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Facts not in evidence: Generational blind spots in legal culture and the law's lag

Generational differences are reshaping legal culture, requiring attorneys and mediators to recognize changing communication styles and understand how they can influence litigation, mediation and dispute resolution.

By **Fatemeh Mashouf**

Public culture, standards and norms are undergoing constant change, forcing the legal profession to play catch-up. One of those changes relates to the generational differences that are shifting legal culture.

Generational differences are real. If they are not fully appreciated, they can seriously impact the way cases unfold in both litigation and mediation. In order to address those differences, we should not resort to judging any particular generation or its way of communicating or litigating; we should simply make an effort to acknowledge the cultural shift and understand the role it plays in how we resolve our legal disputes.

The generational divide in action

Generational dynamics in mediation are usually not about the substance of the matter; far more often, they are about the register of the dialogue and the expectations of the participants. Earlier generations were largely taught to share information sparingly and to adhere to narrow privacy norms. A new generation raised on social media, however, has been taught that documenting and narrating one's own experience is normal, even useful.

Such a difference is exemplified by the stark contrast between a person raised with "don't ask, don't tell" as acceptable (even mandatory) and



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one whose role models are gender-fluid influencers, proudly proclaiming their identity. This exemplifies rapidly changing social norms that, in their own way, can surface starkly in a mediation. An unfiltered, emotionally candid account that reads as authentic to one listener can read as oversharing or, worse, as performative or inappropriate to another.

In today's world of constant public proclamations online, these issues

regularly show up in mediation. I once mediated a case in which an employee had posted on the company's Slack channel a detailed account of her medical condition to explain why she was unavailable for work; HR intervened to discourage her from being so open — eventually leading to litigation. In another case, a company announced over Slack its Pride Month celebration. When an employee responded with an inap-

propriate comment, the company — unsure how to react — banned employees from posting on the channel indefinitely but failed to discipline the inappropriate employee. Clearly, company-wide communication forums can present unique challenges for a generation that has a limited filter when communicating from behind a computer screen. This can result in reactionary acts that create new risks.

The law has not yet caught up with ever-shifting social media culture. And because so much of the law depends on "reasonableness," what is considered reasonable is a moving target; it changes with generational and technological changes. Parties do themselves a disservice if they rely too heavily on past standards while the culture is shifting.

The chit-chat trap

I've coined the term "chit-chat trap" to describe an important dynamic that is becoming increasingly prevalent, where casual, unfiltered conversations quickly escalate into dangerous zones. This is due to a broader shift in how people relate to one another at work, both online and offline. It is driven by a generation that has come of age communicating primarily through screens; casualness, sarcasm and unfiltered communication tend to be the default register.

The trap is that this informality reads as friendliness in the moment and as evidence in hindsight. But the

same joke, the same offhand comment, the same lack of filter that felt harmless in passing can be reconstructed later — in a witness interview, a deposition or an investigative report — and stripped of the context that made it feel harmless at the time.

These habits don't stay contained to the platforms that shaped them; they carry over into the break room, the hallway and the post-meeting debrief. Indeed, I most often see the chit-chat trap pour directly into the mediation. Colleagues who might once have measured their words more carefully when communicating in person now bring the same loose, familiar tone to face-to-face exchanges that they would use in a group chat.

As the line between “how we talk online” and “how we talk in person” continues to dissolve, the chit-chat trap will only become a bigger factor and a risk that even legal professionals are susceptible to.

The legal profession's lag

Layered on top of this generational dynamic is a separate shift: the law is slowly adapting to the same cultural changes that are reshaping how people communicate with each other. Courts that once treated text messages and social media posts as informal, throwaway communication now routinely admit them as evidence of intent, agreement or motive, and judges have increasingly been forced to work out what an emoji, a GIF or a lowercase “k” actually signifies in context.

Cultural changes also encompass appearance and gender roles. Consider, for example, how the definition of “professional appearance” has changed over the last decade. Workplace norms historically treated certain hairstyles, and by extension certain people, as inherently less professional — a learned bias that fell disproportionately on Black people because natural Black hair was being scrutinized.

The CROWN Act, first passed in California in 2019 and since adopted in dozens of states, formally recognized that grooming policies built around one narrow standard of professionalism were themselves a form of discrimination. But going deeper than the blatantly biased norms around natural hair, the way people dress has also been transforming, and in the era of fast fashion and social media, the very notion of “professional” attire has evolved at lightning speed.

Gender roles have also shifted substantially over the past few decades; the law has largely followed that shift, rather than led it. The Supreme Court's decision in *Bostock v. Clayton County* (590 U.S. 644 (2020)) — holding that Title VII's prohibition on sex discrimination extends to sexual orientation and gender identity — is one clear example of the law catching up with public attitudes that have already moved.

These issues expand far beyond gender, attire, hair and notions of professionalism, but all these examples show how culture has shifted before the law has caught up. As lawyers who regularly rely on decades-old case law, we should simultaneously be prepared to be one step ahead of the law, and at the very least, attempt to look forward and not just behind.

How this plays out in mediation

Because the legal profession is, in a real sense, representing the law itself, it doesn't have the luxury of adapting on its own timeline. Watching this lag can be painful. And, while it pains me to admit it, the legal profession is far from perfect. During one long mediation, a female attorney needed several breaks over the course of the day to pump, but the older male mediator and co-counsel showed visible discomfort. Even worse, she was left out of the discussion each time she was away. By day's end she had been effectively disengaged from the very

case for which she was expected to advocate.

Despite mediators' assertions that the parties are always in the driver's seat, the reality is that they wield considerable influence over the proceedings. Those who fail to acknowledge this are doing a disservice to the parties and the process, especially when their conduct is inappropriate.

Most instances of mediator lapses won't be as stark as in the case involving the nursing attorney. Usually, gender hostility shows up as a microaggression rather than outright exclusion. But the direction is the same, and it's worth naming plainly. The profession representing the law can't afford to lag behind that law.

My rule of thumb is that disputes and resolution often come down to a question of respect, but respect turns out to be a far less objective standard than most people believe. We each have our own definition of respectability based on our life experience, upbringing and workplace culture, but most people quietly assume that what they find disrespectful must be so, full stop. This is shortsighted.

A mediator who hears a party swear, ramble or vent without much filter may be tempted to discount that party's credibility or seriousness. But register is not the same as reliability. A great deal of what reads as “unprofessional” or “disrespectful” is simply a different way of delivering information a more formal speaker would offer in measured sentences.

Whether the issue is wearing sandals, propping up feet, chewing gum or casually interrupting a superior, perceptions of what is appropriate, professional and respectful are no longer universally shared. Investigators have increasingly had to learn not to discount slang, profanity or texting shorthand as indicative of unreliability; the same

discipline belongs at the mediation table, where tone can otherwise be mistaken for substance.

Objecting to our own assumptions

This is not to say that generational differences are imaginary, or that they don't come up when considering how a mediator or attorney thinks about a case. They plainly do. But generational assumptions, like any other assertion in a dispute, hold up better when they're tested rather than simply accepted.

The mediator who takes a moment to question, rather than simply accept, assumptions about a party's communication style, how a workplace norm operated or what a claim might have looked like under the law 15 years ago as opposed to today is doing the same work a good advocate does when an assertion is offered without support.

In a legal and cultural landscape moving this quickly, that habit of testing the assumption before accepting it may be the most valuable skill a neutral can bring into the mediation room.

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