

**CIVILITY IN THE FACE OF INCIVILITY:
APPROPRIATELY DEALING WITH LEGAL INCIVILITY**

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I. INTRODUCTION

As a legal practitioner, odds are that you know of, or have heard of, an attorney that you would classify as an overaggressive, “bulldog,” “pit-bull,” “junkyard,” or “Rambo” litigator. Perhaps you’ve already had the misfortune of dealing with such an attorney in a dispute, and have witnessed, first-hand, the harm they can cause. The purpose of this article is to assist in identifying the overly aggressive or “Rambo litigator,” to examine why they act the way they do, to address their approach to litigation and the tactics they employ. This article will provide helpful suggestions to successfully respond to and prevail against such litigator, and to win battles by following the Utah Standards of Professionalism and Civility and the Utah Rules of Civil Procedure.

II. THE “RAMBO” LITIGATOR

Remember Rambo? In the 1980’s, Sylvester Stallone, played “John Rambo,” a troubled, yet heroic, war veteran who finding himself wronged by a small town’s police force, systematically destroys his opponents with overwhelming force. Towards the end of the movie, Rambo destroys the town in a hail of gunfire and explosions and walks away against a background of flames. The Rambo litigator is not nearly as heroic, but can turn any given case into a nightmare.

The Rambo litigator is an attorney who believes that by bullying, acting obnoxious, demeaning and offensive, and employing “scorched earth” practices, he or

she will crush any opposition and win the case. Their intent is to create confusion and disorder in a case and thus distract opposing parties and counsel from the facts and real issues. Such individuals are often over-competitive, aggressive, blaming, and unstable individuals, with poor anger management skills and a lack self-perspective. They rarely recognize themselves as the source of any problem, including the delay in case resolution, increased costs, and/or unfavorable rulings and outcomes for their clients. For a Rambo litigator, it is always someone else's fault.

III. CIVILITY: THE HALLMARK OF PROFESSIONALISM

The word "incivility" is derived from the Latin *incivilis*, meaning "not of a citizen."¹ Incivility is a general term or category regarding social behavior, and includes lacking good manners, rudeness, antagonism, chronic anger, or a general lack of respect for others. Rambo litigators aren't alone in acting uncivilly.

A. The Decline of Civility.

Civility is a concerning issue in America. In 2010, Weber Shandwick and others released their first annual *Civility in America: A Nationwide Survey* to gauge the American public's attitudes toward civility and gathered experiences of incivility in a variety of areas of American society and daily life. The 2013 study concluded:

Without a doubt, America has a civility problem. Each wave of Civility in America reiterates the unfortunate fact that incivility is ubiquitous; no area of American society is untouched. Eroding civility is harmful to our country's future and takes a toll on how we interact with the people and institutions around us. The belief that America has a civility problem and that civility will get worse has not waned.... In fact, it has become our

“new normal.” Americans’ experiences with incivility add a noticeable disturbing dimension, particularly as we see the Internet increasingly identified as a cause of incivility.²

The 2013 study reported that; Americans encountered incivility an average of 17.1 times per week (an average of 2.4 times per day), 95% of respondents believed there is a civility problem in America, 81% believed uncivil behavior is leading to an increase in violence, 71% believed civility is worse compared to a few years ago, and 70% believed incivility has risen to crisis levels.³

B. Declining Civility in the Legal Profession.

Where many seasoned attorneys reminisce about earlier days when the legal profession was more highly esteemed and revered, the modern practice of law has arguably become more uncivil and, in some circumstances, dangerous to practitioners. Now, it is not unusual to hear or read about some act of violence against attorneys and/or judges. Where violence from outside the legal profession clearly inflicts serious injury to local legal communities nationwide, and has increasingly required attorneys to become more watchful of danger inside and outside the workplace, incivility from within the legal profession presents, perhaps, an even greater danger to the profession as a whole. After all, who can expect the public to respect a profession that does not respect itself?

