# ATTORNEY PROFESSIONALISM FORUM

## 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

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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.[2] 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.

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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 employee 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. Quon*, 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