

Views From the COVID Bomb Shelter - A Statistical Analysis

By Vance Cooper, Cooper Mediation Inc

In mid-March, 2020, Canadian life as we knew it changed very dramatically. Mediation was able to continue by reason of the collective will of government, the judiciary and, most of all, lawyers and litigants.

Initially, there was an optimistic view that mediations could be adjourned for a few months and take place in person in the late spring or early summer of 2020. Sadly, this was not to be and when mediations which had been rescheduled for this purpose came up for the second time, these mediations universally proceeded remotely.

There were some initial skirmishes over the remote platform. Zoom, which seems to have been designed for mediation in a pandemic despite its actual launch some 9 years earlier, received some initial reluctance due to some adverse publicity. These problems were overcome and Zoom has been the “go to” platform for mediation by videoconference for well over one year.

Cooper Mediation set out to conduct a statistical analysis of all mediations conducted for approximately one year leading into the pandemic and one year under pandemic conditions to determine if settlement rates were materially different. Our analysis follows.

Background

In order to put the analysis into context, a few words of explanation are required.

“Settlement” means either a complete or partial settlement of the matter being mediated. We looked at matters scheduled for a half-day (3 or 4 hours) or full-day (6 hours), depending on the mediator. We looked at two party, 3 party or 4 or more party mediations. We examined matters that were mediated within the original time budgeted for the mediation and matters that went into “overtime” - more than 6 hours for a full day mediation and more than 3 or 4 hours for a half day mediation.

The pre-COVID period captures a total of 352 half-day and full-day mediations conducted from March 1, 2019 to and including March 13, 2020. The COVID period captures 416 half-day and full-day mediations from March 16, 2020 through March 31, 2021.

What happened under COVID?

While life in many ways shut down, we buckled down and were very busy.

We saw an increase in half-day mediations from 205 to 281 (a year over year increase of 37%). There was a slight decline in full-day mediations from 147 to 135 (a decrease of 8%).

Overall, the settlement rate dipped by 2% during COVID when looking at all mediations by all mediators at Cooper Mediation.

Interestingly, the settlement rate for all half-day matters was virtually identical. By comparison, there was a slightly more meaningful difference in the settlement rate of full-day matters with a decline of 3% during the COVID period.

When one examines the rate of settlement having regard for the number of parties, the settlement rate increased under COVID for two party cases by 3.3%. This may suggest that two party cases lend themselves to remote access mediation: fewer parties, fewer issues, fewer people and fewer personalities.

The settlement rate declined under COVID by 13% for 3 party cases and by 8% for 4 or more parties. This may suggest that with more parties, there is likely to be more complexity and nuance to the negotiations and that an in person mediation puts the parties, their counsel and the mediator in the best position to tackle these challenges.

If we examine settlement rates in the pre-COVID period, the settlement rate for 3 party cases was 17% higher than two-party cases. The settlement rate for 4 or more party cases was approximately 15% higher than two-party cases and roughly the same as 3 party cases. This suggests that for multiparty cases, there was definitely a benefit to in-person mediation.

Under COVID, the settlement rates for two party and 3 party cases were virtually identical. The settlement rate was surprisingly somewhat higher for 4+ party cases as compared to two party or 3 party cases (up by about 4%). We believe that this improvement might be attributed to a willingness on the part of the litigants and counsel to stick with the matter a little longer under COVID, given the benefits of working remotely. There is certainly a temptation to end mediations earlier, when one is contemplating commuting time, rush-hour traffic, congestion on public transit, etc.

In our experience, one of the toughest jobs for a mediator is to keep people at and engaged in the discussions and negotiations for a sufficient period of time to allow the process to work and for resolution to be revealed. Our data strongly supports this view.

The percentage of all matters requiring over-time was up to a small extent when comparing the pre-COVID period (21.6%) to the COVID period (24%). While the percentage of settlement for matters requiring overtime dipped by about 10% during COVID, the settlement rate for matters requiring overtime as compared to the settlement rate for matters completed within the original time budget was almost 30% higher before COVID and some 20% higher during COVID.

Vance Cooper

Vance's settlement rate was slightly better during COVID but not in a meaningful way (up overall by 2.5%). There was a meaningful improvement for half-day matters during

COVID (up 5.5%). Full-day matters were resolved at very similar rates (2% higher during COVID).

There are a couple of statistics that stand out. For cases involving 4 or more parties, the settlement rate increased dramatically during COVID (an increase of 27%). This is counterintuitive. One would have thought that multi-party cases would benefit from in-person mediation. Vance believes that there was a greater likelihood to terminate negotiations at in-person mediations. When litigants and their lawyers are participating remotely in the mediation, they are more inclined to stick with the matter and see it through to completion.

For cases mediated into overtime, the settlement rate increased slightly by 6% during COVID. Moreover, the percentage of matters which required overtime increased by 12%. During COVID, 27% of all matters required over time as compared to about 15% before COVID. Most significantly, over 91% of the matters that were mediated into overtime during COVID were resolved as compared to 67% which concluded during the original time budget.

