



Counterpoints for the Virtual Mediation Skeptics

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As we all know, the COVID-19 pandemic has a major impact on the legal industry. In-person proceedings that we have taken for granted have been put on hold indefinitely as we shift to a new normal. The mediation world has adapted to this new normal by moving to virtual platforms like Zoom.

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But let's face it, despite the times, not everyone has embraced the virtual mediation movement. The pros are obvious. It is more convenient, efficient and cost effective than a traditional, in-person proceeding. In response, the doubters seem to rely on a few common beliefs. Addressing these concerns will go a long way toward moving virtual mediation into the mainstream.

Non-Verbal Cues Can Only Be Observed In-Person

One of the main arguments against virtual mediation is that the ability to evaluate the other party's non-verbal behavior, i.e., body language, is hindered in an online format. First, at least in my experience, whereas joint sessions were commonplace in the past, they are relatively rare now. Therefore, there is little to no opportunity to actually size up the other side at an in-person mediation anymore.

Moreover, studies show that video can be more intimate and telling than telephone and in-person interactions. Indeed, having someone on a video screen forces the viewer to focus on the speaker's face and eyes – the proverbial window to the soul.

Nevertheless, the concern about reading non-verbal cues is legitimate and instructive. One way to address this concern is to

try virtual mediation on those cases where the parties have already had an opportunity to size up the opposition at a deposition, hearing or other proceeding.

There Is a Lack of Engagement in a Virtual Mediation

Another concern that the doubters raise is that the act of sequestering the parties at a physical location for the entire day increases their engagement and investment in the process. Again, this is a legitimate concern, but one that may be somewhat overblown. If the parties are truly motivated to resolve their dispute, then the mediation shouldn't come down to a physical endurance test.

In addition, many litigants are business people who regularly negotiate deals that dwarf the value of the lawsuit at hand. They know from their personal experience that time is money, and that spending the day sitting in a conference room is not necessarily time well spent. That is why most participants at a traditional mediation bring other work to do during the downtime. If efficiency is at a premium in the business world, then why abandon that notion when it comes to mediation?

Lastly, virtual mediation actually can enhance the parties' ability to engage in the process. In the world of in-person mediation, there are often key players, such as insurance claims representatives, who do not participate in a meaningful way at a typical mediation. Rather, it is common for them to be looped in via telephone toward the end of the day only if/when the deal is imminent. Virtual mediation can bring these key players into the room for the first time.

A Virtual Mediation Cannot Replicate the Interpersonal Dynamics of an In-Person Mediation.

A third concern that the virtual mediation critics have is that there are certain interpersonal dynamics, like those between attorney and client, that cannot be replicated online. In my opinion, this concern is also easily debunked.

Today's technology allows for all of the interpersonal interaction of an in-person session. With tools like Zoom, the parties can have joint sessions. They can be grouped into private breakout rooms and collaborate with or without the mediator present. The attorneys can have private meetings with the mediator if they want. The parties can also supplement the online platform with texting or voice calls on their smart phones.

Zoom also allows for sharing and annotating documents, which is usually much more efficient than fumbling through clunky binders. When it comes time to draft and sign a settlement agreement, tools like DocuSign, e-mail and scanners, all of which are available as mobile applications, can easily substitute for getting wet ink signatures on the spot.

To sum it up, virtual mediation is a game changer when it comes to alternative dispute resolution. Understandably, some are resistant to change based on their belief systems. But by debunking some of those beliefs and slowly opening the doubters' eyes, we can hopefully offer litigants another viable option for resolving their disputes during this crisis.

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