on the consequences. Maria G. Enriquez, BatesCarey LLP, Bullying by and of Lawyers: Why It Happens and What to Do About It (ABA Webinar, Sept. 16, 2014). Enriquez further suggested that one subjected to bullying (particularly at a deposition) should always keep a record, create a paper trail, work to control the environment, file motions, consider requesting sanctions, etc.

If bullying occurs in the settlement meeting context, where all parties are often present, Enriquez suggests that the lawyer pull opposing counsel aside, explain to counsel that the client is very uncomfortable with his or her demeanor and let counsel know that, although the client really wants to settle, you and your client will terminate the meeting if counsel doesn’t stop. And, if he or she doesn’t stop,
then recommend to your client that you leave. *Id.*

It is also important to remind Ben that his client’s interests are the real issue, rather than whatever the bully may be saying. Ben would be advised to keep in mind that bullying is often a reflection of the actor’s own internal insecurity, and to recognize that while a bully’s attack may be personal, Ben would be stronger if he disregarded it and remained in his professional role as representative of a client. See *Editorial: Confronting Bullying Within the Legal Profession*, Ct. L. Trib., http://www.ctlawtribune.com/id=1202668248833/Editorial-Confronting-Bullying-Within-the-Legal-Profession?slreturn=20150121100044 (last visited Feb. 23, 2015).

If you see that Ben’s well-being has not improved even after giving him this advice, then you might suggest that he seek professional help through one of the lawyer assistance programs available at both the state and local bar levels in New York. If Ben chooses to go this route, he should be aware that information he gives to a member or agent of a lawyer assistance committee is confidential by statute. See *Judiciary Law* § 499.

Turning to the applicable ethical rules and guidelines, an attorney who subjects another attorney to bullying almost certainly violates the Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A), but may not necessarily violate the Rules of Professional Conduct (the RPC); and the conduct may not serve as a basis for a disciplinary complaint. That being said, Ben’s adversary clearly has acted in contravention of the recommended behavior under the Standards.

The Standards were first proposed in a report issued by the NYSBA’s Commercial and Federal Litigation Section, and were then adopted by the House of Delegates. The Standards act as “a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.” Although the Standards serve as a model for appropriate behavior, they were “not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [the predecessor to the RPC], or any other applicable rule or requirement governing conduct.” See Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, supra.

Part I of the Standards provides that “[l]awyers should be courteous and civil in all professional dealings with other persons.” Part I also offers a series of guidelines that are meant to encourage lawyers to maintain a level of courteousness and civility when dealing with anyone they might come across in a professional setting. These include:

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

The Standards have been in place since 1997 and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. More important, identifying uncivil conduct as bullying can help in recognizing and understanding it when it occurs. See *Editorial: Confronting Bullying Within the Legal Profession*, supra.

As stated in other Forums, while the RPC does not directly address civility, several rules deal with “overly aggressive behavior” or “harassing behavior” by attorneys, including Rule 3.1 (“Non-meritorious Claims and Contentions”), 3.2 (“Delay of Litigation”), 3.3 (“Conduct Before a Tribunal”), 3.4 (“Fairness to Opposing Party and Counsel”), and 8.4(d) (“engage in conduct that is prejudicial to the administration of justice”). See Anthony E. Davis, *Replacing Zealouness With Civility*, N.Y.L.J., Sept. 4, 2012, p. 3, col. 1.; Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, supra; see also Syracuse and Maron, *Attorney Professionalism Forum*, Jul./Aug. 2014, supra.

It could be argued that the bullying conduct exhibited by Ben’s adversary may be considered “conduct that is prejudicial to the administration of justice.” See Rule 8.4(d). However, Comment [3] states that the Rule “is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice. . . .” (emphasis added). Although Ben’s adversary’s conduct is a prime example of uncivil conduct, it is not (as we have pointed out in the past) behavior that parallels the more egregious conduct that could be deemed a violation of Rule 8.4(d). Examples of conduct subject to discipline include “advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding . . .” and the like. See *id.* Comment [3]. See also Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, supra.

In the deposition context, see Part 221 of the Uniform Rules for the New York State Trial Courts, the Uniform Rules for the Conduct of Depositions (22 N.Y.C.R.R. pt. 221). The purpose behind the enactment of Part 221 was to “ensure that depositions [were] conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum.” See 2006 Report of the Advisory Comm. on Civil Practice, p. 50, http://www.nycourts.gov/ip/judiciary/legislative/CivilPractice_06.pdf; Syracuse and
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 can I 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
To the 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

Dear Concerned Counsel:
Your letter raises a very important and often difficult question. When and under what circumstances, if any, does a lawyer have an obligation to disclose confidential information learned from the client during the course of the lawyer’s representation of the client?

It is a fundamental principle of ethics that a lawyer is generally prohibited, with some exceptions, from revealing a client’s confidential information. See Rule 1.6 of the New York Rules of Professional Conduct (NYRPC). But, that is not the end of the road. The NYRPC also prohibits lawyers from making false statements to a third person, assisting a client in conduct that the lawyer knows is illegal or fraudulent, or from simply engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See NYRPC Rules 4.1(a), 1.2(d), and 8.4(c). Indeed, while the public interest is generally best served by strict compliance with the rule requiring lawyers to preserve the confidentiality of information relating to their representation of clients, the confidentiality rule is subject to limited exceptions that, inter alia, are intended to deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of the judicial process. See Rule 1.6 [Comment 6].

Does your predicament place you in one of the limited exceptions to the confidentiality rule? Based on what you have described, we believe it does even though the mediation is by its very nature a confidential process.

Let us take a look at which Rules of Professional Conduct are implicated in negotiations and specifically the mediation context. As an initial matter, we note that the negotiation process creates an inherent tension for lawyers since “[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.” ABA Model Rules of Professional Conduct, Preamble (1995). Indeed, the mediation process often presents ethical dilemmas since the art of negotiation frequently involves some level of misrepresentations, “posturing” and “puffery,” particularly concerning each side’s minimum settlement points as well as the exaggeration or emphasis of the strengths of one’s position, and the minimization or de-emphasis of the weaknesses of one’s position. See ABA Committee on Ethics and Professional Responsibility, Formal Op. 439 (Apr. 12, 2006) (ABA, Formal Op.). Certain types of statements during negotiations, such as estimates of price or value placed on the subject of a transaction, or a party’s intentions as to an acceptable settlement of a claim, are generally accepted conventions in negotiation and are ordinarily not deemed to be false statements of material fact, and therefore are not considered to run afoul of the ethical rules. See Rule 4.1 [Comment 2]. Additionally, it is recognized that the duty of zealous representation generally prohibits a lawyer in negotiations from voluntarily disclosing weaknesses in his or her client’s case. See ABA, Formal Op. 375 (1993).

The flip side to those general principles is that the ethical rules governing lawyer truthfulness and the ethical prohibitions against lawyer misrepresentations apply in all environments, including the mediation context. See ABA, Formal Op. 439, at 8.

Specifically, Rule 4.1 of the NYRPC, Truthfulness in Statements to Others, has been found to govern a lawyer’s conduct when negotiating either inside or outside of the mediation context. It provides “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” Pursuant to this rule, a lawyer is required to be truthful when dealing with others on a client’s behalf and is not permitted to make misrepresentations to another – mean-
ing the lawyer cannot incorporate or affirm a statement of another that the lawyer knows is false. NYRPC Rule 4.1 [Comment 1]. Although lawyers generally do not have an affirmative duty to inform opposing parties of relevant facts, it is recognized that misleading statements or omissions of facts may be “the equivalent of affirmative false statements.” NYRPC Rule 4.1 [Comment 1].

In addition, Rule 1.2(d) provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client” (emphasis added). Rule 1.2(d) only applies when the lawyer “knows” that the client’s conduct is illegal or fraudulent. It does not apply when it is merely “obvious” to others that the conduct is illegal or fraudulent, or when the lawyer simply believes or suspects but does not know that the client’s proposed scheme is fraudulent or illegal. Roy Simon, Simon’s New York Rules of Professional Conduct Annotated, Simon’s Annotations on Rule 1.2(d), at 108 (2015 ed.).

Moreover, Rule 8.4(c) of the NYRPC overlaps with Rule 4.1 providing that a lawyer may not engage in “dishonesty, fraud, deceit or misrepresentation.”

Based on the facts provided, it appears that your client does not have the wherewithal or the intention to fund the settlement that was entered into during the mediation. In our opinion, this creates a real possibility that later on someone may cry foul and accuse your client of fraud. Your risk is that you could be charged with actual knowledge of your client’s wrongdoing because you were told prior to the mediation that the client’s business is doing “lousy” and that he intends to file for bankruptcy before any settlement payment becomes due. Consequently, you are likely to be found to be in violation of the aforementioned Rules for assisting the client in perpetuating that fraud even if all you did was remain silent as to your client’s situation. The Rules recognize that “omissions of material facts are the equivalent of affirmative false statements.” Rule 4.1 [Comment 1].

So, what should you have done under the circumstances? The NYRPC expressly tell us that when a lawyer’s representation will result in violation of the Rules or other law, the lawyer must advise the client of any limitation on the lawyer’s conduct and remonstrate with the client confidentially. See Simon’s Annotations on Rule 1.2(d), at 110–11 (citing NYRPC Rules 1.4(a)(5)) (a lawyer shall consult with the client about any relevant limitation on his or her conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law) and 1.16(b)(1) (a lawyer shall withdraw from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law). A lawyer “cannot simply remain silent in the face of a request or expectation by the client for assistance the lawyer is forbidden to provide. The lawyer has to explain that the lawyer cannot give that assistance.” Simon’s Annotations on Rule 1.4(a)(5), at 139.

If the client is uncooperative and still wants to proceed after you have warned him that you cannot assist in his fraud, you are required to take reasonable remedial measures, including perhaps going so far as to tell the mediator that you no longer will participate in the mediation, and may be constrained to withdraw as counsel. We note that paragraph (b) to NYRPC Rule 1.6 simply permits, but does not require, a lawyer to disclose confidential information relating to the representation to, inter alia, prevent the client from committing a crime (Rule 1.6(b)(2)). However, Rule 1.16(b)(1) provides that a lawyer shall withdraw from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law.

It is unclear from the facts you provided whether your client did all the talking during the mediation or whether you assisted him in giving the other side the misimpression the client was in a position to fund the settlement. This is important because as your role on behalf of the client expands, so too does your responsibility for making sure that third parties are not misled. In other words, if you made representations during the mediation concerning your client’s ability to fund the settlement, then your ethical obligations are substantially greater than if you were merely present when the client himself was speaking. But even if you simply remained silent during the negotiations, your silence under the circumstances may nevertheless have severe consequences.

