

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My colleagues and I always try to be civil in our dealings with adversaries and judges. However, I have found that bullying typical of what I imagine occurs with kids is occurring more and more in the legal profession. I have seen this kind of behavior not only in depositions but also in court and at settlement meetings (where clients are often present). One of my colleagues (Bullied Ben) has been on the receiving end of repeated harassment by an adversary in contentious litigation in court, in settlement meetings and in all of the depositions taken in the case. I am seeing this adversary's persistent bullying beginning to take a psychological toll on this person. It is affecting his performance in the office, and I've been told his home life is a mess.

What should I tell him to do in order to help him address this situation?

Sincerely,
Friend of Bullied Ben

Dear Friend of Bullied Ben:

Although many believe that bullying is something that happens only in the schoolyard, the sad reality is that many of us have at times experienced bullying in our practices. We have indirectly touched upon this topic in a couple of *Forums* where we addressed the issue of uncivil conduct in communications between adversaries (see Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, New York State Bar Association Journal, Jul./Aug. 2014, Vol. 86, No. 6) and in depositions (see Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, Vol. 85, No. 9). Your question causes us to drill down on the subject once more.

We suspect that bullying by lawyers is not something new and has probably occurred ever since barristers in Britain first donned wigs. Bullying can have severe consequences, affecting the mental health of all involved. It is an unfortunate statistic that lawyers are 3.6 times more likely

to suffer from depression than non-lawyers. See *Why Are Lawyers Killing Themselves?*, CNN.COM, <http://www.cnn.com/2014/01/19/us/lawyer-suicides/> (last visited Feb. 23, 2015). Various bar associations have responded to this serious problem by adding a "mental health" component to mandatory legal continuing education. A recent American Bar Association program brought together a panel consisting of practicing attorneys, a judge and a psychologist to discuss the growing concern over bullying in the legal profession. One of the panelists noted that bullies act to devalue and dehumanize their target for their own psychological needs, based upon their own feelings of envy, hatred and inadequacy. Peter Graham, PhD, Acumen Assessment LLC, *Bullying by and of Lawyers: Why It Happens and What to Do About It* (ABA Webinar, Sept. 16, 2014).

Dr. William Gentry, a Senior Research Scientist at the Center for Creative Leadership, has this to say about bullying:

Bullying may be seen as an effective way to get things done if used infrequently, strategically, and for short-term improvements. But, in the long run, bullying will not pay off. Bullying is a detriment to job satisfaction, increases anxiety at work, and causes stress, which can ultimately lead to health problems. And, bullying will eventually catch up with the bully himself or herself. In fact, the research shows that one of the top reasons managers derail (get demoted, fired, or [do] not fulfill early career potential) is because they have problems with interpersonal relationships – they are cold, arrogant, aloof, dictatorial, and order people around – they are bullies.

So how does one respond to bullying? Certainly, responding in kind is not the answer. What you should do will, of course, depend on the given situation. But, our basic suggestions are that you do not take the bait by engaging in similar conduct, that you

stay as calm as possible, that you ignore their tactics, and you resist the opportunity to yell back. We also suggest that you draw lines you believe should not be crossed, outline the consequences and be prepared to act on the consequences. Maria G. Enriquez, BatesCarey LLP, *Bullying by and of Lawyers: Why It Happens and What to Do About It* (ABA Webinar, Sept. 16, 2014). Enriquez further suggested that one subjected to bullying (particularly at a deposition) should always keep a record, create a paper trail, work to control the environment, file motions, consider requesting sanctions, etc.

If bullying occurs in the settlement meeting context, where all parties are often present, Enriquez suggests that the lawyer pull opposing counsel aside, explain to counsel that the client is very uncomfortable with his or her demeanor and let counsel know that, although the client really wants to settle, you and your client will terminate the meeting if counsel doesn't stop. And, if he or she doesn't stop,

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 e-mail to journal@nysba.org.**

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then recommend to your client that you leave. *Id.*

It is also important to remind Ben that his client's interests are the real issue, rather than whatever the bully may be saying. Ben would be advised to keep in mind that bullying is often a reflection of the actor's own internal insecurity, and to recognize that while a bully's attack may be personal, Ben would be stronger if he disregarded it and remained in his professional role as representative of a client. *See Editorial: Confronting Bullying Within the Legal Profession*, Ct. L. Trib., <http://www.ctlawtribune.com/id=1202668248833/Editorial-Confronting-Bullying-Within-the-Legal-Profession?slreturn=20150121100044> (last visited Feb. 23, 2015).

If you see that Ben's well-being has not improved even after giving him this advice, then you might suggest that he seek professional help through one of the lawyer assistance programs available at both the state and local bar levels in New York. If Ben chooses to go this route, he should be aware that information he gives to a member or agent of a lawyer assistance committee is confidential by statute. *See* Judiciary Law § 499.

