# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I am a first-year associate in a large international law firm. Over the first few months of my employment, I have received extensive training concerning the available technological resources (including email, discovery software and document systems) which I will be using in my day-to-day practice. The partners have explained to the first-year associates time and time again that we are ethically obligated to understand how technologies are utilized in connection with a given representation and that we should be intimately familiar in the usage of those technologies.

My uncle, Lou Ludite, has been a solo practitioner for almost his entire legal career spanning nearly 40 years. For the most part, his only office staff has consisted of one secretary and one paralegal. He's never hired an associate (in his words, associates were "utterly useless"). During family holiday gatherings while I was in law school, I would share with him everything I was learning about electronic research tools and applications which I would need to master once I began practicing law. He would always tell me, "Ned, all this technology is hogwash. Real lawyers do not need email, and this whole thing with these hand-held devices, they look like something that Kirk, Spock and McCoy were playing with on *Star Trek*. It's all unnecessary."

Last week, Uncle Lou told me that Ted Techno, an attorney from a firm with whom he was working on a case, was repeatedly using emails and text messages to set up conferences to discuss strategy for an upcoming trial set to occur in three weeks. Uncle Lou boasted that he informed Ted that he doesn't read or write emails and his "policy" was to have his secretary look at his emails "no more than twice a week" and for her alone to "occasionally" reply to emails intended for Lou. Uncle Lou also told me that he had decided to take a vacation in Bali and didn't plan on returning stateside until the evening before the trial. He also said he told Ted Techno that he will be "completely unreachable" while he is away and "not even his secretary would be able to get a hold of him for any reason."

I have been taught that good communication and responsiveness are essential practice skills for all lawyers and that one cannot practice law without using email. I am very fond of my Uncle Lou and think that I should speak with him. I know that I am a novice in our profession especially when compared to my uncle, which is why I would appreciate some guidance from The Forum about whether he is behaving in a professional and ethical manner.

Sincerely,
Concerned Nephew

## Dear Concerned Nephew:

A previous Forum reviewed various questions concerning an attorney's obligation to promptly respond to correspondence (including email) from clients and opposing counsel. We also made various suggestions that addressed situations where, for whatever reason, an adversary puts communications on hold and ignores them. *See* Vincent J. Syracuse & Amy S. Beard, Attorney Professionalism Forum, N.Y. St. B.J., Feb. 2012, Vol. 84, No. 2. Your letter raises broader issues, including the question of whether attorneys can choose to ignore electronic communications.

Let's start with that one first. Rule 1.1 of New York Rules of Professional Conduct (RPC) states the basic ethical obligation of lawyers to provide competent representation. Specifically, in the words of Rule 1.1(a), "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In addition, competent representation of clients requires an understanding of how technologies are utilized in connection with the representation of a client. While some may wish that they were practicing law in simpler times, this is not a matter of choice and attorneys must be intimately familiar with the usage of those technologies. The importance of this point was recently underscored in an amendment to Comment [8] to Rule 1.1 of the ABA Model Rules of Professional Conduct (Model Rules) which states that, in maintaining competence, "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." *Id*. (emphasis added.) At least one jurisdiction is already seeking to enact the amended Comment [8] of the Model Rules. *See The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Amendments to the Massachusetts Rules of Professional Conduct*, http://www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html.

Literally from the first day of law school, future lawyers receive extensive instruction in electronic research tools, and once in practice, they learn first-hand the necessity of utilizing a variety of technological resources in their practice, including electronic discovery programs, document management and other productivity applications. In addition, most attorneys, in law firms of all sizes, utilize mobile devices in their respective practices to communicate (whether by email, text messaging or instant messaging) with clients, adversaries and other attorneys on a particular matter. As previously noted in this Forum, use of mobile devices is just one of many technologies that are integral to today's legal practice. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 2013, Vol. 85, No. 4.

With all respect to your Uncle Lou, to put it nicely, he is practicing law as if we were in the Stone Age. The disdain for using email not only may

be detrimental to the representation of clients but may also violate various ethics rules, specifically, Rule 1.1. Furthermore, Uncle Lou's "policy" of telling others that he doesn't read emails is problematic. Although he may be having his secretary occasionally read and respond to emails, lawyers should not isolate themselves from this basic method of everyday communication. Moreover, the use of a nonlawyer assistant to respond to email could raise issues under Rule 5.3, which governs a lawyer's responsibility for conduct of nonlawyers. Rule 5.3(a) states:

> A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter *and the likelihood that ethical problems might arise in the course of working on the matter.*

*Id.* (emphasis added.)

