ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent one of the defendants in an action brought against a number of parties in an unfair competition case involving various employees who left their employer to work for a competitor. The plaintiff has sued its former employees and their current employer (my client). It is a high-stakes litigation involving huge sums of money, and it has gotten to the boiling point. Plaintiff's counsel and the attorney for one of the employees have been exchanging what I consider to be vulgar and horrifying emails. The level of insults hurled between these two individuals and the language of their exchanges would make schoolyard talk look like dialogue from the Victorian age. One insult by plaintiff's counsel included a reference to the death of opposing counsel's child; another email made a remark about the disabled child of one of the lawyers. I am astounded that two members of the bar would engage in such disgusting behavior or think that their conduct is effective advocacy. Thankfully, none of the attacks have been directed to me. I am trying to represent my client to the best of my ability and have kept out of the fray.

My question for the Forum: How am I supposed to handle this kind of bad behavior?

Sincerely,

Donald Disgusted

Dear Donald Disgusted:

Your question raises issues strikingly similar to those recently confronted by a Florida court. *Craig v. Volkswagen of America, Inc.*, Case No. 07-7823 CI7 (Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida) proceeded just as many litigations do; after the case was filed and issue was joined, there were motions and court conferences followed by the beginning of discovery. For reasons that are at best unclear, it was discovery that led some of the lawyers to turn to the dark side.

It began with a protracted email exchange among counsel concerning the scheduling of discovery motions. Plaintiff's counsel threw the first stone by insulting defense counsel, his firm and his hearing preparation tactics. In response, defense counsel referred to his adversary as "Junior" and asked him to stop sending "absurd emails," which in turn was answered with an email that called defense counsel an "Old Hack" admonishing him to "[l] earn to litigate professionally." Later, as the parties were attempting to schedule depositions, plaintiff's counsel (who had apparently failed to propose deposition dates) wrote that defense counsel could not "deal with the pressure of litigating . . . " and that "if [his adversary could not] take the heat then [he should] get out of the kitchen . . . " The response was quick. Defense counsel's email again called his adversary "Junior" and accused him of being both on "drugs" and a "little punk" whom he then referred to as a "bottom feeding/ scum sucking/ loser . . . ." who had a "NOTHING life . . . " and was told to go back to his "single wide trailer . . . " This obviously did not sit well with plaintiff's counsel whose retort to defense counsel was that "God [had] blessed him with a great life" and that he allowed himself ample time for various hobbies, such as traveling, riding "dirt bikes and atvs" and his "motorcycle." This could have easily been ignored but, no, defense counsel had to have the last word, so this is what he put in an email:

> [T]he fact that you are married means that there is truly someone for everyone even a short/ hairless jerk!!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization!!!

If you think it could not get any worse, guess again. Approximately three months later, plaintiff's counsel wrote an email that characterized opposing counsel as a "lying, dilatory mentally handicapped person" adding in another email that opposing counsel (whom he called "Corky") had a type of "retardism" [sic] resulting from counsel's "closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality . . . " These statements apparently hit a nerve with defense counsel who then disclosed to his adversary that he had a son with a birth defect but then went on to make various *ad hominem* attacks against plaintiff's counsel's family members and questioned the legitimacy of his adversary's children. If you still think it could not get any worse, it did.

In his response to that email, plaintiff's counsel said the following:

> Three things Corky:
>
> (1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot [sic] sometimes retards can produce normal kids, sometimes they produce F*****up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitively know the kid is yours.
>
> (2) You are confusing realties [sic] again the retard love story you describe taking place in a pinto

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 e-mail to journal@nysba.org.**

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> [sic] and trailer is your story. You remember the other lifetime [sic] movie about your life: "Special Love" the Corky and Marie story; a heartwarming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that retard can live a normal life (well kinda).
>
> (3) Finally, I am done communicating with you; your language skills, wit and overall skill level is at a level my nine-year old could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75 or 100 points to your I.Q.

