

# Kluwer Mediation Blog

## On Civility: Mediation and Ethics Part 2

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“The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them: that’s the essence of inhumanity.” *The Devil’s Disciple*, Act II (1901). G B Shaw

I ended my previous blog post [<http://kluwermediationblog.com/2015/05/26/the-mediator-as-ethicist/>] by saying that there were a couple of aspects of ethics and mediation – beyond the conventional issues of “mediation ethics” – that I wanted to return to. My general point in that blog was to suggest that there are considerable insights to be gained, for the practice of mediation, in reading ethics – insights into justice, morality, decision making, ethical pluralism (rather than relativism) and so on.

What a broad reading of ethics can also give us is another analytical tool, to enrich one specific resource mediators already have: the practice of framing and reframing. We can do this by recasting toxic language into more palatable forms; by chunking up or chunking down the information provided by the parties; by restating proposals in ways that are likely to be more acceptable to the other party; by shifting the context and time frame of the discussion; or by redirecting the aim of the conversation. What a reading of ethics can also provide is an insight into just what kind of argument or proposal the parties have on the table, not in terms of its content or substance, but rather in terms of its intended or unintended philosophical foundations. Without getting too exotic about this – and because this is not the main aim of this blog – when parties offer justifications for and defences of their proposals, they’ll fall roughly into one of three types of “moral” explanation: **consequentialist** (this is a good offer because it will lead to these results and benefits); **duty-based** (this offer reflects the obligations I have to this core principle or to my family/shareholders/society/tribe); or **character-based** (this offer or outcome reflects the kind of person I hope you see me to be, and it’s consistent with my values – or virtues – that I’ve tried to convey). The reasons why this can be useful for the mediator are, first, because most of us are unintentional ethicists and not necessarily aware of the kind of moral claim being made; and second, because – as with all communication – it’s likely the parties will be talking past each other, not only on content but also on the language of justification. They are making different kinds of claims, not just different substantive claims. Our job of getting the parties singing the same tune is made just that little bit easier if we

ourselves recognise what kind of moral or normative language is being used, and if then we can reframe the conversation so that the same moral conventions are used. This is not to push the parties in the direction of being one kind of ethicist or another, but rather only to seek a degree of consistency both within and between arguments or claims.

There is, however, a more specific aspect of both ethics and everyday life that draws my attention for this blog: **civility**. It has its origins in the same general inquiry into the roots of ethics as I've already mentioned; but there are a few specific "provocations" for this focus. First, I made the mistake of turning on the radio before the 6.00am news and was greeted by the unedifying soundscape of parliamentary "debate". There may be some nations that are blessed with politicians who don't descend to the levels of cat-calling, innuendo, faux courtesies; and happily our politicians in New Zealand don't indulge in the kind of fisticuffs that we occasionally see elsewhere. But what we have is the kind of schoolyard verbal fracas that is elevated only by the slightly enhanced vocabulary of politicians and the practical realities of the rules and standing orders that place limits on what may be said in the House. It is, however, a measure of both political inventiveness and a tolerant view of what constitutes "robust debate" that the exchanges seem - on mercifully brief hearing - to be all posture and no content. Such civility as there is, is enforced by the Speaker's occasionally despairing references to "order" (sounding uncommonly close to the French "ordure" at times). The costs of this unseemly spectacle? A diminution of respect, an inefficiency in process, the reinforcement of a culture of disrespect and combat ... you finish the list.

Second, and more constructively, there has been some recent discussion in the media and professional journals on the costs of incivility at work, in particular in the work of Christine Porath. See, for example her co-authored work, with Christine Pearson, in the *Harvard Business Review*, on "The Price of Incivility" [<https://hbr.org/2013/01/the-price-of-incivility/ar/1>] and her more recent article, "No Time to Be Nice at Work" this month in the *New York Times* [<http://www.nytimes.com/2015/06/21/opinion/sunday/is-your-boss-mean.html>]. The common thread in this research is that (i) incivility, ranging from a failure to greet colleagues through to overt verbal attacks, is rife in the workplace; and (ii) that there are significant costs in terms of stress, loss of productivity and - interestingly - loss of business where, for example, potential repeat customers witness workers being poorly treated by their peers or superiors. The parallel problem - not unlike our Parliamentary worlds - is that this is a largely unrecognised problem, or it is shrouded by social conventions about "toughing it out", or there is simply a lack of recourse - other than leaving that workplace, if possible (which is, of course, not a realistic option for many). We have, the research suggests, normalised incivility and, in doing so, we diminish the capacity of people of good will and good intentions to act on those intentions. Thus - in terms of the ethical conventions mentioned before - we effectively preclude or diminish the capacity to act on the basis of character or virtue. The cost of this, as Porath & Pearson comment, is that "we know two things for certain: Incivility is expensive, and few organizations recognize or take action to curtail it." On the tangible costs to commerce and efficiency, they also point out: "According to a study conducted by Accountemps and reported in *Fortune*, managers and executives at Fortune 1,000 firms spend 13% percent of their work time—the

equivalent of seven weeks a year—mending employee relationships and otherwise dealing with the aftermath of incivility.”

