ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an attorney at a law firm with a large litigation practice. Obviously, this entails the exchange of numerous discovery demands between parties, including demands for a bill of particulars or interrogatories, and demands for discovery and inspection. In addition, my cases involve the scheduling of numerous depositions.

Because of the demands of a busy practice, opposing attorneys do not always respond timely to discovery requests issued by my firm. In addition, disputes arise between parties regarding what is discoverable and whether certain documents have to be produced. Parties also struggle with scheduling depositions when written discovery requests have not been honored. I have sometimes encountered attorneys who refuse to respond to requests for their client's availability for deposition.

It is my understanding that attorneys are required to engage in good faith efforts prior to filing motions to compel discovery responses. However, I have received motions to compel from adversaries who have made little to no effort to confer with my office prior to filing their discovery motions. I have even received motions which include the obligatory affirmation of good faith efforts when no effort has been made by that party to speak with me about the allegedly outstanding discovery. In addition, I have often been in the position of making several attempts to contact opposing counsel with respect to outstanding discovery demands or a refusal to cooperate in deposition scheduling, without receiving any response. Phone calls and letters have gone unanswered.

Can the Forum please shed some light on what is required in order to fulfill the good faith efforts requirement prior to filing a discovery motion, including a motion to compel? What efforts are required prior to filing the motion by the party demanding compliance? How long must I wait before filing a motion to compel where opposing counsel is non-responsive to my efforts to communicate on this issue? Do lawyers have an ethical obligation to cooperate with each other during discovery?

Sincerely,

Undiscovered

Dear Undiscovered:

Unfortunately, we all have at least one case where counsel for the opposing party is non-responsive to discovery and refuses to return phone calls or respond to correspondence seeking compliance. Obviously, dealing with such an adversary can be quite frustrating. But in addition to frustration, such behavior also violates the Rules of Professional Conduct, including Rules 1.1, 1.3, 3.1 and 3.2.

Rule 1.1(c) provides that an attorney "shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules." When an attorney fails to comply with discovery, whether by failing to respond to written discovery requests or requests to schedule depositions, the attorney exposes his or her client to a possible discovery motion, including sanctions and fees. Even if fees are not awarded to the party making the discovery motion, the non-responsive attorney will have prejudiced his or her client by incurring the legal fees for having to defend against a discovery motion which should have been unnecessary had the attorney merely responded to the opposing party's good faith efforts to resolve the issue. Moreover, a failure to comply with discovery can also cause the attorney and his or her client to lose goodwill with the court.

Rule 1.3(a) requires an attorney to "act with reasonable diligence and promptness in representing a client." While attorneys generally think of this rule in terms of responding to client communications, an attorney's failure to respond to correspondence, discovery requests and inquiries from opposing counsel demonstrates a lack of diligence in the representation and therefore implicates this rule.

Rule 3.1 deals with frivolous conduct, which includes conduct which is undertaken "to delay or prolong the resolution of litigation." Similarly, Rule 3.2 provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." An attorney's deliberate refusal to cooperate during discovery, thereby delaying the resolution of the proceeding, violates both rules. Unfortunately, it is not always possible to determine whether an attorney is deliberately failing to respond.

When faced with unresponsive opposing counsel, it is important to document all efforts to obtain compliance, both by phone and in writing, so that you can demonstrate that you made good faith efforts to obtain opposing counsel's compliance. Correspondence with opposing counsel should detail the issues; it should also

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advise the adversary that you intend to seek court intervention based on continued non-compliance.

