ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a senior partner in a small practice that regularly makes court appearances. I am mentoring a talented associate who started to appear in court for the firm, including at oral arguments. She recently was involved in a minor car accident on the way to an oral argument and, as a result, was 15 minutes late for the court appearance. She has appeared in that part before and it usually runs behind with multiple calendar calls. However, as luck would have it, on that morning her motion was the first one called, the judge held her in default, and the case was dismissed. She immediately contacted the opposing counsel who informed her he would only consent to re-calendaring the motion and vacating the default by stipulation if our client paid for his fees for the appearance. The opposing counsel told my associate, "You should have texted me after your accident" and hung up.

We made a motion to vacate the default and re-calendar the motion. At oral argument, the associate profusely apologized to the court for being late to the motion and explained that her delay was a result of the car accident. The judge proceeded to scold her and said, "You young people have no respect for anyone. You should have immediately called the court or your adversary to notify us that you were going to be late." He went on to say, "I reviewed your pleadings anyway and your case doesn't really have any merit. So, Miss, I am denying your motion to vacate the default because you have wasted enough of our time. Think of this as a valuable lesson on how to practice law."

Needless to say, this situation has put me in a difficult predicament. Our longstanding client is furious with me because of the dismissal, and the associate is angry because she feels that the judge and opposing counsel were disrespectful to her and treated her unfairly and inappropriately. I think my associate acted reasonably under the circumstances and, as a mentor, I am having a hard time advising her how to get past this unfortunate result. In our discussions, she has said, "If that is what it takes to win in this business, I guess nobody will ever get a pass with me again!" I now have to deal with an expensive appeal that I can't charge to the client, and a disillusioned young attorney.

Should a judge refuse to vacate a dismissal taken where an attorney is only a few minutes late and has a legitimate excuse for his or her tardiness? If I do get the default vacated on appeal, can I move to have the judge removed from the case based on his conduct? If I can't get the judge removed from the case, is there anything I can do to make sure he does not continue to harass my associate? Is there anything I can do about an opposing counsel who is unreasonably refusing to stipulate to vacating the default?

Sincerely,

Distressed Mentor

Dear Distressed Mentor:

Every young attorney will make a mistake at some point in his or her early career that, at the time, can seem devastating. Some mistakes will have more severe ramifications than others. When dealing with such a situation as a mentor, it is important to use the mistake as a learning opportunity and lead by example.

The Associate

The associate may feel as if she was treated unfairly, but she is not completely without blame. While she has a reasonable excuse for her failure to timely appear for oral argument, attorneys making court appearances in 2016 should be able to communicate by cellphone to an adversary, the court, or, at a bare minimum, their own office. We have all had to deal with unexpected traffic, subway delays, and family emergencies on the morning of a court appearance. These situations are common enough that a professional making court appearances – where numerous people are waiting for both parties to be present – should have a cellphone to communicate if delays arise. We understand that some technophobes might reject the notion, but the American Bar Association and many states across the country now require attorneys to remain current with technology. Although the New York State Rules of Professional Conduct (RPC) do not currently contain such a requirement (at least not yet), New York State Bar Association Comment 8(ii) to Rule 1.1 of the RPC suggests that "[t]o maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

We have addressed this issue in prior Forums, which have stated that attorneys should be familiar with the usage of common and current technologies such as cellphones, email and social media to fulfill their obligations of providing competent representation

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 email to journal@nysba.org.**

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to clients. *See, e.g.*, Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2014, Vol. 86, No. 5 (understanding technology to establish and implement appropriate data security policies); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2014, Vol. 86, No. 1 (email as basic method for everyday communication); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2013, Vol. 85, No. 5 (usage of social media to conduct research); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2013, Vol. 85, No. 4 (mobile devices).

