ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am dealing with an adversary who communicates very differently than I do. We had a discovery dispute, and I would spend time drafting specific letters with references to statutes, case law, and Bates numbered documents. After I would send out the letters, I would immediately get back a vague one-paragraph response that didn't address any of the issues I raised. I tried calling him, but his number always went directly to voicemail, and he would only respond, days later, with another vague email. I expressed my frustration with the attorney and finally received an email saying that due to my "excessive" communications with him, he was sending me a list of "rules" that I was supposed to follow going forward. Some of the rules seemed outlandish: "1) Do not call or leave messages on my voicemail unless it is to notify me of an Order to Show Cause or some other emergency relief being sought (in which case, the phone call is MANDATORY); 2) You must copy my client on all email communications to me; 3) You may not copy or blind copy your own client to emails to me and my client; 4) Do not follow up on any communications with me until I have had a week to respond." Can an attorney dictate rules for how another attorney communicates with them? Even if I ignore these rules, what can I do to deal with an attorney who is so difficult and non-responsive?

While I am on the subject of attorney communications, I just learned that one of my clients was getting a "second opinion" from another attorney about a case I am handling. I am not sure how this new attorney met my client, but I know that her firm advertises heavily in our area for giving second opinions on pending cases, and there was recently an article in the law journal that one of our motions was partly denied. I am concerned because I have no idea what this attorney is telling my client and she might be bad-mouthing me in the hopes of taking over the case. This firm's business model appears to be based upon taking over cases from other attorneys and does not have a very good reputation in the local legal community. Can I ask my client about what the other attorney is saying about the case? Can I warn my client that there are rules about how attorneys solicit clients and that the other attorney may have violated them? Can I contact the other attorney to explain some of the legal aspects of the case that my client may not fully grasp? Even if I can talk to my client or this other attorney, should I?

Very truly yours,
Attorney Worrywart

Dear Attorney Worrywart:

We can all agree that efficient and effective communication is vital to the practice of law. The Rules of Professional Conduct touch upon nearly every aspect of communication within the legal profession. There are specific rules governing how attorneys communicate with clients (New York Rules of Professional Conduct (RPC) 1.4), unrepresented parties (RPC 4.3), jurors (RPC 3.5), and even how they advertise their services to the public at large (RPC 7.1). Surprisingly, the Rules of Professional Conduct do not expressly govern how lawyers should communicate with one another. *See* Ethics Opinion No. 1124 ("no provision in the Rules of Professional Conduct . . . mandates how lawyers must communicate with each other"). This is likely because the Rules essentially treat our profession as "largely self-governing" trusting that lawyers – as members of a vocation founded principally on honesty and integrity – will hold themselves and their colleagues accountable for following the professional and ethical norms inherent to the profession. *See* Preamble to the Rules of Professional Conduct, ¶ 4. Despite this void in the actual text of the Rules of Professional Conduct, the Standards of Civility set forth in Appendix "A" to the Rules contain several universal principles that lawyers should bear in mind when communicating with an adversary.

The Standards of Civility are guidelines intended to encourage lawyers, judges, and court personnel to abide by 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." However, the Standards of Civility were not intended to replace, or even supplement, the Rules of Professional Conduct. Instead, they are essentially an honor code outlining "best practices" and professional courtesies lawyers routinely observe and extend to their colleagues. Not surprisingly, many of these "best practices" concern lawyer-to-lawyer communication.

For example, the Standards of Civility remind us that "lawyers should allow themselves sufficient time to resolve any dispute or disagreement by *communicating with one another* and

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

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

imposing reasonable and meaningful deadlines in light of the nature and status of the case." Standards of Civility, ¶ II(B) (emphasis added). The Standards further provide that lawyers should make a good faith effort to *consult with other counsel* regarding scheduling matters in order to avoid scheduling conflicts. *Id*., ¶ III(D) (emphasis added). Finally, Paragraph IV of the Standards of Civility dictates that "a lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response." *Id*., ¶ IV. While the provision does not indicate whose telephone calls and correspondence require a prompt response, one can reasonably infer that calls and correspondence from opposing counsel would fall into that category. Therefore, it is reasonable to conclude that your adversary's self-imposed, week-long grace period for responding to communications may run afoul of the Standards of Civility. But again, the Standards of Civility merely guide – they do not govern.

A recent ethics opinion released in May 2017 offers some more practical guidance on the ways and means of "proper" lawyer-to-lawyer communication. Responding to an inquiry from a lawyer whose adversary would only respond to written communications and preferred not to use the telephone, the New York State Bar Association's (NYSBA) Committee on Professional Ethics advised in Opinion No. 1124 that "[a] lawyer may communicate with opposing counsel in any manner he chooses . . . regardless of the instructions of opposing counsel." NYSBA Comm. on Prof'l Ethics, Op. 1124 (2017). However, the Committee clarified that "opposing counsel is not required to respond to the lawyer's chosen method." *Id*. Therefore, in response to your adversary's instruction to not call or leave him voice messages unless it is an emergency, you may continue to call and leave him voice messages as you see fit; however, bear in mind that he is under no obligation to respond in kind.

