

Bullied in court? What chambers can do about it



This article is not designed to offend the Judiciary but the ‘quiet word’ has only taken us so far – it is time concerns were recorded formally, says the first set to introduce an external bullying policy

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All examples of bullying below have had details changed to ensure anonymity.

'A judge once decided to remand my client mid-trial. When I tried to respond with his record of good attendance, he started shouting a long and unpleasant rant. I was "giving evidence"; I didn't know what I was doing. By now my client had burst into tears. He was terrified and could see I couldn't help.

'After sending him down, Judge wanted to discuss directions. By now I was struggling and asked for a moment to compose myself.

'Judge said, "you're going to cry aren't you". And then added that I was worse than the 16-year-old complainant who had cried during her evidence. Then he stormed out.

My client was acquitted, after a night in the cells.'

A female junior (7+ years' call)

As barristers we are used to representing the interests of others. We learn to go into court prepared to face whatever comes our way. We do this protected under a cloak that is our client's instructions: we speak for them, not for ourselves. But as much as we are prepared to deal with all manner of attacks on our clients, we are vulnerable when those attacks are aimed at us. The cloak falls away and we are suddenly no longer defending a client; we are defending ourselves.

'I did a 6-week case. Every single time I stood up to ask a question I'd be interrupted by the Judge. It got so ridiculous that myself and my five co-defending counsel started keeping score of whether I was able to ask more than one question; I never was.

'Finally, I asked for the jury to go out to raise it; Judge refused and said to the jury, "She is going to make a fuss." In other words, I couldn't do my job.'

A female junior (15+ years' call)

Bullying can diminish even the fiercest advocate. The confident image we like to project crumbles and we become a child at the grown-ups' table. It's a mixture of embarrassment and a lack of understanding of whether it is even appropriate to respond. Do you fight back and risk prejudicing your client's trial, or do you become the punching bag?

Rehna Azim's excellent article 'Bullied from the Bench' (*Counsel* March 2022) and Darren Howe QC and Professor Jo Delahunty QC's striking series 'Recognising and managing oppressive behaviour – in-court and out' (*Counsel* April and May 2022) identified the corrosive effect of judicial bullying. The Bar Council's 2021 Working Lives Survey revealed that 31% of the 3,479 respondents

Do you fight back and risk prejudicing your client's trial, or do you become the punching bag?

had reported personal experiences of bullying, harassment and/or discrimination within the previous two years, up from 21% in 2017. This gets substantially worse if you are a woman (54%), Black (53%), Asian (47%) or have a long-term disability (45%). If you're a Black woman, it's 63%.

'Overnight I'd had some thoughts on Judge's summing-up and sent some suggested amendments. I'd texted Prosecution counsel to warn them. I told the clerk I needed to raise them. But Judge came in and said, 'jury in'. He shouted over me when I rose.

'He then accused me of misconduct. He said I'd tried to trick him into putting the amendments to the jury without anyone noticing. It was extraordinary. In open court, in a high-profile case. I responded saying he was wrong.

'Judge insisted on me forwarding him the texts I'd sent Prosecution counsel. He retired to read them but made his parting shot: 'lying barristers will be remembered in this court.'

'Then he asked to see me in chambers. I refused; he was clearly planning to retract his allegation off the record. Eventually he retracted them in court, without an apology.

'It was sexist bullying. Plain and simple.'

A female junior (10+ years' call)

This vulnerability is not like the kind in other workplaces. There is no human resources department or higher authority to which to appeal. We do not even work for a company that can take action on our behalf. And so we face the grim reality of facing our bully at court for as long as our trial lasts, and then most likely again on future occasions. You are back in the playground being taunted to respond, knowing what will happen if you do. There is no shortage of sympathy, but the memory of that sympathy fades quicker than the memory of the bullying.

