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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

TO THE FORUM:

My firm recently began providing *pro bono* services for a not-for-profit organization that assists individuals with mental health issues. In most of the cases we have handled, we had an immediate impact, the work was extremely gratifying for the attorneys, and the clients were thrilled to receive assistance. Recently, however, we began representing one individual in a criminal matter where we have faced significant communication issues. Although the client receives treatment for his mental health issues, this client has become aggressive on occasion, is often non-responsive, and has occasionally been verbally abusive to the attorneys on the case. The attorneys in my firm are becoming frustrated because they are trying to act professionally, but are concerned that they are not getting through to the client and, on occasion, are fearful of the client.

I thought that if I placed some limitations on the client's communications with our attorneys, it might resolve some of these issues. For example, we could inform the client that his communications with us are limited to pre-arranged meetings or calls. If that doesn't work, I might possibly limit communications outside the courtroom to only writing. Although I think this might help the situation, and still allow us to provide competent legal advice, I don't want to run afoul of my ethical obligations to the client. Is it acceptable to place limitations on communications with our own client? I think that if I had some assistance from a staff member at the organization we are working with in future client meetings, it might also help. But I am concerned about waiving attorney-client privilege. In the event that I can't resolve the communication issues, is there any reason we can't withdraw as counsel? Are there any other ethical issues our firm should consider when providing legal services to individuals with mental health problems going forward?

Sincerely,
Mo Bono

DEAR MO BONO:

Problems frequently arise in the attorney-client relationship, like other interpersonal relationships, when there is a fundamental issue with communication. After all, if attorneys can't communicate with clients, they cannot have an understanding of client goals and objectives. Although we have previously addressed attorney/adversary communications in a prior *Forum* (Vincent J. Syracuse, Carl F. Regelmann, Richard W. Trotter, & Amanda Leone, *Attorney Professionalism Forum,* N.Y. St. B.J., September 2017, Vol. 89, No. 7), attorney/client communications are a new subject for us.

Your question requires a discussion of several provisions of the New York Rules of Professional Conduct (RPC), including RPC 1.4 ("Communication"), RPC 1.16 ("Declining or Terminating Representation"), and RPC 1.14 ("Client with Diminished Capacity").

We begin with RPC 1.4 which sets forth a lawyer's communication obligations to clients. The Rule generally requires that an attorney keep their client apprised of all material developments in their matter, comply with their client's reasonable requests for information and consult with their client about the means of accomplishing their goals and decisions regarding the representation. (RPC 1.4.) A recent opinion of the New York State Bar Association (NYSBA) Committee on Professional Ethics offers some guidance. The opinion concluded that attorneys are permitted to reasonably limit the timing and manner of their client communications. (NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018).). In the question presented to the committee, the client had ongoing mental health issues, was physically intimidating, verbally abusive and frequently non-responsive. In analyzing whether a lawyer may limit the method of communications with a client, the committee expressed the view that RPC 1.4 does not mandate a specific manner of communication between lawyers and clients; lawyers should use their discretion in controlling the timing and method of the communications. (*Id.*, citing RPC 1.4(a)(4).) This rule

recognizes that it is a fact of life that we often have clients that may make unreasonable demands upon counsel for immaterial information and that attorneys are not obliged to meet every one of those demands in order to comply with their ethical obligations.

Although lawyers must obviously be responsive to the needs of their clients, Rule 1.4 permits them to control the timing of attorney/client communications. The RPC requires that the lawyer comply with the general requirement to "promptly" communicate with his or her client. Comment [4] to RPC 1.4 advises that when a prompt response to a client's request is not feasible, the lawyer or a member of the lawyer's staff should "acknowledge receipt of the request and advise the client when a response may be expected." (*Id.*, quoting RPC 1.4 Comment [4].) The committee also opined that this "Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications." (*Id.*) We believe that your plan to prescribe client limitations on communication is a good idea in this circumstance as long as you are able to comply with your obligations under RPC 1.4, including updates to the client of significant information in the case and responding to reasonable requests for information. We hope that this improves the attorney-client relationship and reduces unnecessary stress on the attorneys in your firm.

