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Understanding why an adversary uses bullying tactics and adequate preparation will help you respond in a professional manner.

Practical Advice for Dealing with a Bully Adversary

At some point in our lives, we have all encountered them: bullies. Most of us probably came across bullies first as children. Whether it was on the playground, in school, in sports, or in other activities, there was always

one child that was known as the bully. As young lawyers, we must advocate for our clients in many settings and deal with adversaries with a wide range of personalities. We inevitably encounter adversaries who prey on or seek to take advantage of those who are younger and less experienced than they are. This conduct by a bullying adversary can trigger what is known as the fight or flight “response” in a young lawyer.

The flight or fight response is a physiological mechanism with psychological dimensions that helps humans deal with perceived threats or dangers. The fight response readies someone to take an aggressive or combative response to a threatening situation, while the flight response readies someone to escape or flee when appropriate.

In litigation, flight is not typically a viable option. You cannot run out of a deposition with your tail between your legs. Rather than fall victim to bullying adversaries, young lawyers must learn how to fight by properly and professionally defend-

ing themselves against bullying antics to maintain control of their cases.

Types of Bullies and How to Identify Them

The first step in dealing with bullying adversaries is to recognize their characteristics. A bullying lawyer may not be as easy to spot as the kid who was known for stealing lunch money. A bullying lawyer comes in many forms, but generally he or she will excuse his or her conduct as zealous advocacy. There is a distinction, however, between advocating for a client and bullying.

As young lawyers, we often deal with seasoned attorneys as adversaries. Often, those with more experience will bully those with less experience simply because they perceive them as easy targets. A seasoned bully may try to strong-arm you to make you think that you need to follow his or her lead because he or she is more knowledgeable about the practice of law than you. A bully may make you question your



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approach or practice to deter you so that you will concede to him or her.

A charming bully may try to convince you that he or she is nice and simply wants to help you out. He or she is generally polite and courteous. He or she may attempt to offer helpful, friendly advice to disguise his or her true intentions, so that you will follow a path, ultimately to the detriment of your case. It is important not to lose sight of the fact that an adversary is an adversary and it is never in your adversary's best interest to help you win your case.

A dishonest bully may use deceptive tactics to his or her advantage. He may make certain representations to you on the phone and then distort those representations in a confirming letter. A dishonest bully may try to mislead the court by fabricating facts or misrepresenting the law in motion papers, during oral argument, or during court conferences and hearings. You cannot trust or rely on a dishonest bully.

A bully with multiple personalities may mutate into different characters, depending on the audience. For instance, this type of bully might be extremely aggressive, argumentative, and disrespectful to you, but show a likeable side to others. He or she may appear cooperative and courteous to a court, but mostly deals with you unreasonably, occasionally "playing nice" with you to secure something.

A nuisance bully may harass or humiliate you or your client, either openly or covertly. For instance, he or she may ask embarrassing questions during depositions to make your client feel uncomfortable or distressed, or he or she may launch a direct attack against your client. He or she may also attempt to degrade you in front of your client by questioning your skills or experience, criticizing your practices without basis.

A fighting bully engages in battle at all times and treats the litigation process as a war. He or she may attempt to engage you in a yelling match and often displays belligerent behavior, such as cursing or screaming. He or she refuses to extend professional courtesies and never concedes anything, creating conflict in all dealings. It is virtually impossible to reach an agreement with this bully, which often leads to chronic motion practice.

The common thread among all types of bullies is that generally they will seek to

exploit a young lawyer's inexperience in all phases of litigation.

Reasons for Bullying

What motivates bullying? The simple answer is the desire for control. In any walk of life, a bully wants to exert control over another as a means to an end, whether it be success, money, fame, or power. A bully believes that unlimited aggression is the best way to achieve these goals.

In the legal community, bullies have more narrow objectives. Most lawyer bullies feel that they will gain tactical advantages or win cases by bullying their adversaries. In general, he or she hopes that his or her conduct will complicate the handling of a matter to such an extent that it may make you simply surrender to demands, whether it be dictating the discovery schedule, or settling the case under terms unfavorable to your client. He or she believes that he or she can send a message to your client that it is not going to be worth the fight.