Having addressed your adversary's so-called "communication rules," we can now move on to his instructions on client communications. Simply put, the Rules do not contain a provision that require you to communicate with your adversary's client. Just as the Ethics Committee could not pinpoint a specific Rule that governed how attorneys are to communicate with one another in Opinion No. 1124, they could not identify anything in the Rules that requires a lawyer to communicate with his adversary's client. *Id*. "It is not the lawyer's responsibility to keep the opposing counsel's client 'informed about the status of the matter' as required by Rule 1.4(a)(3). That is opposing counsel's obligation under that Rule." *Id*. Thus, you may – as a professional courtesy to your adversary – copy his client on all email communications, but you are under no obligation to do so.

Despite your adversary's direction to the contrary, you may in fact copy or blind copy your own client on emails to your adversary and/or his client. According to NYSBA Committee on Professional Ethics Opinion No. 1076 issued in December of 2015, "[a] lawyer may blind copy a client on email correspondence with opposing counsel, despite the objection of opposing counsel." NYSBA Comm. on Prof'l Ethics, Op. 1076 (2015). Keep in mind, however, that there are certain risks involved with copying and blind copying email communications. The Ethics Committee opined that while it is not unethical to copy or blind copy clients on email correspondence with opposing counsel or adverse parties, there are other practical reasons why attorneys should think twice before doing so. According to the Committee, "cc: risks disclosing the client's email address. It also could be deemed by opposing counsel to be an invitation to send communication to the inquirer's client." *Id*. With respect to the perils of using "bcc:," the Committee stated that while this may "initially avoid the problem of disclosing the client's email address, it raises other problems if the client mistakenly responds to the email by hitting 'reply all.'" *Id*. We previously recommended avoiding the use of "reply all" for this reason. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., September 2012, Vol. 84, No. 7. Limiting your use of "bcc:" is a way to protect your clients from this frequently committed human error.

Ultimately, if playing by your adversary's communication "rules" becomes too onerous, negatively impacts your ability to effectively represent your client, or impedes the resolution of the case, it is best to relay your concerns to him and attempt to "work out . . . the methods of communication that will best facilitate resolution of the matter at hand." NYSBA Comm. on Prof'l Ethics, Op. 1124 (2017). As we often do as lawyers, you should compromise and devise a communication strategy that is reasonable and feasible for both parties. Above all else, the Ethics Committee recommends that lawyers apply common sense to their dealings with one another. *Id.*

While the contours of attorney communication preferences are a mixed bag of professional courtesies and recent ethics opinions, client solicitation and attorney advertising are far more black and white. According to the "No Contact" rule of the Rules of Professional Conduct, "[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." RPC 4.2(a). The Ethics Committee has opined, however, that the "No Contact" rule only applies to communications "made by a lawyer in the course of 'representing a client.'" NYSBA Comm. on Prof'l Ethics, Op. 1010 (2014). Therefore, it does not apply to communications from a third-party firm in which the firm seeks to obtain "new clients in matters in which the firm is not already involved." *Id*. In other words, it is not unethical for a lawyer or law firm to "poach" a client who is already represented by counsel in an active matter, as long as the lawyer or law firm is not itself involved in

the case. Therefore, despite your concerns about the firm's business model and their reputation in the legal community, they may lawfully advertise their "second opinion" services to your client.

That being said, the third-party firm's advertising tactics are subject to the Rules governing legal advertisements and client solicitation. Pursuant to Rule 1.0(a) of the Rules of Professional Conduct, an "advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Rule 1.0(a). The Rules restrict and prohibit certain types of legal advertising, including statements or claims that are false, deceptive or misleading (RPC 7.1(a)(1)), and impose limits on paid endorsements and fictionalized portrayals (RPC 7.1(c)). The Rules further require a disclosure that the advertisement is in fact an advertisement (RPC 7.1(f)) and impose pre-approval and retention requirements (RPC 7.1(k)).

The Rules of Professional Conduct also place certain restrictions on client solicitation. Under Rule 7.3, "solicitation" is defined as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." RPC 7.3(b). While this definition could theoretically encompass the third-party firm's conduct as you described it (i.e., targeting clients who have recently received adverse decisions and offering "second opinions"), the comments to Rule 7.3 narrow the scope of "solicitation" substantially. "[A]n advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a *specific incident* to which the advertisement explicitly refers." RPC 7.3, Cmt. [3] (emphasis added). If the advertisement does not make reference to a specific incident, it is not considered to be a solicitation, and is not subject to the additional restrictions enumerated in Rule 7.3. *See, e.g.*, RPC 7.3(a)(2)(v) (solicitation not permitted where lawyer intends but fails to disclose that services will be performed primarily by a different, unaffiliated lawyer); RPC 7.3(h) (setting forth requirement that soliciting lawyer include certain information about his or her services); RPC 7.3(e) (applying specific restrictions on solicitations relating to personal injury or wrongful death claims). Advertisements for "second opinion" services arguably approach the line between solicitation and non-solicitation, but according to the Ethics Committee, they are permissible. *See* NYSBA Comm. on Prof'l Ethics, Op. 1010 (2014) ("A firm may advertise that it is available to provide second opinions on pending legal cases on which individuals are already represented."). Therefore, the services offered to your client by this third-party law firm are not subject to tougher scrutiny under Rule 7.3.

