

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.**

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TO THE FORUM:

I am a recent law school graduate, who passed the bar exam and am awaiting admission to the New York bar. I was lucky to land my dream job working as a law clerk while I await my admission. As I cannot practice law until after I am admitted, I have mostly been conducting research and shadowing the admitted attorneys.

Recently, Raoul Bender, a senior partner at my firm, asked me to cover a court appearance on his behalf, due to an unavoidable conflict for which he could not find coverage. When I reminded him that I am not yet admitted, he responded "That's okay. It's just a conference. All you have to do is state your name and the law firm you work at, opposing counsel will cover the rest. It will be good experience for you."

However, my gut instinct, and limited knowledge of the Rules of Professional Conduct, tell me that such an appearance is prohibited and could potentially compromise my admission to the bar. What's more is the attorney representing the opposing party is the same attorney that I have my character and fitness interview with.

I am worried that if I tell Mr. Bender I am uncomfortable covering the conference, I will jeopardize my job. On the other hand, I am worried that if I do not speak up, I could jeopardize my entire career. Am I ethically permitted to appear on Mr. Bender's behalf? If not, what are my ethical obligations with respect to his request?

Very Truly Yours,
Inn A. Pickle

DEAR INN A. PICKLE,

Let us begin by welcoming you to the practice of law. The good news is that although not yet admitted, you are properly identifying some very important issues that will serve you well once you are admitted to practice. Attorneys must never lose sight of their ethical and professional obligations. Although the New York Rules of Professional Conduct (RPC) do not apply to non-

lawyers – even those awaiting admission to the Bar – in our view, a working knowledge of the RPC and the ethical rules of the road is something that should be learned early on in one's career.

First and foremost, we note that newly minted lawyers – especially those awaiting admission – should never be shy about raising ethical concerns with their colleagues, including the partners and associates supervising their work. While some may say, "that's easier said than done," lawyers are officers of the court, who have a duty to uphold the legal process; demonstrate respect for the legal system; seek improvement of the law; and promote access to the legal system and the administration of justice while also protecting our reputations and credibility. See Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 6 (2019 ed.). Accordingly, should a conflict arise during the lawyer's practice which creates a tension among the lawyer's responsibilities to clients, the legal system, or the lawyer's own interests, the lawyer must resolve such issues through the exercise of sensible professional and moral judgment, guided by the basic principles stated in the RPC. *Id.* at 8. Since your admission to practice is imminent, it is wise to honor these rules. Separate and apart from professional ethics, if your current employer reacts negatively to your questions concerning your ethical obligations, you may want to consider whether this is the right place for you to be working.

Turning to your specific question, we note that you have not identified the type of conference that Mr. Bender is asking you to cover, which is an important consideration to our response. For example, is it a calendar call where you are simply submitting papers, or is it a substantive pre-trial or compliance conference? Depending on the type of conference, and any applicable court rules that tell us what is expected of counsel, your appearance in court on Mr. Bender's behalf could potentially violate RPC 5.5, which governs the unauthorized practice of law. RPC 5.5(a) states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the

legal profession in that jurisdiction.” Subsection (b) of RPC 5.5 further states, “a lawyer shall not aid a non-lawyer in the unauthorized practice of law.” It is important to note that Comment [2] to RPC 5.5 provides an exception to the unauthorized practice of law where a lawyer supervises work he or she has delegated and retains responsibility for the non-lawyer’s work. As Professor Simon notes, the prohibition against the practice of law by a non-lawyer is grounded in the public’s right to the integrity and competence of those who undertake to render legal services. See Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1293. Because a non-lawyer who undertakes to handle legal matters is not technically subject to the same rules that apply to lawyers (i.e., the RPC), the unauthorized practice of law is viewed by many as a potential threat to the integrity of our profession.

