



## What History and Ethics Can Teach Us About Attorney Civility

### HYPOTHETICAL SCENARIOS

## CIVILITY SCENARIOS FOR ATTORNEYS

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*Attorney scenarios 1-5 all take place at the fictional law firm of Chapman & Becker. Chapman & Becker is a general practice law firm that's been around for about 25 years. Unfortunately, they haven't fully recovered from the Recession. Rumors are flying that if they don't get new clients soon, lay-offs will occur.*

### ATTORNEY SCENARIO #1

Divya Singh is a litigation associate at Chapman & Becker. She's been at Chapman & Becker for six years, ever since she graduated law school. She has a good relationship with all the partners there and they trust her independence and judgment. She's also hoping to make partner soon.

Divya has been assigned to an employment discrimination case. Her client, Karen, is a pregnant woman recently dismissed from her job. Karen strongly suspects that she was fired due to her pregnancy. Karen's former boss, Deep Singh, says the reason was performance-based. The company does not have a formal review process and so it is essentially your client's word against Deep's.

Divya shares the same last name as Deep. Opposing counsel once mistakenly sent Divya an innocuous email intending to send it to Deep. Because she wanted to keep a civil relationship with opposing counsel, Divya sent back the email. Opposing counsel apologized and offered to reschedule a deposition that would work better with Divya's schedule. Divya appreciated the effort and thinks opposing counsel is a good, trustworthy attorney.

Late one night, Divya receives an email from opposing counsel. Upon opening the email, she realizes that it's again meant for Deep. The email states: "Deep, please review ASAP the attached document. It outlines the reasons we could very well lose this case to Karen, as well as our previously-discussed settlement strategy."

#### **What should Divya do?**

- A. Delete the email immediately.
- B. Forward back the email without opening the attachment.
- C. Read the attachment and delete the email.
- D. Read the attachment and notify opposing counsel of the misdirected email.
- E. Call opposing counsel and ask him what to do.

**Answer:**

The only action required to be taken under the Rules is to notify opposing counsel. Rule 4.4(b) states: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows that the document was inadvertently sent shall promptly notify the sender.” Comment 2 to the Rule explains: “Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.” The Comment to Rule 4.4 goes on to state: “Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived..” Questions you can ask your group: What is your prior relationship with counsel? What’s your future relationship with counsel? How will this impact the litigation? What would your client expect? Are these relevant considerations?

## ATTORNEY SCENARIO #2

Divya arrives in court for a routine motion. Opposing counsel has sent his partner to cover the hearing. During Divya’s argument, he mutters a condescending remark about Divya that she can hear clearly but the judge cannot. Divya continues but opposing counsel does it a second time.

**What should Divya do?**

- A. Ask the judge to have counsel repeat his remarks.
- B. Ask counsel to repeat the remarks and ask the judge to rule on the propriety of the remarks.
- C. Say nothing and continue with her rebuttal.
- D. Tell counsel directly to stop interrupting her.
- E. Ask the judge to instruct counsel to stop talking during her rebuttal.

**Answer:**

This question does not have a Sample Answer and fully depends on the facilitator’s perspective and experience. Please incorporate other comments in the room into your remarks. Selections C and E may be more appropriate to the situation. In C, counsel may address the comments after court and outside the courtroom. In E, assuming counsel requires an assertion against opposing counsel, it should come as a request to the bench and not directed to opposing counsel.

## ATTORNEY SCENARIO #3

Jimmy O'Rourke is a family law partner at Chapman & Becker. He's known for being particularly aggressive when it comes to divorce cases. Clients seek him for that aggression and combativeness.

A new client shows up one day, Susan Lewis. Susan is the CEO of a Fortune 50 company and wants Jimmy to represent her in a potentially high-profile divorce. She's never used Chapman & Becker and Jimmy knows that getting her as a client could lead to getting her company as a client as well. Susan wants to file for divorce on the basis of adultery. She shows Jimmy an anonymous letter she received with a picture of her husband and their Nanny in a compromising position. The person wrote: "This has been going on for months! Pics are ALL OVER Facebook!!" Susan wants Jimmy to "friend" the Nanny and download all those pictures.

**Jimmy wants to know what he can ethically do.**

- A. Friend the Nanny on Facebook.
- B. Get his secretary to Friend the Nanny on Facebook.
- C. Have Susan use her husband's account to access the Nanny's Facebook page.
- D. None of the above.

**Answer:**

First of all, remember Rule 8.4: "It is professional misconduct for a lawyer to: (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."

