ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

I'm currently representing a client whose honesty (or lack thereof) is becoming a problem. The litigation involves a dispute between siblings regarding a family business and, like many familial disputes, is highly contentious. I've always had a suspicion that, given the opportunity, my client might try to pull something to get a leg up on his siblings, but there haven't been any specific incidents that alarmed me until now. While preparing him for his deposition recently, the client all but told me that he intends to lie when asked a particular question by opposing counsel. Although I had my suspicions that something like this might happen given my client's personality and the nature of the dispute, I was still shocked. I always assumed that his brash statements and frequent outbursts were a product of his frustration with the whole case. I reminded the client that he would be testifying under oath during his deposition and warned him of the risks of perjury, but he was unfazed. He intends to go forward with his "strategy" during his deposition, and I'm not sure what to do. I know the client will decline any request I make to be relieved because it will be expensive for him to get a new attorney up to speed on this matter.

We have a status conference coming up before the court-appointed referee, and I'm considering moving to be relieved before the conference. Can I move to be relieved instead of notifying the court of the client's intent to lie at the deposition? If I am not relieved before the conference, do I have an obligation to tell the court referee what he said during our prep session even though my client hasn't actually committed perjury yet? What about opposing counsel? If I am obligated to inform the court referee and/or opposing counsel, are there any particular precautions I should take in order to safeguard my client's rights? In the event that I can no longer ethically represent this client, and am relieved as counsel, do I have to tell his next attorney of his apparent intention to lie during his deposition? On the off chance that the client does allow me to withdraw as counsel, if he decides to represent himself as a pro se litigant, do I still have an obligation to inform the court of his intent to lie under oath?

Another issue involving this troublesome client is also looming on the horizon. In the event that I am relieved as counsel, I'm certain that he will be furious with me. On prior occasions, he's been slow to pay his legal bills and has dissected many of my time entries, asking questions about every little task. I'm actually still waiting on him to pay his most recent bill, and I'm concerned that I'm not going to get paid after he finds out that that I've made a motion to be relieved. If I do have to bring an action against this client to collect my fees, to what extent am I obligated to maintain attorney-client confidentiality especially in light of my reason for seeking to be relieved?

Very truly yours,

I. M. Forthright

Dear I. M. Forthright:

There is a fine line between an attorney's duty to be an advocate for his client and his responsibility as an officer of the court to be candid and forthright. Most of the time, lawyers navigate this boundary without difficulty. We are taught early in our careers – even as law students – the importance of "candor toward the tribunal" and hear horror stories about the shame and lasting damage that can occur when a lawyer betrays this duty. Generally speaking, the risk to our livelihoods is enough to keep the strength of our advocacy in check. But what are our responsibilities when we suspect our *clients* may be crossing the line?

The *Forum* previously addressed a situation where a client gives an attorney confidential information that contradicted her testimony *after* the deposition and the attorney's confidentiality obligations. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2012, Vol. 84, No. 6. Your question takes us to another level. What should an attorney do when his client has not *yet* perjured himself, but the attorney reasonably believes the client *may* or *will* sometime in the future?

To answer this question, we first need to dissect Rule of Professional Conduct (RPC) 3.3(b). Pursuant to this Rule, "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This Rule imposes a mandatory obligation on attorneys to report criminal or fraudulent conduct – even intentions that have not come to fruition – that threaten the integrity of the proceeding if the attorney *knows* his or her client (or another person involved in the proceeding, such as a witness) intends to commit the fraudulent or criminal act. Thus, to answer your first question regarding whether you can move to be relieved

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

as counsel without notifying the court of your client's intention to lie, you first need to assess the strength of your knowledge. As RPC 3.3(b) instructs, if you know for a fact that your client intends to lie, disclosure is mandatory. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1101 (2016 ed.) ("if counsel for *another* party intends to call a witness that the lawyer knows will testify falsely, and if the lawyer cannot remedy the problem by talking the other party's counsel out of doing so, then Rule 3.3(b) will require the lawyer to disclose that intended perjury to the court"). However, a mere hunch or suspicion is not enough to trigger disclosure under RPC 3.3(b). *See* NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014) at ¶ 14 (citing NYSBA Comm. on Prof'l Ethics, Op. 837 (2010) ("[a]lthough a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge").