'I once saw female counsel politely note they didn't have sufficient time to deal with a complex issue of law before the end of the hearing. Judge asked why she hadn't been there before 9:30am (even though her listing was at 10:00am); defence counsel responded she had a baby. Judge responded, in open court, "I don't know if you want me to congratulate you or commiserate you on having a child, but that's completely irrelevant to me.'" xxxxxxxx

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Defining the problem: difficult judge or bully?

The trickiest part is how to define the problem. We are rightly expected to deal with stern language and direct criticism of our performance. A court is not the place for barristers to be mollycoddled and our bruised egos must take a back seat. But there is a clear line between a difficult judge and a bully.

The Bar Council defines bullying as *'behaviour constituting offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the person being bullied'*. An article by a former Chair of the Bar added examples: *'personal abuse, contemptuousness, relentless criticism, demeaning behaviour, sarcasm, unreasonable demands, intemperate language or comments designed to embarrass or humiliate'* ('We need to bring judicial bullying into the open, says Bar Council Chair', *Legal Futures*, 20 June 2018). We would add that shouting at counsel should also be included.

'My Judge ignored all the senior female barristers in my trial. He said, "I need a brain" to discuss his directions and asked the only available man, who was more junior and further down the indictment, to address him. He then spent the rest of the trial making various references to my brain "not working the same as his".'
A female junior (5+ years' call)

We understand that the Judiciary are under pressure themselves. The role of a judge is demanding. Judges must command authority and ensure efficient case management. This is a difficult task and requires a number of skills, including (but not limited to) good judgement, intelligence, the ability to command respect and robustly case manage, the ability to manage counsel with a wide range of experience, and some might say,

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most important of all, patience. The majority of judges are not bullies. Judges are human beings who can, like all of us have a 'bad day'. However, there are clear repeat offenders, who are known by all in the profession. There are also times when the behaviour of usually fair and patient judges can stray into bullying, without the perpetrator either knowing or being made to reflect upon the behaviour or how to improve.

The judicial selection process does not involve psychometric testing or any assessment of a candidate's ability to demonstrate patience or man management. There is no judicial training on the topic of how to manage court staff or counsel, nor on the topic of bullying.

The issue of bullying and the consequences of bullying goes almost entirely ignored. The process by which any complaint can be made is generally regarded at the Bar to be ineffective. Our system contains a complicated mess of government departments, companies, chambers and regulatory groups – and not one of them is well-suited to tackling this issue.

There is a perception at the Bar that when complaints are made to the Judicial Conduct and Investigations Office, that on the rare occasion such complaints are made, they are not often upheld, and it is simply not worth 'putting of one's head above the parapet'. What happens to the advocate whose complaint is or is not upheld, when he is next in front of the judge in question?

Senior judiciary are hesitant to get involved, on the basis that rigorous case management and the independence of the judiciary is vital. Every Circuit has its known offenders, yet their behaviour continues, notwithstanding in some cases the fact that a perpetrator has been 'spoken to' by senior judiciary, until the day they retire.

'During a long fraud trial a few years ago, the Judge made everyone's life hell except for the prosecution. He reduced one female barrister to tears. He would regularly badger junior counsel with questions only their leader could answer. It was a horrendous experience; I seriously considered leaving the Bar.'
A male QC

The impact of bullying at the Bar is not just about barristers. We will take the hit and move on: that is our job for our client's sake. But if a jury sees bullying, that can have wider and graver consequences. The jury do not know that their judge 'has a reputation', they might see bullying as a sign that one side should be blamed. The result may be unfair convictions or wrongful acquittals.

This article is not designed to criticise or offend the Judiciary. But there is a problem which the Bar alone cannot fix.

So, what can the Bar do?

Record and report

'Talk to Spot', the online complaints platform supported by the Bar Council, has been designed to address the reluctance by barristers to come forward and make complaints about bullying, harassment or discrimination. The platform is easily accessed (see: bit.ly/3mHAUpk) and allows the user to record these behaviours. It is completely secure and enables the user to make a record of exactly what happened, who did it, who saw it, where it happened and when. A date stamped contemporaneous record of the incident is then generated, which belongs only to the person who created the record.

