

Mediate now, not six months from now

By Sidney Kanazawa

A common complaint about good mediators is that they are so in demand that they have no available dates for months. So, we schedule and wait months before mediating.

Since the pandemic and the ubiquitous use of Zoom, waiting - like ice boxes after the introduction of electric refrigerators - is a thing of the past. There is no reason to wait. Why?

Logistics. The logistical problem of coordinating schedules to get all the necessary parties physically in the same physical space at the same time, is like depending on snail mail in a world of overnight delivery and internet email. Today, we can set up a Zoom meeting with all the necessary parties, within an hour, no matter where the parties are and no matter what they are doing. It is that easy.

Body language and visual cues. With Zoom, we can see each other and hear each other, like we are in the same room. In fact, we can see more. We see backgrounds (virtual and real), pets, and kids that tell us so much more about each other than we would see in an office meeting. Unlike in a conference room, where we might not be facing everyone or might not be able to see people at the far end of the conference table, on Zoom we see everyone - head and shoulders - with an intimate view that could only be replicated in person if we were nearly nose-to-nose with each other. Thinking we can only mediate in person is like thinking



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we can only view movies in movie theatres (and not streaming), or we can only get the news through newspapers and broadcasts (and not online).

Mirror to see ourselves. In addition, on Zoom we can see ourselves. We can see how we appear and sound to others in real-time. And everyone else can do the same, which has the effect of checking our own behavior and unconsciously putting us in the shoes of others and forcing us to see what they see. I mentioned this to a friend who worked in a bar and she noted that bars often have mirrors behind the bar for the same purpose - to let patrons see themselves and check their behavior.

Amazing platform for agreement. The purpose of mediation is to reach a voluntary agreement. Disagreeing parties come together before a mediator to explore whether they can become collaborators and partners on a path out of the past and into the future. No one can force the parties to walk together on a singular path. They must voluntarily agree. The platform reduces common barriers to agreement. Insecurities about power imbalance are reduced by equal-sized boxes for every participant - whether they are big or small, tall or short. Physical intimidation is eliminated. The parties are not in the same room and can see and hear each other, even if they have restraining orders against each other. Separate meet-

ings can be arranged among those in the room or others outside of the room in an instant. There is no sense of forcing an agreement because everyone can leave at any time and the meeting can be terminated, continued, and restarted at any time.

Status conference approach. There is no need for exhaustive marathon mediations. We can meet immediately and periodically in 5-to-15-minute bites. Using a status conference approach, we can meet immediately, find out the status of the parties' information exchange, find out what each party needs to be ready to negotiate, and then follow up as the parties prepare to get ready for a mediation - not trial.

Talk not text. By meeting on Zoom, we engage in regular dialogue, rather than one-way faceless voiceless written texts that can be misinterpreted and can escalate misunderstanding and distrust.

No impasse. Using the status conference approach, the concept of an impasse is eliminated - unless the parties choose to have their matter decided by a court or arbitrator. The parties can meet early and often. There is no one mediation day. We can meet separately. We can meet together. We can bring in other interested parties. We can agree on a plan to help our decision-making process. We can change mediators. It is an ongoing process that saves the parties from unnecessary discovery, motions, and trials. The status conference approach opens the door to a just, speedy, and inexpensive agreement in the 98% of cases that

are resolved without a trial. And it does not prevent parties from preparing for or going to trial - if they so choose.

New understanding of how we agree. The studies and writings of Daniel Kahneman, Robert Barush Bush, Joseph Folger, Dan Simon, Tara West, Deepak Malhotra, Jonathan Haidt, Sam Ardery, Douglas Noll, Mark Goulston, Robert Cialdini, William Crano, Chris Voss, Alexandra Carter, Daniel Goleman, Robert Mnookin, Chip and Dan Heath, Tom Tyler, Robert Fisher, William Ury, and many others have changed our understanding of how we effectively help people voluntarily agree.

Bullying is obsolete. The concept of forcing parties to agree has become obsolete. Like the real situations of Russia/Ukraine and Israel/Hamas, we can see that zealous

warrior threats, intimidation, and imposition of risks and costs are not magic keys to peace. Among lawyers and litigants, bullying does not usually yield submission. Bullying usually leads to fights and an escalation of the fights. Galvanizing ourselves and our clients to do battle in mediation six months in the future does not speed up agreement, does not reduce costs, and does not increase satisfaction. Just the opposite.

Freedom opens collaboration windows. On the other hand, the pandemic has shown us that Zoom and its freedom to leave and its ability to convene us face-to-face for 5-to-15-minute status conferences can help the parties see each other as collaborators, rather than enemies, and can help the parties reach just, speedy, and inexpensive resolutions like never before.

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