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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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DEAR FORUM,

I am an attorney practicing in the arena of civil litigation. I am currently representing a client who I am consistently at odds with. It seems that no matter what I do the client refuses to follow my advice. For example, the client has sent numerous emails to opposing counsel regarding issues in the case despite my insistent instruction not to do so. What's more is that the client refuses to follow my trial strategy and insists that I decline all reasonable extension requests from the adversary. Unfortunately, I feel as if our attorney-client relationship has broken down beyond repair requiring me to withdraw as counsel. Am I permitted to do so under the circumstances I have described? If so, what are my professional responsibilities? Do I have any ethical obligations to the client and/or the court in the process?

Very truly yours,
Tami Terminated

DEAR TAMI TERMINATED,

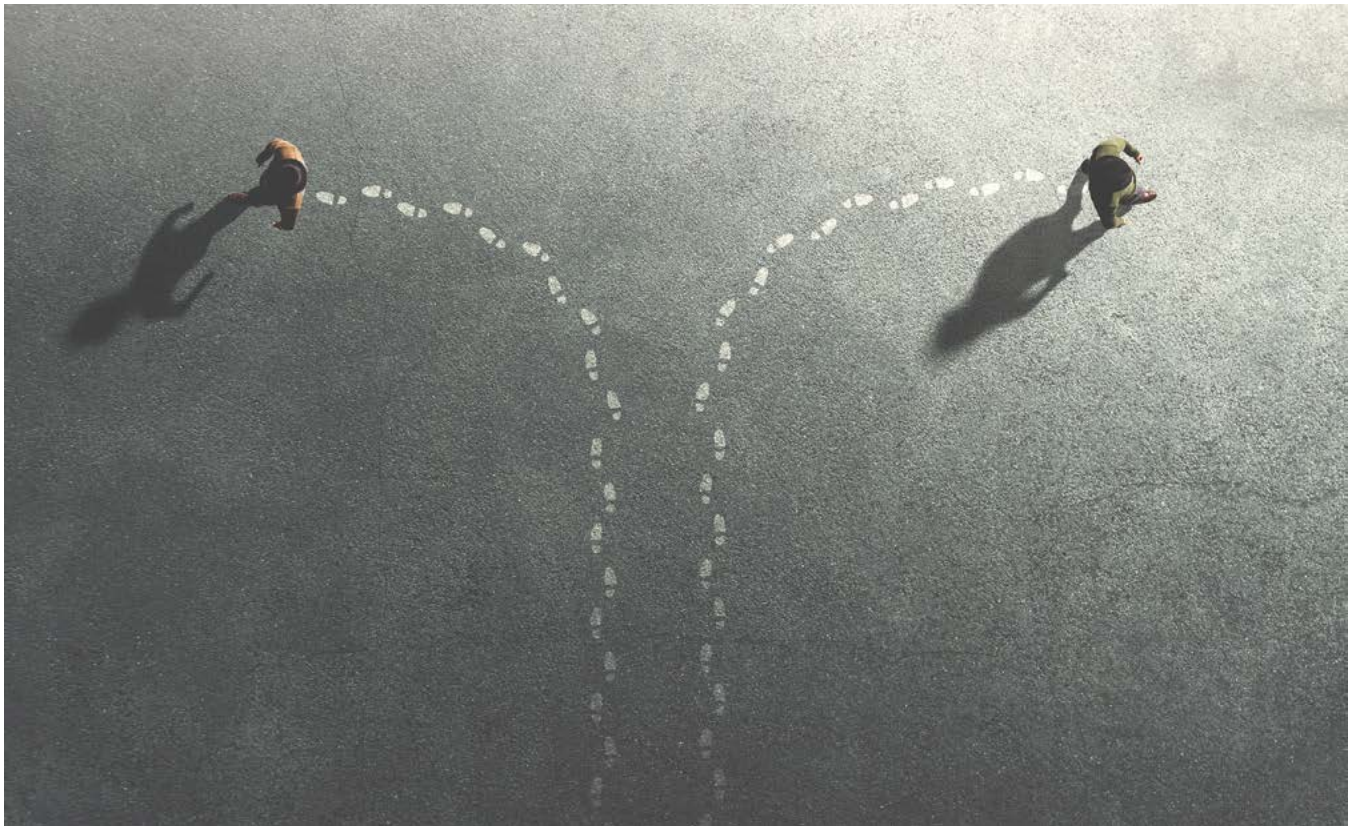
Dealing with difficult clients is always a challenging minefield for lawyers to navigate and, unfortunately, something that most lawyers will often experience during the course of their careers. So what should a good lawyer do? When a "communication" breakdown does occur, it is important that you approach the problem with professionalism and do your best to resolve matters amicably. However, if you reach a point where the relationship becomes irreconcilable such that representation cannot be carried out effectively, you may be permitted to withdraw. If you believe that this is the direction your relationship with the client is heading, you should take care to keep the following Rules of Professional Conduct (RPC) in mind.

