

## **Mandatory Professionalism: RPC 3.2 and the Lawyer's Duty to be Courteous and Considerate**

*by David H. Dugan III*

Lawyers have a responsibility to treat others with courtesy and consideration. This goes along with being a professional. In New Jersey, however, being courteous and considerate is not just professionally desirable, it is mandatory under the Rules of Professional Conduct (RPC).

The New Jersey version of RPC 3.2 states:

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A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration, all persons involved in the legal process.

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The ABA Model Rule version of RPC 3.2 contains only the first half of the above text, stopping with "client." The second half was added to RPC 3.2 by the New Jersey Supreme Court when it adopted the RPCs in 1984. The Court took its "courtesy and consideration" language from DR 7-101(A)(1) of the Disciplinary Rules, New Jersey's ethical code between 1971 and 1984. The verbiage has a long history; however, the context in which the words appear is not the same under the two rules.

The relevant part of DR 7-101(A)(1) stated:

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A lawyer shall not knowingly...fail to seek the lawful objectives of his client...A lawyer does not violate this Disciplinary Rule...by treating with courtesy and consideration all persons involved in the legal process.

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Technically, DR 7-101(A)(1) did not mandate courtesy and consideration. Rather, the rule simply declared that courtesy and consideration are not incompatible with appropriate advocacy on behalf of the client. When the Supreme Court shifted the courtesy and consideration language over into RPC 3.2, the nature of the rule changed, becoming both mandatory and open-ended.

### **An Ethical Mandate**

At a minimum, RPC 3.2 is violated whenever a lawyer is discourteous or inconsiderate toward anyone who is part of the legal process. Thus, lawyers have been sanctioned under the rule for making rude and degrading statements about an opposing party during argument of a motion; for making sarcastic and degrading remarks to a municipal court judge; for addressing loud and obnoxious statements to a judge's secretary; for declaring during court proceedings that the adverse party should be "cut up in little pieces and sent back to India"; for making personal attacks against almost everyone involved in the lawyer's own child custody case, including two judges; for sending an insulting letter to the complaining witness in a criminal matter, charging her with giving false information about his client; for repeatedly shouting at the judge; and for calling the prosecutor an idiot and pushing the police officer who was a witness.<sup>1</sup>

Historically, disciplinary prosecutions under the second half of RPC 3.2 have been limited to situations involving these types of discourteous or inconsiderate behavior. However, it would be a mistake to view RPC 3.2 so narrowly. Phrased in positive terms, on its face at least, the rule requires lawyers to be courteous and considerate seemingly without limit.

## **A Principle of Professionalism**

The open-endedness of RPC 3.2 serves to associate this rule of discipline with standards relating to courtesy and consideration in the wider world of lawyer professionalism. DR 7-101(A)(1) was superseded in 1984, when New Jersey adopted the RPCs. However, the principles it articulated were revived in 1997, when the New Jersey Commission on Professionalism in the Law adopted a collection of 16 principles of professionalism for lawyers and judges.<sup>2</sup> Among these principles are:

- Clients should be advised that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation.
- To opposing counsel, a lawyer owes a duty of respect, courtesy and fair dealing, candor in the pursuit of truth, cooperation in all respects not inconsistent with the client's interests, and scrupulous observance of all agreements and mutual understandings.
- As an officer of the court, a lawyer should act with complete honesty; show respect for the court by proper demeanor; and act and speak civilly to the judge, court staff and adversaries, with an awareness that all involved are integral parts of the justice system.

Unlike RPC 3.2, these three principles are not binding on lawyers. They are only admonitions. However, they are useful reminders of what courtesy and consideration should look like in the everyday practice of law. They also contain two important propositions that may be of interpretive benefit when applying RPC 3.2. The first proposition, also found in DR 7-101(A)(1), is that showing courtesy and consideration to others is not incompatible with proper and effective advocacy.

The second proposition contained in the principles of professionalism is that the lawyer's responsibility to extend courtesy and consideration should be subordinated to the client's interests. Similar language actually appears in RPC 3.2 as "...consistent with the interests of the client." However, these words come at the end of the first half of the rule, and were probably intended to relate only to the matter of expediting litigation. Nevertheless, in the absence of contrary precedent, the notion that client interests should take priority over courtesy and consideration seems reasonable.

