

Dealing with High-Conflict Counsel: An Interview with Bill Eddy

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Perhaps one of the most difficult aspects of practicing law is an early assessment of the parties to the disputes. Although family law practitioners often expect emotions to run high in representation, none of us are immune from the presence of a highly-charged client. However, an emotional client is one species while one with a “high-conflict personality”—an HCP—is quite another. Couple this irrational personality with an HCP attorney who feeds the fuel and carries the torch for the HCP client, and you may find the challenge beyond your expertise. To my knowledge, there is at least one source of guidance: attorney/mediator/social worker **Bill Eddy**.

Last year, Eddy, author of the books *High Conflict People in Legal Disputes*; *Splitting*; *Managing High Conflict People in Court*; and the newly-released *Its All Your Fault!*, provided NCBA members [with a seminar] with an inside view to the litigation personalities who focus on finding and eliminating their adversaries. In a recent discussion with Bill, I learned that he has been getting more questions from attorneys and judges who attend his seminars about dealing with high-conflict counsel. With the new civility standards in California since last July, the topic is ripe for discussion.

Q. Bill, in a nutshell, what is the definition of a high-conflict personality?

Basically, when a person has a high-conflict personality, he or she is stuck in conflict. It’s part of who they are. The issue’s not the issue. They will just find another issue to fight about the same way. It’s how they routinely think, feel, and act. Because it’s part of their personality, they can’t see it. They can’t see that their behavior is out of line or “over-the-top.” It feels necessary and normal to them even though everyone around them can see that the person—who I call an HCP—is acting very inappropriately. It’s hard to believe, but they really lack self-awareness of how inappropriate they are. And you can’t “make” them see it like you can’t make a blind person see. HCPs just get defensive when you give them negative feedback, and often escalate the conflict even more.

Q. How can we determine if opposing counsel’s lack of civility is fostered by their own high-conflict personality, as opposed to zealous representation? In other words, in practice, what kind of behavior, or series of behaviors, should we view as “red flags?”

The biggest sign is whether they can turn their aggressive behavior on and off to appropriately fit the circumstances. If they are always

aggressive—even when it hurts their client or themselves—that is a sign they can't stop themselves. It's this lack of self-awareness that's key; e.g., if you can't even talk to them reasonably on the phone; if they always make it personal with personal attacks or public rebukes of you or your client; if they have emotional outbursts they can't control; when they can't even make a settlement proposal or respond to one; if they "project" their own behavior onto you and blame you for acting in ways that *they* are really acting; or if they tell the judge that you're being uncooperative or not communicating. These are all signs of a high-conflict personality and predictive of future uncivil behavior.

Q. How do we effectively deal with opposing counsel when we are faced with this situation?

I believe there are at least four key points:

1. Don't take it personally. This high-conflict behavior isn't about you. It's about the high-conflict person, the HCP. If you get emotionally hooked, you are likely to feed the conflict and look like an HCP yourself. Don't respond to every inappropriate challenge of high-conflict opposing counsel. You don't have to defend yourself. You will become exhausted.
2. Don't counter-attack in the same aggressive manner because, if you do, they will use it against you. HCPs are far more clever at blaming people than most reasonable people are. And, for a while, you will look bad to your client, to the court, and perhaps to other professionals (especially if they don't know you). The key, I believe, is in staying reasonable and unaffected even when the HCP is pushing your buttons. Display calm confidence in the face of the HCP's histrionics.
3. Instead, be very assertive in the case. Keep the pressure on for settlement. Keep preparing

for court, if necessary. Keep writing settlement letters and preparing court documents. Let opposing counsel know that you are not going to back down based on dramatics. Know more about your case than anyone else. Stay focused on the facts and who needs to hear them. Do your homework and keep the information pressure on. Then, you retain your credibility in front of your client, in front of the court, and in front of the opposing party. Be the one who stays focused on information rather than emotion.

4. Don't pressure your client to settle just to get the case over with. Keep informing your client of the realities of the situation and let the client decide what to do. Don't feel that you have to prove anything to your client or to opposing counsel. It's not about you. Let your client know that you are dealing with opposing counsel with a reputation for being "difficult." But don't go into greater detail or you risk being considered uncivil yourself. Many cases with high-conflict opposing counsel never settle, so be prepared from the start to go to court.

Q. Are there disciplinary measures in place for HCP counsel?

Unfortunately, the new civility standards don't have any teeth. They are voluntary. This shows a deep misunderstanding of the problem of HCPs. About 15% of the general population appears to have high-conflict personalities, and this means that they can't stop themselves. This means that it often takes consequences to have any impact on their high-conflict behavior.

Just suppose, for the sake of discussion, that 15% of lawyers are HCPs. This means that 85% are able to act fairly reasonably and able to manage their own behavior in a civil manner and don't need civility standards to know what's appropriate and what's not. It's the 15% who need it spelled out for them who need these standards, but they aren't going to follow them

or change their own behavior unless they have to.

I believe there needs to be an enforcement mechanism before you will see a positive change in civility in our profession. Especially since HCPs are increasing in our society at large, I believe you will see more, not less, in our profession unless there's some enforcement.

On the other hand, there was a very recent appellate court case in which the attorneys had consequences. They were personally sanctioned for pursuing a frivolous appeal in which the court stated:

“An attorney in a civil case is not a hired gun required to carry out every direction given by the client. . . . As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. . . . Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client. In re Marriage of Gong and Kwong (2008) 163 Cal. App. 4th 510, 521.”

Perhaps, with cases like this, HCP opposing counsel will be a little more careful about reinforcing their HCP clients in engaging in high-conflict behavior designed to harass reasonable parties and their counsel.

Q. If you were to introduce programs for MCLE Ethics, what topics do you believe would be the most beneficial to counsel?

I can think of several things. First would be to understand the brain research on how emotions are contagious. Just in the last few years, a lot has been discovered which helps explain why we get emotionally hooked by clients and by

high-conflict professionals. Understanding these dynamics can help us avoid getting emotionally hooked, which happens a lot in these high-conflict cases.

Second would be teaching alternate methods of responding to high-conflict parties (and many these days don't even have an attorney) and high-conflict counsel so that these cases don't just spin out of control with everyone over-reacting to everyone else. Communicating effectively to calm down the conflict rather than escalating it. Calming high-conflict clients on both sides should be part of what we do, and it's now part of the civility standards, at least in family law.

Third would be addressing the issue of “professional splitting” in which opposing professionals start to hate each other and make the dispute personal. This is predictable when one or more parties with a high-conflict personality are in a case, and avoidable. Checking out rumors. Speaking directly. Not seeing the case or the parties as “all good” versus “all bad.”

Lastly, looking at developing real consequences for uncivil behavior and how we as a profession can set limits on our peers instead of tolerating incivility. Also, looking at how the courts can sanction the extremes without alienating the profession as a whole. Without consequences,

this problem will continue to increase. We're already seeing that. That's why we're talking about this today.

Bill Eddy is Certified Family Law Specialist in San Diego and the President of the High Conflict Institute (www.HighConflictinstitute.com) He has given seminars to attorneys, mediators, judges and others on the subject of handling high conflict personalities in 20 states, several provinces in Canada, France and Australia. He continues to provide divorce mediation services as the Senior Family Mediator at the National Conflict Resolution Center in San Diego.