For A., the Nanny does not appear to be represented by counsel therefore Rule 4.2 would not apply ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.")

Jimmy could contact the Nanny via Facebook. However, if he does, he can't misrepresent and mislead pursuant to Rule 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.")

For B. and C., again under Rule 8.4, "It is professional misconduct for a lawyer to: (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." Jimmy's secretary could contact the Nanny through Facebook but she cannot misrepresent who she is. Similarly, if Jimmy can't access the Nanny's Facebook using the husband's account, he can't ask his client to do the same thing either.

The closest correct answer therefore may be D., none of the above. Note, if the information is public information that is accessible without friending the Nanny, it is fair game.

## ATTORNEY SCENARIO #4

Susan comes back a month later. She and her husband have officially separated, the Nanny's quit her job, and the Nanny and the husband are now living together. Susan's livid. She demands Jimmy sue the Nanny for breach of contract, tortious interference, defamation and any other cause of action he can think of. She wants him to list every scandalous fact about her husband in the complaint. She also wants him to get the Nanny deported. She doesn't care if it's dismissed and she reminds Jimmy that she hired him based on his aggressive reputation.

### What should Jimmy do?

- A. File a complaint against the Nanny and include every conceivable legal theory and salacious fact.
- B. Tell Susan that he can no longer represent her.
- C. Remind Susan about his professional responsibility obligations.
- D. Send the Nanny a letter threatening to report her to Homeland Security.

### Answer:

The Rules of Professional Conduct expressly forbid A. Rule 3.1: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." The Rules of Professional Conduct also expressly forbid D. Rule 8.4(g): "It is professional misconduct for a lawyer to ... (g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter."

B or C are both discussion questions. How valuable is Susan as a client? How can you make Susan understand the obligations you are under as an attorney? If Susan sought you for your aggressive behavior, how do you explain to her where you cross the line? How will you justify losing this client to your law firm?

Ask the group what they would do and why. Remind them of the ethical reasons they can't do A and D, but note that B and C are also difficult to do.

## ATTORNEY SCENARIO #5

Candace Jackson is a partner at Chapman & Becker. Rumors abound that Candace often comes very close to the ethical line in her litigation practice. Rumors also abound that Candace, who customarily has a large book of business, has struggled to bring in business this year. Candace appears to be becoming increasingly nervous

about her book given the general state of Chapman & Becker. However, she does have one large matter that may go to trial in about seven months.

Divya gets assigned to Candace's case. Candace instructs Divya to work overtime on trial prep. Divya thinks that Candace is churning the bill, but she's not in contact with the client and doesn't know what the client thinks.

### **What should Divya do?**

- A. Tell Candace that trial prep is premature and ask that she rethink her plan of action.
- B. Find out from the client if they know about and approve the trial prep activities.
- C. Ask a partner for guidance.
- D. Ask an associate for advice.

### **Answer:**

This hypothetical gives rise to a number of practical professionalism questions for a young junior attorney. A. implicates how to survive as a savvy associate in a firm where you disagree with the partner and want to keep your license. We all are responsible for ethical rules regardless of whether a superior has directed us to do something (see Rule 5.2). Is Rule 1.1 involved? "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Are these trial prep actions necessary for the litigation?

Among other rules, B. implicates Rule 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client." Again, where is the line between zealous advocate and churning the bill? Has Candace crossed the line here? Similarly, Rule 1.5: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule also requires that the basis of the fee be communicated to the client either before or within a reasonable time after commencing the representation. The facts do not state that Candace communicated that information. Is this Divya's concern?

Finally, Rule 1.4: "A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Should the client know about these trial prep activities? Would Divya informing the client constitute reasonable action?

C. and D. are both professionalism questions rather than ethics questions. Who should Divya seek advice from – a partner who may not be sympathetic to her plight or the associates in her firm who may be more sympathetic

but would have less ability to obtain a solution? When we tell our younger attorneys where to turn in an ethical or professional dilemma, who should we tell them to turn to?

## ATTORNEY SCENARIO #6

You are an attorney corresponding via email with opposing counsel regarding potential settlement of a case; the tone was quite casual because you had become friendly throughout the pendency of the case. However, as settlement negotiations break down, the email correspondence becomes heated and rude. One attorney uses the correspondence as a basis for a motion for sanctions. See: *The Florida Bar v. Kurt Mitchell*, 2009-10, 487 (13C), S.C. 10-637 (Fla. Oct. 5, 2010)

**What do you do?**

**Answer:**

You can ask your group what to do, but the best advice would be not to engage any further. These sorts of e-mail feuds do nothing to help the case, the clients, or the sense of justice, and only move the focus of the case away from the substance of the matter. Let your legal position speak for you and explain your actions to your client.