If you are not able to solve the communication difficulties with your client by placing reasonable boundaries on those communications, it may be appropriate to consider withdrawing from the representation. RPC 1.16(b) addresses compulsory withdrawal while RPC 1.16(c) discusses permissive withdrawal. RPC 1.16(b) requires a lawyer to withdraw from representation, subject to paragraph (d) of the Rule, when: "(1) the lawyer knows or reasonably should know that the representation will result in violation of the [RPC] or of law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the lawyer knows or reasonably should know that the client is bringing legal action . . . merely for the purpose of harassing or maliciously injuring any person." (RPC 1.16(b).) The *Forum* has previously addressed the issue of compulsory withdrawal when a lawyer knew that their client's conduct reached a point where continued representation could result in a violation of the lawyer's ethical responsibilities. (*See* Vincent J. Syracuse, Esq. & Maryann Stallone, Esq., *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2015, Vol. 87, No. 6, *and* Vincent J. Syracuse, Amanda M. Leone, & Carl Regelmann, Esq., *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9.)

From the circumstances you describe, it does not appear that you are *required* to withdraw as counsel, but this may be a situation where you may want to consider permissive withdrawal. Rule 1.16(c)(1) permits withdrawal when it "can be accomplished without material adverse effect on the interests of the client"; Rule 1.16(c)(7) permits a lawyer to withdraw when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the employment effectively"; and RPC 1.16(c)(12) permits a lawyer to withdraw as counsel when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." We believe that RPC 1.16(c)(7) is most applicable to your situation. RPC 1.16(c)(7) gives us two

circumstances where an attorney may withdraw: when the client fails to cooperate or when the client makes the representation unreasonably difficult. Examples of a client's failure to communicate include a client's refusal to address certain critical strategy issues, refusal to follow counsel's advice, and a client's attempt to dictate a matter's legal strategy. (Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 956 (2016 ed.), citing *Terry v. Incorporated Village of Patchogue*, 2007 WL 2071557 (E.D.N.Y. 2009).). Professor Simon identifies some circumstances that may render the representation unreasonably difficult under RPC 1.16(c)(7) including a client's deliberate misrepresentations to the attorney, "a client's constant calls to talk about the case or request information beyond what is fruitful or reasonable," failure to keep scheduled appointments or return calls, and "a client's abusive or threatening communications to the lawyer." (*Id*. at 957.) If your client does not cease his aggressive behavior, or improve his responsiveness, withdrawal under RPC 1.16(c)(7) may be appropriate.

The foregoing, however, is subject to the caveat set forth in RPC 1.16(d). RPC 1.16(d) states: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." (RPC 1.16(d).) In New York state court, if you are unable to file a signed consent to change attorney under CPLR 321(b)(1), you must obtain a court order under CPLR 321(b)(2) in order to withdraw. Federal Local Civil Rule 1.4 of the Southern District of New York also requires permission from the Court before withdrawing as counsel where the attorney has appeared as attorney of record. (Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 963.) If you are considering withdrawing from your matter, be sure to consult with the individual rules of that tribunal before proceeding. Also, as Comment 7A to RPC 1.14 notes, "[p]rior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action" pursuant to RPC 1.16(e) to avoid forseeable prejudice to the client. (RPC 1.14 Comment [7A].) This would include giving the client reasonable notice of the intent to move for withdrawal, delivering the client litigation materials, and allowing time for new counsel to be hired. (RPC 1.16(e).)

You indicated in your question that your client suffers from mental health issues and therefore discussion of RPC 1.14, entitled "Client with Diminished Capacity," is necessary. RPC 1.14(a) requires that the attorney, "as far as reasonably possible, maintain a conventional relationship with the client" when a client's capacity to make decisions is diminished, because of minority, mental impairment or for some other reason. (RPC 1.14(a).) Comment 6 to RPC 1.14 notes that in determining the extent of a client's diminished capacity, the lawyer should consider the following factors: the client's ability to explain their reasoning leading to a decision, ability to appreciate the consequences of decisions, and the consistency of those decisions with the known long-term commitments and values of the client. (RPC 1.14 Comment [6].) If an attorney believes a client has diminished capacity, and the client is at risk of substantial harm without the ability to act in their own interest, a lawyer is permitted to take reasonably necessary protective action. (RPC 1.14(b).) This includes, "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." (*Id*.) The NYSBA Committee on Professional Ethics also addressed this issue, noting that a "lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client." (NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018), citing NYSBA Comm. on Prof'l Ethics, Op. 986 (2013).)

