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PERSPECTIVE

The pandemic, Zoom, and a “new” civility

By Sidney Kanazawa

The pandemic and Zoom resurrected a “new” civility in mediations that Shakespeare depicted in the “Taming of the Shrew” as “do as adversaries do in law, strive mightily, but eat and drink as friends.”

We began the pandemic frustrated with online mediations. Technical difficulties. Could not look people in the eye. No private hallway conversations. No lunch.

Then we saw benefits. Easy logistics. Close-ups of everyone’s face and facial reactions, including our own (and how we appear to others). Even-sized boxes equalized the power dynamics of height and size and “manspreading.” Interesting backgrounds (and occasional kids and pets) sparked small talk and identification not available in a conference room setting. Getting key people in the room no matter where they were or how much time they had became easier.

And then many noticed online mediations were faster, more effective, and the participants seemed nicer. Why? Perhaps the logistical ease of jumping online from the comfort of our homes without local or long-distance travel put us in a more agreeable frame of mind. Or perhaps our ability to quickly schedule real-time audio/visual interactions bred a personal familiarity all too uncommon in today’s snarky text-based world. Or perhaps, even without food or drink, the online audio/visual con-



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nections reaffirmed UCLA Professor Albert Mehrabian’s early studies indicating that we react to each other based 7% on the words we use, 38% on our tone of voice, and 55% on our facial expressions. The exact same words can have a completely different meaning depending on our tone and facial expressions.

But there was more.

With stay-at-home orders and the limited availability of courts, we learned to negotiate – without threats. Threats of trial were hollow. Threats to leave a mediation were laughable – you were already at home and could be called back in an instant. And as bonds of familiarity strengthened, threats were awkward among friends.

We were forced to rethink the value of threats. How do we react when threatened by an opponent? Are threats the best way to orchestrate a voluntary agreement?

With no other choice, we listened – with curiosity and open-ended questions – and found that listening opened hearts and minds – of even the most disagreeable. A little laughter, humility, and kindness helped too.

At the beginning of the pandemic, I was assigned several cases that were not ready for mediation because “sufficient knowledge” had not yet been exchanged. To facilitate this information exchange (without court assistance) we conducted a series of online status conferences (5-15 min) to map

Sidney Kanazawa is a full-time mediator/arbitrator with ARC (Alternative Resolution Centers LLC). skanazawa@arc4adr.com



out and monitor the exchange of “sufficient knowledge.” (See <https://edr.institute.org> for a more formal approach to this exchange.)

To our surprise, the best part of these online status conferences was not the exchange of information, but the informal chit-chat, laughter, and stories exchanged by the attorneys stuck at home during the pandemic. It bred a familiarity and empathy that allowed the subsequent mediation to proceed quickly and inexpensively.

This return to Shakespeare’s vision of lawyers and Abraham Lincoln’s perspective that “the best way to destroy an enemy is to

make him a friend” is exactly what we need now to fulfill the goals of Rule 1 of the Federal Rules of Civil Procedure - to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

Warriors fight; friends collaborate. Warriors see difference as an enemy that cannot be trusted and must be defeated. Friends see difference as a challenge that calls on our “better angels” to find mutually acceptable paths forward.

In Aristotle’s *Book of Rhetoric*, he describes a model of persuasion – ethos, pathos, logos – that explains why persuasion among

friends is easier than between zealous advocates. To Aristotle, a persuasive speaker must establish her credibility (ethos) before anyone will listen and must emotionally identify with her audience (pathos) before they will follow her lead. Logic (logos) is also an element, but it does not persuade. As in our polarized political world, logic follows and justifies our beliefs, identification, and actions. It is hard to believe and identify with an enemy intent on defeating you. It is easier to believe and identify with a friend.

As the pandemic recedes, the choice is now ours. We can go back

to thinking like warriors and fight, evade, and conquer based on our disparate views of the past. Or we can think like friends and listen, understand, and use the wisdom of conflict in a free society to shape mutually promising futures. We can treat each other as enemies based on the color of our uniforms. Or we can use our online platforms to mend the tears in our social fabric by just taking a few minutes to listen beyond the team cheers. We can ruminate about the rising cost of litigation. Or we can appreciate that agreement is the goal in 98% of the cases filed. The choice is ours. Our fellow citizens are watching.