In 2006, Judge Christine M. Durham stated:

The consequences of incivility are grave—it increases litigation costs, fails to promote clients’ legitimate interests, and diminishes the public’s respect for the legal profession and its ability to benefit society. Our profession has by tradition been a learned and respected one, but respect must be constantly earned and deserved. Public trust and confidence in the American system of justice depend in significant part on the integrity and

high standards of professional behavior to which every lawyer (and judge) should aspire.⁴

From January 17th through February 17th, 2006, the Utah Bar Association conducted the first statewide survey of violence against the legal profession in the United States.⁵ The results of the Survey presented a surprising picture of the level and kinds of violence experienced by members of the Utah Bar. The Survey received a total of 984 responses out of the then 8,745 members of the Utah Bar, which represented 11.25 percent of its total membership.⁶ Of the 984 responses, 452 or 45.9 percent of the total respondents reported that they had been threatened and/or physically assaulted at least once.⁷ Even more concerning was the fact that 27 incidents of threats and/or violence came from opposing counsel. Some reported examples included:

- Hit by opposing counsel in a deposition, required a hospital visit.
- In the heat of the moment after a hearing where opposing counsel lost, opposing counsel grabbed me by the tie and tried to drag me out of [the] courtroom to discuss the matter further.
- Opposing counsel suggested we step out into the parking lot to settle the matter at issue.
- In the federal court house . . . I was threatened by oppos[ing] counsel in an elevator with a weapon.
- Opposing counsel chest-bumped and threatened to “deck” me.
- Opposing counsel made threats against counsel and client suggesting damage to property and person . . . attorney subsequently disbarred.
- On one occasion I was physically assaulted by another attorney outside my office.
- During settlement negotiations in a business fraud case, opposing counsel (a large male) shoved everything off the conference table, raised his fist, and began threatening myself and my colleague (a petite woman) from about six inches away.

Similar statewide surveys of violence against the legal profession have been conducted in Idaho (2008), Wyoming (2012), Oregon (2012), Nevada (2012), Arizona (2013), New Mexico (2013), Nebraska, Kansas (2013), Iowa (2013), North Carolina

(2013), Mississippi (2014), North Dakota (2014), and Michigan (2014). These surveys document numerous accounts of incivility among legal professionals.

IV. THE “RAMBO” LITIGATOR’S APPROACH TO LITIGATION

The method most attorneys apply to litigate a conflict is instilled in them through law school training, and has been characterized by Leonard Riskin, Professor of Law at the University of Florida Levin College of Law, as “the lawyer’s standard philosophical map” (“standard philosophical map”)⁸ This philosophical map is governed by two significant assumptions; 1) that disputants are adversaries, where one must win and one must lose, and 2) disputes may be resolved through the application of law to facts of a given case.⁹

In the practice of law, the assumptions of the standard philosophical map are encouraged through regular application, the legal process itself, and procedural rules and the professional standards. With these experiences and standards, attorneys apply themselves to a given case by primarily behaving in an evaluative manner, focusing upon the parties’ rights and duties under the law, determining the strengths and weaknesses in legal positions, and deciding how to exploit these positions to the clients’ advantage. Victory by attorneys on both sides becomes solely defined by the size of the monetary judgment.¹⁰ Unfortunately, Rambo litigators apply the standard philosophical map to the extreme, where victory is often nothing less than prevailing at all costs.

One of the most serious pitfalls of Rambo litigators is the employment of contentious tactics to achieve “victory.” While some of these tactics are not inherently inappropriate, others – and the methods in which a Rambo litigator employs them – both

violate the Utah Standards of Professionalism and Civility and can be destructive in any given case. These contentious tactics generally include:

Gamesmanship. Gamesmanship is far too common in the practice of law, and is regularly employed with the hope of pushing the other party and their counsel off balance. Some common examples of gamesmanship include preparing and filing a complaint which contains unfounded allegations in order to increase the cost of litigation, serving unnecessary discovery requests, the failure or refusal to provide requisite discovery responses, delay, name calling, offensive statements, etc. Attorneys regularly see through these tactics, resulting in a rapid escalation of the dispute.¹¹

Shaming. Shaming is the act of causing another to feel the emotion of shame, often by publicizing inappropriate conduct. While shaming is a highly effective way to obtain compliance with social norms and the standards of practice, it often backfires. If a party perceives the shaming as unjustified, it can result in anger and aggression, and damage the relationship between the attorneys and parties.¹²

