Communication and Conflict: Managing Verbal Aggression in Mediation

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I. Introduction

Life inevitably involves conflict, ranging from simple personal choices about whether to spend one’s last few cents on a jellyfish, rather than a glazed donut to global war. One response to conflict is avoidance: flight, not fight. The other is to seek resolution by taking action in one form or another.

Significantly, with the exception of direct consensual resolution between or among the contending parties themselves (negotiation), in the entire 4.5-million-year-plus presence of our species or our immediate forbears on earth only three methods of conflict resolution have regularly been used: violence (interpersonal, intratribal and international), third-party intervention (arbitration, litigation, “kleine,” etc.) and some form of mediation (negotiation facilitated by a neutral third party).1

Since drive-by shootings and mass global destruction do not qualify as civilized approaches to dispute resolution, that leaves either negotiated resolution or some form of third-party adjudication or mediation as the dispute resolution medium of choice.

Adjudication, of course, involves the submission of a dispute to an independent agency to which the parties have ceded the power to make a binding decision.2 Mediation in one of its various manifestations, on the other hand, involves the use of a neutral third party or parties (be they a parent, relative, professional, or other authority figure) to assist disputants in seeking a mutually acceptable resolution of their differences.3

The choice between adjudication and mediation, if any thought is given to it, generally involves consideration of how willing the disputants are to:

Surrender significant control over the process and the outcome of the dispute to others, or

Play a direct role in shaping the resolution process and crafting a mutually acceptable resolution.4

Disputants who are willing and able to actively participate in the dispute resolution process frequently opt for the less formal, more friendly and flexible, and generally less costly and time-consuming process of mediation, whatever the form it may take.

As with most choices in life, there are costs involved in trading the benefits of vesting the power to control the process and eventual outcome to a third party or parties in an adjudicative process for the right to actively shape, direct and participate in both the process and the outcome of a negotiated resolution. One significant cost of selecting mediation is the relinquishment of the large degree of coercive power characteristic of adjudication.

Simply stated, the mediation process involves the risk that participants, disputants and counsel alike, may have greater freedom (and perhaps a perceived greater opportunity) to engage in combative, hostile, face-to-face (“aggressive”) conduct in mediation than normally would be the case in adjudication. Such conduct, of course, is not only counter productive, it is frequently destructive to the process of reaching consensual resolution.

This paper examines a common manifestation of such negative conduct, “verbal aggression,” and proposes an approach to avoiding, or at least minimizing, its negative effects in mediation.

II. Aggression Generally

Among all God’s creatures humans have been, far and away, the most persistent in their use of violence in response to conflict. Indeed, physical aggression as a means of dealing with conflict has been a defining characteristic of our species (particularly our males) throughout its known presence on the planet.6 Even the most ferocious of the other beasts generally have the sense to quit when the outcome of a potentially injurious or life-threatening encounter becomes clear. Not
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so with man.

Some have theorized that the human propensity for violence resulted from the recognition that tools, a product of man's early intellect and manual dexterity, could be used as weapons. This same intellect also made humans far and away the most successful species in utilizing cooperation, facilitated by the power of speech, to achieve mutual goals and benefits: hence, "civilization." In fact, the power to communicate and cooperate explains, without rational debate, the social evolution of the species from small, family-based bands of hunter-gatherers, through a period of nomadic tribes, to emerge on the threshold of a globally interdependent community.

All of this, of course, involved endless conflict.

When humans began organizing themselves into monarchical city-states, the sovereign (or his surrogates) generally became the ultimate "arbiter" of disputes, and rules for the decision-making process slowly began to evolve. In most cases, of course, submission of a dispute to a sovereign decision-maker left parties to the dispute with little or no control over its outcome, as continues to be the case with conventional litigation. Nevertheless, using a neutral and detached third party to either decide or to facilitate the resolution of disputes, pursuant to an established set of rules, has been the basis of non-violent dispute resolution since before recorded history.

Lying between destructive violence and resolution externally imposed by an outside agency in this process is mediation, where disputants voluntarily work toward a mutually acceptable resolution of their differences under the guidance of a third-party neutral or neutrals.

