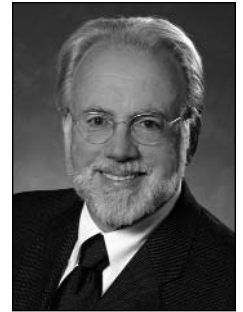


# Dealing With an Uncivil Opponent— Finding the High Road

by William E. Walters



Get Over It  
Get Over It  
All this whinin' and cryin' and pitchin' a fit  
Get Over It  
—Eagles  
*Get Over It*<sup>1</sup>

Stories about attorneys who acted in an “uncivil” or “unprofessional” manner may be more commonplace than one would care to think. Articles have been written on this topic<sup>2</sup> and courts have issued opinions on cases dealing with attorneys who have been sanctioned for their misconduct.<sup>3</sup> Bar presidents have tried to promote civil behavior and speakers have traveled the circuit bemoaning the lack of professional behavior between and among attorneys.

On the other hand, many of us know attorneys whose professional careers exemplify the finest traditions of practicing in a civil manner. Attorneys such as Dale Harris, Alex Martinez, Joan McWilliams, Bill McClearn, and Ed Kahn quickly come to mind as attorneys who have exhibited “civil” lawyering by example. I know there are hundreds of others.

My intention is to not to berate “bad” or promote “good” behavior. It is a sad fact that some members of our profession may never learn to behave in a civilized manner. Fortunately, there are more members who will always behave with civility.<sup>4</sup>

Regrettably, those who misbehave are rarely the ones who will hear or accept the message of how to act in a professional manner. Thus, the purpose of this article is two-fold:

First, I would like to suggest that individuals who exhibit objectionable behavior are not going to go away. So, as the Eagles suggest in their lyrics, we need to “get over it.”

Second, I would like to offer a few practical suggestions for dealing and coping with these “uncivil” lawyers. I strongly disclaim any attempt to provide psychological or psychiatric advice or engage in psychobabble. What follows is based on the experience of other attorneys, as well as my own experience, when dealing with attorneys who do not treat those whom they encounter in the practice of law with “fairness, courtesy, respect and honesty.”<sup>5</sup>

## The Scope of the Problem

Before I visit each of our twenty-seven local bar associations, the CBA staff sends out a survey asking our members to identify the problem areas of practice. Among the comments we have received are:

- “lack of professionalism”
- “rudeness”
- “lack of ethics among more aggressive lawyers”
- “dealing with insincere and dishonest people”
- “attorneys playing fast and loose with the ethics rules”
- “unprofessional attorneys.”<sup>6</sup>

The American Bar Association reported in October 2007 that a majority of those surveyed felt attorneys have become less civil to one another. Interestingly, those in practice more than ten years recorded the highest increase in such observed behavior.<sup>7</sup> Whether the issue of “lack of civility” is on the increase is impossible to determine. Whatever the scope, it clearly is on the minds of practitioners, judges, and the public.

## What's a Lawyer to Do?

Whatever the reason (which ultimately makes no difference except as to how you deal with the situation), we have to accept that uncivil lawyers will be part of the practice milieu. Perhaps some will reform, but the odds of their changing are slim. Here are a few suggestions for confronting your “problem” situation:

1. Understand where the person is coming from. Trying to “get behind” the words and actions of the difficult lawyer may not always provide a solution, but it may keep you from sinking to the same level.
2. Reach out to opposing counsel before the matter gets underway. Try to do so in person. Perhaps schedule a lunch. I know of one family law attorney who always tries to meet with the other attorney before the motions start to fly. He observed that on one occasion when he failed to do so, the case presented challenges from beginning to end. On the other hand, when he met with an attorney whom many others had described as “difficult,” the entire case proceeded smoothly.
3. Stay on the high road at all times—don't venture into the mud. I'm sure many of us have given this advice to a client at one time or another. Attorneys should heed this advice, as well, especially during highly contentious situations. As one attorney explained to me, “You don't need to copy the bad behavior. Responding in kind rarely results in any advantage.”
4. Be willing to apologize. Despite your best efforts, tempers will rise, things will be said, and phones will be slammed down. Be willing to acknowledge your contribution to the confrontation and call opposing counsel to apologize for the behavior. The words “I'm sorry” hold amazing power—they can disarm the other attorney and allow you to move on.
5. Know the rules and “structure” of your practice area. Legislators have long known that he or she who knows the rules can determine the outcome of floor fights when passing legislation. Lawyers are no different. By knowing the rules, the attorney will know what can and can't be done. If you're in discovery, make a record with the court reporter that you wish to call the court; this often brings matters to resolution. Of course, the court also must be well prepared and willing to act. Ask anyone who appears in federal court if they have encoun-