In your associate's case, it is less likely that she did not have a cellphone than that she simply chose, for whatever reason, not to use it. The expectation of many members of the Bar is that the ability to communicate with adversaries and the court is easy enough. After your associate was safe, and finished handling the fender bender, she could have made a phone call or sent an email or text message to try to avoid the exact scenario that ultimately played out. We note that opposing counsel also could have and probably should have reached out to your associate or your office to find out why someone from your office was not present; in fact, there are many judges who would require it. That being said, as already mentioned above, we believe she had a reasonable excuse for her tardiness, and it is important to note that even great attorneys make a mistake from time to time. Your associate needs to know that. She should accept the mistake, learn from it, and move on.

As a mentor and her supervising attorney, RPC 5.1 requires you to teach your associate to follow the Rules of Professional Conduct and to take reasonable efforts to ensure that she follows the RPC. Based on the facts provided, the associate appears to have acted appropriately when she appeared before the court on the motion to vacate and in her interaction with opposing counsel even though she felt they had treated her unfairly and inappropriately.

The associate's recent statement, however, that "nobody will ever get a pass with me again" raises a concern that you should address as her mentor so that she can avoid future rule violations. It is incumbent on you to remind her that reputation is everything and vital to a successful legal career; she does not want her reputation tarnished for potentially gaining a small advantage here and there. The losses down the road could overshadow any minor wins she gains from sharp practice. You may also want to discuss the dangers of uncivil conduct in interactions and communications between adversaries, an issue we have also addressed in prior Forums. *See* Vincent J. Syracuse, Maryann C. Stallone, & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2016, Vol. 88, No. 3; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2015, Vol. 87, No. 3; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July 2014, Vol. 86, No. 6. As we have previously remarked, uncivil conduct is not effective advocacy and does not advance the interests of our clients, and therefore should be avoided.

The Judge

Despite your associate's error in not contacting her adversary or the court, some of the judge's comments were clearly unwarranted and improper. Several sections in Part 100 of the Rules of the Chief Administrative Judge are applicable to the judge's comments from the bench. Section 100.1 states "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Section 100.2(A) states "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Section 100.3(B)(3) states that "[a] judge shall be patient, dignified and courteous to . . . lawyers." Section 100.4(B)(4) requires judges to

> perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice . . . based upon age, race, creed color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status.

The judge's comment, "You young people have no respect for anyone," is clearly improper and disrespectful to the associate. In our opinion, this is a violation of §§ 100.1, 100.2(A), and 100.3(B)(3) and suggests the appearance of an age bias in violation of § 100.4(B)(4). The judge's comment, "You have wasted enough of our time. Think of this as a valuable lesson on how to practice law," also seems excessive in light of a minor delay for a car accident and your firm's prompt motion to vacate the default containing a reasonable excuse for the default. This could certainly qualify as a § 100.4(B)(3) violation for an undignified comment and lack of courtesy to the associate. Reference to your associate as "Miss," depending on the judge's tone and inflection, also can be construed as demonstrating bias based upon sex in violation of § 100.4(B)(4).

Under § 44(1) of the N.Y. Judiciary Law (Jud. Law), you may submit a complaint to the New York State Commission on Judicial Conduct, which would conduct an investigation of the complaint. If the Commission decides to hold a hearing on the judge's conduct, it can ultimately admonish, censure, remove, or retire a judge (Jud. Law § 44(7)). The Commission has admonished judges in proceedings where they have referred to an unrepresented litigant as "nuts" (*In re Going*,

1997 WL 433228 (N.Y. State Comm'n on Jud. Conduct 1997)), made "angry," "scolding" and "sarcastic" comments in multiple proceedings (*In re Pines*, 2008 WL 4415139 (N.Y. State Comm'n on Jud. Conduct 2008)), and stipulated to an admonishment for an undignified exchange of taunts, insults and obscenities with a minor (*In re McLeod*, 2012 WL 6735978 (N.Y. State Comm'n on Jud. Conduct 2012)). You and your associate are in the best position to determine whether, after considering the totality of events and the judge's inflection, a complaint to the Commission on Judicial Conduct is warranted. Based upon the circumstances you have described, it is unlikely that the judge's comments, albeit improper, would warrant anything more severe than an admonishment.

