ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate at a firm that has maintained a long-standing client relationship with a professional sports league (the League). Recently, the League suspended one of its star players (DD) for two years as a result of an incident where he assaulted his fiancée in a hotel elevator and rendered her unconscious. The player has since filed a legal action against the League in federal court alleging that the League's suspension of him was arbitrary and capricious under the League's personal conduct policy in light of the fact that the League had previously rendered a monetary fine against DD based upon the incident in question which had been documented in a surveillance video showing DD pulling his unconscious fiancée out of the elevator but not the actual assault.

Earlier this year, I participated in a call along with my supervising partner (SP), the League's assistant general counsel (the AGC), the League's General Counsel (the GC) and another League executive. During the call, the GC advised us of the incident and when SP asked if the incident was recorded, the GC quickly responded that it was in possession of the subject video. My first thought upon hearing this information was to find out if other videotapes of the incident existed. I wrote those thoughts on a notepad and showed them to SP who quickly waved me off during the call. After the conclusion of the call, SP chided me and demanded that I never make such inquiry of the client again.

A few weeks later, I ran into the AGC at a client event. He pulled me aside and informed me that although the GC told my firm that only one videotape of the incident existed, the League in fact had another tape in its possession showing the entirety of the incident (including DD physically assaulting his fiancée) but he indicated that he was directed not to ever discuss the existence of the second tape because of the public relations fallout that would almost certainly ensue if the full video ended up in the public realm as well as the potential legal ramifications for the League.

My firm is preparing to defend DD's lawsuit, which will almost certainly include depositions of League executives. I have been told that the plan is to take the position that the only videotape in existence was the one that was disclosed to the public. What if I told you that I know this information to be false? What are my professional responsibilities? Is there a "reporting up" requirement? With regard to how the SP handled his fact gathering, was he obligated to fully probe the League's GC as to his knowledge of the existence of any and all evidence relevant to the incident? Finally, if it is later determined that SP knowingly failed to make the proper inquiries so as to avoid learning damaging information, could my firm be disqualified from representing the League in the lawsuit brought by DD or possibly sanctioned?

Sincerely,

Tim Troubled

Dear Tim Troubled:

Your question first asks us to address the professional obligations that arise when an attorney learns that a client intends to present false information to opposing counsel and/or a tribunal. Rule 4.1 of the New York Rules of Professional Conduct (the RPC) tells us that "[i]n the course of representing a client, a lawyer shall not *knowingly* make a false statement of fact or law to a third person" (emphasis added). Rule 3.4 which requires that attorneys act with fairness and candor when dealing with an opposing party and their counsel is also applicable.

In Rule 3.4, subparagraph (a)(1) states that "a lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce."

Subparagraph (a)(4) requires that "a lawyer shall not . . . *knowingly* use perjured testimony or false evidence" (emphasis added).

Subparagraph (a)(6) requires that "a lawyer shall not *knowingly* engage in other illegal conduct or conduct contrary to these Rules" (emphasis added).

In addition, Rule 3.3 governs your obligations to the court. Rule 3.3(a)(1) states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." In addition, Rule 3.3(a)(3) requires that

> [a] lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . .

The key words used in the aforementioned sections of the RPC are "know" and "knowingly." Comment [8] to Rule 3.3 states that "[t]he prohibition against offering or using false

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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evidence applies only if the lawyer *knows that the evidence is false*" (emphasis added) and that "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."

Generally speaking, lawyers are permitted to rely on a client's recitation of the facts and do not have a duty to second-guess or independently verify what their clients tell them, an issue which we covered in a previous *Forum*. *See* Vincent J. Syracuse and Matthew R, Maron, *Attorney Professionalism Forum*, New York State Bar Association Journal, July/August 2012, Vol. 84, No. 6. In fact, even if a lawyer has doubts about the veracity of a client's version of the relevant facts, so long as a lawyer's investigation of the facts does not conclusively demonstrate that what the client is saying is false or fraudulent, a lawyer is permitted to accept the client's word. Put another way, attorneys are not required to be the judges of their clients' positions. *Id.*; *see also* Lawrence J. Vilardo and Vincent E. Doyle III, *Where Did the Zeal Go?*, Litigation, American Bar Association, Fall 2011, Vol. 38, No. 1.

