

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.**

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TO THE FORUM:

I have been asked to represent XYZ Corporation in connection with a corporate investigation into allegations of fraud and corporate mismanagement against three high-level executives at the company. XYZ Corporation became a client of the firm through a relationship with the managing partner of my firm and we have represented them for over a decade. XYZ Corp. is one of our firm's most valuable and economically lucrative clients.

Last week, when I was at XYZ Corporation preparing for trial, one of the high-level employees, not involved in the instant suit, pulled me aside to ask my opinion on a matter that was personal to him. I quickly cut him off and reminded him that I was retained to represent the company and not him as an individual employee and advised him to seek private counsel for any questions not related to the XYZ matter. He was so outraged by my refusal to give him legal advice that he stormed away.

Later that week, the managing partner of my firm called me into his office and reprimanded me for not providing legal counsel to the employee. He informed me that from here on out I should do whatever the high-level employees ask because they comprise the corporation that is the client. Essentially, they call the shots and we do not want to lose them as a client. When I tried to push back, he informed me that if I did not please the client, my job would be in jeopardy.

I don't want to lose my job, but I can't shake the feeling that what he is asking me to do is unethical and wrong. What are my ethical obligations with respect to XYZ Corporation and its individual employees? Do I have a general obligation to do whatever the client asks? Was the managing partner of my firm out of line? If so, what, if anything, can I do?

*Very Truly Yours,
Inn A. Bind*

DEAR INN A. BIND,

Your inquiry raises several important questions that lawyers need to keep in mind at all times. First, who is your client? Here, it is clearly the corporation. Second, can you simultaneously represent executives or employees of your corporate client on unrelated personal matters? The quick answer is that it depends. Third, what are the risks in doing so and, most important, what steps can you take to avoid disqualification that would prevent your firm from representing the corporation on future matters should a dispute occur between the corporation and that executive or employee? As always, the Rules of Professional Conduct (RPC) are our guide in answering your question.

RPC 1.13 sets forth an attorney's ethical obligations when the client is an organization and provides that: "when a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents." RPC 1.13(a). This is often referred to as the Corporate Miranda Warning or the Upjohn Warning. A "constituent" of the corporate organizational client includes officers, directors, employees and shareholders but also equally applies to positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations. See RPC 1.13, Comment [1].

Comment 3 to RPC 1.13 tells us that "when constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." In any case, RPC 1.13(b) makes clear that a lawyer's obligation is to

act in the best interests of the organization. Thus, if the lawyer knows that the actions of an executive or other corporate constituent are in violation of law that might be imputed to the organization or are otherwise adverse to the interests of the corporation, the lawyer must proceed as is reasonably necessary in the best interest of the organization. *See* RPC 1.13(b), Comment [3]. RPC 1.0(k) tells us that a lawyer's knowledge can be inferred from the circumstances and a lawyer cannot ignore the obvious. *See* RPC 1.0(k).

The RPC outlines the circumstances where representation of the corporation's executives, directors, employees or other constituents would not violate an attorney's ethical obligations. For example, RPC 1.13(d) states: "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." RPC 1.7 discusses conflicts of interests that arise during the representation of a current client and we briefly discussed its application in our prior *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2020, Vol. 92, No. 4.

As a general matter, RPC 1.7 provides that a concurrent conflict of interest exists, thereby barring the attorney's

representation of the client, if a reasonable lawyer would conclude that either: "(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." It is fundamental that loyalty and independent judgment are essential aspects of a lawyer's relationship with a client and that the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. *See* RPC 1.7, Comment [1]. Subsection (b) of RPC 1.7, however, provides a carve-out that permits a lawyer to represent the client even in the presence of a concurrent conflict of interest if: "(1) the lawyer reasonably believes that the lawyer will be able to 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." RPC 1.7(b).

Therefore, if your firm believes that it can provide competent representation to both XYZ Corporation and the employee on a matter that obviously does not involve a claim by the employee against the corporation, or vice versa, and the matter is unrelated to the firm's representation of XYZ Corporation, the firm may properly



represent the employee so long as it has obtained the informed written consent of both XYZ Corporation and the employee. *See* RPC 1.7. The conflict waiver or written consent should provide, *inter alia*, that the firm believes that there is currently no conflict between XYZ Corporation and the employee that would preclude concurrent representation of both. As part of the waiver, XYZ Corporation and the employee should agree to waive in advance any and all conflicts of interest that may arise in the future. We suggest language stating that in such event the firm would not be able to continue to represent the employee but would continue as counsel to XYZ Corporation.

