ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work as an assistant general counsel for MegaCorp, the largest manufacturer of widgets in the United States. We began growing concerned that our competitors are slowly chipping away at our market share, which may cause MegaCorp to lose its place as the largest manufacturer in the widget industry. Therefore, the company's executives decided to purchase the fourth and fifth largest widget manufacturers, thereby eliminating its top competitors. Because of these potential acquisitions, MegaCorp has begun to face scrutiny from antitrust regulators. In addition, the company has been advised that the due diligence reviews of the company's records by these antitrust regulators have uncovered a potential issue concerning improper waste disposal at one of the company's manufacturing facilities, which has been referred for further investigation by the Environmental Protection Agency. I, of course, have been tasked by the company's general counsel to handle MegaCorp's compliance with federal and state environmental laws and regulations.

What are my ethical obligations pertaining to this particular situation? Specifically, if federal regulators attempt to interview me as part of their investigation concerning the waste disposal matter, do I have to comply with their interview request? And if I do submit to an interview, what I can disclose? Finally, if the company is ever sued by the government as a result of the investigation, and I am subpoenaed to testify at trial, what am I allowed to disclose?

Sincerely,
Quentin Questioned

Dear Quentin Questioned:

A recent ethics opinion issued by the NYSBA Committee on Professional Ethics (the Committee) addressed a situation close to what you have described. The Committee, in Opinion 1045, found that in-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client where the facts to be disclosed by the lawyer will not constitute confidential information. N.Y. State Bar Op. 1045. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule. *Id.*

The pertinent section of the advocate-witness rule (officially referred to as Rule 3.7(a) of the New York Rules of Professional Conduct (the Rules)) states:

> A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.

The term "tribunal" is defined in Rule 1.0(w) to include

> a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

One has to remember that application of the advocate-witness rule is often very fact-driven. As further explained in Comment [4] to Rule 3.7 (which specifically relates to paragraph (a)(3)),

> a balancing is required among the interests of the client, of the tribunal, and of the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rule 1.7, 1.9 and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

As an initial matter, if federal regulators from the Environmental Protection Agency (the EPA) attempt to interview you as part of their investigation of a waste disposal matter, we expect that you would in all likelihood comply with the request and that you would engage

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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counsel to be present for the interview. Noncompliance may raise issues under Rule 1.1(c)(2) which states that "[a] lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules."

Next, if you consent to the investigatory interview, the question arises whether you are permitted to discuss the contents of the company's records concerning the waste disposal issue and what (if any) confidentiality issues may arise. As we have noted many times before, Rule 1.6 prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). "Confidential information consists of information gained during the representation of a client that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential." N.Y. State Bar Op. 1045.

Since the information concerning your company's waste disposal practices is likely to be embarrassing or detrimental to MegaCorp, or if your superiors request that you not disclose this information in the interview, then you may not voluntarily disclose it without the company's informed consent.

As to the interview forum, even though the interview is with an administrative agency (in this case, the EPA), at this stage, the EPA is exercising its investigative functions, rather than acting in an "adjudicative capacity." *See, e.g.,* N.Y. State Bar Op. 1045. Consequently, the advocate-witness rule would not apply at this stage of the game. That being said, if the EPA determines to bring a formal complaint against the company following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if you are "likely" to be a witness on a significant issue of fact (such as your knowledge of the company's waste disposal practices), Rule 3.7(c) will come into play, and you would not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. *See* N.Y. State Bar Op. 1045 ("lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated" (internal citation omitted)).

If the agency determines to bring charges against MegaCorp and you are subpoenaed to testify at trial, you will then need to determine if you are likely to be a witness on a significant issue of fact. This requires, among other things, evaluating other available testimony. *Id.* In *MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), the court (in making its analysis under the former Code of Professional Responsibility) held that "[a]n additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." The court found in *MacArthur* that an independent lawyer would likely call the other lawyer, "both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary." N.Y. State Bar Op. 1045 (quoting *MacArthur*, 524 F. Supp. at 1209) (internal citation omitted).

If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The Rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. *Id*.

If you are subpoenaed to testify in an EPA proceeding brought against MegaCorp, you cannot overlook your obligations not to disclose confidential information under Rule 1.6 unless one of the conditions previously discussed above is satisfied.

Forcing an attorney off a case is never an easy decision. It is a matter that must be carefully analyzed. Professor Roy Simon points out that before an attorney-witness should be taken off of a case, it is necessary to determine if he or she has acquired distinctive value in that particular matter. *See* Simon's New York Rules of Professional Conduct Annotated at 1106 (2014 ed.). Indeed, we agree with Professor Simon's analysis that a lawyer has distinctive value in a particular case only if "[t]he lawyer has spent a lot of time on the litigation itself or the events giving rise to the litigation, and the client . . . would suffer undue delay finding a new lawyer or waiting for the new lawyer to learn the facts." *Id.* Therefore, before assessing what your distinctive value might be, we must know how long you were involved with the waste disposal matter, and what burden MegaCorp might suffer if you were off the case. As we pointed out at the outset of this Forum, a determination under the advocate-witness rule is often fact-specific, and these questions concerning what your distinctive value might be fall within this premise.

So, in the end, what are you permitted to do if you could not give testimony in the EPA proceeding? You could still participate in the case outside the courtroom by, for example, directing outside counsel. *See* N.Y. State Bar Op. 1045 citing Rule 3.7(a) (lawyer shall not act as advocate before a tribunal); ABA Inf. Op. 89-1529 (1989). Although this may not be an ideal position, it is better than being completely walled off from participating in the matter if, in fact, the EPA chooses to pursue charges against MegaCorp, and will allow you to continue to act in some capacity to protect MegaCorp in defending any charges brought by the EPA.

Knowledge of the advocate-witness rule is critical for in-house counsel. It could mean the difference for an inside lawyer either being in the middle of

the action or left behind and unable to fully assist his or her company.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a mid-level associate at a prominent New York law firm. Two years ago, I served as the foreperson of the jury in a medical malpractice trial in Manhattan Supreme Court. After the conclusion of the trial, we returned a verdict in favor of the defendant. I recall that as everyone was filing out of court, the plaintiff's counsel (Peter Perturbed) approached me and began to speak in a harsh manner as to his and his client's dissatisfaction with the verdict. We then walked in different directions out of court and I wrote Peter's behavior off as just sour grapes from another obnoxious lawyer.

Last month, the partner in charge of my department came into my office and said he received a long-winded email from Peter that accused me of lying during the voir dire process prior to trial and being unfairly biased towards his client. As much as I know that my superiors honestly believe that I would not act in the manner claimed by Peter, I am deeply disturbed by the scurrilous accusations made against me and I am concerned that it could damage my professional reputation in other avenues of the legal community.

My question to the Forum: Could Peter be subject to discipline if I report him, and if so, what level of punishment could he receive?

Sincerely,
Heather Harassed

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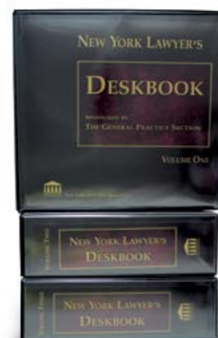

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