Persuasive Arguments. There is nothing necessarily wrong with attorneys advocating their clients' position to a limited extent in mediation. However, according to experienced mediators, the most persuasive communicators in mediation spend about ten percent of the time advocating their viewpoints.¹³ When attorneys focus too much on advocating positions in mediation, they present to the mediator as if the mediator were a judge, and attempt to persuade the mediator that their position is correct. In doing so, they often overlook the interests of the other party, and lose site of the fact that it is the other party and not the mediator who needs to be persuaded.¹⁴

Threats. In order for a threat to be effective, the harm must be worse than any gain from compliance, and it must be credible. Threats can be very effective, costs nothing if they work, can always be reneged, and are often consistent with an individual's sense of justice. However, threats are generally resented and often destroy relationships by creating distrust. Fulfilling a threat can be very expensive and time consuming, and escalate the conflict.¹⁵ Moreover, if one makes a threat and doesn't follow through, there is a loss of credibility.

Coercive Commitments. Coercive commitments are escalated threats, indicating "I have started doing something that punishes you and will continue doing it until you conform to my wishes." This tactic is similar to playing the "game of chicken," where both parties may be substantially harmed if one party does not relent. The weaker party is generally in the stronger position, especially where the weaker party has "nothing to lose."¹⁶ For example, in a divorce case, one party might threaten the opposing party to either accept an unfair settlement offer or all joint assets will be spent to fight any different division of assets.

Violence. It is never appropriate behavior of an attorney to initiate or instigate violence. Unfortunately, it does occur. It goes without saying that violence in mediation is unlikely to promote resolution.

V. THIRTEEN HELPFUL HINTS TO DEAL WITH DIFFICULT OPPOSING COUNSEL

The following list of suggestions are presented to assist practitioners to cope and deal with the Rambo Litigator:

1. Recognize that you are dealing with a Rambo Litigator;

2. Identify the contentious tactic/s being employed;
3. Stay calm in the face of uncivil behavior and contentious tactics;
4. Do not respond to uncivil communications immediately;
5. Do not respond to Rambo Litigators' incivility in kind;
6. Know the Utah Rules of Civil Procedure and carefully consider your recourse options;
7. Do not make the case personal;
8. Continue to focus on the merits of your case;
9. Document your actions and responses in writing;
10. Do not be afraid to expose bad behavior and dirty tactics;
11. Pick your battles carefully;
12. Don't be so concerned about the battle that you lose the war; and
13. Remember that Rambo Litigators' behavior and tactics are signs of weakness.

VI. WIN BATTLES AND YOUR CASE BY FOLLOWING THE STANDARDS OF PROFESSIONALISM AND CIVILITY AND KNOWING THE RULES OF PROCEDURE

Every state has established some form of agency or organization for the purpose of setting ethical and/or civil guidelines for its legal community and to investigate complaints and provide discipline as necessary. Regardless of such efforts to monitor the legal profession, it is unrealistic to rely on organizations or the courts to “force” members of the profession to “be good” and act civilly with one another. Where such organizations are clearly a necessity to protect the profession from egregious acts of incivility; these organizations act more as the teachers of ethical principles and measure

the minimal requirements an attorney needs to retain without sanction. A more realistic approach to halting the decline of civility and professionalism, and in turn, working to change the public perception of the profession as a whole begins with the individual, and a commitment to recognized principles. Even a few shining stars can brighten an otherwise black night. Applying the following principles will greatly promote professional civility and deal with Rambo Litigators.

A. Know and Follow the Utah Standards of Professionalism and Civility.

Aside from state bar disciplinary codes, an ever-increasing number of states have established standards of professionalism and civility. Personal civility in the practice of law defines the individual as well as the practice as a whole. Where some attorneys might believe that choosing to ignore or selectively apply civility and ethical standards in a given litigation will give them “the edge,” and help them win, and/or provide the attorney greater prestige, such is not the case. As discussed by Justice Richard D. Fybel of the California Court of Appeal, for District Four, Division Three (Santa Anna):

The unethical lawyer is not trustworthy and is not trusted. The ethical lawyer will establish a reputation among judges and his or her representations will be relied upon.

