

## **Some Observations on Remote Learning and Videoconference Mediation**

By Hon. Alexander H. Sands (ret.)

The Covid-19 pandemic has raised many issues in the business, as well as the health, world since March of 2020. As both a mediator and a law school professor, since retiring from the Land Court bench in 2017, I thought it would be helpful to clarify some thoughts on the new “normal” in the business, educational and legal worlds.

As a law school professor, the pandemic has been challenging. For the last three years, since I retired from the bench, I have taught two courses at three different law schools; one on trial advocacy, a standard trial practice course, and the other on the social issues involving affordable housing, a course which I created and believe to be unique to law school curriculum. I based the affordable housing course on my experience with my affordable housing cases while on the Land Court bench.

Both classes are modeled on traditional in-class presentations. The trial advocacy course is based on student oral presentations in opening statements, direct and cross examination of lay and expert witnesses, and closing arguments. In that class, the final examination involved the students presenting a full trial on a given set of facts. As any trial practitioner knows, the presentation of the facts from the witnesses is a key part of any trial, both in what they say and how they say it. Body language is a critical component of the testimony, and it is important for the judge to be able to assess credibility and truthfulness. I initially thought that body language would be a challenging component of the trial and wondered how this would translate in the Zoom stage. When I taught this class in the spring of 2020 (pre-pandemic), the first half of the semester was all in-class, and I came to know my students in person. When we transferred to the remote Zoom classes, I already knew the students and could carry over the knowledge I had accumulated earlier of each student, which made the processing of the information from the students an easier task. I could translate what and how the students were speaking in a more cohesive fashion. The mock trial at the end of the semester worked out quite well. The students, already conversant in the tech world, which was so new to me, made the process of transitioning to remote online teaching more meaningful for both them and me.

This fall, I am teaching a law school course on affordable housing, which began as a remote Zoom class and will in all probability conclude as one. This is more challenging, as I have met none of my students in person, making it harder to get to know them and discern their reaction to the class. The course’s final exam is a written paper, picking a particular city or town from the 351 cities and towns in the Commonwealth, which has not met the statutory minimum (set in 1969) of 10 percent affordable housing required of them 51 years ago, and explaining why this requirement has not been met. A vast majority of the 351 cities and towns have not met the 10 percent threshold. The current pandemic and its required social distancing has made the student’s research more problematic, as the best research is in-person meetings between the students and municipal employees in the towns which the students chose. However, I have been impressed with my students’ resourcefulness, as they react to the pandemic environment. This process prepares my students to respond to unplanned events in the real world, which, as we know, always occurs.

I've seen the same confusing process in my REBA Dispute Resolution mediation practice, although with a different approach. As many of you know, there is a certain magic to a mediation with everyone physically in the same room, a magic which often disappears when the parties leave the building without resolution of the case. When the pandemic hit in March, many lawyers initially postponed their REBA/DR mediations until the summer, anticipating that in-person mediations would then resume. When it became clear that the pandemic would continue longer than expected, the lawyers agreed to try online mediations for two reasons. The first was the litigation impasse, as the courts were closed, conducting no hearings and trials. The second was that online mediations, even with their uncertainties, were better than no mediations at all. As a non-techie (my daughter and grandchildren tell me that I am a Neanderthal in the use of social media), I was anxious myself about remote Zoom mediations. However, having learned from my class teachings that online could work, I became more comfortable in this remote setting. REBA Dispute Resolution has a great advantage in having a pro (Bob Gaudette) who handles the tech part of the mediations.

At REBA Dispute Resolution, I have had great success with online mediations over the last several months. Structured like an in-person mediation, the mediator meets all parties at the beginning. After openings, the parties break into separate virtual rooms (controlled by Gaudette) ensuring confidentiality and security. When I host a pre-mediation telephone conference with the lawyers, I determine that they have had prior experience with remote mediations. If not, REBA/DR gives them a pre-mediation training session. This brief training session becomes the key to a fruitful mediation.

Prior online remote experience is the significant difference between the students in my class (who have *tech* experience) and the lawyers in my mediations (many of whom, like me, do not); but I have found that once a lawyer acknowledges his/her inexperience and receives a brief training, the fear dissipates and the mediation session functions effectively. I have also handled arbitrations in the online remote setting, and that process also works well.

The pandemic, although horrible in so many ways, has a silver lining – affording innovative avenues to tried-and-true practices, and bringing new self-confidence. I recommend that any practitioners who still feel uncomfortable with the new remote mediation process give it a try and face your fears. It actually works – take it from a non-techie like me!

*With 15 years on the Land Court bench, his experience on municipal boards and more than 30 years in a transactional real estate practice, Judge Sands is uniquely qualified to mediate any real estate dispute, particularly zoning, permitting and land use matters. He also has extensive experience in affordable housing, with many such cases on the Land Court, resulting in his teaching a unique course on the subject in several Massachusetts law schools. All of these experiences have honed his role as a communicator and facilitator in ADR matters. To schedule a mediation or arbitration with Judge Sands, go to [adr@reba.net](mailto:adr@reba.net).*