

When a Mentor Is Uncivil, You Have Options

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To the Forum:

I am corporate transactional attorney who has been in practice for nearly 30 years. Every few years I participate in an alumni program at my law school where I am paired with a recent law school graduate to mentor throughout their first few years of practice. A few years ago, I was paired with a graduate who I have mentored for the last five years. She is now a mid-level associate at a boutique litigation firm where she just started. We were having coffee recently and discussing her new position. During our conversation, she recounted a few of her experiences with her new boss that left me troubled and raised some questions as to attorney civility and her ethical responsibilities as an associate and member of the bar. She told me that the partner that she reports to, whom I will refer to as "Ren," is particularly spirited, so much so that, in my opinion, he appears to cross the line between zealous advocate and unprofessional. For example, she told me that during meet and confer calls he is constantly screaming at adversaries, talking over them and changing course on his prior agreements by telling the court that he did not agree to certain things that she specifically remembers that he did agree to. She also noted that he often attempts to justify his positions and misstatements by indicating that she agrees or that she will recall him saying things that she is certain he never said.

On one particularly offensive occasion, during a meet and confer Zoom call between counsel, the associate on the opposing side attempted to address a discovery issue with her directly. Ren immediately and aggressively interjected by stating, "DO NOT SPEAK TO HER!" She said she was taken aback because she was not only prepared to answer the adversary's question, seeing as she was the attorney who prepared and transmitted the production, but she found it offensive that he would not even afford her the opportunity to speak at all. On another occasion, Ren even went as far as to tell one of their male adversaries to "control" his female co-counsel during a meet and confer call between counsels. While my mentee indicated that she was not comfortable speaking up during the call, she asked me whether I thought she should have addressed the issue with him directly after the call.

I couldn't believe what she was telling me. In my 30 years of practice, I have never encountered such behavior from a professional. Is Ren's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? If so, as an associate who is employed by the individual exhibiting inappropriate behavior, does she have any ethical obligations that she should be aware of?

*Sincerely,
Ainsley Associate*

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Dear Ainsley,

Unfortunately, lawyer incivility during virtual practice as a result of the COVID-19 pandemic may have increased over the last few years. This is likely due to a variety of factors. First, as numerous studies have documented, lawyers have reported increased levels of stress, anxiety, depression and feelings of being burnt out during the pandemic.¹ Second, while practicing in a home environment, often in their sweatpants, lawyers may have inadvertently dropped their standards of professionalism. Whatever the reason for it, there is little doubt that incivility between attorneys disserves the profession and the client. In the words of the Honorable Justice Sandra Day O'Connor, which have remained true over the years:

[T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and system itself lose esteem in the public eyes [I]ncivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.²

We have addressed the best practices of civility between opposing counsel in several prior Forums.³ The situation you describe involving your mentee gives us an opportunity to revisit the issue in a somewhat different context – what should an associate do when a supervising partner engages in egregious behavior? Further, we will address the inappropriate gender overtones evident in Ren's behavior, which unfortunately many female

litigators have likely encountered during the course of their careers.

First and foremost, the incivility you describe is certainly a violation of the New York State Standards of Civility.⁴ These standards were adopted by the courts to guide the legal profession, including lawyers, judges and court personnel, in observing principles of civility. Although the standards are not intended to be enforced by sanctions or disciplinary action, they give us basic principles of behavior to which lawyers should aspire. For example, Section 1 of the standards provides that “lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others” and that “lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.”

In our view, Ren's conduct in screaming at opposing counsel during meet and confer calls and repeatedly talking over them is not acceptable behavior, nor is it in the interest of effective advocacy. The point of any meet and confer call is to attempt to resolve open discovery issues and avoid needless motion practice, which results in larger expense to the clients and increased backlog to the court's already jam-packed docket. A meet and confer is intended to be a conversation between counsel and an attempt to compromise on outstanding issues; it should not be used as an opportunity to pound chests on the merits of each other's respective cases.

By not allowing opposing counsel to get a word in, and in repeatedly changing course on agreed-upon items, Ren has unnecessarily increased the length of the meet



and confer call and, thus, the costs of litigation for both parties. We assume that by engaging in the conduct referenced above that nothing was accomplished during the meet and confer calls, thereby requiring discovery motions or applications to the court, which would serve to unnecessarily increase the cost of the litigation as well as the court's backlog. Attorneys and their clients should know that an attorney who establishes a bad relationship with his or her adversary (and ultimately the court) is taking a big risk should problems arise in the future of the case.

Further, Ren's comments that his male adversary should get "control" over the female co-counsel crossed the line. Not only is such conduct uncivil, but it is highly unprofessional, offensive and inappropriate behavior that, in our view, violates the standards. Needless to say, Ren's conduct is a poor example of proper mentor conduct. Demonstrating combative, unprofessional behavior sets a bad tone for associates for the type of conduct that is acceptably engaged in by lawyers. Although Section I(D) of the standards provides that "lawyers should require that persons under their supervision conduct themselves with courtesy and civility," in the instance you describe it appears that Ren, the partner, has failed to lead by example. However, Ren's offensive behavior goes beyond that, and we would be remiss if we did not address the elephant in the room. It appears that Ren's inappropriate behavior was, at least in part, motivated by a gender bias. Unfortunately, there is a tendency by some male counterparts to dismiss female litigators who are direct and assertive in advocating their clients' positions by characterizing them as "aggressive," "hostile" or, in this case, telling them to get "control" over their so-called emotional state. Two of the co-authors of this article have experienced this very behavior on more than one occasion and therefore can confirm that this unacceptable behavior still persists in 2022. There continues to be a double standard clouding the profession that, where a male attorney is zealous in advocating for his client's position, he is perceived as a leader, assertive and tough, whereas a female litigator demonstrating the same qualities is described as hostile, aggressive, irrational, hysterical or out of control. We raise these uncomfortable issues to bring awareness to this issue and to call it out for what it is – inappropriate gender stereotypes and discrepancies that are never acceptable in any profession, especially the legal profession.