In addition, Rule 5.3(b) provides:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:
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> (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
>
> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
>
> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
>
> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

*Id.*

Delegation may be a good thing for busy lawyers but trying to turn back the clock by giving a secretary or personal assistant what is essentially sole responsibility for receiving and responding to email communications directed to the employer creates a multitude of risks that could lead to violations of Rule 5.3. What if Uncle Lou's secretary is out of the office on vacation or is out sick for days on end? There is a fairly high probability that Uncle Lou will not be regularly reachable by email (via his secretary) under such a scenario; and therefore, he may be in breach of his diligence obligations pursuant to Rule 1.3, which will be discussed further below.

Your Uncle Lou's attempt to make himself totally unavailable while on vacation is also troubling. Although we believe that work/life balance is essential for everyone, we would not recommend an attorney going "off the grid" with a trial scheduled to commence almost immediately upon returning from vacation.

Turning to your other question, while it may be unclear whether the RPC imposes on lawyers an obligation to promptly communicate with co-counsel, Rule 1.3(a) requires that lawyers "shall act with reasonable diligence and promptness in representing a client." Moreover, Rule 1.3(b) states that lawyers "shall not neglect a legal matter entrusted" to them, and Rule 3.4(a)(6) provides that lawyers shall not knowingly engage in conduct contrary to the Rules; together, these rules do suggest that lawyers must communicate with co-counsel in a reasonably prompt fashion.

In our view, it is plainly apparent that ignoring communications from co-counsel constitutes neglect of a legal matter and is a breach of the lawyer's duty of diligence, regardless whether the duty is owed to the client or co-counsel. Furthermore, engaging in conduct contrary to the Rules – such as neglecting a legal matter – constitutes a breach of Rule 3.4(a)(6). Apart from ethics, as a matter of basic courtesy, a lawyer should promptly respond to communications from all counsel, especially co-counsel.

We suggest you tell Uncle Lou that we recommend the following best practices (which we would strongly suggest that he integrate into his practice). First, a variety of means of communications should be utilized when attempting to contact co-counsel, and all attempts to communicate should be documented. If a voicemail message is ignored,

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a follow-up email should be sent; if that email goes unanswered, try a phone call instead. If your co-counsel has communicated with you promptly in the past, give him or her the benefit of the doubt, but even if your co-counsel has a history of poor communication, always be civil in your own communications. This is especially critical given the fact that both attorneys share the same client and the client would not look kindly upon hearing that his two attorneys are not communicating regularly as would be expected in this particular representation. Ideally, the best way to resolve communication failures between co-counsel is for attorneys to sit down face-to-face and discuss how to better communicate with each other.

Second, if voicemails and emails alike do not spur a response, send your co-counsel a letter detailing the issue(s) about which you need to communicate and describing your attempts to reach him or her.

Third, and as a last resort, it may be necessary to let the client know that co-counsel has been unresponsive to your inquiries. However, this action carries with it the proverbial double-edged sword. On the one hand, the aggrieved attorney is making the client aware that by his efforts to communicate with co-counsel, he is acting with the utmost diligence in carrying out that client's representation pursuant to his obligations under Rule 1.3. On the other hand, complaining to the client about co-counsel's conduct could result in a deterioration of the relationship between the two attorneys, which could have a detrimental effect on carrying out the representation of their shared client.

Electronic communications have become the primary mechanism of communicating with clients, co-counsel, adversaries and any other relevant persons necessary to carry out a given representation. Although it should go without saying, attorneys cannot ignore the critical importance of using current technologies in their respective practices; technology is here to stay.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

Jonathan Entrepreneur (Jonathan) had been a longtime client of my firm. Back in 2011, he decided that he wanted to set up a hedge fund with his friend, Paul Partner (Paul). At Jonathan's request, my firm did the work that resulted in the creation of Hedge Fund GP, in which Jonathan and Paul became equal partners. My firm also prepared the papers for Hedge Fund GP to become the general partner of Hedge Fund Partners, an onshore fund my firm organized. Because of my firm's long-standing relationship with Jonathan, we did not issue an engagement letter for this work. In addition, Jonathan asked that our firm also represent Paul in the formation of the fund entities, and we were happy to grant his request.

My firm generated a bill each month for legal services rendered to Hedge Fund GP, to Hedge Fund Partners, to Jonathan, and to Paul and addressed the bills only to Hedge Fund GP.

Hedge Fund GP was always behind on paying its bills. However, earlier this year, Hedge Fund GP ran into trouble and completely stopped paying our firm's bills.

We want to commence an action against Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul to collect the fees that are owed. I have heard different views from several people on whether we were required to issue engagement letters to Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul if they were all to be responsible for our fees, but I have been unable to get a definitive answer. What are the rules on engagement letters and is the absence of an engagement letter fatal to my firm's claim for unpaid legal fees?

Sincerely,

I.N. Confusion