While the RPC may not technically apply to you, Mr. Bender is an admitted attorney in a supervisory role and is ultimately responsible for your actions. Scheduling conflicts are often inevitable, but Mr. Bender should not be asking you to do something that could be viewed as the unauthorized practice of law or possibly incur the wrath of the judge before whom you will be appearing. The classic test of whether an activity is considered the unauthorized practice of law is whether the non-lawyer exercised legal judgment, especially the application of law to a particular set of facts. See Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1293. Ministe-

rial activities such as appearing in court for calendar calls and other routine appearances generally do not constitute the practice of law any more than filing a complaint in the clerk’s office. *Id.*

In New York, the unauthorized practice of law has a statutory definition. Judiciary Law § 478 states that “it shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner . . .” In addition, N.Y. Judiciary Law § 484 provides that “[n]o natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate . . .” Both Sections 478 and 484 set forth exceptions for law students acting pursuant to a program approved by the Appellate Division of the Supreme Court or governmental entities, but neither of these exceptions appear to apply to you.

In any case, we can think of many situations where some lawyers may want to send a recent law school graduate (or perhaps a paralegal) to cover a calendar or conference, particularly in smaller offices and underserved communities, where lawyers are in short supply. Nevertheless, if you do find yourself in this situation, you should *never* under any circumstance hold yourself out to be an admitted attorney. Thus, in response to your question, if the



conference Mr. Bender is asking you to attend is merely a calendar call where you will be submitting papers or perhaps requesting an adjournment, we think that is something you can do. Anything more than that would require disclosure to the court and opposing counsel. Mr. Bender should make any required disclosures in advance of the conference so that he can ascertain whether there is an objection. Of course, if there is an objection from the court or opposing counsel, that will put an end to it; any objections would have to be addressed by Mr. Bender.

Mr. Bender should remember he has an obligation to supervise your conduct as a non-lawyer. Rule 5.3(b) states that “[a] lawyer shall be responsible for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of [the RPC] if engaged in by a lawyer,” under two circumstances: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; and (2) the lawyer is a partner in a law firm in which the non-lawyer is employed or is a lawyer who has supervisory authority over the non-lawyer and knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial measures. Under the scenario described, Mr. Bender has an ethical obligation to supervise your work and his failure to do so could put him at odds with the RPC.

Your question raises another important issue, which touches on a tricky subject. While Mr. Bender’s request that you cover the conference is something that can be properly handled without your appearance constituting the unauthorized practice of law, what should someone in your situation do if compliance with future requests from senior lawyers crosses that line? RPC 8.3 governs the reporting of professional misconduct and states, “a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or action upon such violation.” Again, because you are not yet admitted, you are technically not required to abide by this rule, but that said, it is important for you to be aware of this reporting obligation, since once you are admitted to the Bar your failure to follow these Rules closely could result in disciplinary action against you.

The reporting obligation imposed by RPC 8.3 only applies when the lawyer “knows” of the impermissible conduct, although some ethics opinions suggest that the duty exists when a lawyer has a “clear belief.” See Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1681. RPC 1.0(k) defines the term “knows” to mean “actual knowledge,” although “knowledge may be inferred from circumstances.” *Id.*; see also RPC 1.0(k).

As discussed in a prior *Forum*, “an attorney should use professional judgment and discretion when determining whether and how to report a colleague.” See Vincent J. Syracuse, Ralph A. Siciliano, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2016, Vol. 88. No. 4. As Comment [3] to RPC 8.3 counsels, the reporting obligation should be limited “to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” The duties imposed by RPC 8.3 further only require the reporting of conduct in violation of the RPC that calls into question the lawyer’s honesty, trustworthiness or fitness as a lawyer.

