

“We Have Met the Enemy, and He is Us.” (Pogo)
The Ethics of Mediation versus Litigation

by

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Serious stomach ulcers were and still are a painful and potentially life threatening problem for many people. Until about twenty years ago, a general surgeon could make a lucrative living performing operations to help relieve the suffering endured by patients with this condition.

Then along came acid blockers, such as Prilosec, and the discovery that a certain combination of common antibiotics could reduce if not eliminate the condition. Today, it would be unthinkable and unethical for a physician or a surgeon to insist on surgery instead of first aggressively pursuing the non invasive drug treatments of choice. Medical ethics demand this course of action and a "paradigm shift" has resulted.

We, the American people, bring 15,000,000 lawsuits each and every year over every kind of possible dispute from "slip and fall" accidents to major civil rights complaints. Up until twenty years ago, these cases were required to be pursued with "zealous advocacy" by the parties' attorneys. That meant piles of interrogatories and time consuming and contentious depositions that created great stress to the participants and the enormous waste of financial resources and lost business and personal relationships.

Then a "paradigm shift" began. Just as the introduction of acid blockers and antibiotics changed the treatment of ulcers, the discovery of alternative dispute resolution techniques such as mediation offered an opportunity for parties and attorneys to 'treat' disputes in a less invasive, less costly and less time consuming way than traditional aggressive adversarial litigation.

So the question is, is it still ethical for attorneys to start lawsuits without first pursuing a less aggressive alternative for their clients that could save them time, money, stress and relationships?

Is it ethical for defense counsel to bury plaintiff's counsel in endless motions and paperwork to wear him down and make him go away?

Surprisingly, the answer is a qualified yes. It is the duty of counsel to pursue their clients' interests with vigor. But many times those interests are better served by not "going for the jugular" but rather insisting that those clients go to the mediation table instead.

The more important question is whether it is ethical for us, as the people who hire these attorneys, to demand that they take our cases "all the way to the Supreme Court" when a simple mediation conference might resolve the issue? Those attorneys can't bring those lawsuits in the first place until we ask them. The buck starts and stops with us. We are the ones responsible for creating a "paradigm shift".

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