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PERSPECTIVE

How I learned to stop worrying and love the pandemic

By Sidney K. Kanazawa

Just as Stanley Kubrick's brilliant satire, Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb, exposed the craziness of our Cold War nuclear race toward Mutually Assured Destruction (MAD), the pandemic has subtly exposed and transformed our approach to dispute resolution.

Court shutdowns, stay-at-home orders and social distancing abruptly nullified traditional lawyer dispute resolution tools. No longer could lawyers threaten upcoming trials or dispositive motions. No longer could lawyers use the logistical difficulties to justify all-day and all-night mediations. And no longer could lawyers even meet in face-to-face mediations, depositions, or hearings to gesticulate their differences.

Online platforms became our only option.

At first, this was daunting. How do you show documents, injuries and diagrams online? How do you "force" opponents to settle without an impending credible threat online? How do you develop rapport or communicate your disgust online? How do you have private conversations and know your conversations are truly private online?

And then the light went on. Calendars cleared. Virtual hearings, virtual depositions and virtual meetings became the norm. "Breakout room" gained new meaning. Travel anywhere was

unnecessary. Productive conversations with anyone, anywhere, were suddenly just a click away.

At a basic level, we learned online visual meetings can greatly enhance our communications and negotiations.

- **Online visual meetings can be arranged in an instant.** Logistics are now a thing of the past. With a few clicks, we can meet whenever we need to meet and adjust to each other's schedules with only a few more clicks.
- **Online visual meetings can get the right people in the room at the right time.** We can see and hear the right people when we need them, no matter where they are and no matter how much time they are available.

- **Online visual meetings can create unexpected opportunities for empathy and connection.** Actual or virtual backgrounds, the occasional child or pet, and our upper-body appearance in the comfort of our home gave us more insights about each other than in-person in a conference room. Seeing ourselves on screen showed us how we look and sound to others. Appearing as equal-sized boxes on the screen balanced the asymmetrical power dynamics and biases that often dominate our in-person meetings (grip strength, height, seating position, etc.). And online visual meetings effectively captured the non-verbal facial messages that

UCLA Professor Emeritus Albert Mehrabian found primarily drives our unconscious determination of whether we like, believe, or trust someone (visual/non-verbal 55%; oral/tone 38%; text/words 7%).

For mediators, these changes created an environment in which mediations were generally faster, more effective and more cordial than in-person mediations.

- **Early online meetings helped attorneys get to know and trust each other.** The easy setup of face-to-face online meetings encouraged more meetings, more information exchanges and more productive settlement conversations. The easy meetings were akin to meeting in the hall with everyone in the same office just a door away. And being just a door away, aggressive combativeness became uncool.

- **Early online meetings – without the threat of trials or court proceedings – forced negotiation style changes.** Instead of blind one-way missives in pleadings, texts, and emails, the parties visually met, heard, and watched each other's reactions in real-time. In pre-mediation and mediation meetings, these real-time two-way discussions opened opportunities for laughter, small talk, cajoling, COVID comradery, empathy and trust. Instead of threats of how one side will imminently win in court, the pandemic forced parties to creatively think beyond what a court could order

and to think about what might be attractive to an opponent now. The parties could agree on payments over time; future business opportunities; apologies or letters of recommendation; exchanges of property or cross-licensing of patents, or myriad other possibilities – even though none of these outcomes could be ordered by the court.

- **Early online meetings encouraged solutions rather than scoring points.** With the possibility of scoring points in court gone, many parties creatively used online meetings and mediations as vehicles for collaboration and brainstorming, exchanges of information, and opportunities to create better outcomes than could be achieved in court. Doing

Sidney Kanazawa is a national full-time mediator/arbitrator with Alternative Resolution Centers LLC (ARC), a leader in online ADR, and a negotiations coach. He can be reached at skanazawa@arc4adr.com.



nothing or churning fees without an opportunity for a resolution seemed wasteful. With less than 2% of cases going to trial in pre-COVID times and now even less in post-COVID times, the new normal of easy and frequent online conversations was an opportunity to talk, cooperate and dispose of cases without inordinate pre-trial costs or delay.

In the process, early online meetings changed how we processed disputes.

• **Most attorneys now prefer online mediations.** Even as

the courts reopen and in-person meetings are possible, few attorneys are choosing in-person mediations. The logistics of arranging an in-person mediation unnecessarily delay and complicate the scheduling of a mediation.

• **Many attorneys are now engaging in early mediations.** With the encouragement of the courts, parties are more regularly engaging in early mediations and discovery referee meetings to ease and speed the exchange of information and the resolution of disputes.

• **The level of civility has skyrocketed.** There seems to be something magical and disarming about working from home (with pets and kids and favorite snacks nearby), seeing the background, appearance, and conduct of others at home, and seeing yourself online in an equal box as everyone else. Almost universally, mediators and parties have reported that everyone seems nicer and more cooperative in online mediations.

• **And the negotiations have changed.** With the absence of

an imminent trial or dispositive motion, threats have decreased, and creativity and empathy have increased as means of finding solutions.

In the darkness of the pandemic some positive seeds sprouted that transformed, and continues to transform, how we resolve disputes. As the dawn breaks, let's hope we are not blinded by adversarial tradition and continue to nurture what we learned in the darkness – our human species thrives best when we collaborate as friends rather than bully as enemies.