Not surprisingly, an externally imposed result through adjudication may not provide true resolution at all, since the losing party (indeed, both parties) has relinquished the power of resolution to others and may well be dissatisfied with the outcome. Moreover, studies have shown that cooperation, without which mediation is doomed to failure, will more likely than not achieve mutual gains for the disputants rather than the zero-sum results of most arbitration and litigation.

Research also strongly suggests that mediated resolutions provide the disputing parties with greater satisfaction with the outcome than externally imposed solutions since the results are voluntary, and adjudication or arbitration invariably involves the threat of external force in the applicable enforcement processes.

Mediation, however, cannot achieve resolution without the willing and active participation (however grudging) of the disputants. In short, as conceptually appealing as mediation may be, it nevertheless relies entirely on the cooperation of the disputants in pursuing, fashioning and implementing a mutually acceptable process for dealing with the dispute and pursuing it to a successful conclusion. This dependence on cooperation, in turn, brings into play a whole series of complicating factors and competing interests, including the potentially destructive effects of uncooperative attitudes and hostile conduct by a participant or participants toward opposing parties, their counsel, and sometimes even the neutral or process itself.

In fact, notwithstanding their agreement to participate in the process, parties and their counsel frequently approach mediation with competitive, and sometimes overtly hostile, attitudes and conduct which threaten the process and seriously undermine prospects for reaching settlement.

III. Verbal Aggression in Consensual Dispute Resolution

One form of such hostility is "verbal aggression," which has long been defined by academics as "message behavior which [sic] attacks a person’s self-concept in order to deliver psychological pain." In the vernacular, verbal aggression the pervasive human tendency ("trait") to argue ad hominem: attacking the opponent rather than the problem.

Because verbal aggression is so widespread, it tends to be destructively reciprocal and escalating because it is a real and unfortunately all-too-common event in human communication (in mediation as well as in everyday life), and because it poses a serious threat to effective communication and cooperation (and hence to the success of any voluntary dispute resolution effort), this paper attempts to outline methods for identifying, avoiding and/or dealing with this pervasive and disruptive human characteristic in the context of mediation.

IV. Factors Bearing on the Management of Verbal Aggression

It takes two to tango and it takes at least two both to create conflict and to resolve it. Put in more academic terms, conflict involves interaction between or among two or more interdependent (resolution requires both) parties (disputants) who have conflicting or incompatible goals (conflict).

Current academic thought posits that affirmative conflict response involves either integrative or collaborative ("cooperative") strategies, on the one hand, and avoidance ("I won’t talk about it") or distributive ("Zero-sum: I’ll win at your expense") strategies, on the other. Integrative strategies tend to move toward positive resolution while avoidance and distributive strategies do not.

According to one author, "An overwhelming body of evidence shows that the integrative approach to conflict management is the most productive with regard to both interpersonal
satisfaction and organizational outcome." Moreover, taking an integrative approach does not entail simply rolling over and playing dead, but rather is most likely best achieved by taking an active, analytical, problem solving approach based on "argumentation," rather than embarking on the destructive path precipitated by "verbal aggression."\

It is important to clearly distinguish between destructive "verbal aggressiveness" and constructive "argumentativeness," a distinction blurred by the connotative and spelling similarities between the two terms.

"Argumentativeness," in the view of some researchers, is one of a bundle of human aggressive traits that include assertiveness, argumentativeness, verbal aggressiveness and outright hostility. Although the notion of being argumentative seems at odds with the collaborative objective of integrative negotiation (perhaps because of the antagonistic connotations of "argument"), scholars assert that argumentativeness is really a constructive form of problem solving communication behavior. One prolific author on the topic, Dominic Infante, asserts that, on the one hand, "argumentativeness involves attacking the positions others take on issues" while "verbal aggressiveness involves attacking the self-concepts of others rather than their positions." on the other.

Significantly, both argumentativeness and verbal aggression tend to be reciprocal; reasoned arguments are likely to induce reasoned responses while verbal aggression is likely to incite an equally or even more vituperative response. Thus, avoiding the impulse to respond in kind to verbal aggression may, in some cases, not only reverse the negative reciprocal spiral which responding in kind to verbal aggression almost inevitably causes but also induce a psychological momentum shift from destructive to constructive reinforcement.

This highly reciprocal and escalative characteristic of the argumentativeness/verbal aggression dichotomy is both intuitive and well documented. Moreover, it establishes the importance of designing and implementing mediation methodologies that "accentuate the positive," "eliminate the negative," and "latch on to the affirmative" in the effective management of verbal aggression in mediation.