Additionally, the instance you describe where Ren refused to allow his female associate to speak during a meet and confer call, despite being the individual with the most knowledge of the facts and procedures, is also improper and, frankly, a disservice to the professional growth of the associate. In our opinion, while Ren has

likely not violated any ethical rule in barring his associate from speaking when spoken to on meet and confer calls, the associate may want to consider having a conversation with Ren about his stunting her professional growth or perhaps speak with someone else at the firm. Unfortunately, there are always some people who do not get the message, and this may be a situation where the best solution is a move to a new employer that is more invested in promoting the associate's professional growth.

Separately, Ren's practice of changing course on his agreements with opposing counsel during meet and confer calls is a further violation of the standards. Section IX(C) of the standards provides that a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court when memorializing agreements. Based on the facts as you present them, it appears that Ren has made a habit out of rewriting the facts to suit his client's objectives rather than stating the correct terms of the agreement. In addition to violating the standards, consistently changing course on verbal agreements made during meet and confer calls also violates several provisions of the Rules of Professional Conduct (RPC) if the misrepresentations are made to the tribunal.

In a prior Forum, we have addressed the ethical implications for Pinocchio adversaries who never seem able to tell the truth.⁵ In that Forum we noted what should be obvious: lawyers should never lie to their adversaries or the court. Several rules and decisions prohibit attorneys from making false and misleading statements.⁶ For example, RPC 3.3(a)(1) provides 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 that lawyer." RPC 4.1 states 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." In addition, RPC 8.4(c) states that "a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Judiciary Law § 487 makes it a misdemeanor for attorney who is guilty of deceit or collusion with intent to deceive court or party. 22 N.Y.C.R.R. § 130-1.1(c)(3) permits sanctions where counsel "asserted material factual statements that are false." Comment 2 to RPC 3.3 is directly applicable to your situation:

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impar-

tial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.⁷

In addition to the safeguards to the profession set forth in the RPC, Section X of the standards echoes the need for lawyers to be mindful of protecting the standing of the legal profession in the eyes of the public. Accordingly, lawyers “should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.” Therefore, you may want to speak with another partner at your firm or even your human resources representative about Ren’s lack of professionalism.

With regard to your mentee’s inquiry as to whether she has an obligation to report his unprofessional and dishonest conduct, the reporting requirement would depend on the extent of the dishonesty. RPC 8.3(a) tells us that

[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 act upon such violation.

As we put it in a prior Forum, “an attorney should use professional judgment and discretion when determining whether and how to report a colleague.”⁸ This advice is similarly applicable to your mentee’s situation. Comment 3 to RPC 8.3 notes

[t]his Rule limits the reporting obligation 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.⁹

Based on your question as you present it, we do not have enough information to determine whether you or your mentee have an obligation to report Ren’s unprofessional conduct. She will need to use her judgment to determine whether the fabricated facts and misstatements of law she witnessed raised a substantial question as to the lawyer’s honesty or whether it was merely an attorney exaggerating his arguments in an attempt to diligently represent his client.

Finally, it appears that Ren needs to be reminded of RPC 5.1, which requires supervising attorneys to teach associates to follow the Rules of Professional Conduct. While leading by example is certainly one of the best ways to accomplish this goal, it does not appear that Ren is doing so. Rather, the course of conduct you describe should not be emulated by attorneys under any circumstance. For example, asking his associate to confirm a lie he has told

or not letting her speak during conferences is certainly in derogation of that Rule.

Sincerely,
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QUESTION FOR THE NEXT FORUM

To the Forum:

I recently graduated from law school. I took the bar exam and am working in the pool of clerks. The judges and their assigned clerks don’t even recognize me, but I recognize them. After working late one night, I went to an Italian restaurant near the courthouse. There, I saw one of the clerks handing an envelope to another person, who I did not know, but seemed familiar. Later, I saw his judge pick him up in his car outside the restaurant.

The next day, I saw an article on the front page of the newspaper about a controversial case currently *sub judice* in our court, reporting on “rumors” as to how the court was expected to rule. The author of the story appeared on the local news program and is a well-known local journalist. The author looked very similar to the person the clerk had met, but I am not certain it was the same individual. When asked by the interviewers how they had heard these rumors, the author did not give a direct answer, but implied that they have a confidential source. This is the first time any such rumors have been published and I am not sure whom I should talk to about this issue.

The judge that I’d seen outside the restaurant was known throughout the courthouse to be a dissenter. I am now conflicted. Am I ethically required to report what I saw based upon mere suspicion, and do the rules apply to me if I have not yet even been admitted to practice?

Sincerely,
Leaker

Endnotes

1. See Stephanie Francis Ward, *As Lawyer Stress Escalates During Pandemic, LAP Agencies See Significant Increase in Calls*, ABA Journal, May 26, 2021. See also Nicole Black, *ABA Survey: Lawyers Are Stressed Out*, Above the Law, Aug. 5, 2021.
2. See The Honorable Sandra Day O’Connor, *Civil Justice System Improvements*, Speech to American Bar Association (Dec. 14, 1993) at 5.
3. See Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., Nov./Dec. 2012; Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2016.
4. See 22 N.Y.C.R.R. § 1200, App. A.
5. See Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., Sept. 2016.
6. See RPC 3.1(b)(3) (A lawyer’s conduct is “frivolous” where “the lawyer knowingly asserts material factual statements that are false”).
7. RPC 3.3, Comment 2.
8. See Vincent J. Syracuse, Ralph A. Siciliano, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2016.
9. RPC 8.3[3].