## **Hypothetical Situation**

Attempting to extend courtesy and consideration to one's adversary without sacrificing client interests can be extremely awkward. Consider, for example, the following hypothetical: Time for completion of discovery in your case has expired, and a trial date has been established. Under Rule 4:24-1(c), no extension of the discovery period will be granted unless "exceptional circumstances" are shown. Your adversary attorney calls wanting to schedule your client's deposition before trial. You ask her why she waited so long, and she admits it was simply an oversight on her part. What do you do?

For two reasons, the lawyer ought not to decide the matter either way without first conferring with the client. First, although the deposition request concerns the 'means' of the representation, over which the lawyer has final authority, RPC 1.2(a) and RPC 1.4(c) require the lawyer to consult with the client before making a decision on means (unless the issue is one for which the lawyer has implied authority). In the context of this hypothetical, authentic

consultation should include explaining to the client that, because the request was made out-of-time, by law the deposition cannot be compelled.

Second, since courtesy and consideration should yield to client interest, the lawyer needs to confer with the client in order to determine what client interests may be relevant. It was observed earlier that the Model Rule version of RPC 3.2, which is identical to the first half of New Jersey's version, ends with the phrase "consistent with the interests of the client." Referring to this phrase, Geoffrey Hazard Jr., W. William Hodes and Peter Jarvis argue in their work *The Law of Lawyering* that only legitimate client interests should be given preference.<sup>3</sup> Once again, in the absence of New Jersey precedent, that modifier seems reasonable.

Returning to the hypothetical, assume that personally you would like to grant your adversary's request, but your client resists, wanting to take advantage of the adversary lawyer's failure. Are you ethically obligated to go along with your client and refuse your adversary's request? The answer would depend upon whether taking advantage of the failure reflects a legitimate interest on the part of your client. It is certainly an arguable issue, but the answer is probably no. However, if you were to demand that your client submit to being deposed after he or she has been told the deposition cannot be compelled, you would surely find yourself with an unhappy client. As a practical matter, if your client is not willing to be deposed you would be likely to support your client's position regardless of whether a legitimate interest were at stake.

Assuming your client does not have a legitimate interest to support a refusal to be deposed but nonetheless refuses, where does that leave you in terms of your RPC 3.2 duty? Presumably, your duty under the rule would not extend to requiring you to cooperate in the deposition. However, the rule's open-endedness has not really been tested in litigation. Presently, any limits on the lawyer's ethical duty to display courtesy and consideration are a matter of conjecture.

### **Mandatory Professionalism**

The second half of RPC 3.2 is a clear example of a disciplinary provision that was constructed around a professionalism concept. Other examples of such hybrid rules are: 1) RPC 1.2(b), which encourages lawyers to represent unpopular clients; 2) RPC 2.1, which encourages lawyers to represent clients holistically; 3) RPC 3.1, which encourages lawyers to reform the law and improve the legal system; 4) RPC 4.4(a), which prohibits lawyers from using means designed to embarrass, delay or burden others; and 5) RPC 6.1, which declares that lawyers have a professional responsibility to render public interest legal service.

These five rules of professionalism serve to demonstrate that the Rules of Professional Conduct are not simply a collection of negative standards useful only for disciplinary proceedings. Some of the RPCs have this limited function; however, many others, and particularly the five cited here, have an aspirational dimension and help to define lawyer function at the highest professional level.

### **Conclusion**

RPC 3.2 is a hybrid, and intended to serve a disciplinary function—holding lawyers accountable if they fail to treat others with courtesy and consideration. At the same time, the rule's open-endedness gives it the sort of aspirational character more typical of professionalism. Vagueness is not a fatal defect for disciplinary standards.<sup>4</sup> Nonetheless, the rule lacks clarity in terms of its disciplinary function. Without adequate definition, the rule tends to blur into the wider world of professionalism.

## **Endnotes**

1. *See Matter of Rifai*, DRB 10-221 (Oct. 26, 2010) and cases cited at pages 9-12.
2. *See generally*, New Jersey Commission on Professionalism in the Law, Principles of Professionalism for Lawyers and Judges (1997), available at [http://www.njsba.com/commission\\_on\\_prof/index.cfm?fuseaction=principles](http://www.njsba.com/commission_on_prof/index.cfm?fuseaction=principles).
3. Geoffrey C. Hazard Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering*, Third Edition, Section 28.3 (Walters Kluwer, 2011).
4. *In re Hinds*, 90 N.J. 604, 631 (1982).

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