Turning to the applicable ethical rules and guidelines, an attorney who subjects another attorney to bullying almost certainly violates the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), but may not necessarily violate the Rules of Professional Conduct (the RPC); and the conduct may not serve as a basis for a disciplinary complaint. That being said, Ben's adversary clearly has acted in contravention of the recommended behavior under the Standards.

The Standards were first proposed in a report issued by the NYSBA's Commercial and Federal Litigation Section, and were then adopted by the House of Delegates. The Standards act as "a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where

courtesy and civility are observed as a matter of course." Although the Standards serve as a model for appropriate behavior, they were "not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [the predecessor to the RPC], or any other applicable rule or requirement governing conduct." *See* Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

Part I of the Standards provides that "[l]awyers should be courteous and civil in all professional dealings with other persons." Part I also offers a series of guidelines that are meant to encourage lawyers to maintain a level of courteousness and civility when dealing with anyone they might come across in a professional setting. These include:

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

See Standards (I).

The Standards have been in place since 1997 and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. More important, identifying uncivil conduct as bullying can help in recognizing and understanding it when it occurs. *See Editorial: Confronting Bullying Within the Legal Profession*, *supra*.

As stated in other *Forums*, while the RPC does not directly address civility,

several rules deal with "overly aggressive behavior" or "harassing behavior" by attorneys, including Rule 3.1 ("Non-meritorious Claims and Contentions"), 3.2 ("Delay of Litigation"), 3.3 ("Conduct Before a Tribunal"), 3.4 ("Fairness to Opposing Party and Counsel"), and 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"). *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, p. 3, col. 1.; Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*; *see also* Syracuse and Maron, *Attorney Professionalism Forum*, Jul./Aug. 2014, *supra*.

It could be argued that the bullying conduct exhibited by Ben's adversary may be considered "conduct that is prejudicial to the administration of justice." *See* Rule 8.4(d). However, Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice*. . . ." (emphasis added). Although Ben's adversary's conduct is a prime example of uncivil conduct, it is not (as we have pointed out in the past) behavior that parallels the more egregious conduct that could be deemed a violation of Rule 8.4(d). Examples of conduct subject to discipline include "advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding . . ." and the like. *See id.* Comment [3]. *See also* Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

In the deposition context, *see* Part 221 of the Uniform Rules for the New York State Trial Courts, the Uniform Rules for the Conduct of Depositions (22 N.Y.C.R.R. pt. 221). The purpose behind the enactment of Part 221 was to "ensure that depositions [were] conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum." *See* 2006 Report of the Advisory Comm. on Civil Practice, p. 50, http://www.nycourts.gov/ip/judiciarylegislative/CivilPractice_06.pdf; Syracuse and

Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

The pressures of legal practice are enough to deal with without having to face off with someone whose bad behavior should never have left the schoolyard. As we noted here and in prior *Forums*, the best thing to do when confronted with someone acting inappropriately is to take the high road and not engage in behavior similar to that of the offending person. It is what we believe to be the best and only responsive tactic.

Sincerely,
The Forum by
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Tannenbaum Helpen Syracuse &
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

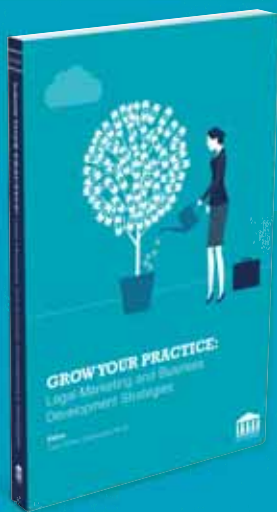
I work as an assistant general counsel for MegaCorp, the largest manufacturer of widgets in the United States. We began growing concerned that our competitors are slowly chipping away at our market share, which may cause MegaCorp to lose its place as the largest manufacturer in the widget industry. Therefore, the company's executives decided to purchase the fourth and fifth largest widget manufacturers, thereby eliminating its top competitors. Because of these potential acquisitions, MegaCorp has begun to face scrutiny from antitrust regulators. In addition, the company has been advised that the due diligence reviews of the company's records by these antitrust regulators have uncovered a potential issue con-

cerning improper waste disposal at one of the company's manufacturing facilities, which has been referred for further investigation by the Environmental Protection Agency. I, of course, have been tasked by the company's general counsel to handle MegaCorp's compliance with federal and state environmental laws and regulations.

What are my ethical obligations pertaining to this particular situation? Specifically, if federal regulators attempt to interview me as part of their investigation concerning the waste disposal matter, do I have to comply with their interview request? And if I do submit to an interview, what can I disclose? Finally, if the company is ever sued by the government as a result of the investigation, and I am subpoenaed to testify at trial, what am I allowed to disclose?

Sincerely,
Quentin Questioned

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