Some lawyers engage in bullying behavior to mask their incompetence or insecurity. They bully to conceal unfamiliarity with the facts of a case, court rules or procedure, or substantive law. For some bullies, money is a primary incentive. They want to use burdensome discovery and unnecessary motion practice to burn through retainers or otherwise line their own pockets. They hope to create disputes over every discovery item because this will escalate legal costs.

Finally, some bullies simply want to humiliate and harass you and your client. They enjoy being feared, by you and in the legal community as a whole. They brazenly display their craft in public settings such as courtrooms or during depositions. They hope that by antagonizing you in public, you will back down or lose focus.

All bullies, regardless of type, hope that their line of attack will cause you to doubt your abilities and question yourself. Do I truly understand the law? Have I misapplied the facts of the case to the law? Do I really have a basis to file this motion? A bully intends to make you stray from your strategy, lose sight of the important issues, and become lost in the minutiae of a case. When a bully achieves any of these goals, or is somehow rewarded for aggressive behavior, the cycle of persistent aggression will continue.

You must understand these motivations

to properly address them in practice. Whoever the bully or whatever the methods, speak up for yourself when appropriate, do not relinquish control, hold to your strategy, and keep the important issues in sight.

Common Bully Scenarios

A bully will use persistent, aggressive tactics at all stages of litigation, but most fre-

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quently, a bully will use them during a deposition, settlement negotiation, or court appearance.

A deposition provides fertile ground for a lawyer to implement bullying devices. No judge is present, and many young lawyers are inexperienced in taking or defending depositions. When defending a deposition, a bullying adversary can use numerous techniques designed to throw a young lawyer off his or her game. These techniques include improper "speaking objections," repeatedly huffing after questions, interrupting, and instructing a deponent not to answer permissible questions. A bully adversary taking a deposition will ask questions in an arrogant and contemptuous manner. An extreme bully will even resort to yelling, issuing threats, and engaging in other forms of intimidation designed solely to overawe an already nervous young lawyer. Here is an example:

Young Lawyer: On April 1, did you have any reason to believe that Mr. Smith was going to suspend you?

Bully (interrupting): Objection. He already answered the question. It's repetitious. He already answered that on that date, he didn't know. Aside from being asked and answered already, I would further object that it calls for speculation and is irrelevant and immaterial.

Young Lawyer: I don't recall asking that question.

Bully: Well, you did and he answered it. He did not know, and further still does not know why he was suspended.

Young Lawyer: Why do you think you were suspended?

Bully: He is not going to answer that question either. It calls for speculation. It's irrelevant and immaterial.

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Young Lawyer: OK. We will move on and come back to this later.

Clearly, the young lawyer in the above example allowed the adversary to take control of the deposition through intimidation. Most importantly, however, this bully successfully suggested an answer to the deponent, his or her client, to one question, and did not allow the client to answer another valid question.

In most jurisdictions, this young lawyer would have been able to use the procedural rules governing depositions to his or her advantage. For example, under the Federal Rules of Civil Procedure, which govern attorneys' conduct during discovery in federal cases, "an objection must be stated concisely in a nonargumentative and nonsuggestive manner." FED. R. CIV. P. 30(c)(2). The examination then proceeds, with testimony "taken subject to any objection." *See id.* Many jurisdictions further limit objections during depositions to those based on form, or require an assertion of privilege or confidentiality.

Thus, the bully's objections in the above example are improper. A young attorney armed with knowledge of the above rules or the rules that applied in the governing jurisdiction would have been equipped to handle the bully's tactic.

The example below illustrates how that situation could have played out if the young attorney had known the rules and had withstood the bullying:

Young Lawyer: On April 1, did you have any reason to believe that Mr. Smith was going to suspend you?

Bully (interrupting): Objection. He already answered the question. It's repetitious. He already answered that on that date, he didn't know. Aside from being asked and answered already, I would further object that it calls for speculation and is irrelevant and immaterial.

Young Lawyer: Counsel, please refrain from any further speaking objections. I do not recall asking that precise question. To the extent I did, your objections are noted. Please direct your client to answer the question.