The Rambo, ethical-challenged lawyers are not better lawyers and do not achieve better results for their clients. Persuasion is the lawyer’s art and skill. Lawyers need to persuade someone – the other side, a court, or an agency, or their own client. People are not persuaded by obnoxious or unethical tactics. Intimidation is overrated as a litigation tool. It does not work in the widest range of my experience – from business cases to criminal pleas and trials.¹⁷

Where unethical and uncivil conduct may bring an immediate reward for some attorneys, starting down such a road does not further one's career in the legal profession, but instead tends to inevitably lead to well-deserved conclusions: a bad reputation and disrespect in the legal community, sanctions and/or disbarment, and potential criminal prosecution. The benefits of following ethical standards become more evident the longer one practices law. The ethical attorney's client base expands and current and former clients as well as other attorneys refer new clients. Not to be forgotten, but often overlooked, is the personal well-being of knowing that one's integrity remains intact when ethical standards are maintained.

B. Avoid Uncivil and Offensive Communications.

The central role of an attorney is the ability to communicate and express his or her clients' legal positions. This role seems to continually expand as communication technology moves ahead. During a typical day an attorney may be required to generate draft filings, memorandum and letters, meet with clients, respond to emails, and make phone calls on their cases, and appear in court to represent clients. It is likely that in all of these daily communications, there will be an uncivil and/or offensive communication from an opposing attorney – this might be inadvertent, and at other times it might be intentional. When this occurs, an attorney always has an option for a response, and it can be easy to fall into the trap of responding to offensive communications in kind. Resolve not to respond offensively. Remember, unprofessional communications from another attorney does not justify a reciprocal response. Such communications do not prove a case and judges don't want to read it or hear about it.

Rambo Litigators believe that the use of offensive language or a harassing communication to browbeat opposing counsel into submission is a useful method to prove their case; however, the truth is that this tactic almost always fails. In most cases uncivil communications are counterproductive, create bad feelings between counsel, cause opposing counsel to react and strengthen their resolution to “fight-it-out” in a given case, and inevitably lengthen the time it takes to otherwise come to the same outcome that the case would have had if the uncivil communications never occurred.

Two personal experiences stand out in my mind as good examples of how to react to uncivil communications. Soon after graduating from law school, I attended a hearing on a particularly hostile case, where during oral argument a relatively new practicing attorney verbally attacked opposing counsel, a seasoned attorney, with demeaning and offensive comments. Instead of retaliating in kind, counsel responded calmly; “Your honor, I am unaccustomed to this method of practicing law, and I will focus my arguments solely to the case at hand.” Although I do not remember a single fact about the case, that seasoned attorney’s response comes to mind any time that I perceive some needlessly hostile or offensive communication from opposing counsel. Incivility does not prove or win a case.

During the course of civil litigation some years ago, a partner in our office received a seemingly never-ending stream of letters from an opposing associate attorney which repeatedly misrepresented the facts of the case, and the court’s rulings and orders. All of these actions appeared to be an attempt to create a false paper-trail and to trick our firm into making concessions and agreements if we did not respond to each letter

individually. After several weeks of responding to these letters, the partner in our office decided enough was enough, and instead of responding hostilely, he wrote a respectful letter to the opposing lead attorney on the case, informing him that our office would not agree to any statement or respond to any further communications made by their associate. The uncivil communications immediately ceased, and the case moved to conclusion.

C. Extend Common Courtesies to Opposing Counsel.

Permitting professional courtesies – such as allowing reasonable extensions on deadlines, working with one another’s schedule, or even calling opposing counsel when a deadline passes without a response to remind them of the matter – goes a long way in the practice of law, even when dealing with a Rambo Litigator. Where a short-sighted attorney might believe there is a benefit in attempting to blindside opposing counsel with deadlines and forcing them to seek relief from the court for otherwise reasonable extensions, it is more likely that such efforts will only create needless work and animosity between counsel. A Utah attorney related an experience when opposing counsel called and requested an extension of a discovery deadline. The conversation supposedly went something along these lines:

“I know that the deadline is today, but I was wondering if I could get an extension until next Friday.”

“The court’s deadline provided plenty of time.”

“But you don’t understand—“

“You still have the rest of the day to get the discovery responses completed. That’s plenty of time.”

“But you don’t understand—”

“If you want an extension file a motion.”

“I’ve just been appointed as a district court judge.”

“. . . How much time do you need, your honor?”

Remember, what goes around, comes around. When one fails to give common professional courtesies it is unlikely that the same courtesies will be returned.