I invite our members to address this frustrating topic of dealing with the difficult, unprofessional, and uncivil colleague and send me your ideas and methods for coping with the problem. Please e-mail me at [bill.walters@cobar.org](mailto:bill.walters@cobar.org) or send your note to me at: Kelly Garnsey Hubbell + Lass, LLC, 1441 18th St., Ste. 300, Denver, CO 80202.

- tered many lawyers willing to play games when Judge Matsch is in charge.
6. Write a letter (if you were born before 1960) or draft an e-mail. Write down all those things you wished you had said at the deposition, hearing, or conference. Be as clever as you like. **DO NOT SEND IT RIGHT AWAY.** Savor your clever *bon mots* several times. Enjoy your brilliant writing style. Then, put it away for at least twenty-four hours. If you still have something to say, eliminate the rhetoric and send it.
  7. Talk to other attorneys. If you are in a firm, discuss the matter at hand with others in the office. Not only can they offer an unbiased perspective, it often helps to vent with others before proceeding. Avoid the “ready, fire, aim” response by describing the situation and actions of the other side. If you have a mentor relationship, give that person a call. If you are a solo practitioner, it has been my experience that others in solo practice or those you may have encountered in Bar activities often are excellent sounding boards for the frustration you are experiencing.
  8. Contact the Metropolitan Professionalism Conciliation Panel (Panel).<sup>8</sup> Panel members will work with attorneys on a one-on-one basis to help resolve professionalism issues. The Panel comprises attorneys from the First Judicial District, Adams/Broomfield, Denver, Arapahoe County, and Douglas County Bar Associations. Lawyers can call the Bar offices at (303) 860-1115 to be put in contact with an “on-call” Panel member in one of these areas.
  9. Encourage your local bar to hold periodic meetings with the judiciary. Many local bar associations sponsor “Bench and Bar Retreats” or will hold topical lunches where judges are invited to attend. Judges are just as interested as attorneys in promoting civility. Some issues that rile attorneys may be the result of the lack of court resources; however, other issues may find a solution with the help of the Bench.
  10. Involve yourself in Bar activities and professionalism programs. These programs often present ways to deal with the “difficult” person and certainly provide a number of alternative role models.
  11. Confront the actor on the inappropriate behavior. Be confident. Look the person in the eye. Stay calm and clear.<sup>9</sup> Make your point in a rational manner. Don’t get personal.
  12. Ignore the behavior. Oftentimes, the pettiness appears in letters that also contain helpful, substantive information. Do as U.S. President John F. Kennedy did during the Cuban Missile Crisis, when he received two messages from Nikita Khrushchev<sup>10</sup>—one message was belligerent, the other conciliatory. Kennedy ignored the belligerent message and responded to the one seeking a solution.
  13. If you are in a situation in which you are able to select the trier of fact (mediator or arbitrator), select a decision maker who will apply the rules and insist on civility in the process.
  14. Ultimately, you may have to appear before the judge or magistrate to resolve the matter—especially when your client is being disadvantaged by the behavior. Sometimes, just the threat of going before the judge can bring about a change in attitude. Because this may not work, however, it may be prudent to document the problems. If it becomes necessary to go before the court, the judge—who may have experienced similar situations in private practice—will have a basis to correct the problem.
  15. In rare circumstances, you may have a situation that gives rise to a complaint to the Office of Attorney Regulation Counsel. Although that office rarely gets involved in such cases, there have been examples in other states where the conduct was so egregious that ethical violations were put at issue.
  16. Recognize that sometimes, nothing works. You may be stuck with a situation that has no remedy.<sup>11</sup>

