Civility and the Mediation Process

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An argument can be made that civility is more critical to the mediation process than to any other form of dispute resolution. The reasons are several: First, unlike trial and arbitration, success in mediation depends entirely upon adversaries reaching an agreement. Mediators have no power to impose a particular result, and while some courts direct parties to use mediation along the way, the process is entirely consensus-driven. No agreement; no deal. To no surprise, civility plays a key role in drawing people toward a consensus, while incivility has the opposite effect.

Second, a wealth of recent behavioral studies of client and attorney decision-making show that lawyers *and* clients often develop unduly optimistic view of their realistic litigation prospects, often with unfortunate consequences.[1] As these studies reveal, clients predict their chances of success with levels of confidence that defy mathematic principles and common sense. In turn, they often turning down pre-trial settlement opportunities only to incur much less attractive adjudicated outcomes – both for clients and counsel-client relationships.

Third, other psychological studies -- by no means unique to lawyers and litigation -- reveal patterns whereby we all seek out reaffirming information and discount contrary data. A recent historical example was the controversy over whether Iraq under Saddam Hussein was actually accumulating weapons of mass destruction. Threads of information were pieced together to support the conclusion that Hussein was doing so, while contradictory information was discounted along with the people raising such doubts. Often referred to as cognitive dissonance, this phenomenon impacts all of us, particularly under adversarial and stressful situations, where the contrary position and the adverse parties are discredited in favor of our rosier predictions.

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[1] See, Donna Shestowsky, J.D., Ph.D., University of California, Davis School of Law, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, Iowa Law Review, Vol. 99., No. 2, 2014, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=402976 ; Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision-Making for Attorneys and Clients* (Springer 2010), pp. 29-48; Jane Goodman-Delahunty, Par Anders Granhag, Maria Hartwig, Elizabeth Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, Psychology, Public Policy, and Law, Vol. 16, No. 2, 133-157 (American Psychological Association); Mark LeHocky, *Navigating the Litigation Conversation: Confessions of a Litigator Turned General Counsel Turned Mediator*, Best Law Firms 2016, 6th Edition, U.S. News & World Report, www.issuu.com/bestlawyers/docs/blf2016-cover-elements/52?e=3342698/30903449

Now link all these phenomena to the mediation process: Lawyers and their clients approach mediation with rose colored glasses and a proclivity to undervalue the other side's position (also known as reactive devaluation), and no one can make you do anything – not the mediator; not anyone. With these phenomena in mind, civility is indeed critical to success – in initiating the mediation process, in presenting your position, and in conducting the mediation session. Each of these three phases is worth separate mention:

Commencing the mediation process:

Short of being ordered into mediation by a court process, the failure to maintain a civil discourse is often the biggest impediment to simply initiating a mediation. Having served as the general counsel of different companies before switching to full-time neutral work, I have encountered several instances where our own counsel warned that mediation – particularly earlier in the life of a dispute – would be a pointless exercise precisely because the other side was incapable of being civil. Each instance involved detailed accounts of slights or obstreperous behavior on the other side, often accompanied by extreme pessimism about the opponent's ability to hold a reasonable conversation.

However, we decided to plow ahead anyway with mediation, trusting our team and the mediator to maintain decorum as well as focus the conversation on a realistic discussion of strengths, weaknesses, alternatives and tradeoffs. These efforts consistently bore fruit, immediately if not soon thereafter, contrary to the prior predictions of unruly behavior and unreasonable adversaries. Obviously, maintaining a civil discourse from the outset is the best set up to a productive mediation. But even in the face of prior incivility (on the other side *as well as* your own), the mediation forum can provide a fresh opportunity to civilly engage with the other side with the aid of a skilled neutral.

Presenting your case:

Remembering that mediations depend upon reaching agreement, and that counsel and clients start out with rose-colored glasses as well as an unfavorable view of your side's position, imagine the likely impact of a mediation brief laced with invective as to parties and their positions. Briefs maligning the other side's intentions and truthfulness, as well as those brimming with words like "frivolous", "specious", "baseless", "fraudulent", are rarely if ever effective in changing the adversary's perspective. Rather, such assaults typically only prompt the adversary counsel to reply in kind. Name calling and efforts to defend your honor trumps a rational discussion of stronger and weaker points, as the exercise devolves into both sides focusing on the slights and affronts rather than the merits of the dispute. So what to do?

First and foremost, leave the incendiary language at home. Focus on the essential elements of liability and damages – what's there and what's missing – and concurrently exercise the discipline to only argue what truly matters. Here again, the tendency to address or revive satellite disputes or minor points typically only dilutes your presentation. Strong points are lost

in the mire of arguing everything, and even worse, the minor points can be a distraction for the mediator as well as the progress of the mediation.

Second, share your brief with the other side. While some courts mandate such exchanges, other courts and regional practice may not. Do it anyway. If your purpose is to convince the other side to settle, this is one of your best opportunities to do so. Concurrently, holding back your best arguments or evidence rarely makes sense. Despite the occasional protests that one side needs to hold their "smoking gun" in reserve, rarely does that protest hold up to scrutiny. To the contrary, cases settle because the parties have exchanged more, rather than less.

Having said that, there are occasions when one side wants to share something particularly significant yet incendiary with the mediator. In most situations, counsel can do so with the side letter sent only to the mediator with the admonition that it is for the mediator's eyes only. The side letter avoids inflaming the dynamic with the other side, and provides the mediator an advance look and chance to prepare for a tricky issue.

Civility at the mediation session:

Practicing civility at the mediation session also produces unmistakable dividends, starting with your credibility with the mediator. While all mediators take pride in our neutrality, uncivil behavior directed at the adversary client or counsel or the mediator is sheer madness. While your mediator does not decide your case, she or he will be positively or negatively impacted by the tone and level of professionalism counsel and their clients exhibit, with positive or negative effects on the mediation session. As importantly, an uncivil tone or attacks directed to the adversary clearly impedes the other side actually absorbing what you want them to hear.

Interestingly, the fear of uncivil exchanges has prompted many attorneys to avoid joint sessions altogether. But think about this tradeoff as an advocate: The joint session may be your first and only opportunity to speak directly with lead counsel and key decision makers about strengths and weaknesses, freed from concerns that your conversation can and will be used against both sides. This is also your opportunity to show that you are not the demon or simpleton that maybe, just maybe, you have been described to be by adversary counsel. This is also your opportunity – shorn of invective and affronts -- to tell the compelling story that you will lay out to a judge, jury or arbitrator if the case does not settle. Properly executed, this type of presentation should impact the mediator's assessment, and with the mediator's input, should prompt the adversary to reevaluate their position. It takes poise, discipline and confidence – all delivered in the most civil tone in order to increase the other side's absorption. But isn't this what you have been trained to do?

Keeping in mind that well over 90% of all filed civil cases never go to trial or arbitration (the percentage is even higher in federal court), the reality for most litigators is that you spend more time directly negotiating and mediating that trying or arbitrating disputes. Practicing civility throughout the life of dispute – and particularly through the mediation process – is key to your own success as well as the fortunes of your client.

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