Indeed, lawyers who make misrepresentations on behalf of clients or withhold material facts when negotiating a settlement in mediation or otherwise risk ethical discipline. See generally Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1 (1st Cir. 2005) (lawyers sanctioned for making misrepresentations during settlement negotiations). They also risk civil liability for fraud, deceit, and legal malpractice. See, e.g., Taft v. Shaffer Trucking, Inc., 52 A.D.2d 255, 259 (4th Dep’t 1976) (action against automobile insurer and its attorneys for misrepresenting policy limits in settlement of personal injury lawsuit); see also Slotkin v. Citizens Cas. Co. of N.Y., 614 F.2d 301 (2d Cir. 1979), cert. denied, 449 U.S. 981 (1980) (allowing fraud suit where lawyer misrepresented the amount of available insurance coverage); Hansen v. Anderson, Wilmarth & Van Der Maaten, 657 N.W.2d 711 (Iowa 2003) (lawyer who lied about client owning a business in negotiation to sell that business held liable for fraud). Not to mention that lawyers jeopardize their reputations and effectiveness in
future encounters with mediators and other lawyers. Once your reputation for honesty is compromised, you may find it exceedingly difficult to negotiate at all with other parties, having lost your credibility.

So, that leads us to your next question: What should you do now? We believe the best course for you to follow is to try to persuade your client to take any necessary preventive or corrective steps that will bring the client’s conduct within the bounds of the law — meaning your client should come clean and disclose to the other side that he does not have the wherewithal to pay the settlement agreed to and see if the parties can negotiate a settlement that your client can honor. If the client refuses to take the necessary corrective action and your continued representation would further assist in the fraudulent conduct, including, inter alia, if it has not already occurred, the drafting and negotiation of the language of the settlement agreement, you must take the necessary steps to withdraw as counsel. See NYSRPC Rule 1.16(b)(1).

In certain circumstances, withdrawal alone may be insufficient and the lawyer may be required to give notice of the fact of the withdrawal and to disaffirm any document, opinion or affirmation proffered to the other side. See Rules 1.6(b)(3) and Rule 4.1 [Comment 3]. Notably, the Court of Appeals, albeit not in the mediation context, has instructed that an attorney’s duty to zealously represent a client is circumscribed by an “equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds.” People v. DePallo, 96 N.Y.2d 437 (2001) (emphasis added) (quoting Nix v. Whiteside, 475 U.S. 157, 173 (1985)).

Sincerely,

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NEW YORK STATE BAR ASSOCIATION

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QUESTION FOR THE NEXT ATTORNEY
PROFESSIONALISM FORUM

I specialize in commodities and securities regulation, as well as the tax consequences of transactions in securities and commodities. Almost 10 years ago, a client of mine in the financial services industry had devised a new transaction that he asked me to implement. The transaction implicated numerous novel questions in commodities and securities regulation, and I was concerned about solicitation were I to represent both my client as the originator and the investors to whom the idea was to be pitched. See Forum (Mar./Apr. 2007) N.Y. St. B.J., p. 52.

As it turned out, for reasons related entirely to market conditions, that transaction did not go forward. In the interim I have stayed close with this client, and now he has come to me with a similar concept. The client would like me to represent only him in his individual capacity and the vehicle as issuer’s counsel. He would also like me to connect him with some investors whom I know and whom I have represented on unrelated matters, but not to hold myself out as representing any of these investors. My role will be to structure the transaction and to provide an opinion stating that the transaction is legal and outlining the specific consequences (as well as any risks). My opinion will be included in the marketing materials, and it is expected that I will make myself available to speak with investors and their advisors. The investors will all be sophisticated persons. However, we will not be able to control whether they will each have their own counsel.

What advice do you have for me?
Sincerely,
U. N. Certain
To the Forum:

A little over a week ago, my client and I met with opposing counsel, whom I will call Lawyer X, and his client to attempt to negotiate a settlement concerning a potential contractual dispute. To my shock and surprise, when my client would not concede to certain provisions demanded by Lawyer X’s client, Lawyer X started screaming at me and my client and made numerous derogatory comments. Among other things, he stated that my client “had no b**s,” and was a thief. Finally, he added that we were nothing more that “money grabbing low lifes,” peppering his comments with several pejoratives about our ethnic origins and religions.

Needless to say, I was deeply offended by Lawyer X’s comments and conduct. As a result, I got up and told my client that we were leaving. That only provoked Lawyer X even more; he began screaming profanities at us, which I will not repeat, as we walked out the door.

I later spoke with some other attorneys who I know have dealt with Lawyer X in the past. They indicated that Lawyer X had comported himself in a similar fashion with them. He called one lawyer “physically and mentally unkempt” in a public courtroom, and called another a “liar” and “disgrace to the legal profession” in front of other attorneys.

Two days after my incident with Lawyer X, he called to apologize, citing family troubles and the stress of his comments with several pejoratives about our ethnic origins and religions.

Dear I.M. Outraged:

Your letter reminds us of a recent Appellate Division, First Department case that dealt with important issues of civility and courtesy. In that case, In re Teague, ___ A.D. 3d __, 15 N.Y.S.3d 312 (1st Dep’t 2015), an attorney was charged and found guilty for making offensive racial, ethnic, homophobic, sexist, and other derogatory remarks to attorneys, insulting an administrative law judge in a public forum, and being disruptive both inside and outside of hearing rooms. Similar to the facts you describe, this particular attorney’s poor behavior was not an isolated incident; investigation revealed several reports, spanning the course of several years, in which this attorney’s outlandish behavior was starting to raise eyebrows. During one specific incident, the attorney in question called an administrative law judge “a disgrace” in an open hearing room during or after a particularly contentious hearing. The First Department found that the attorney’s patently offensive behavior and remarks warranted a three-month suspension, and furthermore, that the attorney be ordered to enroll in a one-year anger management treatment program.

The New York Rules of Professional Conduct (NYRPC) also provide guidance in answering your question about whether you have an actual obligation to report Lawyer X’s offensive behavior. Incivility, rudeness, and the use of offensive language and tactics can certainly rise to the level of a violation of one or more of the Rules of Professional Conduct. Specifically, Rule 8.4(d) holds that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice” and Rule 8.4(h) holds that a lawyer shall not “engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.”

Disruptive and/or explosive conduct before a tribunal may also violate Rule 3.3(f), which holds that “[i]n appearing as a lawyer before a tribunal, a lawyer shall not . . . (2) engage in undignified or discourteous conduct [or . . . ] (4) engage in conduct intended to disrupt the tribunal.”

As officers of the court, we are not permitted to ignore this kind of bad behavior and must act in accordance with Rule 8.3(a) which reminds us that a lawyer “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.”

However, this leads us to the question: How do you determine if the particular conduct you have witnessed or experienced rises to the level to warrant reporting it to the Disciplinary Committee? This question is much harder to answer and is definitely case specific. Some commentators have tried to make a distinction between unethical behavior and unprofessional conduct. See Joseph J. Ortego & Lindsay Maleson, Incivility: An Insult to the Professional and the Profession, 37-SPG
Brief 53, 54 (Spring 1998). Indeed, according to one author, “[t]he basic distinction between ethics and professionalism is that the rules of ethics tell us what we must do and professionalism teaches us what we should do.” James A. George, The “Rambo” Problem: Is Mandatory CLE the Way Back to Atticus?, 62 La. L. Rev. 467, 472 (2002) (emphasis added).

Expanding on this theory, the questions we should really be asking are: When does bad behavior cross over from being just unprofessional to actually being unethical? And should that make a difference? These are not easy questions and we suspect that there are many lawyers who will tell you that they are simply acting as zealous advocates. Courts grappling with this very question have recognized its complexity. For example, the U.S. Court of Appeals for the Second Circuit aptly noted:

[op] the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.

Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 341 (2d Cir. 1999).

We can shed some light on this gray area by referring to several cases where courts have determined that the attorney’s misconduct rose to the level of behavior that warranted punishment. In one of the more infamous cases, Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994), a Houston plaintiffs lawyer used vitriolic and threatening language while representing one of the directors of Paramount in a deposition. Among the outrageous comments made by this attorney during the deposition, when opposing counsel tried to question the witness, was: “Don’t ‘Joe’ me, asshole. You can ask some questions, but get off of that. I’m tired of you. You could gag a maggot off a meat wagon.” Id. at 54. The Supreme Court of Delaware found this attorney’s behavior to be so lacking in civility that it added a whole addendum to its formal opinion in order to publicly censure the attorney and raise awareness about what it described as “a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts.” Id. at 52. In its addendum, the Delaware court elaborated on why this particular attorney’s conduct went far beyond zealous advocacy and completely crossed the line. According to the court,

[s]taunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client’s legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by [plaintiffs’ lawyer] on the record of the [plaintiff’s] deposition is not properly representing his client, and the client’s cause is not advanced by a lawyer who engages in unprofessional conduct of this nature.

Id. at 54.

Yet another example of attorney misconduct rising to the level of unethical behavior: In In re Kahn, 16 A.D.3d 7 (1st Dep’t 2005), the court found that the attorney’s pattern of sexually oriented and offensive comments directed at female attorneys and female clients, dating as far back as 1991, warranted serious sanctions. The attorney’s egregious conduct included publicly referring to a female attorney as “pig vomit on my shoes,” and on another occasion, as the same attorney, who is overweight, was about to enter the courtroom, yelling “[h]ere is the elephant, she’s coming in. Who wants tickets? Come see the show.” The attorney also admitted to having made inappropriate comments about a 13-year-old client arrested for prostitution and to asking an adversary to guess the bra size of a 14-year-old client. Id. at 9. Given the testimony of witnesses and the attorney’s own admission to engaging in a pattern of misconduct for years, the First Department suspended the attorney from practicing law in the State of New York for a period of six months. Id. at 10.

Courts will consider the larger context within which the inappropriate and outlandish behavior takes place when weighing their decision. One important factor is whether the conduct represents a single isolated incident, or is part of a more established pattern of misbehavior. The Appellate Division in In re Hayes, 7 A.D.3d 108 (1st Dep’t 2004), explicitly stated that its decision to impose the sanction of a public censure against an attorney who accused the court and its clerk of prejudice and racism in the course of a landlord-tenant proceeding was in part attributable to its consideration of the particular attorney’s prior transgressions. The court explained, “We are mindful of the [Departmental Disciplinary] Committee’s observation of the facts that respondent [attorney] has had two prior admonitions, one for misconduct which is very similar to that which occurred here, and that such discipline did not deter the instant misconduct.” Id. at 110.

However, there are certainly situations in which one incident alone is enough to warrant punishment. For instance, in In re Dinhofer, 257 A.D.2d 326 (1st Dep’t 1999), the court imposed a three-month suspension on an attorney for calling a federal judge “corrupt” during a telephone conference. A transcript of the conversation indicates that the attorney made the following remarks: “This is rampant corruption. I don’t know what else to say. This is a sham. This is blatantly corrupt. You are sticking it to me every way you can. I’m not rude to them [a reference to the court’s staff], I’m rude to you, because I think you deserve it. You
are corrupt and you stink. That’s my honest opinion, and I will tell you to your face.” Id. at 327–28. In its decision, the court pointed out that while the attorney had no other disciplinary record, his conduct was so egregious that it “impinge[d] upon [his] fitness to practice law. . . .” Id. at 328.

