



DEALING WITH DIFFICULT SENIOR COUNSEL

December 04, 2015 | Justin Jakubiak and Stephanie De Caria

This article combines Stephanie De Caria's recent personal experience with a difficult opposing counsel, and Justin Jakubiak's perspective, as a more senior member of the bar, on the prevalent issue of lawyer bullying.

Contrary to the classic lawyer stereotypes perpetuated by pop culture, most lawyers are not overly competitive, power-obsessed snobs looking to win at all costs, regardless of the consequences. In fact, many lawyers are nice, normal humans who love what they do and do it with skill and grace, while living a somewhat balanced life. That said, there are bullies among us. Some lawyers are full-time bullies; others become bullies due to the pressures of practice and life (which, let's be frank, can creep up on the best of us).



STEPHANIE'S EXPERIENCE:

Many of us are familiar with bullies. There's the schoolyard bully, the neighbourhood bully, the high school bully, and even the workplace bully. What about the opposing lawyer bully?

I was a practising lawyer for a total of one week when I experienced my first lawyer bully. It happened on my first contested motion, against a senior partner of a prominent Bay Street firm. I had all of my materials ready and I knew them inside and out. Despite that, I had huge apprehensions about arguing against a lawyer who had been practicing law longer than I've been alive.

I immediately recognized opposing counsel when I entered the courtroom (I obviously googled him, and his entire practice) and

approached him to say hello. He did not bother to look up from completing the counsel slip and mumbled what sounded like some sort of greeting. He completed the slip, slid it over to me and walked away.

Due to a long motions list, we had an hour to discuss a resolution of the motion. We left the courtroom together and the lawyer almost immediately began to aggressively yell at me (which was surprising as we had previously had cordial telephone conversations). He yelled all sorts of things, some of which were relevant to the motion, and others that were not. His tone and volume were such that others sitting outside of the courtroom kept looking over to observe the commotion. When I tried to discuss my client's position, the lawyer bully became increasingly irascible, uncooperative and dismissive.

Finally, I had enough. I informed him that if he was going to bully me, I would not continue to speak with him. He walked away from me. A short while later he returned, a little less hostile, but by no means calm. I did my best not to counter his tone with equal vitriol and attempted to diffuse the situation. We were eventually able to work together and resolved the motion.

Strangely, as we left the courtroom together, the lawyer bully was surprisingly pleasant. It was as if our heated interaction had not happened at all and we were old friends. From my experience, remaining respectful, but still assertive, was an effective way to manage a difficult senior opponent.

JUSTIN'S THOUGHTS

Unfortunately, Stephanie is not alone in her experience. I was 24 when I was called to the bar, full of enthusiasm and confidence; the kind that had not yet been tempered by experience and the realization that I knew very little about the practice of law. I still sweat when I recall a discovery in which senior counsel took every opportunity to tell me how long he had been practising, how little I knew, and how bad the advice was that I was giving to my client.

Over the next several years Stephanie will encounter various types of lawyer bullies. Each will attempt to use their grey hair (or firm name, personal reputation, etc.) and her recent call to the bar to secure an advantage for their client. Employing intimidation tactics is just one tool among many employed by senior counsel against more junior lawyers – the trick is to know how to respond, when not to respond or rise to the bait, and when to take a breather.

The following are just a few tips of how to deal with intimidation and general incivility:



1. **Engage mindfully:** If opposing counsel raises their voice, lower yours. If you feel your temper rising, take a break from the confrontation. If you receive an abusive letter from opposing counsel, pen your response but don't send it until you have had a chance to cool-off and consider your tone and message. I have a minimum overnight reply rule for particularly nasty letters from opposing counsel. I also write each piece of correspondence keeping in mind that it may end up in the hands of a judge or arbitrator down the road.
2. **Stay Focused:** Remember that your job is to represent your client's best interests. If you let opposing counsel's uncivil behaviour get the best of you, they have achieved their goal and your representation of your client has likely been negatively impacted. Don't let abusive tactics prevent you from properly preparing and arguing your case. It is common for lawyers to want to ignore their difficult files, or their files with difficult opposing counsel. This is a terrible trap to fall into as it can lead to many undesirable consequences, including a possible negligence claim against you.
3. **Stand your ground:** Even though you may feel attacked and vulnerable, refuse to be bullied. Confront counsel and call them on their inappropriate behaviour. It is sometimes helpful to make a comment on the record during a discovery concerning a lawyer's eye rolling or aggressive demeanor.
4. **Seek Help:** Seeking advice from colleagues is an invaluable yet underused tool. Everyone can benefit from someone else's experience with a lawyer bully. It is also helpful to have someone take an independent look at the situation to help determine whether you are in fact experiencing unreasonable behaviour, or assist you in ensuring that you don't respond to uncivil behaviour in kind.

In closing, I suggest that junior lawyers try not to take opposing counsel's conduct personally. This is likely the hardest part for all lawyers, junior and senior included. The unprofessional behaviour of opposing counsel is not a reflection of you as a lawyer. Counsel is treating you poorly simply because they think they can by virtue of their age, seniority and/or experience, and more so because they think they can get away with it. If it's not you, it's the next junior counsel they meet in court, on the phone, or across the negotiating table. Don't dwell on the experience, learn from it and move on.

Lastly, you will make mistakes. In a moment of rage you will likely reply with a nasty e-mail or say something in a heated exchange which you later regret. That's okay. Mistakes are not as important as your reaction to them. A short apology will go a long way in establishing your reputation as a great opponent.

ABOUT THE AUTHORS

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