Notably, under the RPC, there is no longer any exception for confidences or secrets. Before the adoption of RPC 3.3, DR 7-102(B)(1) stated that a lawyer with evidence "clearly establishing" that a client had perpetuated a fraud on a tribunal had to first insist that the client correct the fraud, and if the client refused the attorney was required to disclose the fraud to the tribunal, except when the information was "protected as a confidence or secret." Now, pursuant to RPC 3.3(c), the duty applies "even if compliance requires disclosure of information otherwise protected by [RPC] 1.6." *See* NYSBA Comm. on Prof'l Ethics, Op. 837 (2010). But more on that later. For now, based on the facts you have given us, you *do* have an obligation under RPC 3.3(b) to report your knowledge that your client intends to lie (*i.e.*, commit a fraud or perjure himself).

Under RPC 1.0(w), a "tribunal" is defined as including "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." RPC 1.0(w). Comment 1 to RPC 3.3 specifically notes that RPC 3.3 "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." RPC 3.3 Comment [1]. As such, both you and your adversary are bound by RPC 3.3(b) during your status conferences before the referee and depositions and must conduct yourselves accordingly.

A lawyer "knows" something when he or she has "actual knowledge" of the fact in question. RPC 1.0(k). However, the NYSBA Committee on Professional Ethics has opined that a lawyer's knowledge can be inferred from circumstances. *See* NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014). This is arguably the most subjective aspect of the analysis and will be based primarily on how well you, the attorney, know your client and how you came to know of your client's intention to engage in fraudulent or criminal conduct. If your client blurted out that he would lie under oath in a frenzied moment, that is one thing. If he has mentioned it on more than one occasion and has a "plan" for the execution of the lie, that is quite another. Unfortunately, this is largely a matter of trusting your instincts. Before proceeding to take remedial measures under RPC 3.3(b), however, you should have (another) frank and serious discussion with your client regarding the consequences of perjury, and inform him of your obligation under RPC 3.3(b). *See* RPC 1.6 Comments [6A, 14]. If he seems unaffected, you will know what you have to do.

As to how much disclosure is required, Comment 14 to RPC 1.6 gives us some guidance. "[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose," and disclosure in an adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." Therefore, in your situation, you should be prepared to disclose: (1) that you reasonably believe that your client intends to lie during his deposition, and what that lie is; (2) how you became aware of his intention; and (3) why your belief is reasonable. Before making a *full* disclosure to the referee, ask whether the disclosure can be made *in camera* or subject to a protective order. Disclosure to the tribunal under RPC 3.3 is mandatory even if the information being disclosed is confidential; however, that does not mean that your adversary needs to be privy to every detail. In fact, Comment 14 to RPC 1.6 implies that he should not.

If you are unsuccessful in persuading your client *not* to follow through with his plan, it is best to withdraw from the representation. RPC 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. RPC 1.16(b)(1) actually *requires* a lawyer to withdraw from representing a client if the lawyer knows that the representation will result in a violation of the RPC or of law. Moreover, paragraphs (c)(2), (c)(4), and (c)(7) of RPC 1.16 allow an attorney to withdraw from a representation in circumstances even if he does not have definite "knowledge" of his client's intention, if the client: (1) persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client insists upon taking action with which the lawyer has a fundamental disagreement; or (3) the client fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. *See* RPC 1.16(c)(2), 1.16(c)(4), 1.16(c)(7). And, if all else fails, a lawyer can always withdraw from a matter for any reason as long as it is not materially adverse to the client's interests under RPC 1.16(c)(1). Comment 3 to RPC 1.16 notes that there might be some difficulty in seeking court approval of a withdrawal if it is based on a client's demand to engage in unprofessional conduct. *See* RPC 1.16 Comment [3]. The comment suggests that if the court inquires as

to the reasoning, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." *Id.*

With respect to your inquiry regarding attorney-client confidentiality when attempting to collect legal fees, you must look to the attorney-client confidentiality rule found in RPC 1.6 and, more specifically, the exception found in RPC 1.6(b)(5)(ii): "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee." Your question depends on whether you reasonably believe it is necessary to disclose any confidential information to recover your fees. This exception should be used sparingly as it is a very limited exception.

