ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent Wishful Thinking Development (WTD). In 2007, WTD took out a multi-million dollar mortgage on a piece of commercial real property which it owns in midtown Manhattan.

After approximately four years, WTD ceased paying its mortgage and the lender instituted a foreclosure action by filing a summons and complaint in Manhattan Supreme Court in early 2012.

The complaint was personally served upon Inover Hishead (IH), the principal of WTD at his office in downtown Manhattan on February 1, 2012. On the morning of February 13, IH called to inform me that he was previously served with the complaint and I advised him that we needed to respond to the complaint within 20 days, which would require a response by February 21, 2012. The complaint contained 10 separate causes of action against WTD, which consisted of nearly 200 paragraphs of allegations. Because of the complexity of these allegations, I consulted with IH and we decided that it would be appropriate to request a 30-day extension of time from the lender's counsel so that we could respond to the foreclosure complaint. In addition, I needed an extension of time as well because last fall I was scheduled to begin a week-long trial in federal court in California on February 16.

Later that day, I telephoned opposing counsel and advised him that I was just retained to represent WTD and requested a 30-day extension to respond to the complaint both because of the time required to address the complex nature of the lender's allegations in the complaint as well as because of my upcoming trial on the West Coast. The lender's counsel informed me that his client wanted to aggressively pursue this action and foreclose on the property immediately. In short, I was informed by my adversary that the lender 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 to me or my client. Although I explained to opposing counsel that an extension of time is a basic courtesy and would not prejudice the lender, he responded that his client was "sick and tired of lawyers being nice to each other" and told me that my request for an extension was denied. He further informed me that if I did not answer or move to dismiss the complaint by February 21, 2012, then he would immediately file a motion for a default judgment against WTD.

Isn't my adversary's conduct a violation of the Rules of Professional Conduct and 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,

Concerned Counsel

Dear Concerned Counsel:

Although your opposing counsel's behavior is deplorable and almost certainly violates the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), it does not necessarily violate the Rules of Professional Conduct (the RPC) or serve as a basis for a disciplinary complaint.

The Standards were first proposed in the "Report on Guidelines on Civility in Litigation," a report issued by the NYSBA's Commercial and Federal Litigation Section (the Report). Seeing a disturbing increase during the 1990s in so-called "Rambo" litigation tactics by attorneys, the Report expressed the Section's concern that there was an urgent need for our profession to address the rising level of incivility by members of the bar. This incivility manifested itself in a variety of ways which included, amongst other issues, "deliberate scheduling of proceedings at times that [were] knowingly inconvenient for one's adversary" as well as "arbitrary refusal to stipulate to reasonable requests for extensions of time and modification of schedules." Report at 1. As stated in the Report, there were "[v]arious contributing causes" to the lack of civility that our profession was experiencing, including:

> the ever-increasing size of the bar . . . the ever-expanding scope of pretrial discovery . . . the misperception by clients or lawyers that mean spirited, "give-no-quarter" advocacy is the only way to win a lawsuit . . . competitive business demands in which the perceived need for billable hours leaves no time for reflection on the values of civility; and inadequate training of lawyers with respect to matters of professionalism.

See id. at 4–5 (internal citations omitted).

The Report also noted that incivility led "to a growing perception that litigation attorneys sometimes confuse the duty of zealous advocacy with a basic lack of respect for other persons" and that incivility made "litigation unpleasant for those participants in the enterprise who rightly believed that lawyers should be able to 'disagree

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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without being disagreeable.'" *Id.* at 4 (internal citations omitted).

In an effort to promote solutions that were intended to combat the growing incivility amongst attorneys at the time, the Report (which was adopted by the House of Delegates and eventually evolved into the Standards) made the case for the need for guidelines designed to raise "the consciousness of the bar in a way that will affect attitudes and conduct." *Id.* at 5.

Enacted in 1997, the Standards were "intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." Although the Standards are a model for appropriate behavior, they were "not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [the predecessor to the RPC], or any other applicable rule or requirement governing conduct." Since the Standards are guidelines only, it is unlikely that reporting your adversary's conduct to the Disciplinary Committee would result in the issuance of a disciplinary complaint. That being said, it does not follow that your adversary's conduct gets a free pass. Rejection of your extension request exposes opposing counsel to likely repercussions before the eventual judge who will be assigned to this matter. Most judges view requests for extensions of time as a matter that should be left exclusively to the attorneys and not involve the courts. It is widely known that judges (most of whom have extensively heavy case dockets) do not want to waste valuable time dealing with minor matters that competent counsel should be able to resolve. In our view, it is not just a matter of attorney professionalism. Intelligent counsel should be mindful of the potential consequences faced by an adversary who demonstrates a lack of civility.

Part II(B) of the Standards provides 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 of the status of the case." Furthermore, Part III of the Standards of Civility sets forth a series of guidelines meant to encourage lawyers to "respect the schedule and commitments of opposing counsel, consistent with the protection of their clients' interests." These include:

> 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.
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> 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.
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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.

See Standards Part III(A)–(D).