In the example, the young lawyer blunted the bully's attempt to control the deposition, demonstrated a working knowledge of the applicable rules, and most importantly, demonstrated that he or she would not tolerate unacceptable behavior.

If a bully continues to assert speaking objections after an initial warning, you should remember the "three-strikes rule." On the second violation, advise the bully again to refrain from making improper speaking objections, note that it is the second time that you have made the request, and advise the bully that you will contact the judge if it happens again. On the third violation, advise the bully that you have made two requests that the bully refrain from improper objections, and then contact the court. Even if the assigned judge merely admonishes the bully, you will have made your point: you will not permit the bully to control your deposition. More often than not, you will find that a bully typically knows that he or she has behaved wrongly and will back down when you display genuine determination. Of course, it is helpful to bring a copy of the applicable court rules with you to a deposition should this or another rules-related dispute arise.

As noted, in the above example in addition to employing a speaking objection, the bully instructed his or her client not to answer a valid question. You may dispense with the "three-strikes rule" in this instance. Under the Federal Rules, an attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under FED. R. CIV. P. 30(d)(3). FED. R. CIV. P. 30(c)(2). Therefore, if your adversary instructs

his or her client not to answer a valid question, you should ask your adversary to state the basis of the instruction. If the basis is improper, then advise the bully of the applicable rule, provided that your jurisdiction's rule is similar to the rule outlined in the Federal Rules. If he or she continues to instruct his or her client not to answer your question, you should advise the bully that you intend to contact the court for a ruling. If the bully actually persists and you do contact the court, be prepared to explain your position, but otherwise, sit back and enjoy the bully's attempts to convince the court that the question at issue falls into one of the protected categories. In most cases, this proactive approach will deter an adversary from further bullying.

Defending a deposition when your adversary deposes your client using bullying behaviors poses its own set of challenges. A bully deposing your client may resort to sarcasm, innuendos, or outright aggression to goad your client into responses that he or she would not otherwise provide. As with most things, preparation is the key. You must thoroughly prepare your client for the deposition. Advise your client of your adversary's nature, but direct your client not to engage the bully on his or her level. Instruct your client to maintain his or her composure and professionalism at all times, regardless of the bully's methods. Your client should take his or her time in thinking about and responding to the bully's questions to prevent falling into your adversary's traps. If your adversary's bullying conduct during depositions is chronic and persistent, a young lawyer may also consider seeking sanctions. Under the Federal Rules, a court may impose sanctions if it "finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent. . . ." FED. R. CIV. P. 30(d)(2)

Another area in which a bullying adversary may seek to take advantage of a young lawyer is settlement negotiations. Whether on the phone, hiding behind a keyboard, or in mediation, a bully will often be completely unreasonable, engage in intimidation tactics, or demean a young lawyer in an effort to force a young lawyer to meet demands. A bully believes that he or she will prevail in a battle of wills or, at a minimum, distract a young lawyer from his or her strategy. A bully may make a subtle

remark about whether a young lawyer has settlement authority, may request to speak to someone with greater seniority, or even make degrading remarks about a young lawyer's knowledge or experience.

The most important thing that you must understand in this scenario is that these are only tactics. They have nothing to do with the substantive settlement value of a case. Therefore, the key to handling bullying in settlement negotiations is to ignore these tactics and stay focused on the objective, which is to secure the best possible resolution for your client. You should start every settlement negotiation with a goal and a strategy to achieve that goal. Unlike with a deposition, you will have no record or avenue to immediately involve the court if a dispute arises. Therefore, you must be prepared to blunt a bully's efforts by displaying knowledge, confidence, and determination. In this setting, do not be afraid to tell a bully that he or she is being unreasonable, or to point out inappropriate conduct to let him or her know that you are aware of it. It is best to do both while maintaining your composure.

While ignoring a bully's tactics is often the right way to proceed, do not feel that you should turn a cheek to every cheap shot launched by a bully. Indeed, it is imperative that you communicate that you expect that your adversary will treat you with respect if he or she crosses a line during settlement negotiations or elsewhere. Establish clear rules on acceptable behavior and consequences. If an extreme instance of abuse occurs, you should always be prepared to terminate the proceedings, communicate only in writing, and consider potential sources of sanctions.

