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COLUMN

Zoom status conference approach to mediation

BY SIDNEY KANAZAWA, ESQ.

The pandemic and Zoom made possible a new status conference approach that facilitates the just, speedy, and inexpensive resolutions of nearly all cases filed.

EXPECTATION

When parties hire a mediator, they expect (and hope) the mediator will facilitate a settlement in nearly every engagement. Unreasonable? No. We try only about 2%-5% of the cases filed. Nearly all the rest are voluntarily resolved by the parties outside of court.

WHERE?

The only question is WHEN? After months and years of sleepless nights and physical and economic pain and suffering? After thousands or millions of dollars exhausted in discovery? After invaluable opportunities are lost? WHEN?

TRADITIONAL APPROACH

Traditionally, we schedule mediations close to trial. We submit briefs, tell our stories, show our evidence, emphasize our strengths and the other side's weaknesses, and expect the mediator to "twist arms" and force the other side to see we are likely to prevail at trial. This approach demands the power of discovery (to wrest vital information from our enemies) and a deadline (trial) to force a fair and just settlement. A very slow and expensive approach to resolving the 95%-98% of the cases that are voluntarily resolved outside of court. The parties must tread through nearly every pre-trial step with only an incremental increase in a party's

confidence in the trial outcome. See P. Silverman, M. Hawash, A. Jordan, "Early Dispute Resolution: A Proven Method to Resolve Disputes Fairly & Ethically in 30 Days," <https://edr.institute.org/resources/2021> (surveyed trial lawyers averaged a 57% trial outcome prediction confidence with an initial story that increased to a 64% confidence after full discovery).

Early mediations are often torpedoed by the parties out of fear of looking weak or being forced into a weak negotiating position - extreme demands/offers, walking out of a mediation, insisting on motions or discovery before the mediation, or otherwise insisting the case is not yet ready for mediation. Again, a slow and expensive approach.

Persistent mediators often follow these early negotiation impasses with follow-up calls to bring the parties back together. Again, a slow, expensive, and drawn-out process.

In the end, this adversarial push and pull usually results in a settlement on the verge of trial or a summary judgment motion or an expert designation or a huge pre-trial expense. And we assume it is a good settlement if everyone is unhappy.

STATUS CONFERENCE APPROACH

Thanks to the pandemic and Zoom, we have a new approach. And all sides tend to leave happy.

At the beginning of the pandemic, I was assigned several cases for medi-

ation that were not ready for an informed negotiation. The parties had not conducted any discovery. Information needed to be exchanged. The courts were essentially closed to all but the most critical motions. We were stuck at home. We could not engage in person.

Zoom opened a new window. We could meet face-to-face. We could talk in real-time (and not by text or email). We could see each other's eyes and reactions. We could connect with ease no matter where we were in the world. We could get the right people in the room.

And there was more. We saw homes and backgrounds (whether real or chosen virtually) that told us something about the other. We saw kids and pets. We started conversations that humanized us to each other. We got to know each other in a context outside of court or our offices or phones or text. With each smile and chuckle, we slowly shed our warrior armor and became friends.

With this new connection, we tried a different approach. We put down our swords and collaborated. We - together - identified what information we needed to practically conduct an informed negotiation. We - together - explored how we would get that information and when we could transmit it to the other side. We - together - evaluated what was important to each side and how we might solve each other's problems. We - together and separately - set deadlines and discussed obstacles and how we might overcome those obstacles for the



Sidney Kanazawa, Esq.

is a full-time mediator/arbitrator at ARC (Alternative Resolution Centers) in Los Angeles who now mediates world-wide with the help of Zoom. He can be reached at skanazawa@arc4adr.com.

benefit of our respective clients. Rather than clinging to our side of the Plaintiff/Defendant divide, we worked together and became teammates looking for solutions rather than rivals intent on destroying each other.

Thus, was born a new approach. A status conference approach. Rather than fighting and fitting into a mediator's calendar six months or a year in the future - close to trial - we started collaborating and problem-solving immediately. We would meet on Zoom for five to fifteen minutes. Identify what we need from each other to mediate. Not scorched earth. Basic information for an informed negotiation. Set a date and time for the next five to fifteen-minute Zoom status conference. Meet. Assess our progress. Set new goals for the next five to fifteen-minute Zoom status conference. Meet. Assess our progress.

Set new goals. And schedule our next five to fifteen-minute Zoom status conference. Familiarity eroded negative assumptions about the other side and built trust. Instead of a court-imposed trial deadline, we set our own periodic deadlines.

When ready, we - together - set a mediation date. Sometimes before any

formal discovery. Not with all the evidence we might need for the 2%-5% chance of trial. But with enough information for an informed negotiation. If more was needed, we knew from our status conferences, we could always adjourn and reconvene. Marathon mediations were unnecessary. And the threat of leaving or ending a mediation

became hollow. We could reconvene in an instant on Zoom. The entire character of our mediations changed. Rather than binary trial-focused outcomes, familiarity allowed the parties to think about how to satisfy each others' needs in a manner that a court could not order -e.g., payments over time, cross-licensing, future purchases, apologies. The media-

tions have become faster/shorter, more effective, and everyone generally leaves happy.

The Zoom status conference, a positive result of the pandemic, now facilitates just, speedy, and inexpensive resolutions of nearly all cases filed.