Obviously, there are situations where no extension may be warranted because of possible prejudice to the plaintiff. However, where there is no prejudice, the Standards suggest that your request for a 30-day extension to respond to the complaint is reasonable in light of the fact that the complaint contained 10 separate causes of action and nearly 200 paragraphs of allegations against your client. *See* Standards Part III(A). In the absence of a showing by your adversary that the client would be adversely affected by an extension of time, he should have granted you the courtesy of the extension you were seeking. *Id.* We doubt that the plaintiff's interests would be adversely affected if opposing counsel granted your extension request, unless there was a situation where your client was committing an act that could cause irreparable harm to the plaintiff (and which would have likely resulted in the plaintiff seeking a provisional remedy against your client at or close to the time when the foreclosure action was commenced).

Rather than simply saying "no," consideration could have been given to a shorter extension and, as discussed below, the extension request may also create an opportunity for the plaintiff to get certain reasonable concessions from the defendant as the price for the extension. In our view, except in very unusual situations, first requests for an extension of time should be granted as a matter of courtesy. *See* Part III(B).

Many times when an attorney is faced with a request from opposing counsel for an extension of time to respond to a complaint, there are conditions which may be placed on granting such request. However, these conditions should not be "unfair or extraneous" and can be given so long as they are "appropriate to preserve rights that an extension might otherwise jeopardize." *See* Part III(C). Examples of conditions given in exchange for an extension of time to respond to a complaint include an acknowledgment of service and the waiver of jurisdictional defenses, including the defenses of improper service and personal jurisdiction. Since this is a foreclosure action involving real property located in New York County and the principal of the defendant borrower acknowledged that he was properly served with the complaint, it is unlikely that you would be raising any jurisdictional defenses to this action.

An example of a condition which is regularly discouraged is the requirement of client consent in order to grant an extension of time. Countless requests for extensions of time are often met with the response "I have to consult with my client" or something to that effect. It is a commonly held belief that the only reason an attorney would impose this condition is to prevent the requesting attorney from obtaining an immediate response to his request for an extension. As discussed at length herein, the decision to grant extensions of time is a matter that rests with the attorneys only and does not expressly require client consent.

Last, opposing counsel should respect and take into account your previously scheduled trial when scheduling deadlines in connection with the instant foreclosure action. *See* introductory paragraph to Part III of the Standards. As stated above, Part III(D) provides that "[a] lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflict" and "should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized." Your upcoming federal trial in California is unlikely to be adjourned. In addition, rescheduling the trial would require altering the travel plans of not only you, but your client(s), your adversary in that case, as well as his or her client(s), and all necessary witnesses. The trial court would have to reschedule the matter while taking into account its own limited availability, which may not be for months. Most important, a delay in the trial date may result in prejudicing your client in that particular case. Therefore, you might want to provide your adversary in the foreclosure action with an affidavit of engagement describing your participation in the trial scheduled in California. If opposing counsel in the foreclosure action takes the position that your affidavit of engagement is meritless and tells you to seek relief from the court, then you would be left with no alternative but to make an application to the court for an extension of time to respond to the complaint. By forcing you to make this application, your adversary risks losing credibility before the court, since he will likely be seen as unnecessarily forcing judicial intervention in a matter that should have been dealt with between attorneys.

The RPC does not directly address civility but does set forth a number of provisions to deal with "overly aggressive behavior" by attorneys "including Rule 3.1 ('Non-meritorious Claims and Contentions'), 3.2 ('Delay of Litigation'), 3.3 ('Conduct Before a Tribunal'), 3.4 ('Fairness to Opposing Party and Counsel'), and 8.4(d) ('engage in conduct that is prejudicial to the administration of justice')." *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, at 3, col. 1.

Arguably, an attorney's failure to grant reasonable extensions of time could qualify as "conduct that is prejudicial to the administration of justice." *See* Rule. 8.4(d). However, Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice* . . . ." (emphasis added). Although your adversary's conduct is a prime example of uncivil conduct, it is not behavior that parallels the more egregious conduct that could be deemed a violation of Rule 8.4(d). Examples of conduct subject to discipline include "advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding . . . " and the like. *See id.* Comment [3].

As discussed above, the courts do not look favorably upon applications seeking extensions of time because such requests can legitimately be viewed as a waste of judicial resources. Determinations of extension requests are matters that should be exclusively the domain of the attorneys in a particular matter. An attorney who forces a dispute over whether to grant an extension of time before a judge risks losing credibility in the eyes of the court. As the Standards suggest, you can be aggressive but still be civil. Therefore, it is the attorneys' responsibility to behave in a civil manner and grant all necessary courtesies so as to avoid unnecessary proceedings before the court, especially on trivial matters such as applications for extensions. There should always be a certain amount of respect between attorneys as to their respective time commitments. This will allow cases to proceed more easily, which will result in a more expedient resolution of client matters.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently received a $10,000 retainer to represent a client (Daniel Developer) in a real property development project. I anticipate the project will take about a year to 18 months to complete. I will be billing on an hourly basis every two months. It has been my practice to put these retainers in my escrow account but in discussing the matter with a couple of fellow attorneys, one expressed the opinion that these retainers should not be put into the escrow account and instead should be deposited into our firm's operating account. The other attorney said that the retainer payment belongs to the client and must be put into an escrow account. Which is it?

In addition, could I enter into a "flat fee" or "minimum fee" payment arrangement with Daniel Developer?

With regards to fee amounts, it has been my firm's practice to increase billing rates at the beginning of each calendar year. Am I required to inform Daniel Developer once our new billing rates take effect?

Last, if for some reason I do not use up the retainer given to me by Daniel Developer, am I required to refund the remaining amount to him?

Sincerely,
Andrew Advocate