Moreover, research strongly suggests that there is an inverse relationship between argumentation skills and verbal aggression: when skill at attacking problems increases reliance on verbal aggression decreases. Intelligence and argumentative skills, on the one hand, and verbal aggressiveness, on the other, are by no means mutually exclusive. However, if argumentative skills can be learned (as seems certain), then it is not too great a leap of faith to conclude that focusing the energy of disputants on solving the problem at hand, rather than on belittling or demeaning one another, should promote the productive influence of the former and reduce or eliminate the destructive influence of the latter in the elusive pursuit of mutual agreement.

If, indeed, the avoidance or effective management of verbal aggression in mediation can have the synergistic effect of maximizing the positive effects of cooperation while minimizing the negative effects of verbal aggression, how can this desideratum be best achieved?

A Proposal for Dealing with the Problem

Despite its significance in human relations, generally, and in consensual dispute resolution processes, specifically, little study has been done of the causes and management of verbal aggression outside the context of children and adolescents in educational and social environments and a few studies of adult verbal aggression in the workplace. Nor, somewhat surprisingly, does much seem to have been written about actually dealing with verbal aggression in the context of mediation.

Nevertheless, based on a general understanding of verbal aggression from the literature and experience in avoiding or at least managing it in the course of a three-decade litigation practice, a few general principles seem evident. They can be found in the Principles of Conflict Resolution, developed by the U.S. Department of Justice, which, slightly reworked and augmented below, provides an excellent checklist for dealing with conflict resolution, in general, and verbal aggression, in particular:

- Think Before Reacting. Instinctive reaction, rather than reasoned response, risks emotionally driven negative escalation. "Take a deep breath."\

- Listen Actively. Effective listening (for parties and neutral alike) is the most important part of communication and dispute resolution. Engage in it. Encourage it.

- Assure a Fair Process. The fact and perception of procedural fairness and neutrality are critical to success.

- Attack the Problem Not the Participants. Isn’t that the point?

- Accept Responsibility. Virtually every conflict has elements of "both to blame." The point here is to avoid placing blame and to honestly acknowledge responsibility where appropriate.

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• Use Non-Confrontational Communication. Be clear and honest but non-threatening. Use “I-Messages” which express your own perceptions, needs and beliefs, rather than criticizing or blaming others.

• Seek Interest. Resolving conflicts is highly dependent upon identifying what the disputants really want and what is important to them.

• Focus on the future. What resolution do the parties want for the future? How does the disputants’ past relationship bear on potential solutions?

• Options for mutual gain. Seek synergism: the proverbial win/win result. Remember: one great advantage of mediation is the power of the parties to reach a collaborative win/win resolution, rather than the zero-sum distributive results offered by adjudicatory processes.

Conclusion

What should neutrals, on the one hand, and disputants and their counsel, on the other, take away from all of this?

Simply that vigilance, sensitivity and reasoned management of verbal aggression can help all the participants in any mediation or negotiation to recognize and effectively deal with this disruptive and destructive human trait. But while the approach seems simple to understand, it is difficult to implement:

First, be alert: Recognizing the early signs of verbal aggression is critical. Watch body language, listen for potentially hostile tone and content, read written submissions for ad hominem content. Be prepared to nip destructive conduct in the bud.

Second, enlist the understanding and acknowledgement by counsel and the disputants and counsel, alike, of the destructive/constructive implications of escalating hostility/cooperation. Seek their acceptance, early in the process, of the paramount importance to the successful resolution of the dispute of avoiding the former and encouraging the latter.

Third, early on the parties and their counsel should actively participate in developing and adhering to a process for avoiding or at least minimizing the likelihood of verbal aggression. In other words, the participants should be asked both to help create and to “buy in” to the program. One example would be to induce party assistance in creating, and their agreement to abide by, simple rules of conduct: speak one-at-a-time (no interruptions); use simple declaratory sentences (without “purple” or incendiary prose); address and treat all the participants with equal respect; use “time-outs” called by the mediator or any of the parties to defuse potentially incendiary situations; focus on finding solutions to the problem rather than its origins or the opposition; consciously avoid retaliation; create, maintain and enhance a climate conducive to relaxed analysis, constructive communication and creative problem-solving; “take a deep breath before responding;” never retaliate, and so forth.