While we do not condone the judge's comments, when making the determination whether to make a complaint against a judge, we also need to consider that even judges have bad days and make mistakes from time to time. Judges today are under extreme pressure to clear their dockets while their judicial resources and staff are being constantly slashed. Therefore, a litigant's tardiness and failure to comply with court-ordered deadlines could certainly put the judge on edge, and perhaps rightly so. In our view, isolated incidents should not be the subject of complaints to the Commission. If, on the other hand, the judge continued to make improper remarks to the associate in future appearances – or if you discovered that this judge has made similar improper comments to other attorneys appearing before him – that could be a totally different story warranting further action.

Responding to your question about removal of the judge from the case, even if the default were to be successfully vacated upon appeal, it is unlikely you would be able to have the judge disqualified. According to 20 N.Y.C.R.R. § 100.3(E)(1)(a)(i), "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party." The Court of Appeals has held that "[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. . . . A court's decision in this respect may not be overturned unless it was an abuse of discretion." (*People v. Moreno*, 70 N.Y.2d 403 (1987)). Judiciary Law § 14 is inapplicable in this action as it addresses situations where a judge is personally involved in the action or related to a party. Accordingly, you would need to make a motion to the judge himself and a denial would be difficult to appeal on the limited facts. If more evidence of a personal bias arises, however, a successful appeal might be more likely.

Putting the judge's improper comments aside, there is a possibility that the judge's dismissal – and refusal to vacate the dismissal – may have been proper. Under Uniform Civil Rules for the Supreme Court, 22 N.Y.C.R.R. § 202.27(b), if the defendant appears but the plaintiff does not, the judge may dismiss the action. While defaults are regularly vacated where there is a reasonable excuse for the lack of appearance, the plaintiff must also demonstrate to the court that the complaint has merit. In *Reices v. Catholic*, 306 A.D.2d 394 (2d Dep't 2003), the Appellate Division, Second Department restored an action where plaintiff's counsel was only 15 minutes late to an appearance. The court explained, however, that "[t]o be relieved of the default in appearing at the calendar call, the plaintiff was required to show both a reasonable excuse for the default and a meritorious cause of action." (*Id.*). The judge in your action appears to have found a substantive basis for denying your motion to vacate, i.e., the lack of merit to your client's pleadings. Lacking any detail as to the facts of the case or the judge's reasoning for his finding, we are unable to opine on this issue. However, what is clear is that to successfully vacate the dismissal on appeal, you will have to show that your case has merit. Therefore, before undertaking the expensive task of appealing the judge's dismissal, you should spend some time considering and discussing with your client whether the case has merit. If you determine you had a weak case to begin with, you may want to consider forgoing the appeal. Alternatively, if your client's claims have merit, the likelihood that the default will be vacated is strong in light of the fact that your associate had good cause for her tardy arrival at the hearing.

The Client

Discussing the dismissal of a case due, in part, to a law office failure with an unhappy client is not a pleasant experience. This is especially true for a really important client. However, Rule 1.4 of the RPC requires you to "keep the client reasonably informed about the status of the matter" and "reasonably consult with the client about the means by which the client's objectives are to be accomplished." RPC Rule 1.4(a)(1), (2) and (3). Indeed, this may be an appropriate time to re-examine with the client the strengths and weaknesses of your case and discuss the client's objectives in the litigation. Does the case have merit and is it likely to be reinstated on appeal? Was your associate going to court to oppose a strong motion (it is unclear whether she was opposing a motion to dismiss or for summary judgment or some other motion)? Are there other alternatives to an appeal that may assist in achieving the client's objectives, such as trying to reach a settlement with the opposing side, who may not want to incur the costs of an appeal? In the latter circumstance, you would file the notice of appeal and then reach out to opposing counsel to try to negotiate a resolution of the dispute.

