

Lessons Learned from Mediating Cases During a Global Pandemic

By Hon. David T. Wall, Ret.



The coronavirus pandemic has changed us as practitioners and as human beings. We stumble, we rise again, we evolve to meet the challenges of a vastly different world. We assume that at some point, things will be as they were when 2020 first began, but we can use the lessons we are currently learning to meet the challenges of a new legal marketplace.

Although the first coronavirus case in the U.S. was identified in Washington state on January 20, 2020, no cases were confirmed in Nevada until March 5, 2020. Even then, it seemed like an issue that could be skirted with common-sense protective measures. On March 11, 2020, the World Health Organization declared the coronavirus outbreak to be a “pandemic” (there’s something frightening about that term; subconsciously, perhaps, we note that the word “panic” resides therein), and on the following day, Nevada’s governor declared a state of emergency.¹

At the JAMS Resolution Center in Las Vegas, I mediated cases on March 11, 12 and 13. For the first time, we practiced social distancing in the caucus rooms and traded elbow bumps instead of handshakes. It still seemed as though we could conduct legal business (mostly) as usual, although on March 12, the Clark County District Court suspended all upcoming civil and criminal trials.

I mediated a case on March 16 in what seemed at the time to be a unique manner. Some of the key individuals involved elected not to travel from out of state to the mediation, and some thought was given to canceling it altogether. Instead, two parties appeared via videoconference, one appeared telephonically, and one attorney appeared in person. Despite these challenges, the matter resolved late that evening.

Then the world changed virtually overnight, not so much in front of our eyes but seemingly behind our backs.

Many businesses, including law firms and alternative dispute resolution centers, closed their physical locations and allowed employees to work remotely from home. Air travel became the equivalent of viral Russian roulette. The idea of a face-to-face mediation session became a risk. Alternatives needed to be discovered.

In many facets of life, including some of the most basic, the pandemic has forced us to learn new ways to do normal things. It has changed how we shop and how we work and play. Our living rooms and kitchens have become our offices. The very essence of communication has changed. Families keep tabs through video chats. Handshakes and hugs became obsolete.

A Surprisingly Advantageous Time to Seek Resolution

Even in the absence of the traditional crowded office, businesses that are still open have had to continue communicating to survive. So it is with the practice of law, and one small segment of that is mediation.

Although law firms and mediation centers scrambled to form alternative platforms for conducting business, a core issue has emerged. Is it even appropriate to mediate cases in the midst of this global pandemic? Is mediation a necessary business function during a time of overwhelmed emergency rooms, massive and sudden unemployment, and palpable fear? I admit, in that first week or so of the shutdown, that it was hard to concentrate on (or care about) legal issues. Mediations were canceled as the nation shut down.

In the intervening weeks and months, however, it became obvious that business (including the practice of law) had to continue. Mediations at JAMS were offered to be conducted from remote locations, either by videoconference or by phone. We faced some healthy skepticism from lawyers

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and litigants on the effectiveness of alternative mediation forums, but fortune favors the bold (or the desperate), and many have accepted the challenge. Despite initial lingering doubts, I have learned that in some circumstances, it was the perfect time to seek resolution of cases in litigation, especially in the area of personal injury.

Maybe it was cabin fever as we waited out the flattening of the curve, but many of us, and law practitioners in particular, longed for some return to normalcy during April and May. In some instances, in our newly insular world (“Stay Home for Nevada”), concentrating on an upcoming mediation has been a welcome distraction, a life raft of familiarity in a sea of crisis and uncertainty.

But beyond the fact that we just needed something to occupy our minds, I found that the shutdown presented new opportunities to resolve differences. The pandemic uncovered our sense of community, of helping our neighbors and those most vulnerable, and even sacrificing for the common good. We have seen healthcare workers on the front lines making extraordinary personal sacrifices to help the afflicted, inspiring a nation, at least for a while, to pull out of the anxiety-ridden small view of the world and rise to recognize the big view.

In some cases, with some parties, it has been easier to achieve resolution at mediation against a backdrop of a world accentuating random acts of kindness. Additionally, litigants who may have felt powerless to change the environment around them have taken charge of the stressful litigation they have been living with to resolve it more amicably. For some personal injury clients, a settlement that provides immediate financial stability has suddenly become more important than some future prospect of greater success.

Learning the Challenges of Mediating Remotely

Mediating by videoconference quickly became the rule rather than the exception. Technological advances (depending on the capability of your computer) rendered it user-friendly, adaptable and private.

For a mediator, however, some of the nuance of being physically present has been lost. In an in-person session, a good mediator is part authority figure, part confidant, part legal expert, part therapist and part investigator. In a video session, some of these roles may be more difficult to assume. It is harder to see the non-verbal cues on video. Many times, they occur stage left or right in the conference room, when the participant may feel unobserved. It is sometimes necessary to overcome a party’s reluctance to appear on camera to elicit the same kinds of “private” conversations that occur in an in-person mediation session.

Ultimately, though, mediation is about compromise. The inclination to compromise or settle is generated from a variety of different feelings or incentives, especially during a national crisis, and these feelings may

be subconscious. At times during the outbreak, people have felt like a compromise was simply the right thing to do; we should all get along, since we are all in this together.

It has become necessary to consider each party’s feelings at the time of the session to an even greater extent than in pre-outbreak sessions. Many of the cases during the pandemic have involved someone scared, out of work (or with someone close to them out of work) and preoccupied with their own safety, and the well-being of those they love. Many personal injury litigants fall into high-risk categories for this virus. They may be fighting the effects of ongoing isolation. Many businesses have been facing economic issues far greater than those associated with the mediation (or the case that that might proceed to trial absent settlement). Some parties are ready to settle, given how their lives have changed and their priorities had shifted. These issues must be discovered and discussed during the session, and at times they are harder to reveal in a remote video setting.

Given these considerations, mediators had to learn to consider, on a case-by-case basis, whether these resulting motivations related to the outbreak have simply made compromise the more reasoned response, or whether they sowed the seeds of a susceptibility for someone to be taken advantage of in negotiations. Accepting a settlement offer that weeks earlier would have been an unconscionable thought might be the unfortunate result of a party who has been waiting to be rehired or concerned about an ill loved one. Ethically, it might not be part of a mediator’s role to prevent resolution on the basis of someone being pushed to compromise due to an extraordinary family circumstance, but it most certainly is the obligation of a mediator to facilitate open discussions about the considerations that fuel resolution. We are in the risk-elimination business. If a client’s life circumstances make the risk of ongoing litigation even more unsavory, then compromise and settlement may be the clearest path forward.

The pandemic and the resulting shutdown brought these new mediation issues to light. Creative solutions to new communication issues have allowed us to still conduct meaningful and effective mediations. We could have just ceased settlement efforts during the outbreak, but at what cost? To quote John A. Shedd, “A ship in harbor is safe, but that is not what ships are built for.”²

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Endnotes

- 1 “A Timeline of the Coronavirus in Las Vegas,” Las Vegas Sun, March 25, 2020.
- 2 John A. Shedd, “Salt from My Attic,” (1928).