## ATTORNEY SCENARIO #7

You are an attorney corresponding with the client via email on a litigation matter. The client is very involved and needs a lot of “hand holding” so you make a point to update him about developments after every court appearance or deposition. You are shocked, therefore, when the partner on the matter calls you in to her office and says that the client has an issue with “the communication style” of the associate on the case and has asked that someone else be the point of contact at the firm. The partner is not pleased.

**What has gone wrong and what do you do?**

**Answer:**

This example emphasizes the importance of proactively establishing the preferences of each client’s communication medium. Some clients may prefer email updates, while others may like a phone call debriefing. It may be a generational preference, or just a personal preference. Regardless, it is best to establish it from the start to avoid such a miscommunication.

## ATTORNEY SCENARIO #8

You are aware of a fellow attorney who practices in traffic court “ambulance chases”, i.e. he approaches individuals he believes are seeking legal representation in traffic matters and advises them not to hire other attorneys appearing before the traffic court. You have heard this attorney referring to other attorneys as “a Jew”, a Jew who only wants to take your money”, “Homosexual” “fag” “faggot” “a child molester” and “idiots and

morons.” See *In re Thomas E. Guadagno*, M.R. 24962, 2010 PR 00065 (Ill. January 13, 2012)

**What penalties should this attorney face, if any? What actions should you take as a fellow member of the bar take?**

**Answer:**

From a purely ethics standpoint, Rule 8.4(j) states that it is attorney misconduct to “violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer’s fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer’s professional activities.” This attorney would be subject to discipline from the Disciplinary Commission.

From a professionalism standpoint, this attorney’s statements are detrimental to our system of justice. He is discriminating against other members of the bar association, and using terminology intended to denigrate and exclude. To the extent he makes these comments around you, you should counter his statements and explain the falsehood of what he says. You could also make clear to the potential clients that you do not subscribe to these beliefs, and his attitude would not be welcome in any court of law.

## ATTORNEY SCENARIO #9

The partner on your case has instructed you to always return opposing counsel’s phone calls after 7pm. Opposing counsel is a new mother and the partner assumes (correctly, it seems) that she will never be working in the office at that time and believes this is a good delay tactic (and also provides a good billing opportunity).

**What do you do?**

**Answer:**

This is an excellent discussion topic for your audience. You should first refer to Rule 1.3 on diligence, “A lawyer shall act with reasonable diligence and promptness in representing a client.” What does “reasonable diligence” mean? How does that compare with the “zealous advocacy” language in the preamble to the Rules? You can also turn to Comment 1 to Rule 1.3 which states, “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf ...The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” Remind your audience that you are in a prolonged relationship with opposing counsel, both in this litigation and in other subsequent litigation you may have. In addition, the legal community is a small one and your reputation precedes you everywhere you go. How do you want to be perceived?

At the same time, you are the junior lawyer on the case and your partner has provided you with explicit instructions on what to do. Discuss with your group how to balance the expectations of your supervisor with the standards of professionalism. How do you tell a partner you believe he's overstepping the bounds of professionalism, while still preserving your name and reputation in your own firm, not to mention saving your job.

## ATTORNEY SCENARIO #9

You have been working closely with an associate on one of your cases for the last several weeks. It has taken the associate awhile to get up to speed on the case and his research and writing for the case, while good, took much longer than you expected. You got a call from the client regarding last month's bill. The client was upset that your initial estimate for the project was off target by 25%. You know that this was due to the associate's slower-than-expected pace.

**What do you tell the client? What do you tell Matt?**

**Answer:**

To be off of a client estimate by 25% may be significant and should be addressed with the client and the associate. As to the client, it is a business decision about how the cost to the client should be adjusted or accounted for to make things right for your client.

As for the associate, additional training and supervision may be necessary. Should a justified increase in billing be justified, the associate should properly convey that to the partner or team, and proactively discuss it with the client before the client is "surprised" by a billing.

# CIVILITY HYPOTHETICAL SCENARIOS (JUDGES)

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*While this Toolkit is focused on civility skills for attorneys, several in your audience may ask what judges can do in response to incivility. We have therefore included a few select scenarios related to judicial ethics and civility.*

## JUDGE SCENARIO #1

You are the judge in a criminal jury trial. A very difficult cross examination of the sexual assault victim has just completed. Defense attorney notices that the witness is in tears, grabs some tissues and approaches the witness box to offer the tissues to the witness. As his hand is outstretched toward the witness, the prosecutor leaps to her feet and approaches the defense counsel bellowing, "Get away from MY witness!"

