ATTORNEY PROFESSIONALISM FORUM

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 mispresenting 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 (1966).

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 NYPRC 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. Stallone, Hannah Furst, *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 Schildhaus*, 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 (October 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-

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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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1. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 96 (1992).
2. Bradley Dowden, *Internet Encyclopedia of Philosophy*, http://www.iep.utm.edu/fallacy/#H6 (last visited June 6, 2016).
3. Adapted from *id.*
4. Neal Ramee, *Logic and Legal Reasoning: A Guide for Law Students*, http://www.unc.edu/~ramckinn/Documents/NealRameeGuide.pdf (last visited June 6, 2016).
5. *Id.*
6. *Regester v. Longwood Ambulance Co., Inc.*, 751 A.2d 694, 700 (Pa. Commw. Ct. 2000).
7. Bo Bennet, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/150/Red_Herring (last visited June 6, 2016) (emphasis deleted).
8. McClurg, *supra* note 1, at 90.
9. *Id.* at 89.
10. Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & Pol. 663, 676 (2012) (internal quotation marks omitted).
11. Inspired by Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 Cornell Int'l L.J. 911, 935–36 (2005).
12. L. Scott Smith, *Religious Toleration and the First Amendment*, 22 Kan. J.L. & Pub. Pol'y 109, 135 (2012).
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14. Adapted from Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and A Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. Rev. 1915, 1939 (2010).
15. *Id.*
16. Inspired by John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 Conn. L. Rev. 819, 821 (2001).
17. Adapted from G. Fred Metos, *Appellate Advocacy*, 23 Champion 33, 34 (Mar. 1999).
18. Bo Bennett, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/29/Appeal_to_Emotion (last visited June 6, 2016).
19. Adapted from Ediberto Roman, *Love and Civil Rights*, 58 How. L.J. 113, 123 (2014).
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23. Ramee, *supra* note 4, at 6.
24. Inspired by Sean Kane, *Honda Finds Convenient Scapegoat in Takata*, 35 Westlaw J. Automotive 1, *1 (2016).
25. Bo Bennett, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/95/False_Effect (last visited June 6, 2016).
26. W. Jerry Chisum & Brent E. Turvey, *Crime Reconstruction* 115 (1st ed. 2007).
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30. William J. Blanton, *Reducing the Value of Plaintiff's Litigation Option in Federal Court: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 2 Geo. Mason U. L. Rev. 159, 199 (1995).
31. Maureen B. Collins, *Losing Arguments*, 90 Ill. B.J. 669, 669 (Dec. 2002).
32. Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 841–42 (1988).

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.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

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