Third, the good news: help is at hand. Perhaps it’s a reflection of this decline in civil discourse, and certainly it’s a consequence of public despair about the lack of coherent political commentary (or comment from politicians, which is different) following the 2008 financial crisis, that there has been in recent years a significant increase in the availability and popularity of books on philosophy. With a nod in the direction of fellow blogger, John Sturrock, I need only mention a few of the more accessible ones – and then only with a view to thinking about civility. Wildly popular in France and now in the English-speaking world, is the work of French philosopher, André Comte-Sponville, specifically his very readable, *A Small Treatise on the Great Virtues*, [Vintage, 2003]. Across the Atlantic, David Brooks has written an accessible inquiry into *The Road to Character* [Random House, 2015]; in the UK, A C Grayling is a prolific and avowedly secular author on just about anything in need of reflection (see his latest: *The Challenge of Things*). Readers of the Kluwer blogs will also know that I have previously referred to the work of Canadian philosopher, Mark Kingwell who, across a dozen books, has explored the roots of public discourse, civility, and citizenship. Two of his books closest to this current theme are his *A Civil Tongue: Justice, Dialogue and the Politics of Pluralism* (1995) and *Unruly Voices: Essays on Democracy, Civility and the Human Imagination* (2012).

Where does this leave us? It is not, as Comte-Sponville points out, merely about the conventions of politeness – as he suggests, a polite Nazi is still a Nazi. Mere politeness is “a show of virtue, its appearance and nothing more... Taken on its own, it is secondary, negligible, nearly insignificant; next to virtue or intelligence it is nothing, and that is what politeness, with its exquisite reticence, must know how to express as well. It is quite clear, however, that intelligent, virtuous persons are not exempt from its obligations. Even love cannot dispense with form entirely ...” However, as he also recognises (and as we know when taming children), we have to start somewhere and the conventions of politeness at least lay the groundwork so that, hopefully, “we end up resembling what we imitate, and politeness imperceptibly leads—or can lead—to morality.” Thus “Morality starts at the bottom – with politeness. But it has to start somewhere.”

Two quick questions to round this off: first, how do we get from civility and courtesy (Comte-Sponville arguing that that latter is not itself a virtue, but is the foundation of all others) to the larger social virtue of justice; and second, what’s this got to do with mediation? On the first question, through all of the works in which civility is explored – whether as a matter of philosophy or as a missing feature of the workplace – civility is seen not only as a personal virtue, but also as the foundation of sociability and co-operation. Social life, put simply, works better on that foundation of collaboration; and collaboration is fostered, nourished, by civility. There are few better discussions of this than Richard Sennett’s *Together: The Rituals, Pleasures and Politics of Co-Operation* (2013). As a founding virtue, if you will, “civility is both a precondition of justice under conditions of moral pluralism and a commitment that would emerge from a dialogue oriented towards the discovery of just norms” [J. Donald Moon, reviewing Kingwell’s *Civil Tongue*]. Civility is inextricably linked with that other great tradition in philosophy and ethics: public reasoning and discourse.

On the second point - the implications for mediation - it is clear that civility is not merely an attitude but rather a practice that mediators already seek to build into the process of mediation, through whatever preliminary norm-setting they may use. Whether we know it or not, there is a degree to which we are guardians of at least that bedrock of civility that will help the mediation work. There is, too, value in Sennett's point that co-operation is a "craft" - it's not something that just happens, but rather needs be created and nourished.

There may be risks in practice, however, arising from the greater familiarity that repeat players (both counsel and clients) have with mediation in that they want to dispense with the "fluffy stuff" at the outset and "cut to the chase". As the ethnography of commercial mediations reported by Debbie de Girolamo, in her book *The Fugitive Identity of Mediation* (2013) suggests, mediators may also risk truncating this foundational element of the process by either complying with those expectations or by themselves short-circuiting the collaborative, face to face elements of the process. If we go back to the splendid blog post by Jeff Krivis in March this year, "Where have all the idealists gone?" [<http://kluwermediationblog.com/2015/03/20/where-have-all-the-idealists-gone-long-time-passing/>], thinking about and fostering civility in mediation is central to the founding ethos of this practice.

"We must therefore insist that though people do have a political right to equal concern and respect on the right conception, they have a more fundamental because more abstract right. They have a right to be treated with the attitude that these debates presuppose and reflect - a right to be treated as a human being whose dignity fundamentally matters. That more abstract right - the right to an attitude - is the basic human right."

Ronald Dworkin, *Justice for Hedgehogs*, (2011, p335)

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