



The silver lining of practicing law during the pandemic

Negotiation may be less contentious, with parties willing to give a little more just to get it done

By KRISTIN KEMNITZER

In the past month, I have traded tips on the best homeschooling activities for four-year-olds; lamented the cancellation of MLB opening day; learned how to build a do-it-yourself MagnaTile light table; and even shared my personal best outputs on my Peloton rides. These are not conversations I have had with my best friends over FaceTime virtual happy hour. These are conversations I have had with opposing counsel while negotiating settlements for my clients.

How in the world...?

On March 10, I flew from the Bay Area to Orange County for a personal appearance in bankruptcy court. I started working from home two days later. By March 17, I was sheltered in place with the rest of the Bay Area. My increased heartrate directly correlated with the emails piling up in my inbox announcing court closures. What was going to happen to the class certification hearing in the Northern District of California on March 19? How was I going to take those March 31 depositions in Los Angeles? Would the Los Angeles County Superior Court approve a motion for preliminary approval on April 7? I'm sure my thoughts mirrored those of countless other attorneys: How in the world am I supposed to practice law during a pandemic? Would all my cases grind to a halt?

Nearly as quickly as the disastrous news started flowing in, I began to see a marked shift in my interactions with opposing counsel. Dealings became *easier*, not harder. Negotiations that in normal times would take months now took hours. It is as if opposing parties are now on the same side, with Coronavirus across the "v."

When life gives you lemons

In normal times, it is not unusual for a defendant in a lemon law case to drag its feet, sometimes for multiple months, before it will sign an already negotiated settlement agreement. I would then expect to have to follow up with opposing counsel numerous times over several weeks to schedule the subsequent vehicle surrender. I grew to expect this tedious process as just part of the business.

Then the Coronavirus hit. I had just settled a vehicle case, and it became in everyone's interest to expedite the process as much as possible. As soon as the parties signed the agreement, which took hours, not months, we all jumped into action. Over the course of one morning we were able to work together to have the vehicle surrendered mere hours before Governor Newsom announced the statewide shelter in place order (while following safe social distancing procedures, of course). Defendants issued settlement checks 30 days *sooner* than the settlement agreement and release required and overnighted the checks to my home since my office was closed. My client received relief far sooner than he would have under pre-pandemic circumstances. In fact, he would probably still be waiting to surrender the vehicle.

The paradox of court closures is that parties must get more creative with their negotiation. This can lead to expansion of the pie and mutual benefit for all parties. During this time of uncertainty, plaintiffs may not be interested in holding out for a slightly better settlement. They may want to settle for a more reasonable amount and move on. Similarly, defendants may be willing to give their best and final offer in order to end costly and uncertain litigation – after all, paying attorneys is probably low on the priority scale of corporate

defendants' most pressing expenses. Defense counsel may also have a vested interest in settling now, given that they may not know whether their clients will be able to pay their legal fees one month from now.

This is not to say that all defendants are as accommodating. In fact, many are using these unique circumstances as the ultimate delay tactic, allowing everything to come to a screeching halt until courts and airports reopen. But defense counsel who take this tactic are being short-sighted. They are doing their clients a disservice and missing out on a rare opportunity. Those defendants with creative, forward-thinking counsel are using this situation as an opportunity to get their clients out of protracted, expensive litigation. Settlement terms that may never have been on the table previously, such as alternative payment structures, are now available.

COVID-19 can help settle cases

Negotiations have always involved a level of theatrics: exorbitant demands; low-ball offers; chest thumping at the pricey mediation; and long delays. COVID-19 has stripped some of the drama (and desire to fund litigation) away and left us all with a sense of shared humanity. That shared humanity settles cases. It is what was missing from previous discussions with opposing counsel. We are now negotiating the way that "Getting to Yes" taught us:

1. Separate the people from the problem
2. Focus on interests, not positions
3. Learn to manage emotions
4. Express appreciation
5. Escape the cycle of action and reaction¹

Suggestions that previously would have resulted in a party walking away from the



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table are now open for discussion. And in the rare occasion that a negotiation goes south, it is easier to explain that negative behavior in the context of the greater global pandemic rather than believe it is related to the case at hand.

Every call I have had with opposing counsel over the past month has started the same way. We spend the first few minutes discussing our families, our current situation, and how we are surviving. These precious minutes connect us as humans. We do not delve into our differences until we first connect about our similarities. Starting the call on a human level means it is less likely to break down. We get to the bottom line faster. Is it worth wasting untold months on a motion to compel discovery responses if I can get 95% of what I need now? Probably no. Is the defendant willing to increase the offer by \$10,000 to avoid two more months of negotiation? Probably yes.

Generosity during negotiation

A recent New York Times article found that generosity during a negotiation is a sign of intelligence.² One study found that the higher one's intelligence, the better the counterpart performed in a negotiation. These individuals were able to expand

the pie in a way that benefits both sides. Traditional game theory studies prove tit-for-tat (i.e., the way short-sighted defense counsel are treating the pandemic). But more advanced recent game theory studies prove that positive repeat relationships make everyone better off. "Believing in a fixed pie is a self-fulfilling prophecy. When we expect the worst in others, we bring out the worst in others. When we recognize that everyone feels the impulse to help (unless you are a sociopath), we have a chance to bring out what Lincoln called the better angels of their nature."

One recent morning I opened my inbox, and in between meet and confer letters and chilling COVID-19 updates was an email from a retired opposing counsel entitled "Shakshuka night!" I opened it and found a photo of the famous middle eastern dish and a touching story about FaceTiming his grandchildren in Israel. I responded with an update on my own children and a photo of the bread we had made the night before.

Someday soon courts will reopen. We will return to the office. But let us remember the humanity we shared during this crisis. I will remember opposing counsel's homeschooling activities, favorite

baseball team, DIY hacks, Peloton personal best, and grandchildren's names. We've seen behind the curtain: Opposing counsel are human beings. The practice of law will benefit.



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Endnotes:

¹ <https://www.pon.harvard.edu/daily/negotiation-skills-daily/six-guidelines-for-getting-to-yes/>

² <https://www.nytimes.com/2020/03/27/smarter-living/negotiation-tips-giver-taker.html>