**What do you do?**

**Answer:**

Rule 3.5(d) forbids a lawyer from engaging in conduct intended to disrupt a tribunal. However, the conduct described in this scenario is likely not designed or intended to disrupt the court. Nevertheless, this is an example of why it is best for an independent party of the court (bailiff, court security, or even the judge) to make such offers and gestures as to not be viewed as drawing favoritism or sympathy from a jury.

## JUDGE SCENARIO #2

When a young attorney arrives in court to argue her first motion, the judge and opposing counsel are holding a lively discussion about a party that they attended earlier that month. Sitting quietly in the courtroom, the young attorney quickly learns through listening to the banter that not only did the judge and opposing counsel go to law school together, but their spouses have known each other since grade school and their children are now college roommates.

The clerk laughingly tells the opposing counsel (whom he calls by his first name) to let the judge get back to work so he can go home tonight. The judge takes the bench and asks opposing counsel, "OK, what are we going to do on this one?" even though it is the young attorney's motion.

- (a) **Should an attorney accept this scenario just as a part of doing business? If not, then what is a proper response?**
- (b) **What would you like the judge to say once s/he realizes that the conversation between the judge and opposing counsel has been overheard by your client?**
- (c) **Now imagine that you are the client in the courtroom. Would your answers change? What are you thinking about this exchange as the client? What are you thinking about our system of justice? How do you respond? Do you think you are going to be able to get a fair trial?**

**Answer:**

**(a) Should an attorney accept this scenario just as a part of doing business? If no, then what is a proper response?**

There is no right or wrong answer for this question. Many courtrooms run successfully partly due to the friendliness and informality of many in the courtroom. However, for new lawyers, that camaraderie can be intimidating and make it appear that the judge or clerk is incapable of performing their job fairly. The attorney has to balance carefully between accepting the situation as it is, and ensuring that her voice is heard and respected as well. She should speak with her fellow lawyers about what the informal and formal policies of this courtroom are. She should introduce herself to the clerk, the other attorney and to the judge, demonstrating both confidence and competence. Above all, she should remember that she is there as an advocate for her client. If she believes that her role as an advocate is compromised by the courtroom dynamics, or she wants to set the standard of professionalism, she could do a variation of this speech in response to the judge's question: "Your Honor, this is my motion. Thank you for hearing me out today. I'm new to this courtroom but I am aware of how well it's run and the good work that you do both inside and outside the courtroom. I'm looking forward to working with everyone here and getting the best result for my client."

**(b) What would you like the judge to say once s/he realizes that the conversation between the judge and opposing counsel has been overheard by your client?**

While the judge is not obligated to say anything, he should keep in mind Canon 2 of the Illinois Judicial Code of Conduct states that, "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow the judge's family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge should not lend the prestige of judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

If the judge believes that his friendship with this attorney will influence his judicial conduct or judgment, then he could voluntarily recuse himself from the case. If he believes that it appears to anyone in his courtroom that he is being unduly influenced, then he can end the conversation with his friend, and remind those in his courtroom of his focus on a judge on fairness, impartiality, facts and law.

**(c) Now imagine that you are the client in the courtroom. Would your answers change?**

This is an open discussion not governed by a Canon or standard of professionalism. However, for the discussion, keep these questions in mind. As the client, what are you thinking about this exchange? What are you thinking about our system of justice? Do you think you are going to be able to get a fair trial?

## JUDGE SCENARIO #3

The parties are before you on a motion to compel answers to interrogatories and a document production

request. During movant's argument, you notice respondent's counsel shaking her head and pursing lips in obvious disagreement at the characterization of her behavior as refusing to abide by court-ordered deadlines and efforts to dodge conferences to resolve discovery disputes. When she has time to respond, counsel flatly denies the accusations that she was non-responsive and makes a couple of pejorative comments, in a condescending tone, along the lines that the movant "obviously does not understand much because she hasn't been practicing long." You ask the movant to respond during which time you observe but do not hear respondent's counsel make a remark sotto voce that causes the movant to wince and grimace.

**What, if anything, do you do?**

**Answer:**

As a judge, you are in charge of civility in your courtroom. One of the common complaints that we hear from lawyers in Illinois is that judges often let uncivil behavior fall by the wayside. You can remind counsel that you will not tolerate unprofessional behavior in your courtroom, and if she needs to leave your courtroom until she is ready to respect the justice system, she is free to do so.