Opposing counsel may not respond to good faith efforts to obtain compliance, thereby necessitating a motion to compel discovery responses or for other relief, such as preclusion or striking pleadings. In the event you must seek court intervention, you must demonstrate that you engaged in good faith efforts to secure the opposing party's compliance prior to submitting the motion. Pursuant to 22 N.Y.C.R.R. § 202.7(a), any motion "relating to disclosure or to a bill of particulars" must include an affirmation by counsel noting "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Section 202.7(c) requires that the affirmation "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Courts strictly construe this requirement, and have routinely held that discovery motions which did not include the requisite good faith affirmation must be denied. *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 A.D.3d 486 (1st Dep't 2009); *Molyneux v. City of New York*, 64 A.D.3d 406 (1st Dep't 2009); *Cerreta v. New Jersey Transit Corp.*, 251 A.D.2d 190 (1st Dep't 1998); *Barnes v. Nynex, Inc.*, 274 A.D.2d 368; 711 N.Y.S.2d 893 (2d Dep't 2000).

Courts have also held that it is not enough simply to state that counsel engaged in good faith efforts to secure an adversary's compliance. The First Department has held that a motion for sanctions based on an opposing party's lack of compliance with discovery was properly denied where the affirmation of good faith "failed to detail the good faith effort to resolve the discovery disputes." *Reyes v. Riverside Park Community (Stage I), Inc.*, 47 A.D.3d 599 (1st Dep't 2008). In this regard, an affirmation of good faith is considered deficient where it fails to comply with 22 N.Y.C.R.R. § 202.7(c). *148 Magnolia*, 62 A.D.3d at 487 (quoting *Amherst Synagogue v. Schueule Paint Co.*, 30 A.D.3d 1055, 1057 (4th Dep't 2006). Courts generally require a showing that a diligent effort was made to resolve the dispute prior to seeking court intervention. *See Baez v. Sugrue*, 300 A.D.2d 519 (2d Dep't 2002). This effort includes actual communication between the parties. *Natoli v. Milazzo*, 65 A.D.3d 1309 (2d Dep't 2009).

While there is no fixed time frame before the party seeking compliance can make a discovery motion, a good faith effort to obtain compliance should require more than simply one letter or phone call. It is important that opposing counsel be afforded a reasonable opportunity to respond before any discovery motion is filed. Your communication with opposing counsel should also set forth a date by which you expect a response or compliance.

In our experience, discovery motions can be avoided if attorneys have the courtesy to respond to voicemail messages and correspondence seeking compliance. A continued refusal to respond to the opposing party's efforts to resolve an issue, whether deliberate or inadvertent, may cause unnecessary rancor between the parties which could have been avoided. Attorneys routinely encounter situations where, due to the demands of a busy practice, they cannot always provide meaningful responses to correspondence or messages as quickly as they would like. When this occurs, the best practice is for counsel to acknowledge receipt of the communication by a quick email or voicemail message to the party seeking compliance. This acknowledgement should state that counsel is otherwise engaged and unable to respond fully at this time and should set forth a time by which he or she will provide a meaningful response. Even a voicemail from a secretary or another attorney at the firm notifying opposing counsel that you have received the message but are out of the office or on trial, can go a long way toward preventing an unnecessary motion to compel and preserving a cordial relationship between the parties. Moreover, in the event that opposing counsel pursues a motion to compel despite diligent efforts, you can then argue that he or she failed to engage in the requisite good faith efforts to resolve the issue.

An attorney's failure to respond to efforts to secure compliance with discovery not only violates several rules of professional conduct, it can lead to unnecessary costs and fees for motion practice on an issue which should be resolved. On the other hand, counsel seeking compliance also has an obligation to engage in diligent good faith efforts to resolve discovery issues prior to seeking court intervention.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a partner in a 10-person law firm and I regularly see prospective clients for initial consultations, which I provide at no charge. We do not take every case presented to us. When we decline a representation, do we have a duty to provide a no-engagement letter or to warn the person about statutes of limitations that may apply to his or her case? What is our risk of malpractice exposure if we decline a representation although the person did have a viable claim and, if the person later pursues it on his or her own, finds that the claim is time-barred? Finally, if a prospective client provides me or one of my partners with confidential information during that initial consultation and I do not take the case, am I obligated to keep the person's confidential information confidential, and can information acquired that way create a conflict that would prohibit me from taking some

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