Comment 14 to RPC 1.6 addresses the need for attorneys to use this exception almost as a method of last resort. As discussed above, it notes that "[b]efore making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure." RPC 1.6 Comment [14]. In your case, you should certainly reach out to the client to attempt to resolve your fee dispute before commencing any litigation. On a side note, you should also review Part 137 of the Rules of the Chief Administrator of the Courts to make sure you are in compliance with New York's Fee Dispute Resolution Program before commencing litigation. Even if you are still at an impasse with your client after attempting to resolve the dispute yourself, it is advisable to use great restraint when you initially divulge information during the commencement of an action or ADR.

Professor Roy Simon notes, "[w]hen the lawyer files a lawsuit to collect fees, the necessary disclosures should originally be narrow, limited to the elements of a cause of action or the bare information needed to initiate an arbitration proceeding or attach a client's property. But as the proceeding widens out to the discovery or proof stage, the lawyer may reveal . . . whatever information is reasonably necessary to put all the facts before the tribunal or arbitrator." Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 315. Based on your description of the events, your complaint for the recovery of legal fees should not need to reveal any confidential information. You can draft a cause of action without revealing the detailed reasons for the breakdown in the attorney-client relationship.

The NYSBA Committee on Professional Ethics has opined on this topic in a few instances, including a very thorough opinion that is relevant to your situation. In NYSBA Comm. on Prof'l Ethics, Op. 980 (2013), an attorney learned that a client was working "off the books" and that the client gave false information to a tribunal about their personal finances. The client subsequently filed for bankruptcy protection from creditors, including the attorney, and the attorney sought to disclose the confidential financial information in the bankruptcy proceeding in an effort to collect legal fees. Acknowledging that the RPC did not "shed much light" on how attorneys should determine what information is reasonably necessary to be disclosed under RPC 1.6(b)(5)(ii), the opinion articulated four guides for attorneys to consider: "First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client." *Id.* The committee did not opine on whether the attorney could disclose the confidential information, however, because it was not clear how the attorney planned to use it. *Id.*

In the event that you do bring an action to collect legal fees, based on what you told us, we recommend that you only reveal confidential information – such as the client's intention to lie – to *defend* yourself against claims by the client that he was harmed in some way as a result of your withdrawal. The client's intent to lie is irrelevant as to whether you are owed fees for the legal services you performed. Therefore, disclosure of the intention to lie in the complaint would be broader than is necessary to state a cause of action. If, on the other hand, the client claims that he should not be required to pay your legal fees because you abandoned him in the middle of the action by withdrawing as counsel, or another reason based on his intention to lie, we are of the opinion that RPC 1.6(b)(5)(ii) permits you to disclose the confidential information to defend your reason for withdrawal. In revealing such information, it is advisable to limit the harm to the client such as an attempt to seal this information in the event that the entire case cannot be sealed. By limiting your disclosure of confidential information to the defense of your representation, you will have demonstrated your reluctance to make such a disclosure and your efforts to avoid abusing the confidential information. There may be situations where attorneys are required to reveal confidential information in order to prosecute a claim for attorney's fees, but your situation does not appear to warrant it.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Amanda M. Leone, Esq.
(leone@thsh.com) and
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a small boutique law firm and we decided that it was time to update our website. In look-

ing at other law firms' websites to get ideas, we realized that all of the firm's "branding" was outdated, especially since we are trying to develop business with small start-up companies in the technology sector. Now, instead of just updating our website, we decided to rethink every aspect of our branding, including online attorney biographies, business cards, social media, and letterhead. We obviously want to retain a professional image and comply with the attorney advertising rules, but we really want to stand out to modern technology and social media savvy companies. I know there are a number of restrictions on attorney advertising. What issues should we consider with our rebranding? Are there any advertising or branding issues we should avoid?

Sincerely,
Ed G. Adman