ATTORNEY PROFESSIONALISM FORUM

To the Forum:

A little over a week ago, my client and I met with opposing counsel, whom I will call Lawyer X, and his client to attempt to negotiate a settlement concerning a potential contractual dispute. To my shock and surprise, when my client would not concede to certain provisions demanded by Lawyer X's client, Lawyer X started screaming at me and my client and made numerous derogatory comments. Among other things, he stated that my client "had no ba**s," and was a thief. Finally, he added that we were nothing more that "money grabbing low lifes," peppering his comments with several pejoratives about our ethnic origins and religions.

Needless to say, I was deeply offended by Lawyer X's comments and conduct. As a result, I got up and told my client that we were leaving. That only provoked Lawyer X even more; he began screaming profanities at us, which I will not repeat, as we walked out the door.

I later spoke with some other attorneys who I know have dealt with Lawyer X in the past. They indicated that Lawyer X had comported himself in a similar fashion with them. He called one lawyer "physically and mentally unkempt" in a public courtroom, and called another a "liar" and "disgrace to the legal profession" in front of other attorneys.

Two days after my incident with Lawyer X, he called to apologize, citing family troubles and the stress of the job as excuses for his inappropriate behavior.

Do I have an obligation to report this type of behavior to the Disciplinary Committee? What consequences could Lawyer X face? On the one hand, I really don't want to see another lawyer out of a paycheck. However, on the other hand, I don't think it's appropriate for a member of the bar to address others and to act the way Lawyer X has been acting.

Sincerely,

I.M. Outraged

Dear I.M. Outraged:

Your letter reminds us of a recent Appellate Division, First Department case that dealt with important issues of civility and courtesy. In that case, *In re Teague*, __ A.D. 3d __, 15 N.Y.S.3d 312 (1st Dep't 2015), an attorney was charged and found guilty for making offensive racial, ethnic, homophobic, sexist, and other derogatory remarks to attorneys, insulting an administrative law judge in a public forum, and being disruptive both inside and outside of hearing rooms. Similar to the facts you describe, this particular attorney's poor behavior was not an isolated incident; investigation revealed several reports, spanning the course of several years, in which this attorney's outlandish behavior was starting to raise eyebrows. During one specific incident, the attorney in question called an administrative law judge "a disgrace" in an open hearing room during or after a particularly contentious hearing. The First Department found that the attorney's patently offensive behavior and remarks warranted a three-month suspension, and furthermore, that the attorney be ordered to enroll in a one-year anger management treatment program.

The New York Rules of Professional Conduct (NYRPC) also provide guidance in answering your question about whether you have an actual obligation to report Lawyer X's offensive behavior. Incivility, rudeness, and the use of offensive language and tactics can certainly rise to the level of a violation of one or more of the Rules of Professional Conduct. Specifically, Rule 8.4(d) holds that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice" and Rule 8.4(h) holds that a lawyer shall not "engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

Disruptive and/or explosive conduct before a tribunal may also violate Rule 3.3(f), which holds that "[i]n appearing as a lawyer before a tribunal, a lawyer shall not . . . (2) engage in undignified or discourteous conduct [or . . .] (4) engage in conduct intended to disrupt the tribunal."

As officers of the court, we are not permitted to ignore this kind of bad behavior and must act in accordance with Rule 8.3(a) which reminds us that 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 tribunal or other authority empowered to investigate or act upon such violation."

However, this leads us to the question: How do you determine if the particular conduct you have witnessed or experienced rises to the level to warrant reporting it to the Disciplinary Committee? This question is much harder to answer and is definitely case specific. Some commentators have tried to make a distinction between unethical behavior and unprofessional conduct. *See* Joseph J. Ortego & Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, 37-SPG

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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Brief 53, 54 (Spring 1998). Indeed, according to one author, "[t]he basic distinction between ethics and professionalism is that the rules of ethics tell us what we *must* do and professionalism teaches us what we *should* do." James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 La. L. Rev. 467, 472 (2002) (emphasis added).

Expanding on this theory, the questions we should really be asking are: When does bad behavior cross over from being just unprofessional to actually being unethical? And should that make a difference? These are not easy questions and we suspect that there are many lawyers who will tell you that they are simply acting as zealous advocates. Courts grappling with this very question have recognized its complexity. For example, the U.S. Court of Appeals for the Second Circuit aptly noted:

> [o]n the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.

Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 341 (2d Cir. 1999).

We can shed some light on this gray area by referring to several cases where courts have determined that the attorney's misconduct rose to the level of behavior that warranted punishment. In one of the more infamous cases, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994), a Houston plaintiffs lawyer used vitriolic and threatening language while representing one of the directors of Paramount in a deposition. Among the outrageous comments made by this attorney during the deposition, when opposing counsel tried to question the witness, was: "Don't 'Joe' me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon." *Id*. at 54. The Supreme Court of Delaware found this attorney's behavior to be so lacking in civility that it added a whole addendum to its formal opinion in order to publicly censure the attorney and raise awareness about what it described as "a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts." *Id*. at 52. In its addendum, the Delaware court elaborated on why this particular attorney's conduct went far beyond zealous advocacy and completely crossed the line. According to the court,

> [s]taunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by [plaintiffs' lawyer] on the record of the [plaintiff's] deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature.

Id. at 54.