Here, we obviously agree that it is inappropriate for any member of the Bar to address others and to act the way Lawyer X has comported himself. Lawyer X’s offensive comments to you and your client, coupled with the fact that his behavior is not isolated, appear to rise to the level of the kind of behavior that may require action on your part under the NYRPC. As evidenced in the cases described above, some of the consequences Lawyer X may face for his inappropriate behavior include suspension or public censure and even enrollment in an anger management program.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com);
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am deeply disturbed by the events that transpired at a recent on-site visit to inspect the opposing party’s books and records in compliance with a discovery order. Due to the defendants’ repeated failure to comply with several discovery orders and deadlines and the parties’ contentious and acrimonious relationship, I got a court order directing that the defendants produce certain documents by a specified date. The court also granted us permission to have an on-site visit and inspection of the defendants’ books and records. On the agreed-upon site-visit date, I met the defendants’ counsel at the defendants’ offices and was accompanied by an accountant that the plaintiff hired to assist with the litigation. Despite the fact that the defendants had several weeks to prepare the documents requested by the plaintiff for the on-site inspection, after we were placed in a conference room, we were given only two Bankers Boxes® of documents, with limited information. Although I made repeated requests for additional information, the defendants failed to produce numerous categories of documents that the court ordered them to produce. The defendants’ counsel stated that they would produce these materials at a later date since they did not have them available.

That wasn’t the end of the story. While we were in the conference room, I saw that there were several boxes of documents in the hallway outside the conference room. I knew right away that the boxes contained categories of documents responsive to the plaintiff’s requests, which the court had ordered the defendants to produce. This was obvious from the labels that were clearly visible and in plain sight on the sides of the boxes.

I asked the defendants’ counsel about the boxes in the hallway but was told that I could not see them because he did not currently have access to those materials. Since I had reason to believe that the boxes contained responsive materials and felt that I was being stonewalled, I used my smartphone camera to take pictures of the boxes from the conference room so that I would be able to present the issue to the court if necessary.

Although the defendants’ counsel was nowhere in sight when I took the pictures, within two minutes he came storming into the conference room and asked whether I had taken any pictures. It was only then that I discovered that we had been under surveillance in the conference room during the entire document production. When I saw the webcam in the conference room, I confronted opposing counsel, asking whether he and his clients had been watching and listening to my communications with the plaintiff’s accountant. The defendants’ counsel did not deny that he and his client had been watching and listening to our communications. Instead, he smirked and replied that my communications with the plaintiff’s accountant had no expectation of confidentiality or privilege. He refused to allow me to take a picture of the webcam. Based on these circumstances, I can only assume that both opposing counsel and his clients had been secretly monitoring my private and privileged communications and work product with the plaintiff’s retained expert.

I am deeply troubled by what happened and by opposing counsel’s behavior, which strikes me as outrageous. Are we now at a point in the practice of law when opposing counsel can secretly videotape a document production and eavesdrop on my conversations during my inspection of the documents? What about telephone conversations? If counsel secretly put me under surveillance while I was in the conference room, it is possible that he may have also recorded our telephone conversations. I am writing to the Forum because, quite frankly, I am unfamiliar with the rules. What should I do?

Sincerely,
Ben Camed

Are you LinkedIn?
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To the Forum:
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Sincerely,
Ben Camed

Dear Ben Camed:
Your letter raises several important issues about what we hope is not becoming a common practice. It seems as if everyone has an iPhone, or another kind of smartphone, with the ability to surreptitiously record conversations and events at will with only the tap of a screen or the click of a button. The fact that technology may present an irresistible temptation to certain members of our profession makes your question particularly timely.

As an initial matter, what occurred may be a great example of an outrageous discovery abuse that would allow you to pursue a whole host of remedies before the court that ordered the document production. However, that is a subject for another time, and perhaps another space. Our focus here is through the lens of the ethical and professional questions that arise from the secret attorney recording that you described and its implications to the legal profession.

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.
It is useful to begin with a brief review of federal and state law on wiretapping. Federal law permits a non-law enforcement individual to record telephone calls and other electronic communications as long as one party to the conversation or communication has consented. See 18 U.S.C. § 2511(2)(d) (2008). States are allowed by 18 U.S.C. § 2516(2) to enact their own legislation on wiretapping. The result, as one might expect, has been that the laws on this issue vary widely from state to state. In some states, so-called “two-party consent” laws have been adopted, meaning that every party to a phone call or conversation must consent in order for the recording to be lawful. These laws have been enacted in California, Florida, Illinois, Maryland, Massachussetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. See Robert Pelton, Ethics and the Law: Professionalism, Voice for the Defense Online, October 2, 2011, http://www.voiceforthedefenseonline.com/story/ethics-and-law-professionalism-robert-pelton.

The majority of states, however, have adopted “one-party” consent laws, meaning that only one party to the conversation needs to consent to the recording for it to be legal. See id. New York is a one-party consent state. Therefore, in New York it is not a crime to record or eavesdrop on an in-person meeting or telephone conversation if one party to the conversation consents; that one party can, in fact, be the individual recording the conversation. N.Y. Penal Law §§ 250.00, 250.05.

With the federal and state laws in mind, the next question is: even if the recording is legal, is it ethical for an attorney to engage in such conduct? Not surprisingly, there also is a wide range of differing opinions on this topic across the United States. Twelve states and the District of Columbia hold that secret attorney recording is not unethical. The 12 states include Alabama, Alaska, Kansas, Maine, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Utah, as well as the District of Columbia. See Carol M. Bast, Surreptitious Recording by Attorneys: Is It Ethical?, 39 St. Mary’s L.J. 661, 684–85.

Nine states hold that secret attorney recording is unethical, except in certain situations. The nine states are Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, South Carolina, and Virginia. Id. at p. 688. Five states hold that secret attorney recording should be evaluated on a case-by-case basis. These states are Hawaii, Michigan, New Mexico, Ohio, and Wisconsin. Id. at p. 694. And 13 states have not yet reached a consensus on this issue. The remaining states are Arkansas, Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. Id. at pp. 683, 695. New York is one of the nine states that hold that secret attorney recordings are generally unethical, but under certain circumstances recordings may be permissible. Id. at p. 688.

Various New York bar associations and ethics committees have examined the topic and provided guidance. In 1979, the New York State Bar Association Committee on Professional Ethics issued a formal opinion on this subject stating that “lawyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party except where the purpose is to commit a criminal, tortious or injurious act.” N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 515 (1979). In addition, the 1979 opinion stated that a lawyer may counsel a client about the legality of the client secretly recording a conversation with a third party. Id.

In 1993, the New York County Lawyers’ Association (NYCLA) also issued an opinion on the subject. The NYCLA reasoned that while “[p]erhaps, in the past, secret recordings were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings [because] [t]oday, recording a telephone conversation may be accomplished by the touch of a button [therefore . . . ] we do not believe that such an act, in and of itself, is unethical.” N.Y. County Lawyers’ Ass’n Ethics Op. 696 (1993). However, the NYCLA’s opinion also advised attorneys to avoid using the recording in a “‘misleading way,’” or lying about the existence of the recording at all, and stated that in these circumstances, the attorney’s behavior would be considered to be “ethically improper.” Id.

In 2004, the Association of the Bar of the City of New York issued an opinion stating that while a secret recording is improper as a routine practice, there are circumstances where undisclosed tapings should be permitted. See Ass’n of the Bar of the City of N.Y. Formal Ethics Op. 2003-2 (2004). For example, where the recording “advances a generally accepted societal good” it may be proper. Id. However, it would be unethical for an attorney to surreptitiously record a conversation for the sole purpose of having an accurate record of the conversation. Id.

The Association ultimately counseled attorneys against making such recordings absent unusual circumstances, stating: “We further believe that attorneys should be extremely reluctant to engage in undisclosed tapings and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.” Id.

Our research did not uncover many New York court decisions on this issue. The one case we did locate is illustrative of when the exception rather than the general rule on secret recordings applies. In Mena v. Key Food Stores Co-op., Inc., 195 Misc. 2d 402, 403 (Sup. Ct., Kings Co. 2003), the plaintiffs, who were employees of defendant Key Food, brought suit against their employer, alleging that obscenities and racial slurs were being directed at women and African Americans in the workplace. A Key Food employee consulted with counsel, who advised her about the legality of secretly recording her employer, and subsequently, a secret recording did take place. Although the defendant
employer tried to suppress the contents of the taped telephone conversations between the employer and third parties, and tried to disqualify the employee’s counsel because of his involvement in the recording, the court ultimately found that the attorney’s conduct was reasonable and appropriate given the circumstances surrounding the recording. The Supreme Court reasoned that the recording was justified because

[the interests at stake here transcend the immediate concerns of the parties and attorneys involved . . . The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin. Weighed against this ethical imperative, the attorney’s conduct . . . should not be subject to condemnation . . . Id. at 407. Notably, privileged and/or confidential communications and information did not appear to be at stake in that case as seems to be the case here.

Other authorities, including the American Bar Association (ABA), have also weighed in on this topic. Interestingly, as technology has advanced and changed over time, so has the ABA’s position on attorney recording. For instance, in 1974, in ABA Formal Opinion 337, the ABA held that an attorney should not record a conversation without full consent from all parties, the exception being that government and law enforcement attorneys could record a conversation without such consent. See Bast, supra, p. 665.

However, 27 years later, in June 2001, the ABA changed course with the adoption of Formal Opinion 01-422, which permits an attorney to secretly record conversations with non-clients in one-party consent states like New York. See ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 01-422 (2001). According to the ABA, “[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn.” Id.

ABA Opinion 01-422 is not without limitations, however. For example, an attorney should not surreptitiously record a conversation in a two-party consent state, where the consent of all the parties is necessary in order for the recording to be lawful. The Opinion also cautions that an attorney shall not falsely deny that a recording is taking place or has taken place. According to the ABA, “[t]o do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person.” Id.

This very issue of lying about making a recording was addressed by the Mississippi Supreme Court in The Mississippi Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993). The Mississippi Supreme Court determined that even if the attorney did not violate any ethical rules by surreptitiously taping two telephone conversations, one with an acting city judge and one with the city police chief, it was a violation of the Mississippi Rules of Professional Conduct for the attorney to lie and deny that the recordings ever took place. The court explained:

We find . . . that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations. Rule 4.1 comment expressly states that “[a] lawyer is required to be truthful when dealing with others on a client’s behalf.” An attorney is not a private detective or a secret agent; he is not acting as an undercover police officer; rather, he is first and foremost an attorney, and his truthfulness must be above reproach. When asked point-blank whether he is mechanically reproducing a conversation, his answer must be truthful. To respond otherwise vitiates all rules of professional conduct.