If the client, however, is insistent on pursuing an appeal to have the default vacated, it would be in your firm's best interest to pursue the appeal. RPC 1.3(b) prohibits a lawyer from neglecting a legal matter entrusted to the lawyer. Since the client is likely to perceive

the dismissal as arising from a law office failure, in addition to upsetting a major client, you may not want to expose your firm to a legal malpractice claim by forgoing the appeal. If you determine that the case has merit, you may consider assigning the appeal to the young associate with your oversight. This will allow the associate to gain valuable appellate experience that may not otherwise be available to her at this stage of her career. It can also be a valuable lesson to demonstrate that attorneys can be successful through persistence and following the rules of procedure.

Whether you decide to charge the client for the appeal is a business decision that only you and the members of your firm can make. On the one hand, it was not the associate's fault that she was in a car accident, which caused her late arrival. However, under the circumstances, you may want to consider charging the client a reduced rate for the appeal or not charging the client at all.

The Adversary

One would hope for a more cordial discussion from an attorney who just learned of a car accident. That said, the perspective of opposing counsel should not be overlooked as he too has a client to whom he has to answer. His client did have to incur the cost of counsel's preparation for and appearance at the hearing. He may be under pressure from his client to keep legal fees down and, therefore, may not be in a position to freely stipulate to the vacature of default. Again, from opposing counsel's perspective, by refusing to voluntarily vacate the dismissal, there is the possibility that your client will not take any further action due to the costs associated with a motion to vacate (and possible appeal) and that he may have achieved his goal of dismissal of the complaint, which is to his client's benefit.

Although the associate may have been frustrated by opposing counsel's demand for the payment of his attorney fees in exchange for the stipulation to vacate the default, in retrospect, the request was not unreasonable for the reasons stated above and, in any event, would have been a much less expensive and time-consuming method for restoring the matter than having to brief and argue a motion to vacate the dismissal or to appeal the judge's decision. Indeed, recognizing that the lack of an appearance by counsel inflicts unnecessary costs on the opposing side, 22 N.Y.C.R.R. § 130-2.1(a) permits a court to award reasonable attorney fees where opposing counsel, without good cause, fails to appear at a scheduled proceeding. While your associate may have had a reasonable excuse for not appearing on time, had your associate accepted her mistake, or even considered the alternatives, she may have realized that agreeing to the fees may have been the better alternative and was in the best interest of her client.

Mistakes happen and their ramifications can be frustrating. Sometimes you can quickly fix the error and other times you have to accept it, learn from it, and move on while considering your client's best interests. A "take no prisoners" mentality in the face of a seemingly unjust ruling may seem warranted to a young attorney. That mentality, however, is shortsighted and can lead to a tarnished reputation. As a mentor, it is your responsibility to lead by example and demonstrate to your associate that you can continue to represent your client's interests while acting in a professional manner.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

While clients understandably are often more emotional when involved in litigation, I have always tried to be civil and, to a certain extent, friendly with opposing counsel. I find that it often works to the clients' benefit since the lawyers are able to remain objective while looking for opportunities to resolve the litigation in a way that is favorable to the client. In recent months, however, I have been involved in very contentious litigations where my adversaries have been keen on bending, or what some might say fabricating, the facts and misstating the law. In briefs submitted to the court and even during oral argument, they have blatantly lied to the court concerning the facts of the case and made misrepresentations about relevant documents. It amazes me that they would risk doing so since your reputation and credibility before the courts is paramount in this business. These lawyers are from large, reputable law firms. Are they counting on their adversaries being poorly prepared to recognize and raise their misrepresentations to the court? How should I handle advocates who might just as well be Pinocchio? Do I run the risk of annoying the court by raising the numerous misrepresentations made by counsel? I'm concerned that some courts might turn on me and find my conduct to be unprofessional or uncivil for essentially calling my adversary out as a liar. My client is outraged and wants to move for sanctions against the lawyer and his client. I'm at a point where I believe something must be done. Your guidance is greatly appreciated.

Sincerely,

Fed Up