First, with respect to your client directly contacting opposing counsel, as we have discussed in a prior *Forum*, RPC 4.2 (the "no-contact rule") governs communications with persons represented by counsel. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., September 2012, Vol. 84, No. 7. RPC 4.2(a) provides that in 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). While the plain language of the rule does not directly address your client's repeated communications with your opposing counsel, Comment [3] tells us that RPC 4.2(a) applies regardless whether the represented party initiates it, requests it, consents to it or tells the lawyer he/she does not feel the need to have his/her lawyer included. RPC 4.2 Comment [3] gives a lawyer only one choice: "[a] lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by the Rule." *Id.*

It is important to keep in mind that lawyers have a professional obligation to respect the legal system and those who serve it, including, judges, other lawyers and public officials. In that light, lawyers should not close their eyes when clients misbehave or engage in offensive behavior that threatens the integrity of the legal system. If your client crosses a line that threatens someone or makes a mockery of the system, doing nothing is not an option. Put plainly, a lawyer should not condone bad behavior. Thus, if your client's refusal to cease contacting your adversary rises to the level of harassment, as difficult as it might be, you should strongly consider withdrawing under the rules discussed below.

Turning now to your client's refusal to follow your recommendation that you consent to a reasonable adjournment, RPC 1.2 generally requires that a lawyer seek the client's objectives and abide by the client's decisions concerning the objectives of the representation. *See* RPC 1.2. However, lawyers are permitted to make decisions in certain areas of the client's legal representation that do not affect the merits of the case or substantially prejudice the rights of the client. *See* Roy Simon, *Simon's New York*

Rules of Professional Conduct Annotated, at 83 (2019 ed.). Generally speaking, decisions concerning whether to grant reasonable extensions to your adversaries belong to the lawyer, and doing so against the client's direction are not a violation of your ethical obligations. In fact, paragraph (g) of RPC 1.2 specifically affirms 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." RPC 1.2(g). The commentary to Rule 1.2 is also instructive; it provides that in accomplishing the client's objectives, the lawyer is not required to be offensive, discourteous, inconsiderate or dilatory. *See* RPC 1.2 Comment [16]. Furthermore, RPC 3.4 governs "fairness to opposing party and counsel" and provides that when dealing with an opposing party and the opposing party's counsel, an attorney must act with fairness and candor. *See* RPC 3.4. Accordingly, you should exercise your professional judgment in deciding whether to grant a reasonable extension at the request of your adversary.



For example, typically an adversary's first request for an adjournment and/or extension of time should be granted as a reasonable request. Though not a rule of ethics, we should also be guided by the Standards of Civility (22 NYCRR § 1200, Appendix A) that apply to all New York lawyers and state that reasonable requests for an adjournment should be granted particularly if it is a first request. In our experience, from a practical standpoint, the kind of behavior that your client expects from you is not smart advocacy and creates a risk that the judge on your case may not look favorably on you and your client.