These principles do not necessarily create a "safe haven" for you. In the circumstances that you have described, the fact that you have apparently become aware that the League has possession of a second video and, nevertheless, wants to take the position that the original video disclosed to the public was the only one in existence, could place you in violation of Rule 4.1 and any one of subsections (1), (4) or (6) of Rule 3.4(a). Moreover, your knowledge of the existence of the second video tape requires full compliance with subsections (1) and (3) of Rule 3.3(a) in order to avoid an ethical violation.

Your next question asks if there is a "reporting up" requirement if you see another lawyer committing an act in violation of the ethical rules.

Rule 8.3(a) states that

> [a] lawyer who knows that another lawyer has committed a violation of the [RPC] 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 act upon such violation.

Id.

Whether SP's behavior requires "reporting up" under Rule 8.3(a) cannot be answered without further additional information. Have you told SP what the AGC revealed to you about the existence of a second videotape? If so, how did he react? Did he tell you to ignore what you were told by the AGC? All of these questions must be answered before we can know whether SP should be reported for alleged misconduct. Again, the critical issue is whether SP has *knowledge* of the second video tape, and nevertheless intends to make false representations to opposing counsel and/or the tribunal.

With respect to how SP handled his fact gathering from the client, we note that Rule 1.3(a) provides that "[a] lawyer shall act with reasonable diligence . . . in representing a client." In addition, SP should also have been guided by competency requirements for attorneys as set forth in Rule 1.1(a), which requires that "[c]ompentent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." We believe that compliance with both of these ethical obligations would require SP to have conducted a more diligent and thorough fact gathering in his communications with the GC.

SP should not have prevented you from making a proper inquiry as to the relevant events as it could subject him to discipline under Rule 3.4(a) and Rule 4.1. If it is later determined that SP *knowingly* prevented you from making a further inquiry from the client because he was afraid of what the client would say, then he would have likely breached an ethical obligation and should be reported pursuant to Rule 8.3(a).

One thing that should be remembered is that retaliation by law firms against lawyer-employees is not permitted and we call your attention to the decision of the New York Court of Appeals in *Wieder v. Skala*, 80 N.Y.2d 628 (1992), which holds that firing an attorney for reporting misconduct of a fellow attorney employed at the same firm violates public policy. *See* Simon's New York Rules of Professional Conduct Annotated at 1840 (2014 ed.). Indeed, the Court of Appeals took a strong position in *Wieder* by articulating the need to protect those reporting misconduct to the appropriate disciplinary authorities. However, the disciplinary committees should not be the only ones enforcing potential misconduct. At a minimum, we hope that your firm has in place internal policies to handle reporting situations like the one you described involving SP. By having such policies in place, the firm can protect itself from potential exposure resulting from acts of misconduct by its attorneys and, at the same time, provide a mechanism allowing for the firm's attorneys to comply with their ethical obligations.

As to your last inquiry, the consequences stemming from SP's conduct would more likely result in sanctions rather than the disqualification of your firm under Part 130, which we have discussed at length in prior *Forums*.

If your firm does intend to move forward in the litigation with DD and continues to push the position that only one video exists, this could be deemed frivolous conduct since false, material factual statements are being asserted in the case you have described.

There is no doubt that you are in a precarious situation. It is therefore important to acknowledge that both you and the attorneys at your firm must comply with all ethical obligations, especially when confronted with the scenario discussed here.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a mid-level partner in a firm that is considered the leader in advising a particular industry. Across the relevant practice areas, the law as it applies to this industry is unsettled and developing, so our activity calls for a lot of judgment. Clients often rely on our advice almost as if our judgments were the law . . . which, of course, they are not, and that is the nub of my problem.

In particular, based on our long-standing advice and the strength of our firm's reputation, no one in the industry engages in a particular practice I will call "X." Last week, a new entrant to the industry (Client) asked about "X," and when I gave the stock "no" answer, Client handed me a research paper written by another lawyer who has never had contact with this particular industry. I read the paper with some skepticism and discovered, to my surprise, that it utterly demolishes our long-held position and proves, conclusively in my judgment, that X is permissible.

