ATTORNEY PROFESSIONALISM FORUM

To the Forum:

A classmate of mine from law school (Anna Associate) works at a firm which focuses on plaintiff's side employment litigation. Her firm filed a complaint in New York State Supreme Court on behalf of a client against her former employer only. The claims asserted were for discrimination, retaliation and wage violations. Anna told me she advised her boss that they should be bringing claims against the company's principals, but, she said, he ignored her suggestions even though the law was clear that principals should have been named in the suit.

The defendant-employer moved for summary judgment and the court dismissed the action. The statute of limitations has apparently run out on the claims which could have been asserted against the company's principals.

Anna told me that she was incensed by the conduct of her boss and felt terrible for the client. She told me that she had evidence of her boss's failure to acknowledge the well-settled law that supported her position that the individual principals should have been defendants to the lawsuit. Her plan was to reach out to the client and assist the client in a potential malpractice case against the firm. After initially contacting the client, Anna threatened to destroy the evidence of malpractice to get the client to acquiesce to the financial recovery in the malpractice claim. She negotiated a 50% contingent fee as compensation for her efforts and because her testimony would require her to leave the firm. And to make matters worse, Anna and the client had apparently engaged in a brief romantic affair which began when his case came to the firm and ended shortly after the case against his former employer was dismissed.

The client is threatening to take both Anna and her firm to the Disciplinary Committee.

What ramifications would Anna face because of her conduct as described here?

Sincerely,

Not a Fan of Vengeance

Dear Not a Fan of Vengeance:

The question raised by Anna's conduct is not whether Anna should be the subject of disciplinary action, but rather what level of punishment would be appropriate. The actions outlined in your question are very similar to the examples of attorney misconduct presented in *In re Novins*, 119 A.D.3d 37 (1st Dep't 2014) (where an attorney was suspended from practice for one year). As discussed below, Anna's behavior (and that of the attorney in *Novins*) are examples of an outright failure to maintain basic professional integrity.

You (and more importantly, Anna) should be aware of the numerous provisions of the Rules of Professional Conduct (the RPC) applicable here:

Rule 1.5(a) provides that "[a] lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive."

Rule 1.8(i) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client."

Rule 3.4(b) provides that "[a] lawyer shall not offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter . . ."

Rule 3.4(c) states that "[a] lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling . . ."

Finally, Rule 8.4 governs attorney misconduct and states that a lawyer or law firm shall not

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> * * *
>
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

So where shall we start? First, Anna's attempt to extort a 50% contingency fee from the client is a clear violation of Rules 1.5(a) (excessive fee), 1.8(i) (acquiring a proprietary interest in the client's cause of action) and 8.4(h) (conduct that adversely reflects on the lawyer's fitness as a lawyer). Although the attorney disciplined in

Continued on Page 60

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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Novins got his client to agree to a 45% contingency fee, we would venture to guess that Anna's one-half contingency fee would probably warrant an even greater penalty than what Mr. Novins had received.

Second, Anna's attempt to serve as a witness in the potential malpractice case against her firm in exchange for the exorbitant contingency fee which she has sought would be a violation of Rule 3.4(b).

Third, by failing to tell her employer that she entered into the contingency fee arrangement with the client and attempting to charge the client for information that the client was ethically obligated to receive, Anna violated Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (h) (conduct that adversely reflects on the lawyer's fitness as a lawyer).

Fourth, Anna's threat to destroy evidence to get the client to agree to her proposed contingency fee arrangement is a violation of Rule 8.4(d) (conduct that is prejudicial to the administration of justice).

Lastly, although Rule 1.8(j)(iii), which prohibits an attorney from entering into sexual relations with a client in a domestic relations matter, is inapplicable here, in our view the romantic relationship that you describe is highly problematic and something that should be highly discouraged.

Your question does not give us much detail as to why Anna did what she did or the underlying circumstances surrounding her behavior. However, her failure to abide by some of the more basic ethical obligations of our profession suggests an exposure to a penalty similar or possibly even greater than what Mr. Novins received. So what is an appropriate penalty here? Like most legal questions, the answer depends on the underlying circumstances as well as an analysis of any mitigating and aggravating factors related to Anna's conduct. *Novins* gives us a series of cases (including *In re Larsen,* 50 A.D.3d 41 (1st Dep't 2008); *In re Caliguiri,* 50 A.D.3d 90 (1st Dep't 2008); and *In re Kiczales,* 36 A.D.3d 276 (1st Dep't 2006)), which tell us why Mr. Novins received a one-year suspension and also provide guidance for us here.

