



Joan B. Kessler
Associate Editor, ADR Issue

Is collegiality a thing of the past?

Leave the hatchet at home and do better at mediation:
Tips and thoughts from the U.S. Army War College

A long-time concern of bench and bar has been the lack of civility among litigators. Being aggressive and advocating strenuously for a client regularly causes lapses in collegiality. I recently received an e-mail from an employment lawyer lamenting the lack of civility encountered and querying how to deal with that.

One remedy is to suggest in forums like this one that civility may yield faster and more successful results in mediations! It has been my experience that when counsel are cooperative, civil and courteous, mediations move faster (translation: less expensive for clients) and tend to be more successful.

Counsel should be polite and professional. However, it has been my experience that some attorneys come to mediate with loud voices and use communication peppered by profanity. This abusive style coupled with personal assaults (even towards me, the mediator) is a recipe for mediation disaster. One key to mediation is my effort to build trust and help all parties begin to listen in order to help communication by reducing hostility and suspicion. Counsel's verbal assaults only make that effort more difficult and more time consuming.

Do not get me wrong, most people I deal with are professional, cooperative and very collegial. But, I regularly see the exception of abuse and lack of collegiality I am referring to.

Leave the hatchet at home to increase mediation success

How does collegiality increase mediation success?

- Increased 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.



Advocate Associate Editor Joan Kessler (fifth from left) participating in U.S. Army War College National Security seminar, June 2011.

- Less game playing yields faster resolution. 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.
- Enhanced changes of getting settlement terms enforced.

What can we all do to increase civility in mediations?

- Hold MCLE seminars on the benefits of civility in mediation and the courtroom.
- Take the "High Road" whenever possible.
- Learn from the U.S. Army War College

I recently was honored by being invited to participate as a civilian at the U.S. Army War College, June 2011 National Security seminar. The motto of the War College is "not to promote war but to preserve peace . . ." Many of the strategic leadership issues discussed at this seminar apply to the mediation context. I was especially taken with the intelligence, professionalism and outstanding communication skills of the colonels and

lieutenant colonels at the War College. While there was no doubt that these senior officers were very tough and experienced in the realities of combat, they were also adept at the use of strategic thinking, being professional and communicating with civility. Perhaps, applying this to the mediation context, the old adage, "If you have the facts, argue the facts; if you have the law, argue the law; and if you have neither – pound sand" should be replaced with the new adage: Work to develop collegiality and civility in every mediation, regardless of the factual and legal strength of your position. You will be more strategic and see faster and more successful mediation results.

Joan Kessler is a full time mediator and arbitrator at ADR Services, Inc. where she specializes in Employment, Real Estate, Trust/Estate, Business, Commercial, Entertainment and Insurance cases. She received her Ph.D. in Communication before attending law school. She practiced law for 25 years, was a jury consultant and taught Communications. www.joanbkessler.com.