Yet another example of attorney misconduct rising to the level of unethical behavior: In *In re Kahn*, 16 A.D.3d 7 (1st Dep't 2005), the court found that the attorney's pattern of sexually oriented and offensive comments directed at female attorneys and female clients, dating as far back as 1991, warranted serious sanctions. The attorney's egregious conduct included publicly referring to a female attorney as "pig vomit on my shoes," and on another occasion, as the same attorney, who is overweight, was about to enter the courtroom, yelling "[h]ere is the elephant, she's coming in. Who wants tickets? Come see the show." The attorney also admitted to having made inappropriate comments about a 13-year-old client arrested for prostitution and to asking an adversary to guess the bra size of a 14-year-old client. *Id*. at 9. Given the testimony of witnesses and the attorney's own admission to engaging in a pattern of misconduct for years, the First Department suspended the attorney from practicing law in the State of New York for a period of six months. *Id*. at 10.

Courts will consider the larger context within which the inappropriate and outlandish behavior takes place when weighing their decision. One important factor is whether the conduct represents a single isolated incident, or is part of a more established pattern of misbehavior. The Appellate Division in *In re Hayes*, 7 A.D.3d 108 (1st Dep't 2004), explicitly stated that its decision to impose the sanction of a public censure against an attorney who accused the court and its clerk of prejudice and racism in the course of a landlord-tenant proceeding was in part attributable to its consideration of the particular attorney's prior transgressions. The court explained, "We are mindful of the [Departmental Disciplinary] Committee's observation of the facts that respondent [attorney] has had two prior admonitions, one for misconduct which is very similar to that which occurred here, and that such discipline did not deter the instant misconduct." *Id*. at 110.

However, there are certainly situations in which one incident alone is enough to warrant punishment. For instance, in *In re Dinhofer*, 257 A.D.2d 326 (1st Dep't 1999), the court imposed a three-month suspension on an attorney for calling a federal judge "corrupt" during a telephone conference. A transcript of the conversation indicates that the attorney made the following remarks: "This is rampant corruption. I don't know what else to say. This is a sham. This is blatantly corrupt. You are sticking it to me every way you can. I'm not rude to them [a reference to the court's staff], I'm rude to you, because I think you deserve it. You

are corrupt and you stink. That's my honest opinion, and I will tell you to your face." *Id*. at 327–28. In its decision, the court pointed out that while the attorney had no other disciplinary record, his conduct was so egregious that it "impinge[d] upon [his] fitness to practice law. . . ." *Id*. at 328.

Here, we obviously agree that it is inappropriate for any member of the Bar to address others and to act the way Lawyer X has comported himself. Lawyer X's offensive comments to you and your client, coupled with the fact that his behavior is not isolated, appear to rise to the level of the kind of behavior that may require action on your part under the NYRPC. As evidenced in the cases described above, some of the consequences Lawyer X may face for his inappropriate behavior include suspension or public censure and even enrollment in an anger management program.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am deeply disturbed by the events that transpired at a recent on-site visit to inspect the opposing party's books and records in compliance with a discovery order. Due to the defendants' repeated failure to comply with several discovery orders and deadlines and the parties' contentious and acrimonious relationship, I got a court order directing that the defendants produce certain documents by a specified date. The court also granted us permission to have an on-site visit and inspection of the defendants' books and records. On the agreed-upon site-visit date, I met the defendants' counsel at the defendants' offices and was accompanied by an accountant that the plaintiff hired to assist with the litigation. Despite the fact that the defendants had several weeks to prepare the documents requested by the plaintiff for the on-site inspection, after we were placed in a conference room, we were given only two Bankers Boxes® of documents, with limited information. Although I made repeated requests for additional information, the defendants failed to produce numerous categories of documents that the court ordered them to produce. The defendants' counsel stated that they would produce these materials at a later date since they did not have them available.

That wasn't the end of the story. While we were in the conference room, I saw that there were several boxes of documents in the hallway outside the conference room. I knew right away that the boxes contained categories of documents responsive to the plaintiff's requests, which the court had ordered the defendants to produce. This was obvious from the labels that were clearly visible and in plain sight on the sides of the boxes.

I asked the defendants' counsel about the boxes in the hallway but was told that I could not see them because he did not currently have access to those materials. Since I had reason to believe that the boxes contained responsive materials and felt that I was being stonewalled, I used my smartphone camera to take pictures of the boxes from the conference room so that I would be able to present the issue to the court if necessary.

Although the defendants' counsel was nowhere in sight when I took the pictures, within two minutes he came storming into the conference room and asked whether I had taken any pictures. It was only then that I discovered that we had been under surveillance in the conference room during the entire document production. When I saw the webcam in the conference room, I confronted opposing counsel, asking whether he and his clients had been watching and listening to my communications with the plaintiff's accountant. The defendants' counsel did not deny that he and his client had been watching and listening to our communications. Instead, he smirked and replied that my communications with the plaintiff's accountant had no expectation of confidentiality or privilege. He refused to allow me to take a picture of the webcam. Based on these circumstances, I can only assume that both opposing counsel and his clients had been secretly monitoring my private and privileged communications and work product with the plaintiff's retained expert.

I am deeply troubled by what happened and by opposing counsel's behavior, which strikes me as outrageous. Are we now at a point in the practice of law when opposing counsel can secretly videotape a document production and eavesdrop on my conversations during my inspection of the documents? What about telephone conversations? If counsel secretly put me under surveillance while I was in the conference room, it is possible that he may have also recorded our telephone conversations. I am writing to the Forum because, quite frankly, I am unfamiliar with the rules. What should I do?

Sincerely,

Ben Camed