Id. at 233.

Another court to examine the issue of covert recordings by an attorney is the U.S. District Court of the Northern District of Illinois in Anderson v. Hale, 202 F.R.D. 548 (N.D. Ill. 2001). In Anderson, the court found that an attorney’s surreptitious tape recording of telephone conversations with plaintiff’s witnesses in a civil case violated the state’s local rule. The court explained that “[a]t a minimum, fairness and honesty require attorneys to disclose material facts to witnesses at the commencement of a conversation [. . . and] [w]hether a conversation is being recorded is a material fact . . .” The court further reasoned that because the attorney’s conduct was inherently deceitful and involved trickery, it would injure the public’s confidence in the legal profession and the legal system as a whole. Id. at 556.

We note, however, that Illinois, unlike New York, is a two-party consent state.

In summary, in New York an attorney is not permitted to secretly record communications with opposing counsel absent some very unusual circumstances. When evaluating the ethical implications of an attorney recording, it is important to consider the context in which the secret recording was made, as well as the intent and purpose behind the recording. Additionally, practitioners should bear in mind the New York Rules of Professional Conduct (NYRPC), specifically, Rule 8.4(c), which provides that a lawyer or law firm shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Applying these principles to the situation you have described, it certainly seems as though the behavior exhibited by opposing counsel in secretly recording your private, and arguably privileged, communications and work product with the plaintiff’s retained expert was made for an improper purpose. Indeed, it seems obvious that opposing counsel knew what he was doing and was trying to obtain an unfair strategic advantage by listening into the confidential conversations between you and the plaintiff’s expert. Although some might suggest that you should have checked the room for the surveillance camera and/or
microphone, in our view, you had a reasonable expectation of privacy and should not have been subjected to your adversary’s eavesdropping. We are at a loss at how counsel could say with a straight face that you had no expectation of confidentiality during the periods you were alone with plaintiff’s expert in the conference room, or how this secret recording of the document inspection “advances a generally accepted societal good,” or in any way was an exercise conducted in good faith with the principles of fairness and honesty in mind. Moreover, although your adversary did not deny recording your conversations when you confronted him with the question, it is unclear from the facts whether he has actually acknowledged the recording or will later deny doing so. As discussed supra, both bar associations and courts have taken a strong position against lying about the occurrence of an attorney recording.

Either way, we believe that opposing counsel’s behavior runs contrary to the standards of fairness and candor, and we echo your sentiment that it is quite outrageous. Indeed, we believe that you would be on solid ground to notify the court and seek, inter alia, the disqualification of the defendants’ counsel and the preclusion of any recording or transcription of the document inspection, as well as to inform the state bar authorities of your adversary’s actions.

That leads us to our last point. Putting aside the legal and ethical ramifications in New York, is this really the direction that we want to be taking the legal profession in – covertly recording or eavesdropping on our adversaries – simply because in the age of smartphones it is just so easy to do so. We think not. George Orwell warned us about Big Brother, but perhaps he should have said something about opposing counsel! We know that the technology exists and facilitates such recordings or eavesdropping, but that does not mean that it should be used. In this world of mass social media and technology, we should take the high road as attorneys and resist the constant temptation to use technology to gain what is, in our opinion, an improper advantage over our adversaries.

Sincerely,
The Forum by Vincent J. Syracuse, Esq. (syracuse@thsh.com), Maryann C. Stallone, Esq. (stallone@thsh.com) and Hannah Furst, Esq. (furst@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY

PROFESSIONALISM FORUM

I am an income partner at a 100-lawyer firm. I was made partner just two years ago. Six months after making partner, I became pregnant with my third child. After making it through the first trimester, I started to share the happy news with my colleagues. When I told a senior partner in my group that I was expecting, he remarked, “Wow! Haven’t you already done your fair share of overpopulating the earth?” I didn’t know how to respond. I felt both defensive and uncomfortable, but I chuckled along anyway, hoping to dissolve the awkwardness. In the months and weeks leading up to my maternity leave, I made sure to communicate effectively both internally at the firm with my colleagues, and externally with my clients, about my anticipated three-month leave and made sure that all my cases would be accounted for and covered during my absence.

Upon returning to work three months later, I was greeted with further offensive comments. On my first day back to work, the managing partner casually strolled into my office asking, “How was your vacation?” I responded that I was not on vacation, but on maternity leave for the birth of my son. The managing partner laughed and stated, “Same difference!” and walked out.

The following week, I attended a meeting with a client at opposing counsel’s office on a case that I had been working on before my maternity leave. When I made a suggestion about a possible resolution of the matter that I felt would achieve the client’s goals, my adversary’s snide response was, “Did it take you nine months to come up with that idea?” I honestly did not know what to say and did my best to ignore the comment.

I have also noticed that the quality and quantity of my work has changed since I’ve returned from maternity leave. Not only do I have a lower volume of work, but the level of interesting work is also lower. Even though I have returned to the firm full-time, my billable hours have decreased significantly. During my first year as partner, I billed 2,500 hours. During my second year as partner, when I had my son and was on maternity leave for three months, I billed 1,800 hours. This leads me to what happened at my end-of-the-year meeting with the firm’s Compensation Committee. During that meeting, one of the partners remarked that my hours were very low for the year. When I responded by reminding the Committee that I had been on maternity leave for three months, another partner said something along the lines of: “Well, if you had spent as much time billing as you did breastfeeding, you would have had more billables this year.”

I cannot believe that in this day and age I should be subjected to these types of comments and behavior. I am outraged. Is the conduct described above acceptable professional behavior?

Sincerely,
Pumped Up

MEMBERSHIP TOTALS

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As of 10/14/15
To the Forum:
I am the lead attorney on a big and important case for the litigation group at my firm, which is currently short-staffed. When I received an email from our managing clerk that our opposition papers to our adversary’s motion to dismiss would be due in one week, I started to panic!

Not only was my mother recently hospitalized, but the senior associate on the case (and his wife) just had a baby and he was going to be out of the office for the next week. With so many personal and professional commitments, I had just completely overlooked this looming deadline.

Out of desperation, I called my adversary. I calmly and politely explained the situation and asked for a 30-day extension of time to draft our opposition. My adversary did not seem sympathetic at all and told me he would consult with his client and get back to me. Within the hour, my adversary called me back and told me that his client wanted to aggressively pursue this case and was tired of what he perceived as constant delays and postponements. In short, my adversary informed me that his client wanted a “take no prisoners” approach in the case and was instructed by his client to not grant any requests to extend deadlines or courtesies. Although I tried to reason with opposing counsel and explain that an extension of time is a basic courtesy and would not prejudice his client, he responded that his client was “sick and tired of lawyers being nice to each other,” and the extension was denied.

Is my adversary’s conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel’s conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
A.M. Civil

Dear A.M. Civil:
We wrote in a prior Forum about civility best practices between opposing counsel (Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2012); your question allows us to revisit the issue.

Your panicked predicament is one that many litigators can relate to! It is to be expected that during the course of one’s career, both personal and professional commitments, including the unforeseen circumstances you have described, may require attorneys from time to time to seek courtesies and flexibility from opposing counsel. But sadly, one lawyer’s personal problem is often seen by an adversary as an opportunity to gain a tactical advantage. In a professional moment, when you rightly expected your adversary to understand and perhaps sympathize with your situation, instead of granting you a basic courtesy you literally got the door slammed in your face. While the refusal to extend you such a courtesy is not a per se violation of the New York Rules of Professional Conduct (NYRPC), or the basis for a report to the Disciplinary Committee at this time, the behavior you experienced, in our view, certainly violates the New York State Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A), particularly if this is the first time you are asking for an extension on this motion.

The Standards, which were first proposed by the NYSBA’s Commercial and Federal Litigation Section, were adopted by the courts to guide the legal profession, including lawyers, judges and court personnel, in observing principles of civility. Although the Standards are not intended to be enforced by sanctions or disciplinary action, they give us basic principles of behavior to which lawyers should aspire.

Part II(B) of the Standards states that “[l]awyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.”

Part III of the Standards states that “[a] lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of their clients’ interests.” Part III is divided into five sub-points:

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.
C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

See Standards Part III. (A)–(E).

In the situation you have described, where it does not appear that the extension of time requested for your opposition papers would prejudice your adversary’s client, one should expect an adversary to consent to a reasonable extension of time purely as a professional courtesy. Trying to take advantage of an adversary’s scheduling conflict to gain some kind of tactical advantage is not just bad form, it reflects poorly on the attorney and/or his law firm. Practically speaking, this strategy is also unwise and does not pass for effective advocacy. Attorneys and their clients should know that an attorney who establishes a bad relationship with his adversary (and ultimately the court) is taking a big risk should problems arise for him or his client in the future of the case. As the saying goes, what goes around comes around, and if the uncooperative attorney needs a professional courtesy in the future, he should not expect one in return.

We are sure that some may argue that your adversary’s behavior is justified because he is simply following his client’s orders and is acting within the confines of zealous advocacy. We disagree with that view and believe that there is a better tack that our profession should take in these situations that keeps us on a proper course. First, as stated in our prior Forum, the decision of whether to grant an extension of time is a matter that ought to be decided only amongst the attorneys involved in a particular case and should not require express client consent. See Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2012. Second, while lawyers are surely charged with representing their clients zealously, refusing to provide a common courtesy such as an extension of time does not, in our view, generally advance the client’s case or our profession. To the contrary, incivility between attorneys diserves the profession and the client. In the words of the Honorable Sandra Day O’Connor:

[T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and system itself lose esteem in the public eyes.

. . .

In civility diserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.

The Honorable Sandra Day O’Connor, Civil Justice System Improvements, Speech to American Bar Association (Dec. 14, 1993) at 5.

Among other things, incivility between attorneys lessens the chances for successful negotiations and thus reduces the attorney’s opportunity to render competent service both to the client and to the court.

The lawyer refusing to grant a first-time or other reasonable extension also should be wary of the impression he is making on the judge or jury. In the ordinary course, requests for extensions of time, like the one you have described, should be handled by the attorneys in the case, not by the courts, which will not appreciate having to expend court time and resources on such routine matters. In Bermudez v. City of New York, 22 A.D.2d 865, 866 (1st Dep’t 1964), the court begrudged having to waste precious court time resolving an extension of time to answer a complaint, explaining that a scheduling dispute is “a matter that properly should have been disposed of by the exercise of simple courtesy between attorneys.” In Lewis v. Miller, 111 Misc. 2d 700, 704 (City Ct. 1981), the court noted that “reasonable time extensions are usually routine manners of courtesy between lawyers in which the Court should not be involved.” And, in Wonder Works Const. Corp. v. Seery, No. 100096/2010, 2011 WL 5024486 (Sup. Ct., N.Y. Co. 2011), where the plaintiff attempted to seize on the defendant’s untimely service of the answer to obtain a default judgment against him, even though defendant’s counsel had participated in many court conferences, exchanged substantial discovery and entered into a confidentiality agreement, the court denied the plaintiff’s motion for a default judgment and compelled the plaintiff to accept the defendant’s untimely answer nunc pro tunc. According to the Wonder Works court, “disputes regarding timeliness of filings are generally resolved amongst counsel.” Id. (internal quotation marks omitted).