In the event the appointment of a guardian is necessary under RPC 1.14(b), Rule 1.14(c) specifically notes that information relating to the representation of a client with diminished capacity is still protected by the attorney confidentiality Rule 1.6. (RPC 1.14(c).) Further, the Rule states, "[w]hen taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." (RPC 1.14(c).) In determining how to proceed with your client, you must first analyze the extent of your client's diminished capacity. Merely suffering from "mental health issues" is not sufficient to warrant invoking RPC 1.14(b). Indeed, the client must be at risk of "substantial physical, financial or other harm" for RPC 1.14(b) to apply and it is not clear from your inquiry to what extent your client may be impaired. (RPC 1.14(b).)

We share your concern about waiving the attorney-client privilege by utilizing the assistance of employees of the non-profit organization to facilitate communications with your client. RPC 1.14 Comment [3] states that "The client may wish to have family members or other persons participate in discussions with the lawyer. *The lawyer should consider whether the presence of such persons will affect the attorney-client privilege*. Nevertheless, the lawyer must keep the client's interests foremost, and except for protective action authorized under paragraph (b), must look to the client, and not family members, to

make decisions on the client's behalf." (RPC 1.14 Comment [3], emphasis added.) Although attorney-client privilege is a legal issue outside the Rules of Professional Conduct, this comment is a clear warning that communications involving non-attorneys may not be privileged even where their presence is for the purpose of assisting clients with a diminished capacity.

The NYSBA Committee on Professional Ethics previously noted that "courts have repeatedly held that the attorney-client privilege is not waived by a lawyer's use of an agent to facilitate communication with a client" including the presence of a daughter of an elderly client. (NYSBA Comm. on Prof'l Ethics, Op. 1053 (2015); *see generally* Michael J. Hutter, *Protecting Privileged Communications Disclosed to Retained Professionals*, N.Y.L.J., April 5, 2017 at 3, col. 1.) The committee opined that if the utilization of a sign language interpreter with a deaf client would not violate the attorney-client privilege, then such use is not only permitted, but required under Rule 1.4 if that is the only means of communicating with the client. (NYSBA Comm. on Prof'1 Ethics, Op. 1053 (2015).) The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics also addressed this question in Formal Opinion 1995-12, opining that, "A lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law." (NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1995-12 (1995); *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 134 (2016 ed.).) While we are unaware of any cases on this point directly, and there are cases suggesting that attorney-client privilege is not waived by an attorney's use of an agent to assist with communications with a client, in light of RPC 1.14 Comment [3], we would suggest using caution or seek a ruling from the court in advance of working with a staff member if you are concerned about waiving attorney-client privilege.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(Syracuse@thsh.com)
Carl F. Regelmann, Esq.
(Regelmann@thsh.com)
Alexandra Kamenetsky Shea, Esq.
(Shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a partner at a law firm with experience representing clients who pay for my legal fees through litigation financing companies. In the past few years, more and more of my clients have used these services and, for the most part, our clients have been very pleased. Our firm has also been thrilled to get financed cases because many of our clients would not have commenced these cases if they had to pay the costs themselves even though they had legitimate claims.

A friend from college recently approached me about becoming an investor in a litigation financing company that he is starting. He knows that I have a lot of experience working in this area and that this industry has been taking off. He suggested that if I was able to refer clients to this company, we could all stand to make a lot of money and help out a lot of people.

Before I even consider my friend's proposal, I want to make sure I would not be violating any ethics rules. Can attorneys refer their clients (or potential clients) to litigation financing companies for assistance financing litigation? If so, can I refer a client to a litigation financing company where I am an investor? Would it matter if another one of my partners was handling the case and I had no involvement in it? Even if I don't become an investor, if I negotiate with litigation financing companies on my clients' behalf to finance one of my cases, am I able to charge the client for that work? When working with a litigation financing company are there any particular attorney-client privilege concerns I should be aware of? Does the litigation financing company have any ability to control the decisions or legal strategy of the case?

Sincerely,
Richie Referral