Another issue that your question raises – perhaps of greater concern – is your managing partner’s demand that you should “do whatever the high-level employees ask.” First, as you have correctly noted, XYZ Corporation is your client, not the employee. Generally speaking, lawyers do not owe a duty to non-clients nor do they have an obligation to render free legal advice whenever solicited. In any case, even assuming that the employee was your client, with the exception of certain carve-outs, attorneys do not have an obligation to do “whatever” the client asks. While it is true that RPC 1.2 confers upon the client the ultimate authority to determine the purposes to be served by the lawyer’s legal representation of the client, such as whether to settle a matter in civil cases, this authority is not absolute. *See* RPC 1.2(a). In fact, blindly taking action at the client’s behest can place the lawyer at odds with his or her ethical obligations and, in some circumstances, cause the lawyer to violate the law.

The RPC recognizes that as a practical matter, lawyers are often faced with situations where the client insists that the lawyer take certain actions that the lawyer believes are improper; in such circumstances, withdrawal from the representation may be the lawyer’s only choice. Breakdowns in the attorney client relationship is an issue addressed in several prior *Forums*. *See* Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., September/October 2020, Vol. 92, No. 7; Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., April 2020, Vol. 92, No. 3.

Although your managing partner’s reaction does not, in our view, violate any of the applicable ethical rules, he certainly could have handled the situation better. In fact, both you and the managing partner should have discussed the high-level employee’s request before reacting one way or the other. When the high-level employee approached you, it might have been better for you to tell the employee that you would discuss his request for legal advice with your

partners rather than outright telling him to hire separate legal counsel. And in turn, the managing partner and you should have had a conversation about a variety of issues, including the facts relating to the high-level employee’s request for legal advice, payment of fees, whether a separate engagement letter and written conflict waiver should be obtained for the personal representation, and whether that representation would create the risk of ultimately jeopardizing the firm’s relationship with the corporation if a conflict were to arise with that high-level employee. Depending on how these questions are answered, separate representation of the employee may or may not be required. While the managing partner’s focus is, to be sure, on the retention of XYZ Corporation as a client and to that end, keeping the executives/high-level employees of XYZ Corporation happy, it is important to keep in mind that lawyers are hired to be counselors and advisors and must perform such duties with the best interests of the client in mind, even if that means at times pushing back when the client’s representative suggests an approach that may not be in the corporate entity’s best interests. Here, if after asking some important questions, performing the above analysis and understanding the risks associated with concurrent representation of the corporate client and its employee, the managing partner makes an informed decision that the concurrent representation is appropriate, such a decision would be a common judgment call regularly made by firms.

Regardless of whether your firm decides to take on the concurrent representation, the lesson to be learned here is that communication, and the specific facts involved, are key. We can debate the existence of a few bright line rules; most decisions fall in the gray category and require thoughtful analysis, rather than knee jerk reactions. You should endeavor to have a better line of communication with the managing partner at your firm, especially when you believe that you are being asked to take actions that may arguably run afoul of your ethical and professional obligations. Even if your gut instinct is wrong and the action does not actually violate any ethical rule, the worst that could happen is you refresh your knowledge of the RPC. And that’s not a bad thing!

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

To the Forum:

I am an attorney of 12 years, admitted to practice in New York State, and about five years ago I became a sole practitioner. In order to reach potential clients, I created a website to promote my services and to showcase my biography, *pro bono* work, testimonials and more. Recently, however, it came to my attention that a former client had posted an extremely negative review of me and my staff on the Yelp website:

Attorney Stones and her staff are rude and beyond incompetent. They overcharged for 'legal' work that I could have done myself – and honestly should have – because I am no better off than I was before their 'help' if anyone would even dare to call it that! It really makes me wonder if she actually went to law school. She needs to be cancelled immediately. Highly do not recommend!! – Ms. Inda Limbo

I have suspicions about who the client may be. I narrowed it down to two individuals; one client owes me a great deal of money, while the other client possesses a criminal record. Yet, both discharged me as their attorney without explanation.

Needless to say, no matter who posted the negative review, I am worried that my previously unblemished reputation is going to be subject to disparagement forever. Continuing to work has been difficult during the age of COVID. With the pandemic shutting everyone in, I rely now more than ever on my website, as well as my internet presence, to obtain business and grow my reputation. I am concerned about these statements – they pop up whenever my name is run through a search engine.

I would like to resolve this without getting myself involved with the Grievance Committee. Am I ethically permitted to respond in defense of my reputation? What can I do and how do I counter this negative review?

**Very truly yours,
Styx N. Stones**