Fourth, avoid criticizing or correcting participants in the presence of others. This has special importance for the neutral, who should take parties who stray from the agreed upon protocol aside to discuss their transgression. “Time-outs” should be utilized to permit cooling off and for the neutral to remind transgressors both of the importance of avoiding hostile conduct and their prior commitment to do so. This clearly should be done, in caucus, in a persuasive and encouraging, rather than critical, manner.

Fifth, both neutrals and counsel must set the example. They are professionals and should always conduct themselves as such. Neutrals should not be timid about taking transgressing counsel aside and tactfully reminding them of their professional duty of professionalism. Effectively using the caucus to remove disruptive participants from the process may also be an effective disciplinary tool.

Finally, the neutral should consistently encourage the parties to focus their efforts on a collaborative, analytical, “integrative” search for creative solutions, rather than wasting their time, energy and emotions on pointlessly attacking their opponents.

There is, of course, no guarantee that adhering to these suggestions will guarantee success in any mediation, or that an entirely different approach might not be superior. On the other hand, the statistics strongly suggest that a well-managed mediation has something on the order of an 85% chance of resolution. The literature, experience and simple common sense all suggest that the process proposed above seems likely to significantly increase the probability of successful communication and dispute resolution, generally, and to contribute to the successful management of verbal aggression, in particular.

It’s certainly worth a try.

End Notes

1 O’Hanlon & Blair, “Mediation on the Net: A Unique Jurisdiction with Unique Possibilities,”
W. Va. J. L. & Tech. 1 (1997). Some would include “avoidance” on this list, but neither fleeing from nor ignoring a problem would seem to qualify as a means of resolving disputes.


4 Unfortunately, perhaps because of the relatively recent emergence of ADR as an acceptable alternative to formal litigation, the modern American legal culture seldom affirmatively offers the opportunity to make such a choice to potential litigants and even less frequently encourages them to make it. See, Riskin & Westbrook, “A Lawyer’s Duty to Advise Clients About Dispute Resolution Options,” Dispute Resolution and Lawyers, Second Edition, (West Publishing 1997), p. 60.

5 Hunter, “Alternatives to Litigation,” supra at 2.

6 Wrangham & Peterson, Demonic Males, 22, 42 (Houghton, Mifflin 1996).


8 O’Hanlon, supra.


11 O’Hanlon, supra, at 2.


15 Putnam & Poole, “Conflict and Negotiation,” Handbook of Organizational Communication, pp. 549 et seq. (Sage Pub. 1987, F. M. Jablin (Ed.): “The three general characteristics of conflict are: interaction, interdependence, and incompatible goals.”) at 552.

16 Id.; Folger, supra, at 53, 54.


18 Id.


20 Infante & Gorden, “Superior’s Argumentativeness and Verbal Aggressiveness and Predictors of Subordinate’s Satisfaction,” 12 Human Communication Research 117-125.

21 Barker, supra.

22 Infante & Rancer, supra.


24 Chandler, Communication and Conflict, Class notes, June 20, 2002.

25 With apologies to Harold Arlen and Johnny Mercer.


28 Desideratum: “God, give us grace to accept with serenity the things that cannot be changed, courage to change the things which should be changed and the wisdom to distinguish the one from the other.” Reinhold Niebuhr.


30 Department of the Navy, “Principles of Conflict Resolution,” www.mediare.com/articles/navy.cfm. As a huge, longstanding and multi-faceted endeavor faced with managing the full range of human conflict, its views on conflict resolution would seem to warrant thoughtful consideration.

31 “Take a deep breath, and envision a glass filling to its very brim, then exhale watching every drop of water draining from the glass. Repeat... etc.” “Draining Away Aggression, Use the same techniques law officers use to keep cool under fire,” Center for Aggression Management, www.aggressiomanagement.com/drain.html

32 The simple expedient of using the universal hand signal for calling “time out” to put an immediate end to potential hostile escalation, followed by a period of disengagement, perhaps to include caucuses, has proven extremely useful to the author.


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Biography

Robert K. Wrede is Of Counsel to a Los Angeles firm specializing in commercial transactions and litigation. For over three decades he has specialized in the mediation, arbitration and litigation of domestic and international commercial disputes involving complex technical and economic issues.

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