When it appears that plaintiff's counsel could not sink any lower, he then writes:

> This guy is an absolute a** clown and what he is not going to use his retarded son with 300+ surgeries (must look just like Mooney so they must be all plastic surgeries) to get out of the trial? I can see already your Honor my retarded son is having surgery for the 301st time so there is no way I can try the case I need a continuance. Absolute joke and a** clown. If this is what a 20 year attorney looks like, then I feel sorry for the profession. Yea, that is exactly what I want to do go watch a jester perform at the Court. How pathetic of a life must you have to run around every day talking about how great a trial attorney you are. Especially, when everybody can see you are an a** clown. After all if I am running around to hearings after 20 years lying to courts and using my time to send childish emails to a third year attorney, the last thing I am going to do is run around saying what a great attorney I am. This guy has to go home every night and get absolutely plastered to keep from blowing his huge bulbous head off. Alright, enough about the a** clown. Later.

And finally, the last exchange between these two "professionals" concluded with plaintiff's counsel referring to his adversary once again as an "a** clown" who should be tending to his "retarded son and his 600th surgery . . . ." He concludes by stating that he heard "the little retards [sic] monosyllabic grunts now; Yep I can make [sic] just barely make it out; he is calling for his a** clown. How sweet."

It should be no surprise that both attorneys were brought up on disciplinary charges, including violations of Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice) and 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic) of the Rules Regulating the Florida Bar. *See* Complaint, The *Florida Bar v. Mitchell*, TFB No. 2009-10,487(13C), Supreme Court of Florida, and Complaint, *The Florida Bar v. Mooney*, TFB No. 2009-10,745(13C), Supreme Court of Florida.

The result was that plaintiff's counsel was suspended from practice for 10 days, ordered to attend an anger management workshop and pay $2,000 in costs. *See The Florida Bar v. Mitchell*, 46 So. 3d 1003 (Fla. 2010). In addition, plaintiff's counsel was subject to reciprocal discipline in both the District of Columbia and Pennsylvania as a result of the Florida disciplinary decision. *See In re Mitchell*, 21 A.3d 1004 (D.C. App. 2011) and *In re Mitchell*, 2011 Pa. LEXIS 2308 (Pa. 2011). Defense counsel was given a public reprimand as a result of his conduct and had to pay $2,500 in costs. *See The Florida Bar v. Mooney*, 49 So. 3d 748 (Fla. 2010).

Craig makes it easy to answer your question: always take the "high road" and never go "shot for shot" when an adversary tries to drag you into the fray. As officers of the court, we should be civil to each other and must always act in a manner that is consistent our ethical obligations. To that end, you (and more important, the attorneys on your case) should take note of the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A) in connection with your duties toward other lawyers. Section I of the Standards provides that "[l]awyers should be courteous and civil in all professional dealings with other persons" and further notes, in part,

> A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
>
> B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
>
> *See* Standards (I).

The Standards have been in place since 1997, and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. It should not be necessary to remind the members of our profession that the rules that govern our conduct apply to emails; lawyers do not get a pass when bad behavior manifests itself in email. Your question and *Craig* tell us that while most lawyers get it, there will always be a few who give in to temptation, especially when using email to communicate. The lawyers in your case fall into this category and appear to have acted in contravention of the recommended behavior under the Standards. Moreover, based on what we have described with regard to the attorneys in *Craig*, they could be subject to disciplinary action under the New York Rules of

Professional Conduct (the RPC). As stated in other Forums, while the RPC does not directly address civility, several rules deal with "overly aggressive behavior" by attorneys, including Rule 3.1 (Non-meritorious Claims and Contentions), 3.2 (Delay of Litigation), 3.3 (Conduct Before a Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"). *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, at 3, col. 1. (*See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., Nov./ Dec. 2012, Vol. 84. No. 9.) The conduct by both counsel in your action (like the attorneys in *Craig*) could qualify as "overly aggressive behavior."