The attorney disciplined in *Larsen* received a two-and-a-half-year suspension for extensive misconduct that involved, among other things, charging the client an excessive fee and threatening fee arbitration if the client did not withdraw a letter of complaint to the court about the lawyer. *Larsen,* 50 A.D.3d at 49–50. Although the majority in *Larsen* felt that the suspension route recommended by the Disciplinary Committee was the correct sanction, former Justice James M. McGuire, writing for the dissent, noted that since the attorney in question had also improperly dipped into escrow funds on multiple occasions, then "no penalty short of disbarment [was] appropriate." *Id.* at 47. Despite the fact that Justice McGuire believed that "no extreme mitigating circumstances [were] present warranting a departure from the typical penalty of disbarment . . ." (*id.* at 53) the majority found that the attorney's "28-year legal career, which was previously unblemished by any disciplinary history, and the fact that she [was] 68 years old, suffering from a variety of ailments, and [as] the sole means of support for her divorced daughter and grandson," suspension and not disbarment was the appropriate sanction. *Id.* at 47.

In *Caliguiri*, a one-year suspension was given to an attorney who improperly used documents surreptitiously obtained after agreeing to advise an inexperienced attorney in the prosecution of a medical malpractice claim. *Caliguiri,* 50 A.D.3d at 92.

Lastly, the attorney in *Kiczales* received a five-year suspension for accepting payments from an adverse party in exchange for information about his client and for assisting in obtaining a favorable settlement. *Kiczales,* 36 A.D.3d at 281. The Disciplinary Committee recommended that Mr. Kiczales be disbarred for conduct that, in its words, constituted "a serious breach of the most fundamental duty of loyalty that governs the practice of law" and found that such misconduct "strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests. The misconduct encompasses precisely the fear clients have that their attorneys will be 'bought off' by opposing counsel, or that their attorneys will use the clients' case to surreptitiously profit from the representations." *Id*. at 280 (internal citation omitted). However, the First Department noted that Mr. Kiczales lacked any disciplinary record up and until the time of the incident in question, had admitted guilt and expressed remorse, and cooperated with the Disciplinary Committee. *Id.* at 281. The court found that due to these mitigating factors, a lengthy suspension, rather than disbarment, was appropriate.

Now turning back to Mr. Novins. In his attempt to get a lesser penalty, he argued that "his family's psychological problems and the resulting financial difficulties" were significant mitigating factors. *Novins*, 119 A.D.3d at 43. However, because it was determined that Mr. Novins' violations were "serious and were motivated by financial gain" (*id*.) as well as his failure to "fully comprehend[] and accept[] responsibility for his misconduct . . . ," the court looked past Mr. Novins' supposed mitigating factors based upon its view that they "seemed too remote in time to be either a causal or mitigating factor with respect to [his] misconduct." In addition, the court found that Mr. Novins' conduct was motivated by the fact that he wanted to retaliate against his employer for cutting his annual bonus. *Id*. at 44.

The lesson that should be learned from *Novins* and other cases is that while it may be true that mitigating and/or aggravating factors may be considered as part of the determination of an appropriate sanction, the impact of these factors is often uncertain and is decided on a case-by-case basis. Anna's behavior, in our view, crossed the line and should subject

her to suspension from practice, or perhaps worse.

Sincerely,
The Forum by
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Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My colleagues and I always try to be civil in my dealings with adversaries and judges. However, I have found that bullying typical of what I imagine occurs with kids is occurring more and more in the legal profession. I have seen this kind of behavior not only in depositions but also in court and at settlement meetings (where clients are often present). One of my colleagues (Bullied Ben) has been on the receiving end of repeated harassment by an adversary in contentious litigation in court, in settlement meetings and in all of the depositions taken in the case. I am seeing this adversary's persistent bullying beginning to take a psychological toll on this person. It is affecting his performance in the office, and I've been told his home life is a mess.

What should I say to him to do in order to help him address this situation?

Sincerely,
Friend of Bullied Ben

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1/1/15 – 1/20/15 _____ 83

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as of 1/20/15 _____2,542

Total Membership as of
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