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Resolving Disputes Involving Senior Executives During the Pandemic

By Mark E. Segall

Despite my more than 10 years of experience as a mediator and arbitrator, each case brings a new set of challenges: a constellation of unique personalities, an unfamiliar or novel business or product, or toxic relationships among the individuals involved. Cases involving senior executives have always posed their own set of challenges because the plaintiff or claimant, who usually has been enormously successful for most of his or her career, suddenly finds herself or himself demoted or out of a job entirely. The executive alleges that he or she is the victim of discrimination or retaliation, and the company answers by claiming that the decision to terminate was motivated by poor performance or, worse, serious misconduct. Millions or even tens of millions of dollars can be at stake.

The COVID-19 pandemic has impacted significantly the way that mediations and arbitrations are conducted. This article addresses some of the challenges to success and shares some insights and best practices that have proven to be useful in this virtual world.

Adjusting to Virtual Platforms and Possibilities

At the outset of the pandemic, everyone was hoping that, within a few weeks, we could all return to the office and hold mediations and arbitrations in person. Over time, the parties came to realize that, if they wanted their dispute to be resolved, there was no choice but to proceed virtually.

The question kept on being asked of me of how I could judge credibility or establish a bond with the parties without being together with them in person.

In order to make the participants comfortable, I tell them what happened during one of my first virtual mediations. It was a very large case involving a senior executive with an enormous amount at stake involving a number of disputed categories. What was supposed to be a long-term relationship in the private equity space deteriorated rapidly after the executive joined the firm. A divorce was necessary. During the Zoom mediation, the lawyer for the claimant was in the process of making an offer that was counterproductive. As the lawyer was detailing its terms, he stopped and said, "You don't like my offer. You just raised your eyebrows at me." I responded that I had indeed raised my eyebrows and that he was right about my not liking his offer. So the exact human reaction that I would have had in person was visible onscreen.

I also describe an experience I had approximately 30 years ago, where an entire case turned on a determination about what happened at a lunch attended by six senior executives. This is when video depositions first came into use. After the depositions of all six executives were filmed, we were in the position to show them to jury focus groups who could provide us feedback on who was or was not telling the truth about what transpired. Veracity, character and believability can be assessed properly onscreen.

There is no question that in sitting as an arbitrator in these cases I have felt just as comfortable making credibility determinations as I have been when sitting in a hearing room at JAMS. Through the use of skilled

moderators and orders that forbid the use of the Zoom chat feature displaying virtual backgrounds and texting or emailing witnesses when they are testifying, as well as specify how exhibits will be provided for the arbitrator and for the witnesses, the challenges of not being in a hearing room can be easily overcome. We also schedule Zoom training sessions for the participants to make sure that they are comfortable with the technology.

Building a relationship of trust with the litigants requires more work with a virtual mediation than it does with one that takes place in person. The individual litigant wants to tell the mediator how he or she has been aggrieved, and they want to see their case advocated before a neutral. As a matter of routine, in almost every case since I first joined JAMS I have held ex parte calls with counsel after receiving mediation statements to discuss anything they think I should know about their clients, their adversaries and/or their adversaries' clients before everyone comes to the mediation. Since the onset of the virtual mediations, particularly in the case of individual litigants, I have offered the option of a private Zoom call, which I use for the primary purpose of engaging in a personal dialogue directly with the senior executive in which he or she gets a full opportunity to explain how they were mistreated. If there is time, they always take me up on this offer, and I find that it enables us to get the formal mediation session off to a much quicker start. The companies, in turn, almost always want the same type of pre-session private Zoom session. Indeed, a defense lawyer told me recently that one of the biggest causes of resentment in post-pandemic mediation is the amount of time that her clients have to wait for their first session with the mediator. Having pre-session Zoom calls cuts the length of the wait dramatically and enables a productive back-and-forth to begin much earlier in the day.

Addressing Problems Exacerbated by the Pandemic

In a number of these cases, the pandemic itself has caused the dispute to become more difficult than it would have been with everyone in the same office. In at least two situations in which I have been involved, the dispute arose pre-pandemic and then was put aside for months while the parties dealt with the business exigencies caused by the pandemic. By the time the parties were ready to address the dispute, positions had hardened, which made my work as the mediator all the more difficult.

In another case, one side accused the other of taking advantage of the distractions caused by the pandemic to obtain approval for certain payments that would not have been made had there been time for full disclosure and complete discussion. In situations like this, I have to work hard as the mediator to allow the parties to vent about the inaction and/or nondisclosure, which really had very little analytical impact on the strength or weakness of the claims at issue, while keeping the parties focused on the risks and likely damage awards should the matter be litigated.

Amidst Many Changes, the Work of Resolution Remains the Same

Notwithstanding the challenges, the task remains the same. If I am mediating, I have to deal with strong personalities and keep them making progress. If resolution is not possible on the day of the mediation, I need to follow up to continue to close the gap and complete a successful negotiation so that expensive and time-consuming litigation, together with the possibility of embarrassing publicity, can be avoided. Regardless of whether I am serving as the emergency arbitrator or the arbitrator on the merits, I need to make sure that all the evidence is before me and that both sides have a full and fair opportunity to be heard. Fortunately, technology allows us to conduct virtual proceedings so that anyone can testify from anywhere, all exhibits can be introduced in evidence and all parties can have the same opportunity to make comprehensive pre-hearing and post-hearing submissions. When these pieces are in place, I can issue a well-reasoned award that considers all the relevant facts and law.

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