With regard to the overall breakdown in your relationship with the client, RPC 1.2 offers little guidance on how to handle disagreements with the client on a variety of issues. *See* RPC 1.2 Comment [2]. Rather, the commentary's general advice is that the lawyer should consult with the client to seek a mutually acceptable resolution of the disagreement. *Id.*

RPC 1.16 recognizes certain situations in which the breakdown in communications between the lawyer and the client is so significant that continued effective representation is impossible. *See* RPC 1.16; *see also* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. Specifically, under RPC 1.16, a lawyer *must* withdraw from representing a client, in circumstances where "the lawyer knows or reasonably should know that the representation will result in a violation of the [RPC] or of law …" RPC 1.16(b)(1). Additionally, a lawyer is required to withdraw from representation when the lawyer knows or reasonably should know that "the client is bringing the legal action, con-

ducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person." RPC 1.16(b)(4). For example, if your client is a serial vexatious litigant, frequently harassing the courts, and third parties with litigation for the purpose of extorting settlements, and harming his/her adversaries, the lawyer according to RPC1.16(b)(4), is required to withdraw as counsel.

Your question does not give us the details on the content of the numerous e-mails your client sent to opposing counsel and we do not have the facts necessary to determine whether they were sent for the purpose of harassing your adversary. If you are able to conclude that the emails are an attempt to harass your adversary and you are unable to get your client to stop sending them, RPC 1.6(b)(4) requires in our view that you withdraw as counsel. However, as discussed below, even in the absence of a reasonable belief that your client's communications were sent for the purpose of harassing the adversary, you may be permitted to withdraw from the representation where your requests that your client cease such communications have been ignored.

RPC 1.16(c) identifies other circumstances under which it is *permissive* for a lawyer to withdraw from representing a client. As an initial matter, except as provided in RPC 1.16(d) (discussed below), a lawyer is always permitted to withdraw from representation when: "(1) withdrawal can be accomplished without material adverse effect on the client's interests; and (2) the client knowingly and freely assents to termination of the employment." RPC 1.16(c)(1), (10); *see also* RPC 1.16 Comment [7]. Moreover, paragraphs (c)(4), (c)(7), and (c)(13) of RPC 1.16 allow an attorney to withdraw from a representation where the client: (1) insists upon taking action that the lawyer has a fundamental disagreement; (2) fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively; or (3) insists that the lawyer pursue a course of conduct which is illegal or prohibited under the RPC. *See* RPC 1.16(c)(4), 1.16(c)(7), 1.16(c)(13), respectively.

One should note, however, that establishing that your client refuses to cooperate in the representation so as to render the representation unreasonably difficult for the lawyer under RPC 1.16(c)(7) is a high burden. *See* RPC 1.16(c)(7). To withdraw under this rule, a lawyer must show not just that their client's behavior was unpleasant, but rather, that it was so egregious that the lawyer can no longer provide competent representation. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 847. Professor Simon identifies several circumstances that may render the representation unreasonably difficult under RPC 1.16(c)(7) including: (1) a client's repeated failure to provide information the lawyer has requested; (2) a client's repeated failure to follow the lawyer's advice; and (3) a client's abusive or threatening communications to the lawyer. *Id.* Such behavior by the client allows the lawyer to withdraw, regardless of whether the behavior is deliberate, negligent, or beyond the client's control. *See* NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018).

For example, in *Bankers Trust Co. v. Hogan*, 187 A.D.2d 305, 305 (1st Dep't 1992), defendant's attorney was permitted to withdraw as counsel of record where the court found that the client's conduct rendered the lawyer's representation of the client unreasonably difficult. The client's conduct included continually questioning the lawyer's work, blaming the attorney for adverse decisions, making verbal threats against the firm, insisting that the firm pursue legal theories and arguments at trial directly contrary to law and counsel's professional judgment, and exhibiting a total lack of trust and confidence in the firm. *Id.*

If all else fails, RPC 1.16(c) contains a catch-all provision in paragraph (12), which allows a lawyer to withdraw as counsel where the lawyer believes in good faith that "that the tribunal will find the existence of good cause for withdrawal." RPC 1.16(c)(12). Thus, in proceedings before a tribunal, a lawyer may move to withdraw based on any truthful reason the lawyer thinks a court would accept. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 851. Typical examples of "good cause" are the lawyer's desire to accept a new job or move to a different state, however, courts have found that a complete breakdown in communications between an attorney and client constitutes good cause for withdrawal. *Id.*