My boss (whose name is on our firm's door) cannot find a hole in the newcomer's analysis but yet still insists that "we have our story and we are sticking to it." I am not sure whether he concedes that he has been wrong or refuses to consider that possibility, but his main concern is that our firm and those whom we have advised have too much invested in the status quo to consider a change. He points out that all the leading industry players have been able to operate successfully (though at some additional cost) without doing X, so there is little to gain in our telling everyone that we have been wrong all along. On the other hand, if we say yes only to Client, it will gain an unfair advantage over the others and when word inevitably gets out we will look silly (or worse) and may lose a lot of business.

To complicate matters, Client insists that the reasoning that it and the new guy on the block have adduced in support of X is their proprietary information, insofar as it represents an ability to do something lucrative that the rest of the market has missed. Client has prohibited us from disclosing that anyone believes that X is permissible.

My boss has instructed me to tell Client that its other lawyer is mistaken and has no feel for this very specialized industry; and, given our firm's reputation, that might well be the end of the matter. But that will not be the end of the matter for me. I am not comfortable giving advice that I honestly believe to be wrong or in participating in what appears to me to be a cover-up. I have three questions:

1. May or must I tell Client my opinion, regardless of the directive from my senior partner?
2. Is Client within its rights in prohibiting our firm from disclosing to others the fact that someone has concluded that X is permissible (regardless of what we advise Client)?
3. If I leave my firm, may I disclose this sordid mess at least to justify why I am leaving or why I have changed my views, or am I bound to respect the firm's confidences even if they constitute, in my judgment, intentional malpractice?

Sincerely,

Painted Into a Corner

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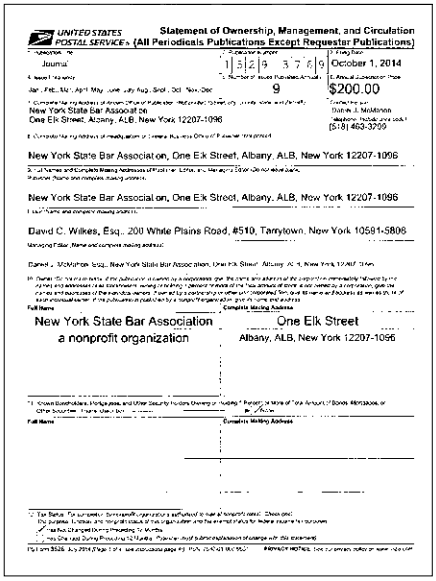

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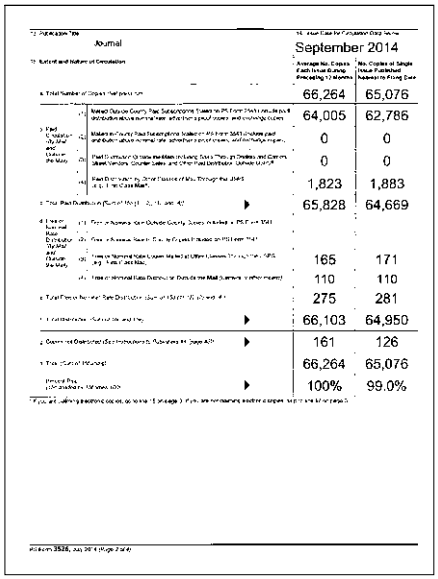

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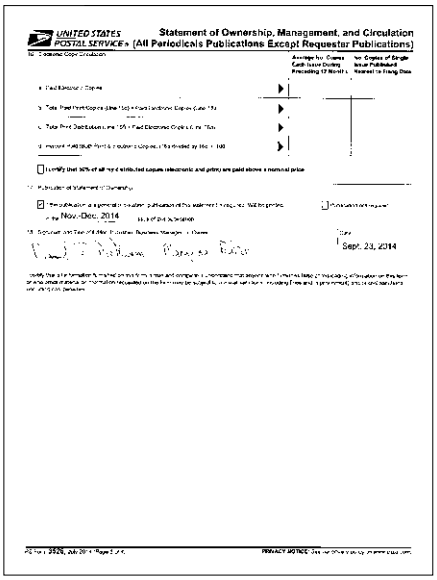

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