## Conclusion

Regrettably, the problem lawyer is not going to go away. The only thing you can really control (a very difficult concept for those of us who have our own “control issues”) is your own behavior. Whatever method you have found to help in dealing with such situations, share it and continue to use it. I invite our members to address this frustrating topic of dealing with the difficult, unprofessional, and uncivil colleague and send me your ideas and methods for coping with the problem. Please e-mail me at [bill.walters@cobar.org](mailto:bill.walters@cobar.org) or send your note to me at: Kelly Garnsey Hubbell + Lass, LLC, 1441 18th St., Ste. 300, Denver, CO 80202.

## Notes

1. Eagles, *Hell Freezes Over* (Warner Burbank Studios, 1994).
2. Ortego and Maleson, “Incivility: An Insult to the Professional and the Profession,” *The Brief* (Spring 2008); Kraus, “Toward Civility in Civil Law,” 16 *Business Law Today* 5 (May/June 2005).
3. *Revson v. Cinque & Cinque, P.C.*, 70 F.Supp.2d 415, 435 (S.D.N.Y. 1999).
4. For those interested in developing and improving their professional skills, I recommend starting with Fulgham, *All I Really Needed to Know I Learned in Kindergarten* (Ivy Books, 1989). From there, you can go on to the myriad suggestions from various state bar associations about “standards of professional behavior.” See California State Bar Association, “California Attorney Guidelines of Civility & Professionalism” (adopted June 2007), available at [www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf](http://www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf); State of Wisconsin, “Standards of Courtesy and Decorum” (2002), available at [www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=1082](http://www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=1082). For a listing of states that have adopted such guidelines or standards, see the National Center for State Courts website at [www.ncsconline.org/wc/courttopics/statelinks.asp?id=45&topic=JudEth](http://www.ncsconline.org/wc/courttopics/statelinks.asp?id=45&topic=JudEth). Closer to home, reread the Colorado Oath of Admission, which states, in pertinent part, “I will treat all persons who[m] I encounter through my practice of law with fairness, courtesy, respect and honesty.”
5. Oath of Admission of Colorado Lawyers, C.R.C.P. 201.14.

6. Colorado Bar Association Zoomerang Surveys of Local Bar Associations (2008).

7. Ward, "Pulse of the Legal Profession," *ABA Journal* (Oct. 2007), available at [abajournal.com/magazine/pulse\\_of\\_the\\_legal\\_profession](http://abajournal.com/magazine/pulse_of_the_legal_profession).

8. The Metropolitan Professionalism Conciliation Panel "provides free one-on-one intervention." See [www.cobar.org/index.cfm/ID/1550/dba/DBA-Conciliation-Panel](http://www.cobar.org/index.cfm/ID/1550/dba/DBA-Conciliation-Panel).

9. See Fiore, "How to Deal With Difficult People," available at [ezinearticles.com/?How-to-Deal-With-Difficult-People-Part-2---The-Bully&cid=99542](http://ezinearticles.com/?How-to-Deal-With-Difficult-People-Part-2---The-Bully&cid=99542).

10. Nikita S. Khrushchev was First Secretary of the Communist Party of the Soviet Union from 1953 to 1964. See [en.wikipedia.org/wiki/Nikita\\_Khrushchev](http://en.wikipedia.org/wiki/Nikita_Khrushchev).

11. Before completely surrendering to the situation, you may want to consider any of the following: count to ten; meditate; exercise; buy a copy of Richard Carlson's *Don't Sweat the Small Stuff . . . and it's all small stuff* (Hyperion, 1996) (Carlson suggests "choosing your battles wisely" and "asking yourself what's really important"); move to a smaller community; get rid of the case; try to become a Type B personality. ■

