



Dial Back the Vitriol

WHEN I STARTED MY MEDIATION PRACTICE MORE than 20 years ago, I hoped to leave behind some of the gamesmanship and uncivil behavior I'd become accustomed to as a litigator. I figured that inserting one cooler head into the dispute resolution process would help the parties work past stubbornness, anger, or resentment.

Sometimes, maybe even most times, that's the way it works. But I've also come to wonder whether the mediation process has made things worse with respect to attorney civility.

For example, before the first session in a recent case with four lawyers, I called each of the lawyers to get acquainted. After telling me about his client's injuries and his legal theory, the plaintiff's counsel launched into attacks on the integrity or competence of each of his adversaries: One was churning the case to increase his billings, so he'd never settle; the next was "untrustworthy" and would hide evidence; and the third just "didn't know what she was doing." Not surprisingly, in my ensuing calls with defense counsel, each told me—in language of varying degrees of saltiness—that the plaintiff's counsel was impossible to deal with.

I've gotten used to this practice of a lawyer taking the mediator into his or her confidence, hoping to skew the neutrality of the neutral. Indeed, this dynamic is even more pronounced when I mediate disputes out of town: Each of the lawyers will take me aside to "educate" me about how things work in their community. This is not only ineffective, it's bad lawyering: harmful to the process, to the clients, and to the reputation of the legal profession.

Even before mediation became common, cases usually settled—often on

the eve of trial. Since settlement was so likely, no matter how heated the litigation, lawyers remained sensitive to preserving lines of communication with their adversaries. This reality benefited counsel as well as their clients: Both sides knew that at some point they would likely be exploring a deal, so civility and mutual respect prevailed.

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Attorneys need to realize that those considerations are still critical today.

As a mediator I am committed to the deal, to reaching a resolution that everyone can live with—and more than 90 percent of the time, it works. After all, the reason the parties are in mediation is to settle. If lawyers would embrace this reality, they might dial back the vitriol; aggressive posturing only encourages clients to dig in their heels, particularly when they hear their counsel declare that the other side is being unreasonable.

Equally important, when lawyers impugn each other's integrity or competence, they simply feed a monster: the negative image of our profession. Most research shows that although the public has a low opinion of lawyers in

general, clients like and respect their own attorneys. However, when one advocate talks about what a jerk or fool another is, it only serves to reinforce a low opinion of lawyers in general.

But being a jerk to the other side somehow seems acceptable, since everybody knows that when it comes time to discuss settlement, the mediator will manage things. He or she will rephrase provocative language into words designed to promote settlement. "F--k 'em," for example, might be conveyed as, "They're looking for movement from your side." Thus, we are left with the irony that mediation—designed to conduct negotiations in a highly civil

manner—sometimes does not promote civility among lawyers and may even enable the rude, unreasonable, and unprofessional attorneys among us.

Mediation is here to stay because it works. But we have to think of it as one tool to resolve cases, not the only tool. As various civility initiatives preach, adhering to a "Golden Rule" approach at every stage of litigation and every phase of a transaction will make us a healthier profession. And that applies especially to mediation. If we are willing to respect each other—knowing that we can effectively represent our clients and still be colleagues—we can do deals and be better lawyers at the same time. [▶](#)

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