However, if the user wishes to take the complaint further, then the report can be used to make a complaint to whomever the user wishes to, about the incident. A complaint can be made to chambers, employers and/or the regulator.

If permission is given, the record can also be sent by 'Spot' to the Equality and Diversity team at the Bar Council. This can be done completely anonymously and would enable The Bar Council to provide additional support and collect information about what's happening where.

At the moment this service is not well known and is under used. Spot receives between 5-10 reports of judicial bullying/inappropriate behaviours every month. Experienced practitioners have indicated that this is not reflective of the scale of the problem. The Bar needs to start recording bullying incidents as and when they occur, even when they are merely a bystander and not involved in the case.

At present, the Bar Council is about to publish its working party report into how it can better support those who are the victims of harassment and bullying. It is expected that the report will confirm the need for the Bar Council to increase confidence in using this platform, which includes providing more information about who sees the reports, what is done with them and assurance that reports to 'Spot' are genuinely anonymous.

What can chambers do?

Represent their members

We know there is overwhelming pressure for barristers to brush bullying under the carpet. The burden of 'making a fuss' shouldn't fall on their shoulders; it's up to chambers to represent them.

It is vital that chambers support individuals who have suffered bullying.

My chambers, QEB Hollis Whiteman, has now adopted an external bullying policy. A panel of barristers within Chambers (including a senior QC) will now address complaints of bullying by judges, solicitors, court staff and other barristers:

- Any barrister, pupil, clerk or member of staff

Every Circuit has its known offenders, yet their behaviour continues... until the day they retire.

within Chambers can make a complaint to any individual member of the panel.

- That member must respond within seven days and can escalate the matter to the full panel.
- Escalation must be considered by the panel within seven days of receipt.
- The panel then has a range of options available, including making complaints to the regulators signed by the panel and our heads of chambers.
- All decisions reached in the first and second instance must be recorded in writing and filed confidentially.

All escalated complaints will be reported by Chambers to 'Talk to Spot'. Our chambers policy is designed to make sure bullying does not go unnoticed by the right people.

Our panel will involve senior judges or other heads of chambers if appropriate. If we need to take on the paperwork involved with a formal complaint, then we will. The quiet phone call has only taken us so far: it is time concerns were recorded formally.

Our policy includes that the person making a complaint does not necessarily have the final say over what actions are taken.

'A few years ago, I had a Judge who was so personally offensive that I dreaded going to court and I couldn't sleep properly throughout. He would say things like, 'I shouldn't have to teach someone of your call how to prosecute a case properly'. He was just appalling; I am convinced that it impacted the jury's mixed decision and it resulted in a re-trial that I refused to do.

It was arrogant, bullying, offensive behaviour by a Judge who knew I couldn't respond.

A male junior (20+ years' call)

We have received invaluable assistance from the Bar Council in drawing up this policy. We do not expect this policy to be the silver bullet, but it is at least an important step in the right direction and one we as a Chambers are committed to taking.

If any chambers would like to discuss the detail of our policy, the authors are happy to assist with any enquiries. Please email: chris.emmings@qebhw.co.uk.

Sources of help:

You can Talk to Spot, the online tool for the Bar to confidentially and anonymously report inappropriate behaviour and concerns, at: bit.ly/3mHAUpk

Other sources of support include:

www.wellbeingatthebar.org.uk (assistance programme tel: 0800 169 2040); lawcare.org.uk (helpline 0800 279 6888); samaritans.org (tel: 116 123; email at jo@samaritans.org)

Further reading

'Bullied from the Bench?' by Rehna Azim (Counsel March 2022): bit.ly/3sxaISA

'Recognising and managing oppressive behaviour – in-court and out: parts 1 & 2', by Darren Howe QC and Professor Jo Delahunty QC (Counsel April and May 2022): bit.ly/3vq8Yg7 and bit.ly/39oyPwo



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