



Bullying the Bully with Mediation: Extortion or Blessing?

By: Gary S. Davis, Esq.

With increasing frequency, lawyers throughout the country are handling bullying cases. I have mediated matters and followed highly publicized cases where students were the targets of videos posted on social media that spewed hatred and conveyed racially or ethnically threatening material, sometimes even using the student's name. Attorneys consulted by these victims of cyberbullying often seek monetary compensation from the bully, the bully's parents, and, at times, the school where both the bully and the victim are students.

Beyond school years, bullying can happen in a number of contexts. There are reports of attacks in the workplace that are often personally directed and may include bullying that is racial or sexual in nature, creating toxic work environments. Bullying can occur during business negotiations or within social groups or clubs. The misconduct of coaches or doctors of athletes, even at the university level, has become commonplace. The same is true of media or entertainment executives whose bullying activities sometimes constituted criminal assault. The victims are male or female, teenage school students, or sophisticated adults.

These bullying situations can happen through cyber or social media activities or in person and are often perceived by the targets as threatening to their safety.

In addition, such activity often damages the victims' reputation. At times, acts of bullying can involve criminal conduct, as well as civil wrongdoing. How can the victim's attorney stop the bullying and also maximize a monetary recovery for his or her victim client? How can the alleged bully preserve privacy? And do so quickly.

Experience indicates that these circumstances cry out for the opportunity for both sides to take part in the confidential remedy afforded by mediation.

At times, actual damages are difficult to quantify. There are usually limits to what the accused will pay to preserve privacy. Once the victim has filed the civil lawsuit, privacy is gone and so is the ability for the victim to obtain what might have been a favorable recovery. Often damages are based solely on emotional distress with no economic loss. Emotional harm can be significant, and in some cases, damages can be substantial. However, damage assessment requires obtaining knowledge of the alleged bully's financial status, family or employer. It is probably no revelation that most teenage students do not have the ability to favorably respond to settlement demands of substance. But parents in some states can be held responsible for the intentional torts of their children (in California – up to \$25,000).

In my capacity as mediator, I have observed cases where innocent parents of a not-so-innocent child

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bully were politicians, actors or highly placed business executives who had reputations to protect at almost any cost. I have seen settlements that involve sums far beyond statutory liability.

Before the filing of a formal lawsuit and resulting publicity, each side should seriously consider other alternatives for resolving the issue. Some accused of being bullies are adamant that they have done no wrong and are not afraid of the publicity. Such accused will want their day in court. This is the way it should be, particularly when the accused bully has not done anything that would cause embarrassment or damage one's reputation. However, when cyberbullying is involved it is often impossible for the bully to deny the basic event.

In other instances, the bully (and those who will be adversely connected) often will relish the opportunity to mediate in an effort to avoid that publicity that would follow a lawsuit being filed. The confidentiality and privacy of mediation lends itself as an alternative to litigation.

Rules regarding confidentiality of a mediation vary from state to state. The careful practitioner may consult the Uniform Mediation Act (UMA). It is commonly agreed that California has the strictest mediation confidentiality rules in the country. California Evidence Code 1119 (a) in essence provides that no evidence of anything said or admission made, or writings submitted, or communications, negotiations, or settlement discussions shall be compelled in any arbitration, administrative adjudication, or civil action. This can be attractive in situations where parties would like to keep the details of the alleged bullying out of the public eye.

In many cases a victim's attorney will send a letter accompanied with a well-drafted, unfiled, proposed civil complaint that sets forth the bullying conduct, the statutes (both federal and state) violated by the conduct and the names of those responsible for damages resulting from the bully's conduct. Often such a letter also names a specific date, in the near future, when the civil complaint will be filed with the court. Having a finite date for the filing acts as a hammer for all sides to be reasonable at mediation.

The victim's attorney must avoid any semblance of the crime of extortion. California Rules of Professional Conduct 5-100 (a) provides: "A member shall not threaten to present criminal, administrative or disciplinary charges to obtain and advantage in a civil dispute." Penal Code 519 is clear, "Fear, such as will constitute extortion, may be induced by threat...if any of the following: to accuse the individual threatened, or a relative of his or her family of a crime."

Those accused of bullying activity often complain at mediation that although there are little or no actual monetary damages, they are being blackmailed or extorted.

While it is true that the desire to avoid adverse publicity is coercive in nature, the willingness to participate in mediation is neither blackmail nor extortion. The opportunity to reach a confidential resolution should be considered a blessing.

In addition to reaching a pecuniary recovery, I have seen many other positive outcomes of utilizing mediation in disputes involving bullying. Mediation may lead to heartfelt apologies or an agreement of the accused and those legally responsible for the acts of the bully to change company policies or to have the bully or those connected to take part in training programs that might avoid there being other victims in the future. Mediation allows for creative remedies, all protected by the veil of mediation confidentiality.

Gary S. Davis, Esq. has over 43 years of experience as a litigator, representing a variety of plaintiffs and defendants. Since joining JAMS in 2006, he has served as a neutral mediator, arbitrator, and discovery referee in matters varying in type and complexity. Mr. Davis has experience with a wide array of matters including business and commercial disputes, employment, cases involving government or public entities, insurance matters, personal injury claims, professional liability, as well as school district and education related cases. He may be reached at gdavis@jamsadr.com.