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PERSPECTIVE

Increased civility can lead to enhanced success during mediation

By Joan B. Kessler and Marti Stein

When I read various legal blogs, I am struck by the prevalence of lawyers and litigants failing to exhibit proper decorum, civility and collegiality in the courtroom. Sometimes lawyers get sanctioned for outrageous and improper behavior in court. But what about civility in more casual settings?

Being aggressive and being a fierce advocate for a client may cause lapses in collegiality, especially when no court sanctions are threatened. In a mediation, loud voices, profanity and generally rude behavior may reduce successful communication overall and particularly between opposing counsel and between counsel and mediator and certainly between litigants if litigants are ever in the same room. As a mediator, I never accept increased volume, angry tones no less profanity. I make it clear from the start that I will not tolerate any profanity or rudeness. I have noticed over the years that when I separate a bully type lawyer from their client, the lawyer's voice becomes less strident, profanity stops and the lawyer becomes far more cordial to me if they have previously demonstrated rude behavior to show their clients how "tough" they are. Once I explain the importance of collegiality in getting a settlement finalized and that in any case civility is a must for my mediations, things start to move along more smoothly.

One of the tools I regularly use as a mediator is to build trust between me and the litigants. In many cases, I have worked with counsel, usually on both sides before. However, except in very rare cases, I am meeting the litigants for the first time. By helping the litigants feel more safe and secure in the mediation process and by increasing their trust in me, usually by establishing common ground, the hostility and suspicion diminishes and civility increases.

Leave the Hatchet at the Door

Civility increases mediation success in various ways. There is a voluntary exchange of information when counsel decide, with my encouragement to share documents even before

formal discovery takes place. This sometimes leads to faster resolutions. As additional documents are shared, trust increases, hostility may decrease and settlements many times, ensue.

Further, there is less game playing, which yields greater productivity. Game playing is part of the negotiation game. But, when profanity and abuse get in the mix, defenses go up and communication efficiency goes down. It has been my experience that when civility increases, mutual respect is enhanced and the chances for the terms and conditions of settlements being enforced increase. If the communication is more positive, hostility is decreased and the end result becomes more positive.

When Civility Increases, Effective Listening Increases

When counsel begin to be more civil and professional the results are more productive. Hostility causes shields and defenses to go up and communication and listening accuracy to diminish. Increased civility in a mediation increases the effectiveness of communication and listening. Counsel and their clients often become more civil and comfortable when the mediator establishes a common ground between the parties by emphasizing similarities. As a result, mutual respect between the parties and their counsel increases and the lawyers are less hostile towards one another. When the parties feel that it is not a hostile environment, they feel more trusting and comfortable during the mediation and are more willing to settle.

In a more positive environment, both the lawyers and clients begin engaging in empathetic listening where they have the ability to have insight into and share the inner feelings of the other party. Reaching a point where all participants have empathy may be one way to solve communication problems arising in the mediation. This often leads to settlements because defenses are down.

To be empathetic, it is helpful to respond to what is said explicitly and to also respond to what is implied or hinted. When lawyers are not approaching the mediation with civility, they may respond to what was explicitly

expressed, but often, they miss something implied. In a civil mediation, the other lawyers may pick up on and appropriately address what was implied, which could be a goal the other party has for settlement. When communication and listening improve, litigant satisfaction is enhanced and reaching a resolution becomes more attainable. There is greater overall client satisfaction at the end of the session when counsel is professional and communicate respectfully with opposing counsel throughout the process.

Another benefit of increased civility and decreased hostility is the reduction in time to reach resolution. It has been my experience that when less time and energy is expended on anger, the process moves along more quickly. Litigants are usually very stressed by the entire litigation process. Many litigants have never been to mediation and find it all very upsetting. As civility increases clients begin to feel more satisfied with the entire process, I have found.

Conclusion

I am a strong advocate of communication skills training for all. Holding MCLE seminars on the benefits of civility in mediation is a great way to enhance communication generally and specifically in mediation. The main takeaway here is increased civility leads to enhanced mediation success, settlements and litigant satisfaction.

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