While there is no bright-line rule as to what type of conduct would call into question a lawyer’s honesty, trustworthiness or fitness as a lawyer, RPC 8.4, which governs attorney misconduct, offers some guidance on the topic. See Vincent J. Syracuse, Maryann C. Stallone & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2014, Vol. 86. No. 9. Rule 8.4 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.” Further, Comment [1] to RPC 8.4 tells us that “[l]awyers are subject to discipline when they 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, as when they request or instruct an agent to do so on their behalf.” In addition, Comment [2] to RPC 8.4 states that “[m]any kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”

To be clear, in our opinion and judgment, Mr. Bender’s request that you attend the conference, without more, does not rise to the level of triggering the reporting obligation. However, if you are aware of other instances where Mr. Bender has engaged in or asked other non-lawyers or clerks to engage in impermissible conduct, the totality of the acts, when taken together, may be sufficient to establish that Mr. Bender has a pattern of engaging in conduct demonstrating an indifference to the legal profession and such conduct may need to be reported.

With respect to your pending admission to the Bar, RPC 8.1 requires candor in the Bar admission process and provides that a lawyer shall be subject to discipline for

making or failing to correct a false statement of material fact in connection with his or her application for admission to the Bar. While the RPC does not apply to law graduates applying to become members of the New York Bar, Rule 8.1 looks backwards, to penalize bar applicants if the disciplinary authorities discover that they knowingly lied or knowingly failed to correct a lie on a Bar application. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1660.

While nothing in your question indicates that you were dishonest in the admission process thus far, if Mr. Bender asks you to engage in the unauthorized practice of law, or any other impermissible conduct, you may be required to update your application to state so. In fact, the New York State Bar application specifically asks candidates to truthfully state whether they: (1) have ever engaged in or whether their conduct has ever been called into question with reference to the unauthorized practice of law; (2) have ever been employed by any person, firm or corporation who or which, to their knowledge, engaged in conduct that was called into question on the subject of unauthorized practice of law during their employment; and (3) have given legal advice or held themselves out as an attorney in New York. In our view, should you need to correct your prior answers to these specific questions, you risk being in violation of RPC 8.1 once you are admitted.

It is worth noting that there are some in our profession who believe that the Rules should be changed to expand upon what non-lawyers are able to do. However, until there is a change in the rules, you should avoid conduct that could be viewed as improper. As a soon-to-be practicing attorney, you are on the right path in beginning to consider and question your ethical obligations. The legal profession places a great deal of value on honesty and integrity and the Rules of Professional Conduct are the glue that binds the seams of the profession. You should continue to consider your ethical obligations throughout your career. Do not be afraid to decline to engage in conduct that will jeopardize your integrity and reputation as a lawyer or the integrity of the legal profession as a whole. And, when in doubt, there are many resources, including our *Forum* and other legal professionals and literature, that will help you navigate the maze of legal ethics.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

TO THE FORUM:

I have been asked to represent XYZ Corporation in connection with a corporate investigation into allegations of fraud and corporate mismanagement against three high-level executives at the company. XYZ Corporation became a client of the firm through a relationship with the managing partner of my firm and we have represented them for over a decade. XYZ Corp. is one of our firm's most valuable and economically lucrative clients.

Last week, when I was at XYZ Corporation preparing for trial, one of the high-level employees, not involved in the instant suit, pulled me aside to ask my opinion on a matter that was personal to him. I quickly cut him off, reminded him that I was retained to represent the company and not him as an individual employee, and advised him to seek private counsel for any questions not related to the XYZ matter. He was so outraged by my refusal to give him legal advice that he stormed away.

Later that week, the managing partner of my firm called me into his office and reprimanded me for not providing legal counsel to the employee. He informed me that from here on out I should do whatever the high-level employees ask because they comprise the corporation that is the client. Essentially, they call the shots and we do not want to lose them as a client. When I tried to push back, he informed me that if I did not please the client, my job would be in jeopardy.

I don't want to lose my job but I can't shake the feeling that what he is asking me to do is unethical and wrong. What are my ethical obligations with respect to XYZ Corporation and its individual employees? Do I have a general obligation to do whatever the client asks? Was the managing partner of my firm out of line? If so, what, if anything, can I do?

Very Truly Yours,
Inn A. Bind

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