ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am the lead attorney on a big and important case for the litigation group at my firm, which is currently short-staffed. When I received an email from our managing clerk that our opposition papers to our adversary's motion to dismiss would be due in one week, I started to panic!

Not only was my mother recently hospitalized, but the senior associate on the case (and his wife) just had a baby and he was going to be out of the office for the next week. With so many personal and professional commitments, I had just completely overlooked this looming deadline.

Out of desperation, I called my adversary. I calmly and politely explained the situation and asked for a 30-day extension of time to draft our opposition. My adversary did not seem sympathetic at all and told me he would consult with his client and get back to me. Within the hour, my adversary called me back and told me that his client wanted to aggressively pursue this case and was tired of what he perceived as constant delays and postponements. In short, my adversary informed me that his client wanted a "take no prisoners" approach in the case and was instructed by his client to not grant any requests to extend deadlines or courtesies. Although I tried to reason with opposing counsel and explain that an extension of time is a basic courtesy and would not prejudice his client, he responded that his client was "sick and tired of lawyers being nice to each other," and the extension was denied.

Is my adversary's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
A.M. Civil

Dear A.M. Civil:

We wrote in a prior Forum about civility best practices between opposing counsel (Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2012); your question allows us to revisit the issue.

Your panicked predicament is one that many litigators can relate to! It is to be expected that during the course of one's career, both personal and professional commitments, including the unforeseen circumstances you have described, may require attorneys from time to time to seek courtesies and flexibility from opposing counsel. But sadly, one lawyer's personal problem is often seen by an adversary as an opportunity to gain a tactical advantage. In a professional moment, when you rightly expected your adversary to understand and perhaps sympathize with your situation, instead of granting you a basic courtesy you literally got the door slammed in your face. While the refusal to extend you such a courtesy is not a *per se* violation of the New York Rules of Professional Conduct (NYRPC), or the basis for a report to the Disciplinary Committee at this time, the behavior you experienced, in our view, certainly violates the New York State Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), particularly if this is the first time you are asking for an extension on this motion.

The Standards, which were first proposed by the NYSBA's Commercial and Federal Litigation Section, were adopted by the courts to guide the legal profession, including lawyers, judges and court personnel, in observing principles of civility. Although the Standards are not intended to be enforced by sanctions or disciplinary action, they give us basic principles of behavior to which lawyers should aspire.

Part II(B) of the Standards states that "[l]awyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case."

Part III of the Standards states that "[a] lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of their clients' interests." Part III is divided into five sub-points:

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

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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C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.
D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.
E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

See Standards Part III. (A)–(E).

In the situation you have described, where it does not appear that the extension of time requested for your opposition papers would prejudice your adversary's client, one should expect an adversary to consent to a reasonable extension of time purely as a professional courtesy. Trying to take advantage of an adversary's scheduling conflict to gain some kind of tactical advantage is not just bad form, it reflects poorly on the attorney and/or his law firm. Practically speaking, this strategy is also unwise and does not pass for effective advocacy. Attorneys and their clients should know that an attorney who establishes a bad relationship with his adversary (and ultimately the court) is taking a big risk should problems arise for him or his client in the future of the case. As the saying goes, what goes around comes around, and if the uncooperative attorney needs a professional courtesy in the future, he should not expect one in return.

We are sure that some may argue that your adversary's behavior is justified because he is simply following his client's orders and is acting within the confines of zealous advocacy. We disagree with that view and believe that there is a better tack that our profession should take in these situations that keeps us on a proper course. First, as stated in our prior Forum, the decision of whether to grant an extension of time is a matter that ought to be decided only amongst the attorneys involved in a particular case and should not require express client consent. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2012. Second, while lawyers are surely charged with representing their clients zealously, refusing to provide a common courtesy such as an extension of time does not, in our view, generally advance the client's case or our profession. To the contrary, incivility between attorneys disserves the profession and the client. In the words of the Honorable Sandra Day O'Connor:

> [T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and system itself lose esteem in the public eyes.
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> [I]ncivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.
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> The Honorable Sandra Day O'Connor, Civil Justice System Improvements, Speech to American Bar Association (Dec. 14, 1993) at 5.

Among other things, incivility between attorneys lessens the chances for successful negotiations and thus reduces the attorney's opportunity to render competent service both to the client and to the court.

