

WEDNESDAY, MAY 27, 2020

PERSPECTIVE

## More settlement, mediation could be COVID-19's legal silver lining

By Lonny Zilberman

A few days ago, Chief Justice John Roberts made a videotaped speech to his son's graduating high school class at Westminster School, telling the seniors that the coronavirus pandemic "has pierced our illusion of certainty and control." Justice Roberts told the graduating class that "this pandemic has or will affect practically everyone in the world in one way or another." He then recounted how centuries-old traditions of the Supreme Court have had to be set aside, for the moment, in order to conduct its business, with a reference to telephoned presentations in place of in-person oral arguments and handshakes.

Undeniably, many lives and businesses have effectively been put on hold, in our collective efforts to curb the spread of COVID-19. A loss of "certainty and control," as Justice Roberts described it, is precisely what settlement and mediation hopes to provide to the parties in any litigation, perhaps now more than ever before. So, with all of the many unintended consequences of COVID-19, including what appear to be massive delays in the operation of the courts, what better time for litigants to try to regain certainty and control by engaging in settlement negotiations and mediation, now conducted

virtually due to social distancing through platforms such as Zoom.

In an unprecedented General Order, issued by Northern District of California federal Judge Richard Seeborg last week, he stated in no uncertain terms: "At this juncture, no assurances can be given as to when civil trials can be resumed, and if so, whether a further suspension due to public health developments will be necessary." His clear message: Parties need to engage in settlement negotiations and try alternative dispute resolution if you want to resolve your case.

Only two months ago, COVID-19 gave little warning on what was about to happen, as the majority of Americans hunkered down to stop the spread of the virus in March. The extraordinary events of the last few months have affected millions of lives and the one thing that can restore more certainty and control in litigation is self-resolution of disputes, as courts seem handcuffed and continue to broadcast that there will be significant delay in providing the justice that litigants seek.

In our current environment, where many cases have effectively been placed in suspended animation, the pragmatism of mediation and self-resolution is a form of utilitarianism that is enticing to both plaintiffs and defendants, individuals, small businesses as well as

Fortune 50 corporations. Mediation is utilitarian because it allows parties to seek their own economic self-interest without constraints. After all, the bottom-line goal of mediation is usually defined in obtaining the best dollar value for a case now, in a free market without constraints. While COVID-19 has upended our current reality, it would appear that the self-interest motivation — for all sides — is larger than ever.

There is also tremendous social utility in early resolution of litigation because the parties define the terms of resolution as whatever the parties want. As I have seen from countless personal experiences, from a psychological perspective, closure is much more preferred than continued ambiguity, insecurity and fear of the unknown. Now, perhaps more than ever, mediation and self-resolution is the one process that will improve society by facilitating a free market community exchange between parties, where isolation, separation and remoteness is the coin of the realm.

Emphasizing early case resolution during the COVID-19 crisis also satisfies the desire to fulfill each party's essential needs now, which only self-resolution and mediation can accomplish as opposed to lingering, indeterminate and protracted litigation. For example, is it really in any parties' best interests to prolong a lawsuit

by six, 12 or 18 months? There are negative opportunity and financial costs for all involved. When times are most uncertain — as they are now — mediation and early self-resolution helps parties seek their essential needs, whether the need is for money, shelter, peace, dignity or fair compensation. Essential needs not only focus on economic needs, but also the emotional and non-financial elements that drive many conflicts and are especially well suited for the current downturn in economic activity and separation and quarantine environment. By engaging in early mediation and settlement negotiations now, each party recognizes the benefits that can be made above the essentials and could lead to better outcomes than the assured delay of cases due to the courts' inability to provide justice. Perhaps where this concept works best is with the most complex cases, where each party wishes to end uncertainty and an escalation of fixed and soft costs due to a lack of resolution. There are clear advantages to resolving disputes without having to wait years for an uncertain end.

Speaking of resolution, while a world-wide pandemic was likely not the inspiration for Chinese military strategist and philosopher Sun Tzu, a quote from his influential work, "The Art of War," definitely resonates today, several thousand

years after he wrote it: “To win 100 victories in 100 battles is not the acme of skill. To subdue the enemy without going to war is the acme of skill.”

Under this concept, the premise is that violence and conflict need to be avoided or resolved, because they are not worth the cost. For pending civil cases, that concept cannot be emphasized more during the COVID-19 pandemic. Since in the current environment civil jury trials may not be available for some time, early self-resolution through mediation is an ideal way to resolve everything from personal injury claims to intellectual property and partnership disputes. By all accounts, we are entering (or are already in) a steep economic downturn, and business operations remain far from normal. The logical conclusion is that resolving problems without protracted and costly litigation is yet another way to help smooth out business operations, reduce costs as well as

personal uncertainty. Reducing litigation anxiety, both economic and psychological will help achieve a level of normalcy again — which we all crave.

Finally, when courts are stymied, mediation and self-resolution may also be an expression of the rule of law and a tool for justice under the rule of law (albeit at a cost savings). Generally speaking, mediation gives parties greater participation and control and focuses on reducing the cost of justice. Just like California’s Safer-at-Home Order has reduced traffic congestion, air pollution, car accidents and even crime, another unintended consequence is perhaps that it is society’s opportunity to also unclog the wheels of justice. The good news is that with more Californians staying home, air pollution is down by nearly a third, creating blue skies. What if 20% or 30% of the current court docket were to disappear through early self-resolution? What if, after the COVID-19

crisis, courts were more accessible and less congested? What an unexpected silver lining that would be. Before the pandemic, if I had made such an audacious prediction, it would be laughed at. However, today, it could happen and not unrealistic to expect, as mediation has gained wide-spread acceptance. One of mediation’s greatest attributes and values has been to reduce transaction costs and increase the level of satisfaction among litigants. That is something needed now, more than ever.

In 2014, I completed the Straus Institute’s program titled, “Mediating the Litigated Case” at Pepperdine University. At its conclusion, participants received certificates, and the program’s then-director, Peter Robinson, handed out a framed quote from Abraham Lincoln. It still hangs on my office wall and Lincoln’s words from over 150 years ago ring true today, more than ever: “Discourage litigation. Persuade your neigh-

bors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” Recent studies suggest that traffic levels on California freeways are at levels unseen in four decades; perhaps we can do the same in court. ■

**Leonid “Lonny” Zilberman** is a partner at Wilson Turner Kosmo in San Diego and practices employment law as well as mediation and alternative dispute resolution.

