What should we do with harassing, abusive opposing counsel?

A female litigator's perspective

By Olivia K. Leary

I am a female litigator in my thirties. Representing my clients requires me to frequently go toe to toe with opposing counsel who are generally older than myself and, often, male. Although we operate in an adversarial system, most of the time, opposing counsel generally acts professionally and most of my experiences litigating have demonstrated that most attorneys are cordial and respectful.

I have also on occasion however, experienced a different breed – opposing counsel who quickly reveal their true opinion of a young female attorney and who feel no qualms about engaging in demeaning commentary regarding my sex and my age. A few examples over my multiple years of practice come immediately to mind: calling me "sweetheart" while negotiating a settlement, asking how old I am and then referring to me as a "baby," offering in a facetious and snide tone to "mentor" me, implying that I would not be the trial attorney on my own case.

The nature of civil litigation necessarily creates a competitive and aggressive practice. However, derogatory conduct directed toward certain attorneys due to their sex or gender has no place in the legal profession and should not be allowed to go unchecked.

In depositions

Sadly, this type of treatment is not that surprising, even in the legal profession. However, perhaps most egregiously, I've also seen this conduct weaponized by opposing counsel as another tool in their arsenal used to throw off an examining attorney during deposition. During various depositions of my own, opposing counsel have raised their voice repeatedly to the point of yelling, refused to let me finish my question without interrupting, thrown multiple fits tantamount to

temper tantrums, threatened completely unsupported sanctions and even gone so far as to tell me to run and get a partner at my firm to "teach me basic discovery." During one such deposition, the attempts at intimidation and insulting behavior crossed such a serious line that the court reporter later told me off-the-record that she had never witnessed such terrible conduct by an attorney during a deposition.

So, what's a "girl" like me (or you) to do? It is an unfortunate reality that we need to be prepared and ready for behavior like this. It is also important that awareness of the prevalence of this conduct in the legal profession extends beyond those it is directed toward. By talking about these experiences, our colleagues and peers can also recognize, call out and report this behavior as inappropriate. Any attorney who witnesses such behavior should be urged to speak up, call out the offending conduct and report it if necessary.

Many attorneys do not know how to push back against this conduct and believe they must serve as a proverbial punching bag for badly behaved opposing counsel, particularly during deposition. Although significant changes are still needed, there are existing avenues available to identify this behavior and to report egregious conduct. Being prepared to call out inappropriate conduct and cite on the record to relevant Rules of Professional Conduct, Bar Association guidelines, and applicable local rules can stop rampaging opposing counsel in their tracks. Knowledge of these ethical rules and standards can also empower the person on the receiving end to respond with conviction that this behavior will not be tolerated. With this conduct on the record, badly behaving opposing counsel will likely halt their offending conduct and learn not to do so again in the future.

Rules of Professional Conduct

Rule of Professional Conduct 8.4.1 was enacted in 2018 to replace the former Rule, 2-400, which provided for a generalized umbrella prohibition of discrimination in legal practice. In practice, this prior rule was rarely used to address harassing behavior beyond the management of a law firm. New Rule 8.4.1 makes multiple updates to the pre-existing rule, which provides for more enforcement opportunities and consequences for those attorneys who break it.

Unlike Rule 2-400, Rule 8.4.1 specifically prohibits harassing behavior by its terms, stating that "[i]n representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic. (Cal. Rules of Prof. Conduct, 8.4.1.) A protected characteristic specifically includes *sex and gender*, as well as gender identity, gender expression, sexual orientation, marital status, and age, "or other category of discrimination prohibited by applicable law." (Cal. Rules of Prof. Conduct, 8.4.1(c)(1).) Further, unlike Rule 2-400, which required a tribunal of competent jurisdiction to adjudicate a complaint regarding discrimination prior to any State Bar investigation, once an alleged violation of Rule 8.4.1 is made to the State Bar, the burden is shifted on the accused. Specifically, Rule 8.4.1 requires the attorney accused of engaging in the conduct barred by the rule to prove that their conduct *did not* violate the rule. If an attorney has knowledge of such an accusation against them, the attorney is also required to notify the State Bar themselves. If they fail to do so, this failure is a separate charge in any State Bar investigation and finding. (Cal. Rules of Prof. Conduct, 8.4.1(d).)