If you do have legitimate concerns that this law firm violated one of the above-mentioned Rules on attorney advertising or solicitation when it contacted your client, you may express those concerns to your client if such disclosure would be in his best interest, but be careful to do your research before making any false or unsubstantiated accusations. If you discover that the firm has in fact violated one of the Rules of Professional Conduct, it may be more appropriate to notify the Grievance Committee.

Finally, if you do reach out to the third-party attorney to offer insight and explain aspects of the case, proceed with caution. Remember, you are still bound by the obligation to protect your client's confidential information gained during or relating to the representation. *See* RPC 1.6. The third-party attorney is also bound by these obligations in his or her communications with you. Thus, you should not expect that you will learn much information about what your client discussed with the third-party attorney and what legal advice, if any, was provided.

The communication boundaries addressed here are complex, and as professional norms change and technology advances, the Rules of Professional Conduct – including the Rules governing advertising and solicitation – will have to evolve accordingly. What must remain constant, however, are the core values of courtesy and civility, which attorneys should practice as a matter of course. Add in a touch of common sense and most, if not all, communication hurdles can be cleared.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Richard W. Trotter
(trotter@thsh.com)
Amanda M. Leone, Esq.
(leone@thsh.com)
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

On my return home from a summer vacation, I almost had a panic attack standing in line at U.S. Customs. The person in front of me was carrying a laptop with a flash drive, and the customs agent instructed him to turn the laptop on, plug in the flash drive, and open certain documents on it. My laptop was in my bag hanging over my shoulder. I started thinking about what was on my laptop. I had been reviewing documents on a very sensitive deal between two well-known public companies that I am sure my client does not want anyone to know about. I am very careful about cybersecurity, and the laptop requires two-factor authentication to access any documents. But this border agent was directing the person to enter a password and show him information on the computer with a number of people in the immedi-

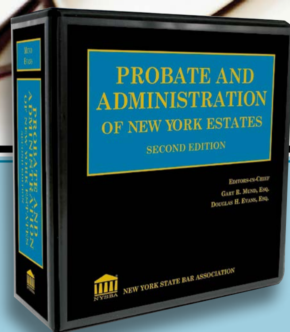
ate vicinity who could see the screen. Fortunately, I went through the checkpoint without having to even turn on my computer. But I travel frequently and I always bring my laptop with me. I know that a number of the attorneys at my firm regularly travel abroad, and many of them take their laptops and phones with them. I am now very concerned about even carrying my laptop to the airport.

Under what circumstances can a customs agent demand to search through a passenger's electronic devices? Are there any limitations for what the customs agent can and can't search? Can they make copies of materials on my devices? Are there exceptions for attorneys who are carrying devices with sensitive or confidential client information? If an agent directs me to show client information, should I explain to the agent that I am an attorney and carrying sensitive information that I cannot disclose?

If the agent insists on viewing the information despite my protests, is there anything else I can do? Am I violating any ethics rules by following the directions of the agent? Am I breaking any laws by refusing to comply with the agent? If an agent does review my devices and confidential or sensitive client information, what are my ethical responsibilities to my client? Does it matter if I have sensitive or confidential information from a potential client that has not yet retained me? What if the same issue arises with a customs agent from another country? Is there anything I should do to my devices the next time I travel abroad to prevent disclosure of client information? ■

Very truly yours,
Justin Cancun

From the NYSBA Book Store



Probate and Administration of New York Estates, Second Edition

EDITORS-IN-CHIEF
Douglas H. Evans, Esq.
Sullivan & Cromwell LLP, NY

Gary R. Mund, Esq.
Attorney-at-law, NY

PRODUCT INFO AND PRICES
2015 / 1,096 PP., loose-leaf
PN: 40054 (Print)
PN: 40054E (E-Book)

NYSBA Members	**$185**
List Price	$220

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

Probate and Administration of New York Estates is a compendium of vital information covering all phases of estate administration, from securing the will through final accounting. It is a handy, single-volume source for quick answers to both straightforward and perplexing estate administration issues, and an authoritative source of background information for further research, if necessary.

This revised second edition includes substantial updates and rewrites, bringing all topics up to the current state of the law, and in particular, addresses many thorny tax issues in the ever-changing landscape of estate taxation.

Get the Information Edge
NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs Mention Code: PUB8689