

Civility Could Be Litigators' New Normal Even Post-Pandemic

By **Matthew Vafidis**

Like many in the legal profession, I am fortunate. Technology and the nature of my practice allow me to adjust relatively easily to sheltering in place. As a civil litigation partner supported by a talented and diverse team of lawyers, and hardworking support staff, I have been able to shift seamlessly into working from home, without (or so I hope) any perceptible change in responsiveness to client needs or my own productivity.



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But beneath my professional "business as usual," I have been undergoing the same personal psychological and behavioral adjustments we are all experiencing. And as we move into the next phase of our response to the pandemic, I am beginning, like many of us, to focus on how our work and personal lives will be changed, and what our new normal will look like.

I am most intrigued to find out if we can carry over into our post-shutdown professional lives the new levels of civility that we have been experiencing over the past few months.

For me, it began with small gestures and accommodations: acquiescing to requests for extensions of time to allow the other side to adjust to working from home, stipulating to the service of documents by email to avoid unnecessary trips to the office, mutually agreeing to postponements, and holding mediations, depositions and conferences by videoconference.

But, within the first few weeks of lockdown, more profound patterns emerged. A losing party suddenly withdrew its appeal, my hitherto intransigent opposing counsel offered to mediate a contentious piece of litigation and adopt our resolution framework, and a government agency agreed to a request for payment of a civil penalty by periodic installments.

And that was just the beginning. Settlements were negotiated and consummated, reasonable time was allowed for claim presentation and assessed, and paths for resolution were discussed. Opposing counsel and I graciously agreed to differ. Cases were resolved. My opponents and I became cooperative, courteous and less adversarial. In short, we were being nice to one another.

Our clients have also appeared to benefit from a more relaxed and more direct access to their lawyers. During the period of lockdown, I am able to connect with clients more regularly and more meaningfully, in more enjoyable and open interactions. And with the financial crisis hitting almost all of us, we have license to be more direct and frank in our discussions about billing and collections. New partnerships and ties have developed.

During the crisis, all aspects of practicing law seem to have become more pleasant.

Part of the reason for this new civility is that, during shelter-in-place orders, some of the normal pressures of litigation have been eased. Litigation lawyers hide or repress our true reactions, but the deadlines imposed by judges or arbitrators often impose on us stresses that can be hard to overcome. This cannot help but have an impact on our dealings with opposing counsel.

During this period of shutdown, however, many of us have been relieved of these court or

arbitrator demands. Coupled with a commute-free and flexible work schedule, we now seem to have more time to communicate. And for lawyers in general, and litigators in particular, there is no better gift than having more time. It is a respite from the pressures of litigation or arbitration that may not lead us to the epiphany of alternative dispute resolution, but we are at least now taking the time to listen and talk to our opponents, ask how they are coping, and treat them as colleagues.

So, can we continue this practice, as we phase into the new normal?

To be sure, some of the stresses of litigation are unavoidable. While it is a fallacy that, in order to be effective, an advocate has to adopt the "aggressive litigator" stereotype, it is also fair to say that, in litigation or arbitration, you cannot generally expect your opposing counsel to make your life easier. Indeed, much of the stress of litigating or arbitrating in an adversarial system stems from the fact that the other side is actively working against you.

Under the circumstances, although we always adhere to the basic standards of decency and civility required or encouraged by bar associations and courts, it is not easy for litigation lawyers always to treat our adversaries with equanimity. We cannot expect that to change overnight.

When we resume the activities of courts and tribunals, the logistics of conducting litigation under public health restrictions will create additional problems. Trials, particularly those involving juries, and arbitration hearings will involve masks and social distancing and, for some length of time, will be far from ideal.

Any in-person litigation activity, be it cross-examination, conducting a deposition, participating in mediation, or interviewing a client or witness, will involve, at the very least, navigating the hazards of public transport, traveling in elevators, touching door handles, breathing in shared circulated air. There is only so much that can be done effectively on Zoom. The day-to-day process of litigation will be frustrating, and, if each side does not share these disadvantages to the same degree, there may be friction.

We would like to think that, in these times, lawyer gamesmanship can, of course, be set aside for more serious concerns. We cannot escape the fact that we all are, or all will be, feeling the adverse economic impact of the pandemic response for some period of time.

The crisis will not discourage litigation (indeed, early indications are that it will have the opposite effect), but the economic devastation it has wreaked should, as we move into the new normal, give us all pause to consider whether we should devote our time and resources to resolving disputes, instead of fighting them out in courtrooms and before arbitrators. Focusing on reassessing the goals and efficacy of litigation inevitably encourages compromise. To achieve this, lawyers will need to be cooperative, realistic with each other, and communicate effectively.

I have hope that the lessons of civility we have been taught in this crisis response will spill over into the new normal of post-lockdown life. We have surely learned that adversity can bind us more closely and encourage courtesy and better communication. There seems to be no reason why, despite operating in an adversarial system, litigators cannot carry forward a new resolve to treat one another well. We can do this, and bring something positive out of the crisis.

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