In addition, the email exchange that you have called to our attention could be viewed as "conduct that is prejudicial to the administration of justice" (*see* Rule. 8.4(d)) and runs contrary to the concept of effective advocacy. Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice* . . . ." and that conduct "must be seriously inconsistent with a lawyer's responsibility as an officer of the court." *See id.* (emphasis added). There can be severe consequences for behavior that runs afoul of these rules. Here in New York, attorneys have been suspended from practice for making offensive remarks to adversaries, clients and even court personnel. *See, e.g., In re Chiofalo*, 78 A.D.3d 9 (1st Dep't 2010) (attorney suspended for two years for using obscene, insulting, sexist, anti-Semitic language, ethnic slurs, and threats in correspondence to his former wife's attorneys and others involved in his matrimonial action. The attorney also filed a meritless federal lawsuit against 29 defendants, including his former wife, her attorneys, judges, and others. The attorney continued to send derogatory and sexist email correspondence to his former wife's attorneys during the pendency of his disciplinary proceeding, indicating a pattern of offensive behavior and a failure to appreciate the seriousness of his actions.); *In re Kahn*, 16 A.D.3d 7 (1st Dep't 2005) (attorney suspended for engaging in a pattern of offensive remarks, including abusive, vulgar and demeaning comments to female adversaries, which included comments about a juvenile client); *In re Brecker*, 309 A.D.2d 77 (2d Dep't 2003) (attorney suspended for two years based on his use of "crude, vulgar and abusive language" in multiple telephone calls and messages to a client and a court examiner over the course of a few hours. The attorney had also been convicted of criminal contempt and had a prior admonition.).

Moreover, there have been instances where attorneys' uncivil conduct has resulted in decisions that had detrimental consequences for their clients in civil litigation. In *Corsini v. U-Haul Int'l*, 212 A.D.2d 288 (1st Dep't 2005), the court found that the attorney's conduct at his own deposition was so lacking in professionalism and civility that the court ordered dismissal of his *pro se* action as "the only appropriate remedy." "Discovery abuse, here in the form of extreme incivility by an attorney, is not to be tolerated. . . . CPLR 3126 provides various sanctions for such misconduct, the most drastic of which is dismissal of the offending party's pleading." *See also Sholes v. Meagher*, 98 N.Y.2d 754 (2002) (the Court denied leave to appeal on procedural grounds for that portion of a case where an attorney was sanctioned and a mistrial granted due to the attorney's lack of decorum by looks of disbelief, sneering, shaking of her head and various expressions designed to indicate to the Court her displeasure); *Heller v. Provenzano*, 257 A.D.2d 378 (1st Dep't 1999) (sanctions awarded against the plaintiff, an attorney, and his counsel because of improper conduct both before and during trial, which included Heller's entering the jury selection room and speaking with jurors without all attorneys present, ignoring the trial judge's warnings not to wander around the courtroom during trial and not to mention another fatal accident which occurred in the same elevator, and referring to the fact that his wife was Hispanic and that he spoke Spanish fluently in an effort to influence Hispanic jury members. Plaintiff's attorney was also sanctioned *because he asked disparaging questions of an expert without a factual basis*); and *Dwyer v. Nicholson et al.*, 193 A.D.2d 70 (2d Dep't 1993), *appeal dismissed*, 220 A.D.2d 555 (2d Dep't 1995), *appeal denied*, 87 N.Y.2d 808, *reargument denied*, 88 N.Y.2d 963 (1996). (A new trial was ordered based, in part, on counsel's "sarcastic, rude, vulgar, pompous, and intemperate utterances on hundreds of pages of the transcript," which were found to be "grossly disrespectful to the court and a violation of accepted and proper courtroom decorum.")

As we have stated both here and previously in this Forum, it is always smart to take the high road when opposing counsel acts inappropriately. Never answer bad behavior with bad (and perhaps worse) behavior.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I just left a position at a large law firm to start work as an in-house attorney for a well-known multinational conglomerate. I am curious about the ground rules that apply to lawyers who make the switch from law firm practice to in-house counsel. Are there any particular ethical rules that I should be concerned with as I am transitioning to this new position? Have there been any recent developments applicable to in-house lawyers that I should know about?

Sincerely,

Moving Inside