VII. DOCUMENT BAD BEHAVIOR AND DIRTY TACTICS

Finally, document the Rambo Litigator's bad behavior and dirty tactics in case there is a need to bring the issue/s before the court. If the bad behavior is occurring in a deposition, put it on the record. If it's occurring in writing, make sure you keep a copy. If it's over the phone, consider a confirming letter identifying and even quoting the inappropriate statements made. The purpose of doing this is not to respond in kind, but to make sure a record exists to address the Rambo Litigator's incivility if appropriate and necessary.

The Utah Standards of Professionalism and Civility do not lack teeth. The court can impose sanctions when an attorney acts uncivilly. In *Peters v. Pine Meadow Ranch Home Association*, the Utah Supreme Court refused to address the merits of an appeal because one party's briefing was "replete with unfounded accusations impugning the integrity of the court of appeals panel that heard the cases below."¹⁸ The Court found that the attorney's attacks were a violation of both standards 1 and 3 of the Utah Standards of Professionalism and Civility, and stated: "Had counsel in the cases at bar observed these standards, he and his clients would not have incurred the severe sanctions we impose today." The United States District Court for the District of Utah has similarly acted to enforce the Utah Standards of Professionalism and Civility. In *Goff v. Utah Funding Commercial*, Judge Dee Benson entered Rule 11 sanctions against counsel, in

part, for asserting that opposing counsel was lying and implicating opposing counsel had fabricated evidence.¹⁹

VI. CONCLUSION

Preparation and patience makes all the difference in dealing with the Rambo litigator. Identifying Rambo litigators and the tactics they employ, while remaining true to the Utah Standards of Professionalism and Civility and the Utah Rules of Civil Procedure, works towards resolution, advances the clients' cause, protects and enhances your reputation, and avoids unnecessary and uneconomical waste.

¹ See Dictionary.com, available at <http://dictionary.reference.com/browse/incivility>.

² Civility in America (2013), available at http://www.webershandwick.com/uploads/news/files/Civility_in_America_2013_Exec_Summary.pdf.

³ *Id.*

⁴ Christine M. Durham, *Promoting the Standards of Professionalism and Civility*, 19 Utah Bar J. 8 (Nov/Dec. 2006).

⁵ Stephen Kelson, *Violence Against the Utah Legal Profession – a Statewide Survey*, 19 UTAH BAR J. 4, July/Aug 2006, at 8.

⁶ *Id.*

⁷ *Id.*

⁸ Chris Guthrie, *The Attorney's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Attorneying*, 6 HARV. NEGOTIATION L. REV. 145, 155 (Spring 2001).

⁹ *Id.*; see also Leonard L. Riskin, *Mediation and Attorneys*, 43 OHIO ST. L.J. 29, 36 (1982).

¹⁰ Riskin, *supra* note 9, at 44.

¹¹ DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 63-84 (3rd ed. 2003); see also Stephen Potter & Frank Wilson, THE THEORY AND PRACTICE OF GAMESMANSHIP: THE ART OF WINNING GAMES WITHOUT ACTUALLY CHEATING (1948). Arguably, the hierarchical order of contentious tactics may differ based on how they are employed.

¹² *Id.* at 69-70.

¹³ Betsy A. Miller and David G. Seibel, *Untapped Potential: - Creating a Systematic Model for Mediation Preparation*, DISP. RESOL. J. 50, 53 (May/July 2009).

¹⁴ Tom Arnold, *Common Errors in Mediation Advocacy*, 13 ALTERNATIVES TO HIGH COST LITIG. 69, 70 (1995).

¹⁵ *Id.* at 71-75.

¹⁶ *Id.* 75-79.

¹⁷ Justice Richard D. Fydel, *Honest Lawyers Makes Good Lawyers: Thoughts on Ethics and Civility in the Legal Profession*, 19 UTAH BAR J. 7, Nov/Dec 2006, at 11-12.

¹⁸ *Peters v. Pine Meadow Ranch Home Association*, 2007 UT 2, ¶ 1, 151 P.3d 962.

¹⁹ *Goff v. Utah Funding Commer., Inc.*, 2009 U.S. Dist. LEXIS 112098, 8 (D. Utah Nov. 30, 2009)