In the early days of remote access mediation, Vance had a belief, not yet supported by the data, that more matters were mediated into overtime. His initial belief was that there were inefficiencies in communication using remote access platforms such as Zoom. His belief evolved over time and his current hypothesis is that those involved in an in-person mediation will tailor their negotiating patterns with a view toward avoiding rush-hour

traffic and with a view toward meeting the other demands on their time - child care, lunch or dinner reservations, tickets to a professional sporting event or a concert, etc. (close your eyes and think fondly of those days). Similarly, there is a temptation for one or more of the participants to a 4+ party in-person mediation to lose patience and leave the mediation. If this party is necessary to achieve resolution, the mediation does not produce a settlement. If this party is participating remotely, they can be doing other things, professionally or personally, and it is easier to keep that party at the mediation and see it through to its conclusion.

Jonathan Cooper

Jonathan's overall settlement rate was slightly better before COVID but not in a meaningful way. There was an overall decline in the settlement rate by 1.3% between cases mediated pre-COVID as compared to those mediated during COVID. Similar to Vance's experience, the number of cases and percentage of cases which required overtime increased during COVID (an increase of 11.5%). The settlement rate for these matters dipped somewhat under COVID by 10% but, once again, these settlement rates are significantly higher than the overall settlement rates for all matters mediated by Jonathan, described above.

Jonathan's key take away is the mediator should be the last person to give up on the prospects for settlement. The mediator should and must push all the buttons and look under all the rocks and do everything they can to make sure that the day is truly not the

day for resolution. Jonathan subscribes to the theory that “if you leave the mediation, your chances of resolving the matter on that day are 0%; if you stick around, the chances increase dramatically”.

Logan Cooper

Logan’s settlement rate was slightly better during COVID but not in a meaningful way - up by about 6.4%. Similar to Vance’s experience, the number of cases and percentage of cases which required overtime increased during COVID by 23%. The settlement rate for matters mediated into overtime increased by 22.6% as compared to all matters mediated and increased dramatically by some 34.5% as compared to those matters mediated during the time originally scheduled.

Logan offers a different perspective on the trend toward more cases requiring overtime during COVID. Logan believes that remote access mediation, with all or most people working from home, leads to people multitasking (attending to other business or personal tasks) and being less focused on the issues and discussions at mediation.

Logan believes that remote access mediation offers a number of advantages. For insurers, there is a savings of time, expense and productivity. For plaintiffs, there is potential for increased comfort as newcomers to the process by reason of the ability to mediate from home. There are disadvantages, to be sure, including the lack of intimacy and technological challenges. All of that said, remote access mediation is here to stay, to

a greater lesser extent, and considering the progress we have all made over the last 13 – 14 months, more progress and success can be expected in the future.

Conclusion

There is no doubt in our collective minds that remote access mediation is here to stay. We continue to hold the view that in person mediation is and will be the gold standard. However, the benefits and savings of remote access mediation cannot be ignored. Those institutional litigants who are involved in hundreds or thousands or tens of thousands of lawsuits annually are expected to require most mediations to proceed by remote access unless there is a compelling reason to mediate in person.

Our statistical analysis suggests that multi-party cases and matters which may not fit within the original time budget may be particularly well-suited to remote access mediation. It may be easier for a mediator to motivate litigants and their lawyers to show extra patience and perseverance to see the matter through to its conclusion.

Finally, there is a case to be made for mediators to move outside of their traditional geographic practice areas and offer their services throughout the province and throughout the country. There does not appear to be a meaningful loss in settlement rates when looking at matters mediated before COVID and during COVID. The savings of productivity and travel time and the expense of in person mediation (facility fees and travel expenses) cannot be ignored.

ABOUT THE AUTHOR

Vance Cooper is the principal of Cooper Mediation Inc. Vance devotes 100% of his professional time to mediating and arbitrating primarily personal injury and insurance cases. He serves as an arbitrator in loss transfer and party disputes under the Insurance Act. Vance is a Distinguished Fellow of the International Academy of Mediators, a Chartered Mediator of the ADR Institute of Canada and a Certified Mediator by the International Mediation Institute. He was inducted to the Ontario Chapter of the Canadian Academy of Distinguished Neutrals (CADN).

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To schedule a mediation with Vance, visit:

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ABOUT THE CONTRIBUTORS

Jonathan T. Cooper is the taller, younger and non-bow-tied mediator with Cooper Mediation Inc. He mediates primarily, but not exclusively, in the area of personal injury and insurance. Jon was recently inducted as a Fellow of the International Academy of Mediators. The IAM is an invitation-only organization consisting of the most successful commercial mediators in the world who must adhere to the highest practice and ethical qualifications.

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To schedule a mediation with Jon, visit:

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Logan Cooper joined the Cooper Mediation team in November 2017 and devotes 100% of her professional time to mediating at roster-rates. She has mediated over 150 cases in the areas of personal injury, property damage, long-term disability and other insurance-related disputes. She has handled global mediations, cases with multiple parties, self-represented litigants and cases with complicated technical and interpersonal challenges.

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