The final scenario that every young lawyer should prepare for is bullying behavior from an adversary during an arbitration or trial. In this scenario, a bully generally will employ subtle methods, to avoid being vilified by the judge, arbitrator, or jury. A young lawyer should be prepared for a bully to assert chronic, yet meritless objections, employ sarcasm, and make offhand comments about a young lawyer's experience.

When another party is present, especially the adjudicator, it is extremely important to remain composed and to avoid engaging a bully on his or her terms. You should turn the tables and expose your adversary for the bully that he or she is. Play

the sympathy card if the facts of your case permit. If possible, point out that age alone does not always provide wisdom concerning the topic in dispute. Always maintain your poker face. Thomas Hobbes reportedly once said that "the appearance of power is power." The same can be said for control. Do not let a bully appear to be in control by flustering you.

General Pointers

It is likely that you will have already pegged your adversary as a bully before the first deposition, settlement discussion, or hearing. However, sometimes you may not have advance warning, so it is important to remember some general pointers for dealing with a bullying adversary in any type of proceeding.

As with most practical advice for litigators, it is most important to be prepared. Know the facts of your case, the rules governing the anticipated litigation event, and the substantive law. Preparation breeds confidence, which is precisely what a bully seeks to attack.

When dealing with a bully, psychological preparation is equally important. Remind yourself not to stray from your goal or strategy. Avoid losing your temper or escalating a situation. The atmosphere will only become more hostile should you allow this to happen. Therefore, it is essential to refrain from engaging in bullying behavior yourself. Do not return a bully's aggression with aggression.

Document everything. Follow up every conversation with a bullying adversary in writing, especially confirming every agreement respecting deadlines, settlement proposals, and representations that impact the litigation. You will probably end up before a judge due to a dispute over one of these areas when dealing with a bully. You can effectively use a timely letter or e-mail reflecting a conversation or agreement as an exhibit, especially when your adversary did not respond. While a judge may not appreciate presiding over a discovery dispute that the parties could not resolve, he or she will appreciate having documents rather than competing affidavits portraying a "he said, she said" scenario. In the same light, understand that anything that you say or write, and even distorted versions of what you say or write, may become part of

an affidavit or confirming letter from your adversary. Therefore, always maintain your professionalism. Extend professional courtesies even when your adversary does not, to show that you have made attempts to be reasonable. Do not stoop to the level of a bully adversary, regardless of how it makes you feel. This is precisely what he or she hopes to accomplish. By maintaining your

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professionalism, you will not only be true to yourself, you will demonstrate your civility to a court.

Learn the rules of professional conduct applicable to your jurisdiction and the potential sanctions for violating these rules. Most states have adopted rules that follow the ABA Model Rules of Professional Conduct. Much of the conduct described in this article may fall under the ABA's rubric. They provide additional ammunition to respond to the abusive behavior of an adversary. In addition, by striving to abide by these rules, you will avoid becoming a bully when you are a seasoned attorney.

Never lose your focus. Whether in a deposition or mediation, before a court, or sitting at your desk working on a case, you must remain in control, focused on your objectives, both short and long term. If you find yourself losing focus or becoming flustered by a bully, slow down and breathe. Take a break, if necessary, to regain your focus and composure. Act as if you are in control even if you do not feel as if you are. If a bully senses weakness, he or she will likely increase his or her efforts. A bully adversary believes that he or she can control you by bullying. Do not let such behavior control you or allow a bully to think that you will relinquish control.

Finally, seek advice from peers or more experienced attorneys. They are invaluable sources of advice. They have likely been

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through a similar scenario or witnessed it occur and will have useful suggestions for dealing with difficult situations.

Conclusion

Dealing with a bully as an adversary is

an unfortunate circumstance, sometimes exacerbated by the adversarial system. Most young litigators will face a bully in one form or another at some point. Choosing flight over fight is not generally an option. What distinguishes one young litigator from the next is how he or she chooses

to fight. Understanding why an adversary uses bullying tactics and adequately preparing both your case and yourself will equip you to handle bullying in a professional manner at any point in litigation. **FD**