As evidenced by the holdings in the cases cited above, a lawyer who unreasonably denies his adversary a time extension is likely to be overruled by the judge should the matter be brought
to the court’s attention. What’s more, the judge is likely to be annoyed that he needed to waste time on this kind of application and may form a negative opinion about the lawyer and/or his firm. At all times, it is important to remember that as attorneys we are officers of the court, and that our reputations and credibility are paramount. Once compromised, the ability of the attorney to be persuasive with the judge or jury is significantly diminished.

We recognize, however, that under certain circumstances it may be entirely appropriate for your adversary to deny your request for an extension of time where that request would be prejudicial to his or her client’s interests. For example, in situations where an adversary has repeatedly requested adjournments of various deadlines in what is a clear attempt to delay the litigation, a refusal of the extension may be justified. In fact, where an attorney is repeatedly negligent of deadlines and constantly asks for extensions to file briefs, he may be in violation of several of the NYRPC (specifically, Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 3.2 (Delay of Litigation)), and may be subject to a report to the Disciplinary Committee. This is exactly what happened in In re Adinolfi, 90 A.D.3d 32 (1st Dep’t 2011), where an attorney was publicly censured for failing to timely file briefs, often requesting extensions to file briefs, failing to timely file for reinstatement of cases, and failing to respond to court orders. However, this does not appear to be the case here.

Several of the NYRPC may also be relevant to the analysis. NYRPC 3.1(a) (Non-Meritorious Claims and Contentions) holds that “a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” In this situation, because it does not appear that giving you a time extension will prejudice the other side at all, your adversary’s staunch refusal to grant you a first-time extension on the motion is arguably a frivolous position. In addition, NYRPC 8.4(d) (Misconduct) holds that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice.” For the reasons discussed above, your adversary’s stubbornness on this issue and his overall lack of cooperation and civility is detrimental to the administration of justice. However, Comment 3 to Rule 8.4 provides that the Rule is generally invoked to punish conduct that results in “substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding.” Your adversary’s conduct does not currently rise to the level of the more egregious conduct deemed a violation of Rule 8.4(d). Finally, Rule 1.2(g) (Scope of Representation and Allocation of Authority Between Client and Lawyer) provides that: “A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.” This specific language urges lawyers to conduct themselves with the principles of courtesy and civility in mind.

Accordingly, while your adversary’s behavior is certainly not civil, considerate, or courteous, it does not rise to the level of violating the Rules of Professional Conduct or warrant sanctions. So, at this point, instead of attempting to get in papers, an application to the court is your best choice. Surely, the judge has better things to do; hopefully, your adversary will come to learn that what he did was not just unprofessional, it was not very smart!

Sincerely,
The Forum by Vincent J. Syracuse, Esq. (syracuse@thsh.com) and Maryann C. Stallone, Esq. (stallone@thsh.com) and Hannah Furst, Esq. (furst@thsh.com) Tannenbaum Helpern Syracuse & Hirschtitt LLP
To the Forum:

While clients understandably are often more emotional when involved in litigation, I have always tried to be civil and, to a certain extent, friendly with opposing counsel. I find that it often works to the clients’ benefit since the lawyers are able to remain objective while looking for opportunities to resolve the litigation in a way that is favorable to the client. In recent months, however, I have been involved in very contentious litigations where my adversaries have been keen on bending, or what some might say fabricating, the facts and misstating the law. In briefs submitted to the court and even during oral argument, they have blatantly lied to the court concerning the facts of the case and made misrepresentations about relevant documents. It amazes me that they would risk doing so since your reputation and credibility before the courts is paramount in this business. These lawyers are from large, reputable law firms. Are they counting on their adversaries being poorly prepared to recognize and raise their misrepresentations to the court? How should I handle advocates who might just as well be Pinocchio? Do I run the risk of annoying the court by raising the numerous misrepresentations made by counsel? I’m concerned that some courts might turn on me and find my conduct to be unprofessional or uncivil for essentially calling my adversary out as a liar. My client is outraged and wants to move for sanctions against the lawyer and his client. I’m at a point where I believe something must be done. Your guidance is greatly appreciated.

Sincerely,

Fed Up

Dear Fed Up:

In the heat of oral argument, when you are trying to juggle a judge’s questions, client issues, exhibits, the holdings in the voluminous number of cases cited, and the key points you want to make to the judge, there is often a fine line between vigorous advocacy and pure misrepresentations. Other times, the line is not so fine. When New York replaced the existing Code of Professional Responsibility with the Rules of Professional Conduct (NYRPC) in 2009, Canon 7’s requirement that “[a] lawyer shall represent a client zealously within the bounds of the law” was removed and neither “zeal” nor “zealously” appear in the Rules of Professional Conduct. (See Paul C. Saunders, Whatever Happened to ‘Zealous Advocacy’?, N. Y. Law Journal, March 11, 2011, 245 no. 47). Many states, perhaps seeing these terms as a relic of the Rambo-era of litigation, similarly have moved away from using them in their rules of professional conduct. Indeed, many detractors have argued that the phrases were being used by those who act outside the bounds of ethical advocacy as a weapon against their adversaries. (See id.) But assuming that the principle of zealous advocacy endures in our adversarial system, there is a stark difference between representing a client’s case with persuasive force and blatantly misrepresenting the law and facts to the court and your adversary for the purpose of gaining a litigation advantage. As Judge Jed S. Rakoff recently put it in Meyer v. Kalanik, 15 Civ. 9796, 2016 WL 3981369, at *7 (S.D.N.Y. July 25, 2016), “litigation is a truth-seeking exercise in which counsel acting as zealous advocates for their clients, are required to play by the rules.” Id., citing Nix v. Whiteside, 475 U.S. 157, 166 (1986).

With these principles in mind, we first address what rules your adversary is potentially violating. It should go without saying that attorneys should never lie to their adversaries or the court. Multiple rules and decisions prohibit attorneys from making false and misleading statements. See, e.g., NYRPC 3.1(b)(3) (A lawyer’s conduct is “frivolous” where “the lawyer knowingly asserts material factual statements that are false.”); 3.3(a)(1) (“A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false.”); 3.4(a)(4) (“A lawyer shall not . . . knowingly use perjured testimony or false evidence”); 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person”); 8.3 (addressing a lawyer’s obligation to report another lawyer where there is a substantial question as to that lawyer’s honesty); 8.4(c) (“A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation”); N.Y. Judiciary Law § 487 (misdemeanor for attorney who is guilty of deceit or collusion with intent to deceive court or party); 22 N.Y.C.R.R. § 130-1.1(c)(3) (sanctions where counsel “asserted material factual statements that are false”). Specifically, Rule 3.3(a)(1), which provides that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,” and Comment 2 to NYRPC 3.3 are applicable to your situation:

This Rule sets forth the special duties of lawyers as officers of

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the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

(NYRPC Rule 3.3, Comment 2) (emphasis added).

The obligation to assure that an attorney’s materially inaccurate information is not relied upon by other parties is so strong that it is one of the limited situations in which an attorney may reveal a client’s confidential information. (See NYRPC Rule 1.6(b) (3) (“A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information . . .”).

The Forum has previously addressed Rule 3.3(a)(1) where an attorney has knowledge of a fact that is contrary to the position her firm intends to take in an action. See Vincent J. Syracuse, Matthew R. Maron & Maryann C. Stallone, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2014, Vol. 86, No. 9). Your question raises a different issue. How does one deal with an adversary who is making false statements to the court?

Rule 1.3(a) of the NYRPC requires lawyers to “act with reasonable diligence and promptness in representing a client.” This rule is instructive on how you should act on behalf of your client and how you should address your less than truthful adversary. In our opinion, the most effective method of handling a dishonest attorney is preparation, attention to detail, and remembering not to sink to their level of practice. If you believe that opposing counsel is lying about facts in court filings, prove it! Do you have an exhibit that unequivocally contradicts the lie? That would be our first exhibit in any responsive motion papers or the first document we would present in rebuttal to your adversary’s oral argument to the court. Build the record that your opponents are dishonest. The court will remember it. If you have proof that they are submitting party affidavits to the court that are contradicted by documentary evidence, show the court the contradiction. At oral argument, you may even remind your adversary that NYRPC 3.3(a)(1) requires them to correct false statements of law or fact. How forcefully you go about this request will depend on the level of dishonesty and your ability to demonstrate that the attorney knew its falsity when presented to the court.

Put another way, don’t tell the judge your adversary is a liar; show the judge that your adversary is being dishonest. If you give your adversary an opportunity to correct the misstatement, the court will see that you are acting professionally without resorting to name calling. In the event that your adversary doubles down on his or her misstatement, insisting that his or her position is valid in the face of contradictory evidence, it is likely that you helped your client by proving to the judge that your adversary and/or his or her client is not trustworthy. As you correctly state in your question, an attorney’s reputation and credibility is everything, the most important asset that any of us can ever have. Once an attorney loses his or her credibility before the court, it has a profound effect on how the judge views that attorney, and in our opinion, how the judge views the case. It is surprising that so many members of our profession forget this.

It is generally more difficult to demonstrate that an attorney knowingly made a false statement of law than of fact. An attorney has an obligation to present his or her client’s case with persuasive force to the court. (See Rule 3.3, Comment 2; NYRPC Rule 1.3(a)). The hallmark of drafting effective papers for a client is to distinguish the legal arguments made by opposing counsel and argue that the cases and statutes should be interpreted in favor of the client’s position. Therefore, unless there is a blatant misstatement of the law, and it is not supported by a reasonable argument for an extension, modification or reversal of existing law, your efforts are best spent on your argument to the judge why your adversary’s legal position is incorrect. See 22 N.Y.C.R.R. § 130-1.1 (attorney conduct is deemed frivolous, and subject to sanctions, if “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law”). In our experience, judges loathe being asked to find a member of the bar dishonest merely because you disagree with his or her interpretation of case law or a statute. However, if your adversary has misquoted a case, or misrepresented a case’s holding, or omitted key facts that are pertinent to a court’s holding or has knowingly failed to cite binding authority that undercuts his or her client’s position, you should identify those misrepresentations or omissions in your argument. Again, show the judge why your adversary’s arguments cannot be trusted.