Since your matter is pending before a tribunal, it is imperative that you check the individual rules of the tribunal you are before, as it may be necessary to obtain court approval in order to withdraw, notwithstanding having met the permissive withdrawal standards of RPC 1.16(c). *See* RPC 1.16(d); *see also* RPC 1.16 Comment [3]. Pursuant to RPC 1.16(d), "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." In any case, notwithstanding the existence of good cause to terminate the representation, RPC 1.16(d) further provides that the court may deny the attorney's motion to withdraw and order counsel to continue to represent the client, and, in such circumstances the attorney must continue to represent the client. *See* RPC 1.16(d); *see also* RPC 1.16 Comment [3].

If you must seek permission from the tribunal to withdraw on the basis that your client demands that you

engage in unprofessional conduct, you must take precautions to ensure that you do not breach your duty of confidentiality to the client. *See* RPC 1.16 Comment [3]. Even where the court requires an explanation for the withdrawal, the lawyer is still bound to keep confidential the facts that constitute such an explanation. *Id.* The lawyer's statement that professional considerations require termination of the representation are ordinarily sufficient to bypass this issue, yet, if the court requires more information, you should be aware of what is appropriate to disclose. *Id.* To avoid running afoul of your duty of confidentiality to the client, it is critical that you strike an appropriate balance between your obligations to your client and your commitment of candor toward the tribunal.

RPC 1.6(a) provides that "a lawyer shall not knowingly reveal confidential information…or use such information to the disadvantage of a client." RPC 1.6 defines "Confidential Information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Paragraph (b)(6) to RPC 1.6 provides a carve-out for compliance with a court order. *See* RPC 1.6(b)(6). All of that said, we call your attention to an opinion of the NYSBA's Committee on Professional Ethics which states that "if the court orders the lawyer to disclose information the lawyer believes is confidential, Rule 1.6(b) permits the lawyer to comply to the extent the lawyer reasonably believes necessary without violating his ethical obligation to protect a client's confidential information …" NYSBA Comm. on Prof'l Ethics, Op. 1057 (2015). This is essentially a balancing act and we call your attention to Comment [14] to Rule 1.6 which further suggests that disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. *See* RPC 1.6 Comment [14]. We discussed an attorney's obligation to maintain client confidences in greater detail in a prior *Forum*. *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., January/February 2019, Vol. 91, No. 1.

This is not the end of the analysis. Even when the requisite standards to withdraw as counsel are satisfied or an attorney has obtained approval from the tribunal to terminate the representation, the lawyer must still take reasonably practicable steps to avoid foreseeable prejudice to the rights of the client by: (1) giving reasonable notice to the client, allowing time for employment of other counsel; (2) delivering to the client all papers and property to which the client is entitled; and (3) refunding any portion of an advanced fee that has not been earned by the lawyer. *See* RPC 1.16(e). It is worth noting as an entirely separate matter, if the client has an outstanding balance, you may be permitted to assert retaining and/or charging liens, which, of course, is another subject. *See* RPC 1.8(i)(1); *see also* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., June/July 2019, Vol. 91, No. 5.

All things considered, the ethics of withdrawing as counsel are complex and it is important that attorneys maintain professionalism and civility when working through disputes with clients.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM,

I am trying to diversify and expand my matrimonial practice by coming up with a flat rate structure that might appeal to couples working towards filing for an uncontested divorce. My thought was that I would charge a flat rate for mediation services with the intention of filing an uncontested divorce packet at the conclusion of the mediation. My contract with the couple would provide, however, that if the parties discontinue my services before resolving all of their issues, I would be paid at an hourly rate for my mediation services performed and any unused amounts would be returned to the couple. Is this permissible under the Rules of Professional Conduct? For example, am I allowed to file legal papers on behalf of the couple if they both agree to it? Are there any issues I should consider if I do pursue this plan when it comes to advertising? Also, when I was discussing this idea with my wife, she said that her psychiatry practice does a lot of couples-counseling and they could offer a free counseling session to couples if it looked like they were going to try to stay together. Can I ethically refer that couple to my wife?

Very truly yours,
Mary Split

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