



**New York State Bar Association
Committee on Professional Ethics**

Opinion 984 (10/8/13)

Topic: Conduct that has no substantial purpose other than to cause needless expense

Digest: A lawyer's refusal to provide copies of publicly-available pleadings to adverse counsel does not violate Rule 3.2.

Rules: Rule 3.2

FACTS

1. Inquirer is asked by adverse counsel in a case to provide copies of pleadings and other documents already filed which form the basis of a default judgment. Inquirer proposes to respond that he will not provide copies of documents that are available from the court file, although such documents are electronically stored on his computer and may not be available electronically from public sources. Such refusal will mean that adverse counsel will incur the cost of time and expense travelling to the court clerk in order to photocopy those documents.

QUESTION

2. Would such a refusal violate Rule 3.2?

OPINION

3. We assume without opining that the inquirer is not required by law or court rule to provide the documents in question. *See* Rule 3.3(a) (lawyer shall not intentionally violate any established rule of procedure or of evidence), Rule 8.4(b) (lawyer shall not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). If the lawyer were so required, refusal to provide the documents would constitute a violation of Rule 3.2.

4. New York Rule of Professional Conduct 3.2 states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Cmt. [1] to the Rule adds that "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense."

5. Rule 3.2 was introduced to New York on April 1st, 2009 when the Rules of Professional Conduct were promulgated by the courts to supercede and replace the old Code of Professional Responsibility. There was no predecessor version of Rule 3.2 in the old Code but it did include

Disciplinary Rule 7-101(A)(1) “Representing a Client Zealously” which stated in pertinent part that “acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client” was not a violation. Former Ethical Consideration 7-38 stated that a “lawyer should . . . accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client.” The quoted language from the former DR 7-101(A)(1) and EC 7-38 was not included by the Courts in the Rules of Professional Conduct, nor in the Comments to the Rules (the Comments were adopted by the New York Bar Association’s House of Delegates). But it seems instructive that only the Ethical Consideration (not the Disciplinary Rule) stated a lawyer “should” accede, because Ethical Considerations had an aspirational, rather than disciplinary, nature. This is our first opinion construing Rule 3.2.¹

6. While providing the documents would save adverse counsel time and effort, the documents were presumably produced or obtained at the expense of adverse counsel’s client, so even if no money were expended, there would be an implicit cost to sharing them. But even if there were no implicit cost, it does not seem likely that in promulgating Rule 3.2 the courts intended to create an ethical obligation to share information, documents or resources solely because the cost of sharing would be minimal. Otherwise, one side could be compelled to provide copies of the cases it has cited in pleadings or even to “lend” the assistance of salaried personnel. When Rule 3.2 states that a lawyer shall not “cause needless expense” we believe it means that a lawyer shall not take *affirmative steps* which result in “needless expense” but that mere refusal to cooperate, as here, does not constitute such an affirmative step. In short, declining to provide documents available at the court to adverse counsel does not constitute “causing” needless expense.

7. We add that while Rule 3.2 does not compel sharing the documents available from the court, we also see no prohibition in the Rules against acceding to such a request. *See* Rule 1.2(e) (lawyer may exercise professional judgment to accede to reasonable requests of opposing counsel when doing so will not prejudice the client’s rights). The lawyer should also consider whether the circumstances of the request merit consultation with the client before deciding whether to accede. *See* Rule 1.4(a)(2) (lawyer shall “reasonably consult” with client regarding the means of accomplishing client’s objectives).

CONCLUSION

8. The proposed refusal would not violate Rule 3.2

(23-13)

¹ Cf., N.Y. State 469 (1977) (lawyer may not interpose a general denial knowing that the client has no valid defense). We do not find any state or federal court decisions in New York that construe the Rule either. ABA Model Rule 3.2 reads differently, stating that “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”