

## Creating and Sustaining Civility and Professionalism in Your Practice

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It is no secret that tensions in our personal domains are mounting. The challenge to remain civil in conversation, let alone, in litigation, is at its zenith. No longer do we just disagree or adopt a disagreeable demeanor. We are mean. To disagree has been elevated to permanent disdain, or worse, hatred.

Long ago the legal profession was cloaked in “gentlemen” terms. We displayed enormous respect and deference to the courts, and to opposing counsel. A handshake was good enough. Today, even a written promise is open to suspicion. There are lots of theories and explanations for why professional civility has declined in the last 50 years, but this author believes it need not be a permanent shift. We can reverse course. And it can be done using only the smallest of adjustments. Whether it is about remembering “everything I needed to learn in life I learned in kindergarten”; or what grandmothers taught us- “you catch more flies with honey than vinegar,” we can rise up and beyond the present-day acrimony. And as leaders of justice and civility, and as officers of the courts, we have a duty to do so.

In preparing for what might be your next difficult conversation or negotiation, whether as mediator, advocate or participant, take a few moments to consider the concepts set forth below. Be thinking about ways you can engineer your particular role and circumstance to plant these elements into your environment and dialogue.

Be **prepared** (for incivility). You will stay more grounded if you anticipate probable unprofessional behavior. What topic, comment, allegation or assertion might cause a flare up from a participant, especially if not stated in diplomatic language? What will be your response? How will you avoid “taking the bait?” What techniques work to keep you grounded in the face of adversity?

Learn in advance-do your **homework**. Are any of the other participants known for their theatrical or unruly behavior? Have a plan to prevent and to manage the conduct. Mediators are expected to control the process so be ready and willing to take charge of the events if you are the neutral. It is not necessary to create a dialogue that is devoid of emotions. They can be helpful so long as they are not abusive. Consider deploying simple tools to collect meaningful reconnaissance about the tone and temperature of the conflict- e.g., a pre mediation conference call with all counsel and the mediator. Useful information about the relationship among the advocates and their level of mutual trust flows from this event.

The mediator can also make **recommendations** on the tone and content of written submissions. As the advocate, ask for some direction even if you aren’t the attorney who needs the guidance. The exchange of summaries written in diplomatic terms is far more persuasive to decision makers and more likely to be well considered.

Have a one on one “**heads up call**” with the mediator prior to the mediation. This enables counsel to express client expectations and issues as well as giving the neutral helpful information that would ordinarily not be put into writing, e.g. expectations of the process, of the mediator and of the opposition; ask, share and learn how the clients can best be served by the mediator and the process; provide and inquire about what help the mediator can give to counsel (and the parties) to move the process toward resolution; get a true read on the relationships among the attorneys involved, not just the stakeholders.

Deploy and adopt simple concepts such as a commitment to civility, passion with diplomacy, using language with others you wish them to use with you, i.e., a set of **ground rules of engagement** that engender affirmative commitments from each participant. Identify and use the complimentary goals of all the participants before negotiating as well as in the negotiations themselves. These planning concepts go a long way to making everyone feel more safe, more secure in the experience, and thus less likely to act inappropriately.

Think about **process dynamics**. Consider what is the appropriate environment, location and physical space of the mediation and how it could impact the encounters. Will the event be on zoom or in person, or some hybrid approach? Interestingly, an unofficial survey of neutrals using zoom is that participants are actually more civil in their demeanor and exhibit a greater level of patience with the process, the neutral and each other. They help with technical challenges, even if it's for the opponent. Goodwill is actually higher and general sessions seem to be sometimes more productive. Perhaps it's the “safety” of their familiar surroundings, or the notion that while everyone may be on a screen, it is not as confrontational as being across a table in a sterile office setting.

Remember that part of the art of mediation is **timing**. Not only is the scheduling of the mediation important in the life of the conflict, there are also multiple nuances to when and how certain methods or techniques are deployed during the mediation process. When is a good time to go to caucus, or to take a break from the process? Should this be the moment the parties meet with their respective counsel? Is it time for the attorneys to consult amongst themselves, with or without the mediator? If tempers are escalating, is it prudent to take a short or true “time out”? Would anyone benefit from a coaching session? Sometimes even people movement de-escalates the situation- change the people groupings and give them time to consult together, away from the mediator and others.

Take time to analyze what is **causing the incivility**? Fear, embarrassment, insecurity and frustration are the usual culprits, along with the thought that grandstanding is persuasive. Unmet expectations of some or all of the participants, including the neutral, may be fueling the outburst. Test your causation theories- if you can identify the cause, you can often re-engineer the circumstances and make forward progress.

Focus on behavior and language that builds **trust capital** with the participants. Go back to basics- active listening, reframing, open-ended questions, curiosity without judgment. Be willing to act with **intellectual humility** and to “think again” once you have an understanding of the opposing perspectives. It costs nothing, and information can be powerful.

Model **patience**. Take your own timeout if necessary to stay civil and professional. Don’t take the bait. Ask others to assist you and the other participants in keeping encounters productive and worthwhile for all.

When all else fails, address the “**elephant in the room.**” A controlled, firm and respectful reaction may be necessary. Reputations are built on civility and integrity. There is nothing wrong with reminding yourself and others of that reality. And then offer to help--think, and then ask how you as one of the participants “rowing the boat” can help engineer the situation to be productive for the escalated individual. In the heat of the moment, tempers flare but they don’t always ignite a full-blown fire.

**Victor Frankl** reminds us: “Between stimulus and response, there is a space. In that space is our power to choose our response. In our response lies our growth and our freedom.”

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