Depending on the extent of dishonesty, you may be required to report it to the court or other authority. NYRPC Rule 8.3 tells us that “(a) A lawyer 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 tribu-
nal or other authority empowered to investigate or act upon such violation.” As we put it in a prior Forum, “an attorney should use professional judgment and discretion when determining whether and how to report a colleague.” See Vincent J. Syracuse, Ralph A. Siciliano, Maryann C. Stalone, Hannah Hurst, Attorney Professionalism Forum, N.Y. St. B.J., May 2016, Vol. 88. No. 4. This advice is similarly applicable to your adversary. Comment 3 to NYRPC Rule 8.3 notes “[t]his Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”

Misconduct involving dishonesty, fraud, deceit and/or misrepresentations may result in severe sanctions from short suspensions to disbarment “depending on the repetitiveness of the misconduct and the desire for personal profit.” In re Becker, 24 A.D.3d 32, 34–35 (1st Dep’t 2005)). The rationale behind these sanctions is that “[a]n attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings. So, a deliberate misrepresentation by an attorney of material facts in open court constitutes serious professional misconduct.” In re Schields, 23 A.D.2d 152, 155–56 (1st Dep’t), aff’d, 16 N.Y.2d 748 (1965); see also In re Donofrio, 231 A.D.2d 365 (1st Dep’t 1997). Indeed, courts have held that where the misconduct alleged involves the misrepresentation of facts to a court, tribunal, or government agency, suspension is warranted even in the face of substantial mitigating circumstances. See, e.g., In re Rios, 109 A.D.3d 64 (1st Dep’t 2013) (nine-month suspension warranted where attorneys intentionally influenced their client to misrepresent the situs of her accident in order to pursue an action which they knew was fraudulent from its inception and commenced an action against an innocent third party, filing papers, such as pleadings, containing misrepresentations with the court); In re Radman, 135 A.D.3d 31, 32–33 (1st Dep’t 2015) (suspending attorney for three months; finding that attorney who had submitted purported expert affirmations from two unnamed doctors to a trial court when, in fact, they were drafted by the attorney himself and were never agreed to or signed by any medical experts, had violated NYRPC Rules 3.3(a)(1), 3.3(a) (3) [“offer or use evidence that the lawyer knows to be false”] and 8.4(c) [“engage in conduct involving dishonesty, fraud, deceit or misrepresentation”]; In re Rosenberg, 97 A.D.3d 189 (1st Dep’t 2012) (one-year suspension for attorney who knowingly used perjured testimony, knowingly made false statements of law or fact, and who thereby engaged in conduct that was prejudicial to administration of justice and adversely reflected on his fitness as a lawyer).

From your question, we do not have enough information to determine whether you have an obligation to report the offending counsel. You will need to use your judgment to determine whether the fabricated facts and misstatements of law you witnessed raised a substantial question as to the lawyer’s honesty or whether it was merely an attorney exaggerating his arguments in an attempt to diligently represent his client.

Under 22 N.Y.C.R.R. § 130-1.1(b), you could move for sanctions against opposing counsel, the opposing party, or both. To obtain sanctions for counsel’s misstatements of law, you would need to demonstrate that counsel’s legal arguments are “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” (22 N.Y.C.R.R. § 130-1.1(c)(1)). To obtain sanctions for counsel’s misstatements of facts, you would need to demonstrate that counsel for the opposing party “asserted material factual statements that are false” (22 N.Y.C.R.R. § 130-1.1(c)(3)).

In extreme circumstances, under N.Y. Judiciary Law § 487(1) an attorney can be guilty of a misdemeanor if he or she uses “deceit or collusion, or consent[] to any deceit or collusion, with intent to deceive the court or any party.” In addition to the penal law punishment, the attorney forfeits treble damages to the party injured. (Id.) Judiciary Law § 487, however, “provides recourse only where there is a chronic and extreme pattern of legal delinquency.” Solow Mgt. Corp. v. Seltzer, 18 A.D.3d 399, 400 (1st Dep’t 2005), lv. denied, 5 N.Y.3d 712 (2005). As one federal decision noted, “neither the language of the statute nor the holdings of several decisions applying Section 487 impose any such requirement” (Trepel v. Dippold, 04 CIV. 8310 (DLC), 2005 WL 1107010, at *4 (S.D.N.Y. May 9, 2005)). Five months after the Trepel decision, however, the Court of Appeals denied leave to appeal in Solow which does impose the requirement (Solow Mgt. Corp. v. Seltzer, 5 N.Y.3d 712 (Octo- ber 20, 2005)). Alas, a detailed history and analysis of the “chronic and extreme pattern of legal delinquency” requirement of Judiciary Law § 487 is perhaps a subject for a future Forum which will have to wait for another day.

By submitting briefs to the court that are well researched and thoroughly demonstrate where your opposing counsel took liberties with the facts and law, and being prepared at oral argument with a solid grasp of the facts of the case, the record and the nuances of the case law at issue, you accomplish a number of objectives. First, you are complying with NYPRC Rule 1.3(a) which requires your diligence on behalf of the client. You also will be demonstrating the dishonesty of your adversary while protecting the reputation of you and your client in the eyes of the judge that may ulti-
7. Straw Man
The straw-man argument is a common fallacy that "involves refuting an opponent’s position by mischaracterizing."19

Example: Ms. Jones argues that the United States shouldn’t fund a space program. Mr. Smith counters that science classes are an important part of a student’s education.

The fallacy: Mr. Smith is mischaracterizing Ms. Jones’s argument to include cutting funding for science classes in schools. Smith can’t imply that Jones also wants to stop funding science in school.

8. Genetic Fallacy
A genetic fallacy occurs when one “attempt[s] to prove a conclusion false by condemning its source — its genesis.”10

Example: Ms. White is a member of Congress. She drafted a bill that will help fund law schools. People opposing White’s bill argue that because White lacks a law degree, the bill shouldn’t be passed.

The fallacy: The fallacy is that people opposing the bill unfairly challenge it because White wrote it. The opposition isn’t challenging the bill’s language or content.

9. Ad Hominem, or Appeal to the Person
“Ad hominem” means “to the person.” An ad hominem fallacy attacks a person’s character, not the person’s ideas.

Example: Ms. Robinson argues that mandatory sentences for criminals should be lowered. Mr. Johnson challenges Ms. Robinson because she’s a convicted felon. Therefore, Robinson can’t be trusted.

The fallacy: Mr. Johnson’s argument is fallacious. He attacks Ms. Robinson’s character. Johnson doesn’t challenge Robinson’s idea on its merits.

10. Tu Quoque
“Tu quoque” means “you do it yourself.” Writers use tu quoque arguments when they contend that because an individual or group is allowed to do something, everyone should be allowed to do it.

Example: Mr. Mozzarella is a member of the Departmental Disciplinary Committee for New York’s First Judicial Department. But he violated the New York Rules of Professional Conduct last year. Therefore, it’s acceptable to act unethically in Manhattan and the Bronx.11

The fallacy: A tu quoque argument makes it “impermissible to justify one wrong by another.”12 That Mr. Mozzarella acted unethically doesn’t entitle other lawyers to act unethically.

11. Nirvana Fallacy
The nirvana fallacy occurs when the writer rejects a solution to a problem. The solution is rejected because it isn’t perfect.13

Example: Mr. Brown doesn’t support a new bill to reduce greenhouse gas emissions. He argues that this bill won’t completely eliminate greenhouse gases and thus it shouldn’t be passed.

The fallacy: Mr. Brown rejects the bill because it isn’t a perfect solution. It’s fallacious to argue against a bill on the sole ground that the bill isn’t perfect. Brown is entitled to hold out for a better bill, but he can’t logically argue that the bill should be rejected because it doesn’t advance all his goals.

12. Poisoning the Well
Poisoning the well presumes your adversary’s guilt by forcing your adversary to answer a question.

Example: The lawyer asked the witness, “When did you stop beating your wife?”

The fallacy: The question assumes that the witness used to beat his wife, that he stopped beating his wife, that he’s married, and that he’s married to a woman.

13. Appeal to Authority
The “appeal to authority” fallacy assumes that a person who excels in one area is credible and authoritative in unrelated areas.

Example: Ms. Peterson told Mr. Stevens, a partner at her law firm, that she had a headache. Mr. Stevens told Ms. Peterson to take antibiotics. Peterson took the antibiotics because Stevens, a partner, must be smart.

The fallacy: Mr. Stevens is an excellent attorney. Therefore, he must know how to treat a headache. The conclusion to take the antibiotics is unwarranted. His credibility doesn’t extend to medicine.

14. Etymological Fallacy
The etymological fallacy dictates that the present-day meaning of a word or phrase should be similar to historical meaning.

Example: In Muscarello v. United States, 524 U.S. 125 (1998), the issue was how to interpret the phrase “carries a firearm” and whether Congress intended by that term to include the notion of conveyance in a vehicle.14 To define “carries,” Justice Breyer cited several dictionaries showing that the origin of the word “carries” includes “conveyance in a vehicle.”

The fallacy: Sometimes courts look to a term’s language of origin, “[b]ut these historical antecedents are not necessarily related to contemporary usage.”15 Historical meaning doesn’t always coincide with present-day meaning.

15. Appeal to Popularity
Appeal to popularity uses popular prejudices as evidence that a proposition is truthful.

Example: The current trend is that defendants are representing themselves at trial. Therefore, all defendants should represent themselves.16

The fallacy: Representing yourself at trial is the right thing to do. But a decision to represent yourself is unwarranted based on the premise.

16. Appeal to Consequences
This fallacy suggests that if the consequences are desirable, the proposition is true; if undesirable, the proposition is false.

Example: If there’s objective morality, then good moral behavior will be rewarded after death. I want to be rewarded; therefore, morality must be objective.
The fallacy: The argument doesn’t address the merits of the conclusion. The conclusion is reached by appealing to the consequences of the result.\textsuperscript{17}

17. Appeal to Emotion
Appeals to emotion are frequently used tactics in arguments and fall into “the general category of many fallacies that use emotion in place of reason in order to attempt to win the argument. It is a type of manipulation used in place of valid logic.”\textsuperscript{18}

The best way to avoid and detect fallacies is to become familiar with them.

\textbf{Example:} Judges may react to the pain and anguish a given law or doctrine causes, and they may point to the painful or existential consequences of that law as reason to change it.\textsuperscript{19}

\textbf{The fallacy:} Emotions shouldn’t be the basis on which to make decisions. Appealing to emotion is a powerful tool. But it’s logically fallacious.

18. Guilt by Association
Writers use guilt-by-association arguments when they support or attack a belief or person by an unrelated association.

\textbf{Example:} Ms. Smith was convicted of armed robbery. Ms. James was friends with Smith. James was charged with conspiracy because of her friendship with Smith.

\textbf{The fallacy:} Ms. James is guilty because of her association with Ms. Smith. Their relationship is not evidence of guilt.

19. Composition
The fallacy of composition assumes that a feature of the individuals in a group is also a feature of the group itself.

