

# VERDICTS & SETTLEMENTS

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## The COVID-19 pandemic's impact on civility in mediations

By Joan B. Kessler and Tori Hirsch

Last year, I co-authored an article for the Daily Journal titled "Increased Civility Can Lead to Enhanced Success During Mediation." Its main premise is that when counsel are professional and civil to each other, mediations tend to be more productive. During the COVID-19 pandemic, we are being challenged to be civil even though we may be stressed in every aspect of our lives. However, I have observed an increase in professionalism and civility in virtual mediations during this global health crisis.

### Empathetic Listening

Usually, crisis and stress are catalysts for incivility, yet it seems that people are trying harder to be "nice" now in virtual professional meetings. Perhaps people are thankful to be interacting, even via video. There are various ways to assess your own civility and strive to increase it. For example, empathetic listening can promote listening accuracy. By repeating what someone has said through paraphrasing, it may be possible to avoid miscommunication by reiterating what has been said. Making sure to respond not only to what was actually said, but also to what was implied or hinted at, is another way to demonstrate empathetic listening. These active-listening practices often enhance mutual respect and understanding. In conducting virtual mediations during the past couple months, I have observed that people seem to be trying harder to tune in and really hear what is being said.

### Being Less Confrontational May Enhance Settlement Possibility.

"Leaving the hatchet at the door" remains an important component to successful mediations. While counsel may be every bit as aggressive and determined to competently

represent their clients, there now seems to be a more human and caring component in mediations. We are seeing a heightened interest in each other's health and wellness. In virtual mediations, small children or significant others may be present in the background, which can humanize the participants. In fact, in a recent mediation, the mediator commented to counsel, who was worried about the process, that his five-year-old daughter, seen in the background using a virtual platform for kindergarten, might be able to offer assistance. That seemed to reduce the tension of using a new platform.

### How Might We Increase Civility in Mediations During This Crisis?

Civility includes a variety of factors, including politeness. Society has provided us with examples of behavior on both ends of the civility spectrum during this pandemic. Today, people have been mandated to wear masks in public. However, while you may be protecting others around you from being exposed to any communicable illness you may have, wearing a mask may limit their ability to assess your nonverbal facial cues and to fully assess your veracity.

Questions have arisen as to the most civil way to handle some scenarios. A few months ago, people may have eagerly greeted their neighbors; today, people may cross over to the other side of the street when they see someone without a mask. Those who have been in a supermarket recently know the stress of backing off and moving away from people even if they have masks on — just because people are not fully sure how to navigate public spaces safely and politely.

These tricky situations have given rise to examples of extreme incivility. There have been physical altercations caused by someone not wearing a mask. For example, in Los Angeles,

two men were escorted out of a store for failure to wear masks inside of the store. Just before exiting, one of the men punched a security guard, breaking the guard's arm. Also, in Illinois, a man shoved a gas station clerk after being asked to wear a mask inside the store.

A virtual platform can provide a welcome respite from this incivility. For example, though people may not be able to see their families and friends in person, some are engaging more than ever virtually. A video platform provides mediation participants a way to maintain high levels of interaction, including the ability to see people's full faces. In a virtual mediation, everyone is in separate locations, so they can see each other, up close and personal, without masks. The mediator is thus able to assess credibility and veracity. Participants can get "up close and personal" and assess nonverbal cues, eye contact and facial expressions, as well as speak without a mask. Virtual mediation is new to many participants, who seem to be more inclined to demonstrate civility by, for instance, waiting a few extra seconds after someone finishes speaking before jumping in. People are also asking for clarification more often, trying to paraphrase and engaging in

active listening on virtual platforms.

Despite the stresses of our current reality, virtual mediation offers us the opportunity to exhibit even more politeness than in our everyday lives. Virtual mediations seem to have increased civility through more humane interactions and increased movement toward settlement.

In this time of tremendous stress, communication skills training and awareness of the benefits of civility in mediation are more important than ever. This includes MCLE seminars. There is an upcoming Women Lawyers Association of Los Angeles (WLALA) seminar, *Civility and Professionalism in the Practice of Law: What Does This Mean for Women Lawyers Today?* Joan B. Kessler, Hon. Holly J. Fujie, Hon. Sandra Klein, Hon. Laura Seigle, will speak, and the seminar will be moderated by Susan C. Yu, WLALA DTLA Career Mentoring Chair. That panel will take place on July 23 from 6-7:30 p.m. The link to register can be found at <https://www.jamsadr.com/events/2020/webinar-navigating-virtual-mediation-mediators-insights>.

I believe that there is a higher level of civility, professionalism, kindness and movement toward resolution in these virtual mediations, which I expect to continue after the pandemic. ■

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