"See you next Tuesday"

A perfect example of this occurred in 2022, when a now-disgraced attorney used a gendered slur targeted at two female attorneys after the court had ruled in their favor on a significant motion. In front of the court, this attorney repeatedly stated to the female attorneys that he would "see you next Tuesday," a euphemistic acronym for an extremely offensive and derogatory term for women. The clear intention behind the use of this phrase became shockingly obvious to the female attorneys when opposing council repeatedly and pointedly directed this to them. These female attorneys then notified the court of the meaning of this under-the-radar insult. Learning of the clear meaning of this statement, the judge publicly rebuked the attorney and, in accordance with Rule 8.4.1, stated that he would alert the State Bar of the attorney's egregious actions for discipline.

ABA rules

The American Bar Association (ABA) goes further than California with regard to prohibiting sexual harassment and discrimination in the legal profession. ABA Rule of Professional Conduct 8.4 finds professional misconduct in a number of categories, including intentionally violating the Rules of Professional Conduct, committing certain criminal acts, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. ABA Rule 8.4(g) specifically holds that "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law" constitutes professional misconduct. A finding of professional misconduct can result in substantial discipline, including formal reprimands, suspension or even disbarment. (ABA Rule of Prof. Conduct 10.) The ABA further explains within the accompanying commentary to this rule that the discriminatory or harassing behavior constituting professional misconduct "includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or *demeaning verbal or physical conduct*." (ABA Rule of Prof. Conduct 8.4 (emphasis added).)

The importance of including harassing and discriminatory behavior, including sex-based harassment, as professional misconduct is explained in the companion note to ABA Rule 8.4. Per the ABA, this conduct works to "undermine confidence in the legal profession and the legal system" and, therefore, actions must be taken to eliminate it from the profession.

Reporting requirements under California Rules

Although the California Rules of Professional Conduct currently contain a mandatory reporting requirement for all attorneys who become aware of certain types of activities, unlike the ABA, harassing and discriminating activities are not included. Pursuant to the current Rule 8.3, a lawyer must report another lawyer if they have credible evidence that the other lawyer committed a criminal act, engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation, or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. (Cal. Rule of Prof. Conduct, 8.3.) Although this new rule, effective as of August 1, 2023, seeks to mandate the reporting of certain prohibited activities by other counsel to the State Bar, by its terms it does not extend to unethical activity, like the harassing behavior at issue here.

Various California Bar Associations have proffered opinions that California's required reporting should be extended to other offenses, including sexually motivated harassment in the legal practice. The Los Angeles County Bar Association opined that mandated reporting by attorneys should include the duty to report unethical behavior, including harassment. This guidance specifically noted that while there "is no California Rule of Professional Conduct presently requiring an attorney to report what he or she believes to be unethical conduct…The Committee believes that it would be inappropriate to find such a duty in the absence of any express requirement in the Rules of Professional Conduct." (Los Angeles County Bar Ass'n, Prof'l Responsibility & Ethics Comm., Formal Op. No. 440 at 144.) The San Francisco Bar Association has issued similar commentary about the importance of eliminating harassing and discriminatory activities in the legal profession.

With regard to guidance when considering reporting unethical activities by other counsel, the LA Bar Association explained: "An attorney can and should consider the seriousness of the offense and its potential impact upon the public and the profession, and may, consistent with the ethical obligations of the California Rules of Professional Responsibility, report such conduct." Thus, although the authority from the State Bar lags behind the ABA by failing to define sexually harassing and discriminatory behavior as professional misconduct, California's Bar Associations are leading the charge. With this continued push, the State Bar should consider adopting even stronger prohibitions to encourage attorneys to report this shameful, derogatory conduct.

Don't let this behavior go unchecked

It is an ugly reality of our valued profession that this is still occurring today. Many of these badly behaving attorneys believe that they can get away with this type of conduct with impunity and have been largely unchecked thus far. However, esteem
for our legal profession relies upon the ethical conduct of its members and it is in all our interests to enforce these principles. By letting egregious conduct go unchecked, the legal profession only protects its badly behaving members to the detriment of everyone else. Direct recipients of this harassing and discriminatory behavior, as well as others that become aware of this conduct, should be encouraged to directly address this conduct as well as report it when appropriate. Only by banding together to hold those bad actors accountable can we weed out this archaic and deplorable behavior.

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