

FRIDAY, MAY 15, 2020

## Mediating during coronavirus: danger and opportunity

By Stephen H. Sulmeyer

It is commonly believed in the West that the Chinese word for “crisis” is comprised of two characters, one representing “danger” and the other “opportunity.” Setting aside the accuracy of this interpretation, I believe the coronavirus pandemic is presenting providers and users of mediation with both danger and opportunity.

The danger is conducting mediation in a business-as-usual manner. If we do nothing differently, we would continue to meet in person and mediate and negotiate using the same (largely unexamined) assumptions, tactics and approaches with which we are familiar. I think that a mediation-as-usual approach would fail to expose the hidden costs of our assumptions and block us from trying something different and potentially better.

The opportunity is being able to pause, reflect and reconsider our beliefs about how we conduct mediation, and to experiment with and embrace new ways of negotiating that reflect the current spirit of cooperation and helping others that is emerging during the pandemic. As Linda Alvarez explains in her book “Discovering Agreement”:

“Transformation of social institutions must begin with examining the patterns of belief that the systems were built to serve and which they perpetuate. By taking a conscious look at the beliefs and assumptions we take for granted, we allow ourselves to decide whether we truly agree with them. We give ourselves the opportunity to accept the given or make a new choice.”

The pushing of the national pause button is giving us a chance to reassess our approaches to resolving conflict, including our largely unconscious assumptions regarding how we do business. Our default approach to negotiation includes our tendencies to think exclusively in zero-sum terms; to blame, objectify or demonize our “opponents”; to justify our own actions and motivations; and to seek total victory for ourselves while handing our adversaries total defeat. It is

considered normal and laudable that a good negotiator is hard-nosed, no-nonsense and logic-centric, focusing solely his or her own interests, assessing value solely in terms of dollars.

However, if we as mediators, lawyers and clients are willing to contextualize our disagreements in light of the current situation, we can rewrite the rules of engagement, consciously and intentionally choosing the values and principles by which we want to be guided. Rather than fighting, posturing, grandstanding and playing for our sole advantage, we can choose to relate to each other as people — as the philosopher Martin Buber put it, we

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can engage in “I-Thou,” as opposed to “I-It,” conversations. We can view ourselves and the other parties to a dispute as not dissimilar human beings who share a common problem that must be jointly resolved. We can negotiate far more effectively when we realize that we are bargaining with a *person* and not a characterization of one. Instead of remaining in separate rooms (virtual or otherwise) and never seeing the “other side,” we can meet at least some of the time in joint session and see each other face-to-face. Doing so requires us to be vulnerable, but this can be a strength rather than a weakness.

Vulnerability allows us to talk about what really matters. Rather than bare-knuckle negotiations that usually focus on money, we can try to understand the human dimension of a dispute — and every case has one. There are at least two sides to every dispute, and initially neither side has the whole picture. With this new mindset, we can educate one another, fill in the blanks and view the situation from a more objective vantage point. We can honestly

discuss and evaluate the strengths and weaknesses of our own and the other side’s cases. We can listen empathically. We can seek to expand the pie by creatively producing new value, focusing on non-cash remedies, building relationships and creating win-win solutions. Skilled mediators know how to facilitate this.

I believe this more holistic approach delivers superior results compared to using a business-as-usual mindset. When the human dimension is addressed, I have found that a dispute can be resolved much more easily — and not simply resolved in the sense that the lawsuit goes away, but

that sound to you?” “I’m all for it,” he said. So we included in the settlement agreement, in addition to the monetary and injunctive terms, what being honorable competitors would actually look like for these two individuals. We created a “hotline” that they could use whenever it appeared that an issue had arisen, or might arise, between them. And we specifically addressed how to handle the defendant’s adoption of trademarks in the future. We didn’t just settle the lawsuit; we created value and fostered the beginning of new, more cooperative relationship that allowed both parties to feel that they were acting with integrity.

The choice is ours. We can carry on with business as usual, or we can use this pause to reassess our habitual and largely unexamined responses to conflict and try newer and potentially better approaches. This is not airy-fairy or Polyannaish naivete. It’s just common sense. And we can bring the benefits we discover into the future, rather than returning to mediation-as-usual when things return to “normal.” We have nothing to lose and everything to gain. The opportunity is here. Let us seize it. ■

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