The lawyer refusing to grant a first-time or other reasonable extension also should be wary of the impression he is making on the judge or jury. In the ordinary course, requests for extensions of time, like the one you have described, should be handled by the attorneys in the case, not by the courts, which will not appreciate having to expend court time and resources on such routine matters. In *Bermudez v. City of New York*, 22 A.D.2d 865, 866 (1st Dep't 1964), the court begrudged having to waste precious court time resolving an extension of time to answer a complaint, explaining that a scheduling dispute is "a matter that properly should have been disposed of by the exercise of simple courtesy between attorneys." In *Lewis v. Miller*, 111 Misc. 2d 700, 704 (City Ct. 1981), the court noted that "reasonable time extensions are usually routine manners of courtesy between lawyers in which the Court should not be involved." And, in *Wonder Works Const. Corp. v. Seery*, No. 100096/2010, 2011 WL 5024486 (Sup. Ct., N.Y. Co. 2011), where the plaintiff attempted to seize on the defendant's untimely service of the answer to obtain a default judgment against him, even though defendant's counsel had participated in many court conferences, exchanged substantial discovery and entered into a confidentiality agreement, the court denied the plaintiff's motion for a default judgment and compelled the plaintiff to accept the defendant's untimely answer *nunc pro tunc*. According to the *Wonder Works* court, "disputes regarding timeliness of filings are generally resolved amongst counsel." *Id*. (internal quotation marks omitted).

As evidenced by the holdings in the cases cited above, a lawyer who unreasonably denies his adversary a time extension is likely to be overruled by the judge should the matter be brought

to the court's attention. What's more, the judge is likely to be annoyed that he needed to waste time on this kind of application and may form a negative opinion about the lawyer and/or his firm. At all times, it is important to remember that as attorneys we are officers of the court, and that our reputations and credibility are paramount. Once compromised, the ability of the attorney to be persuasive with the judge or jury is significantly diminished.

We recognize, however, that under certain circumstances it may be entirely appropriate for your adversary to deny your request for an extension of time where that request would be prejudicial to his or her client's interests. For example, in situations where an adversary has repeatedly requested adjournments of various deadlines in what is a clear attempt to delay the litigation, a refusal of the extension may be justified. In fact, where an attorney is repeatedly neglectful of deadlines and constantly asks for extensions to file briefs, he may be in violation of several of the NYRPC (specifically, Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 3.2 (Delay of Litigation)), and may be subject to a report to the Disciplinary Committee. This is exactly what happened in *In re Adinolfi*, 90 A.D.3d 32 (1st Dep't 2011), where an attorney was publicly censured for failing to timely file briefs, often requesting extensions to file briefs, failing to timely file for reinstatement of cases, and failing to respond to court orders. However, this does not appear to be the case here.

Several of the NYRPC may also be relevant to the analysis. NYRPC 3.1(a) (Non-Meritorious Claims and Contentions) holds that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." In this situation, because it does not appear that giving you a time extension will prejudice the other side at all, your adversary's staunch refusal to grant you a first-time extension on the motion is arguably a frivolous position. In addition, NYRPC 8.4(d) (Misconduct) holds that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." For the reasons discussed above, your adversary's stubbornness on this issue and his overall lack of cooperation and civility is detrimental to the administration of justice. However, Comment 3 to Rule 8.4 provides that the Rule is generally invoked to punish conduct that results in "substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding." Your adversary's conduct does not currently rise to the level of the more egregious conduct deemed a violation of Rule 8.4(d). Finally, Rule 1.2(g) (Scope of Representation and Allocation of Authority Between Client and Lawyer) provides 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." This specific language urges lawyers to conduct themselves with the principles of courtesy and civility in mind.

Accordingly, while your adversary's behavior is certainly not civil, considerate, or courteous, it does not rise to the level of violating the Rules of Professional Conduct or warrant sanctions. So, at this point, instead of attempting to get in papers, an application to the court is your best choice. Surely, the judge has better things to do; hopefully, your adversary will come to learn that what he did was not just unprofessional, it was not very smart!

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate in the M&A group at an Am Law 100 firm. After a deal my team and I had been working on for months closed, a few of the associates and I decided to go out to a bar to celebrate. "Work hard, play hard" as they say in big law. Because I had been so tied up on this deal and had not had much time out of the office to socialize, I decided to invite a few of my non-lawyer friends out to the bar to meet us.

It only took a few drinks before the lawyers and non-lawyers alike in our group were all having a great time. Just before 2 a.m., as I was getting ready to leave, I overheard an associate sitting next to me talking to one of my non-lawyer friends. The associate was slurring his words and sounded like he had a few too many drinks. What I overheard was alarming – the associate was talking to my non-lawyer friend about a major and highly confidential M&A deal that the firm was currently engaged in. I was tired and ready to call it a night so I decided not to interrupt the conversation and I grabbed my coat and left. I didn't think much more about the incident.

Two weeks later, I met up with my non-lawyer friend for lunch. During our lunch, he casually mentioned to me that after the conversation he had two weeks ago with the associate at the bar, he had decided to invest in the stock of the company being purchased in the major deal the associate in my group had told him about.

Now I'm starting to worry about the serious implications of this bar night! Should I report the associate in my group, and if so, to whom? Does the firm, the associate or my non-lawyer friend have potential liability for insider trading? What policies should my firm have in place regarding divulging such insider information?

Sincerely,
N. O. Insider