\textbf{Example:} The plaintiff’s case relies solely on circumstantial evidence. No witness for the prosecution showed that the defendant committed the crime. Therefore, the prosecution didn’t prove its case beyond a reasonable doubt.\textsuperscript{20}

\textbf{The fallacy:} Although no single witness offered sufficient evidence to convict the defendant, the totality of the circumstantial evidence might be enough for a conviction.

20. Division
Division is the converse of the composition fallacy. If a group has a feature, the individuals in the group have that feature.

\textbf{Example:} The defendant was part of a cult. The cult is known for committing violent acts. Therefore, the defendant is a violent person.

\textbf{The fallacy:} The defendant must be a violent person because he’s part of the cult. The fallacy of division suggests that the defendant is violent because the cult he’s a part of is violent.

21. Appeal to Ignorance
The logical fallacy of appealing to ignorance occurs by “forgetting that absence of evidence is not evidence of absence.”\textsuperscript{21} One can’t assume that a proposition is true or false just because some information is absent.

\textbf{Example:} Scientists can’t prove that aliens haven’t visited earth. Therefore, aliens must have visited earth.

\textbf{The fallacy:} The lack of evidence in this case is not evidence of the conclusion. The conclusion is based on a lack of evidence.

22. Begging the Question
Begging the question draws a conclusion based on an unproven assumption. To beg the question isn’t to evade the issue or to invite an obvious question.\textsuperscript{22}

\textbf{Example:} Murder is wrong because killing another human is wrong.

\textbf{The fallacy:} The fallacy here is that the premise is used to support itself. Murder is wrong, but the conclusion is invalid based on the premise.

23. Circular Reasoning
Circular reasoning is used when the writer “assumes the truth of what one seeks to prove in the very effort to prove it.”\textsuperscript{23}

\textbf{Example:} The defense attorney argues this in summation: “My client couldn’t have committed this crime. He isn’t a criminal.”

\textbf{The fallacy:} The fallacy in the argument — even though reputation evidence is admissible — is that the defendant is innocent just because he’s not a criminal. The logic is circular. Circularity is an invalid method of reasoning.

24. Scapegoating
Scapegoating passes to another target the blame for an unfortunate event.

\textbf{Example:} The Widget Company manufactures cars. Widget didn’t properly inspect its brakes in the cars. As a result, the brakes in Widget’s cars were faulty. The faulty brakes caused many injuries. Widget blamed the Application Company for the faulty brakes. Application manufactured the brakes for Widget’s cars.\textsuperscript{24}

\textbf{The fallacy:} The Widget Company’s argument relies on the scapegoating fallacy. Widget should have inspected the cars it sold. Widget passed the blame on to the Application Company because Application manufactured the faulty brakes.

25. Non Causa Pro Causa
This fallacy occurs when the writer “incorrectly assumes an effect from a cause.”\textsuperscript{25}

\textbf{Example:} I forgot my umbrella today. Therefore, it’ll rain today.

\textbf{The fallacy:} The speaker invalidly concludes it’ll rain. It’s impossible to conclude from the initial premise that it’ll rain.

26. Fake Precision
The fake-precision fallacy occurs “when an argument treats information as more precise than it really is. This happens when conclusions are based on imprecise information that must be taken as precise in order to adequately support the conclusion.”\textsuperscript{26}
27. False Dilemma
The false-dilemma fallacy occurs when the writer “make[s] choices based on a perceived set of variables that do not effectively identify the real choices available to the decision-maker.”

Example: A lawyer asks a witness, “Would you say that the defendant gets drunk about once a week, twice a week, or more often?”

The fallacy: The defendant is drunk at least once a week. The possibility exists that the defendant never drinks. The question posed allows only for a limited number of options.

28. Slippery Slope
The speaker argues that once the first step toward a particular event is taken, the first step will inevitably lead to the worst possible outcome.

Example: Tuition for school is too expensive. If the tuition increases, students won’t be able to afford it. If students can’t afford to go to school, they’ll inevitably turn to a life of crime to make money.

The fallacy: The conclusion relies on the slippery-slope fallacy. The premises don’t support the conclusion that students will become criminals if they can’t afford tuition.

29. Faulty Analogy
The fallacy of faulty analogy occurs when items in an analogy are dissimilar. When analogies are dissimilar, the conclusion becomes inaccurate.

Example: To illustrate an idea about security interests, Ms. Daniel relates them to the principles under which bankruptcy contracts operate.

The fallacy: Bankruptcy contracts don’t function the same way security interests do. The items in the analogy are dissimilar. The method of reasoning is inaccurate.

30. Hasty Generalization
The fallacy of a hasty generalization occurs when the writer takes a limited sampling to justify a broad conclusion.

Example: Chief Court Attorney Samson never edits draft opinions from his law department. All chief court attorneys are lazy.

The fallacy: Because one chief court attorney doesn’t edit draft opinions, all chief court attorneys must be lazy. Just because Mr. Samson doesn’t edit drafts doesn’t mean that he or any other chief court attorney is lazy. Countless reasons can explain why only Samson doesn’t edit drafts.

31. Fallacy of Accident
The fallacy of accident occurs when there’s an “improper application of a general rule to a particular case.”

Example: Murder is illegal. Anyone who kills an ant should be charged with murder.

The fallacy: The general law that murder is illegal is improperly applied to the specific case of killing ants. This is opposite of the fallacy of the hasty generalization.

32. False Cause
False cause is also known as post hoc ergo propter hoc. This means “after this; therefore, because of this.” This fallacy assumes that because one event occurs after another, the first event caused the second. These types of “arguments fail because they imply a causal relationship without a basis in fact or logic.”

Example: Every time I brag about how well I write, I submit a document with lots of typos.

The fallacy: If you don’t brag about your writing, you’ll submit typo-free documents. No causal link connects bragging and submitting typo-free documents.

33. Appeal to Tradition
An appeal to tradition suggests that a practice is justified because of its continued past tradition.

Example: Law X has been in effect for generations. Therefore, Law X shouldn’t be repealed.

34. Special Pleading
A special pleading is a fallacy people use to claim that something is an exception, even without proper evidence to support that claim.

Example: Drunk drivers should be punished. But Mr. A is an exception. Today’s his birthday.

The fallacy: That today is Mr. A’s birthday isn’t an adequate reason for an exception.

35. The Prosecutor’s Fallacy
The Prosecutor’s Fallacy results from confusion between the probability that (a) any individual will match the description of the guilty person and (b) an individual who does match the description is actually guilty.

Example: The perpetrator was described as seven feet tall, with blond hair, walking with a limp, the exact characteristics of the defendant in the courtroom. An expert testifies that the odds of any given person matching that description is 0.00000072 (72 out of 100 million). The prosecutor argues that the odds that the defendant is the guilty party are approximately 1.4 million to 1.

The fallacy: The prosecutor has ignored the size of the population in question. The New York metropolitan area has a population of more than 20 million people. If the case were in New York, the odds that the defendant is the guilty party (without any other information) are only 1 in 14.4, or less than 7 percent (i.e., 0.00000072 times 20 million).

After reading through this list of fallacies, readers might find it difficult to believe that any argument can be wholly free of them. The best way to avoid fallacies in arguments is to become familiar with them. The following six guidelines, from University of Memphis Professor Andrew Jay McClurg, are a good start for any
lawyer crafting fallacious-free arguments:32
1. “The premises must be at least probably true.”
2. “The essential premises must be stated.”
3. “The conclusion must at least probably follow from the premises.”
4. “The conclusion cannot be used to prove itself.”
5. “Competing arguments must be fairly met.”
6. “Rhetoric must not supplant reason.”

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mately decide the case. If, on the other hand, you decide to resort to name calling before the judge, especially where there may be issues of fact or multiple interpretations of the cases cited by opposing counsel, you may annoy the judge and undermine your case in the long run. Judges do not want to spend their time overseeing attorneys that bicker about whether each and every statement is an outright lie or whether it is a matter of interpretation. You may be correct when you say that your opponent is lying. But you need to show the court that you are right. Telling the court that you are right will not help if you cannot demonstrate it. If you judiciously pick your battles over which material misstatements deserve your strongest assertion of impropriety, and you have the evidence to support your contention, you are unlikely to irritate the judge, you will protect the reputation of you and your client, and you will have diligently represented your client’s interests.

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My client insists that we use a private investigator to “dig up” dirt on his adversary to use in our litigation. I certainly can see the benefits of doing so, but I’m also concerned about the ethical pitfalls and my obligations with respect to a third-party over whom I may not have control. What are the ethical issues I should be aware of? Should I have my client retain the private investigator? Would that protect me if the private investigator goes AWOL? Am I responsible in any way for the private investigator’s actions if he or she is taking directions from my client and is not adhering to the guidelines I provide? How do I protect myself?

A.M. I. Paranoid
To the Forum:
I work for a governmental agency. We recently held a training workshop for our junior staff attorneys pertaining to trial advocacy. The attorneys were required to cross-examine witnesses, and give opening and closing statements as part of the training. After their closing statements, they received feedback from me as well as other senior staff attorneys. After one of the junior attorneys had concluded his summation, one of my colleagues critiqued him as follows: “You did a great job, but next time try to turn down the gay. A jury is not likely to react positively to it.” The junior attorney is openly gay. I watched his reaction and he was visibly upset and taken aback by the comment. As his supervisor, I’m deeply concerned about how to address this situation. On the one hand, my senior colleague was trying to provide constructive feedback because jury bias toward counsel may clearly have an effect on the outcome of a case. On the other hand, my colleague’s comments could be construed as being highly offensive and insensitive, if not discriminatory. How should I, as a supervisor, be addressing this issue internally with my colleagues and with the junior attorney? Do I have an obligation to do something? And if so, how do I approach the issue without exposing my team to liability?

Sincerely,
A.M. Awkward

Dear A.M. Awkward:
Social standards surrounding discriminatory conduct have changed dramatically in recent years, and the legal profession is attempting to keep pace by amending ethical rules and redefining the standards of professional conduct that govern the practice of law. Nowhere has the social and legal shift toward greater acceptance and equality been more evident than in the area of gay rights. As the ABA Commission on Sexual Orientation and Gender Identity wrote in its memorandum in support of a proposed amendment to ABA Model Rule 8.4 to prohibit discrimination on the basis of, among other things, sexual orientation, “it is time for the legal profession to support its rhetoric of equal justice with action and consequences. An ethical rule will set a standard for lawyer conduct [and] force lawyers to examine and reform their own behavior.” See Memorandum to Standing Committee on Ethics and Professional Responsibility, February 7, 2016. As an attorney, you have a professional obligation to keep abreast of these developments, or else risk exposing yourself or your colleagues to ethical violations and, potentially, official sanctions or censure. While there may be no bright line rule for assessing whether your senior colleague’s comments about the junior attorney’s sexual orientation constitute an ethical violation, familiarizing yourself with the relevant rules and requirements will enable you to take the necessary preventative measures and, if needed, deal with a potentially discriminatory act in a manner consistent with your own ethical obligations.

New York has been a pioneer in enacting rules of professional conduct to prohibit discrimination in the practice of law. In 1990, New York adopted DR 1-102(a)(6), which prohibits discrimination on the basis of sexual orientation, race, gender and other specified bases. See Roy D. Simon, Simon’s Rules of Professional Conduct Annotated at 1968 (2016 ed.) By contrast, the ABA’s model rule counterpart was not adopted until August of 2016. See Wendy Wen Yun Chang, A New Model Anti-Discrimination Rule, Daily Journal, August 19, 2016. In fact, “many states still have no rule making discrimination an ethical violation.” Simon supra, at 1968. Indeed, as one commentator has noted, “New York’s anti-discrimination rule is the paradigm model for targeting and proscribing determination because of its bifocal approach to prohibiting discrimination against clients and other lawyers.” Nicole Lancia, New Rule, New York: A Bifocal Approach to Discipline and Discrimination, 22 Geo. J. Legal Ethics 949, 949 (Summer 2009).

Rule 8.4(g) of the New York Rules of Professional Conduct (NYRPC), which replaced DR-102(a)(6), governs discriminatory misconduct by attorneys and states that “[a] lawyer or law firm shall not unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.” NYRPC 8.4(g). NYRPC Rule 8.4(g) is, however, somewhat limited in its scope. First, the Rule applies only to an attorney’s conduct in the practice of law, and therefore a lawyer cannot be disciplined for discrimination in his or her personal life or in any other business outside the practice of law. Second, Rule 8.4(g) requires that before a complaint for discrimination can be brought before disciplinary authorities, it must first be brought before a tribunal and the petition-
er must obtain a final determination and the right of appeal must be exhausted. As Professor Roy Simon has observed, “[t]he goal of the rule is lofty and laudable, but the scope of the rule is extremely limited.” Simon supra, at 1966.

With that said, New York courts have been willing to impose penalties upon attorneys that have violated the requirements of NYRPC Rule 8.4. For example, in Principe v. Assay Partners, the Supreme Court, New York County, considered a claim of abusive and improper professional conduct by plaintiff’s counsel toward an opposing counsel. 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992). During a deposition, plaintiff’s counsel made derogatory comments to his opposing counsel which demeaned her on the basis of her gender. He referred to her as “little lady,” “little girl” and told her to “pipe down” and “go away.” Id. at 704. These comments were “accompanied by disparaging gestures [such as] dismissively flicking his fingers and waving a back hand” at opposing counsel. Id. The court concluded that the conduct exhibited by plaintiff’s counsel was the “paradigm of rudeness” and degraded his colleague on the basis of her gender. Id.

The court stated that “[a]n attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession, and an attorney’s conduct that projects offensive and invidious discriminatory distinctions . . . is especially offensive.” Id. The court concluded that plaintiff’s counsel had violated the predecessor to NYRPC Rule 8.4(g) and that his behavior fell “within well-established categories of sanctionable conduct.” Id. at 708.

In summarizing the importance of New York’s rule against discriminatory conduct, the court in Principe found that “[t]he fundamental concern raised is that discriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession,” and that “any reasonable attorney must be held to be well aware of the need for civility [and] to avoid abusive and discriminatory conduct.” Id. at 707–08.

In In re Monaghan, the Appellate Division, Second Department considered an appeal of an order of public censure by the U.S. District Court for the Southern District of New York in response to an attorney’s race-based abuse of opposing counsel during a deposition. 295 A.D.2d 38 (2d Dep’t 2002). The attorney in question harassed opposing counsel for her alleged mispronunciation of certain words, invoking unambiguous racial stereotypes in the process. The District Court warned and then publicly censured the attorney for his race-based abuse and his violation of the predecessor to NYRPC Rule 8.4(g).

On appeal, the Second Department granted the petitioner’s motion to impose discipline upon the attorney and affirmed the censure for the attorney’s professional misconduct. Id. at 41.

Courts in other states have issued similar decisions arising from violations of their own professional prohibitions of discriminatory conduct by an attorney. For example, in In re Kelley, the Supreme Court of Indiana considered a disciplinary petition against an attorney for her derogatory comments to the employee of a company that she contacted on her client’s behalf. 925 N.E.2d 1279 (Ind. 2010). The attorney’s client had received unlisted phone calls from a company attempting to contact someone with the same name. The attorney called the company and spoke to a male representative. The attorney said that she was calling on behalf of her client and “gratuitously asked the company’s representative if he was ‘gay’ or ‘sweet.’” Id. The company representative commented on the unprofessional nature of the attorney’s comment and ended the phone conversation.

The Supreme Court of Indiana subsequently concluded that the attorney had violated Indiana Professional Conduct Rule 8.4(g), which prohibits prejudicial acts by an attorney on the basis of sexual orientation, and imposed a public reprimand and costs against the attorney.

The adoption of ABA Model Rule 8.4(g), and other state rules prohibiting discriminatory conduct by attorneys in the practice of law, has not been without controversy. Some commentators have suggested that such rules restrict an attorney’s freedom of speech and thus run contrary to the constitutional values that attorneys are obliged to uphold. (See Ronald D. Rotunda, the ABA Decision to Control What Lawyers Say: Supporting “Diversity” but not Diversity of Thought, The Heritage Foundation Legal Memorandum No. 191 (Oct. 6, 2016).) They have argued that ABA Model Rule 8.4(g) and its state counterparts attempt to penalize forms of speech protected by the First Amendment and that “[e]ven when a court does not enforce this rule by disbarring or otherwise disciplining the lawyer, the effect will still be to chill lawyers’ speech, because good lawyers do not want to face any non-frivolous accusations that they are violating the rules.” (Id. at 4.) Others have opposed the adoption of ABA Model Rule 8.4(g) on the grounds that it would “change the attorney-client relationship and impair the ability to zealously represent clients.” (Elizabeth Olson, Bar Association Considers Striking ‘Honeys’ from the Courtroom, The New York Times (Aug. 4, 2016).)

Such objections aside, our profession should expect that the adoption of ABA Model Rule 8.4(g) is likely to cause more states to follow New York’s example by adopting ethical rules restricting or prohibiting discrimination by attorneys in the practice of law. As a result, attorneys everywhere have a professional obligation to apprise themselves of current developments in this area.

Your senior colleague’s comment that a junior attorney “turn down the gay” raises in our view several issues under NYRPC Rule 8.4(g). First, while the comment appears to have been made in an attempt to provide the junior attorney with constructive criticism, it is also based on certain discriminatory stereotypes concern-
ing the ways in which gay men speak, and attempted to impose an arbitrary and prejudicial standard of how a male attorney would or should sound when giving a closing statement to a jury. In this way, it is very similar to the attorney’s comment in In re Kelley, which appeared to be based on certain assumptions about the company representative’s sexual orientation based purely on his manner of speech. And while your senior colleague’s comment does not appear to embody the same degree of vitriol as the statements by the attorney in In re Monaghan, it could still be construed as an unnecessary critique of another attorney’s speech based purely on a similar set of discriminatory stereotypes. Your senior colleague might claim that it was not his intention to discriminate against the junior attorney. Indeed, he may not have even meant to upset the junior attorney at all. However, NYRPC Rule 8.4(g) does not require that the discrimination be intentional, or even reckless. Instead, the Rule prohibits discriminatory conduct of any kind, whether the conduct was intentional or not. In this way, NYRPC Rule 8.4(g) differs from ABA Model Rule 8.4(g), which requires that the discriminatory conduct be knowing or, at a minimum, requires that the discriminatory conduct be intentional or, at a minimum, negligent. Compare NYRPC Rule 8.4(g) with ABA Model Rule 8.4(g).

The other question raised by your senior colleague’s comment is whether it was made “in the practice of law,” as required by NYRPC Rule 8.4(g). The comments at issue in both In re Monaghan and Principe v. Assay Partners were made during depositions. The comments by the attorney in In re Kelley were not made during a formal proceeding, but were clearly made in the attorney’s professional capacity while making a call on behalf of her client. Your senior colleague’s comment appears to be somewhat more remote from the actual practice of law than any of the foregoing cases, but could still be construed as having been made within the practice of law because it was made in a professional environment during an official attorney training program. There is not enough case law on this point to definitively say whether the comment was made “in the practice of law,” but there is certainly a chance that a court could conclude that it was. See Simon supra, at 1967 (noting that Rule 8.4(g) does not extend to private business activities).

Regardless of how your senior colleague’s comments may be construed by a court in an ethical proceeding, it would be prudent of you to inform him of his ethical obligations under NYRPC Rule 8.4(g). Whether the comments constitute a violation of the Rule or not, they certainly seemed to offend the junior attorney and made him feel as if he was being unfairly targeted based on his sexual orientation. This is likely to have an adverse impact upon not only the junior attorney, but also other attorneys that may have found the comments to be offensive or discriminatory. It could also lead to further problems in your agency and, potentially, employment litigation. While the comments may have been intended as constructive criticism of the junior attorney’s performance, there was no reason for your senior colleague to tether his criticism to the junior attorney’s sexual orientation. Your senior colleague should not have told the junior attorney to “turn down the gay,” just as he should not tell a female attorney to “act more ladylike” or an African-American attorney to “turn down the ghetto.” Your senior colleague’s critique should have been made without reference to the attorney’s sexual orientation, and instead should have been limited to the specifics of the junior attorney’s closing argument. For example, did the junior attorney speak too fast, or too slow? Was he too animated, or too droll? Your colleague’s choice to bring the junior attorney’s sexual orientation into the discussion was a poor one, which has put him and your agency at risk of a potential violation of NYRPC Rule 8.4(g) and civil liability.

Perhaps your senior colleague may be completely unaware of the require-ments of NYRPC Rule 8.4(g), and may not have realized that his comment would make the junior attorney so uncomfortable. As discussed above, the fact that he was not aware, however, will not protect him from sanctions under NYRPC Rule 8.4(g). In our opinion, you should discuss the situation with your senior colleague, inform him of his ethical obligations and recommend that he has a follow-up session with the junior attorney in which he provides him with a more constructive, less discriminatory assessment of his performance. You may also want to recommend diversity training for all your staff to avoid similar situations in the future as a failure to address the issue may lead to future improper conduct.

Finally, we should note that this past February, the ABA’s House of Delegates enacted Resolution 107 which encourages bar associations and other licensing and regulatory authorities that require mandatory CLE to offer “as a separate required credit, programs on diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”).” Resolution 107 has the support of various bar associations who see D&I CLE as an important tool to raise awareness of bias in our profession and develop the means to effectuate change. The adoption of stand-alone D&I CLE in New York is an issue that we expect will be addressed by the NYSBA’s House of Delegates in the near future.

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