

VERDICTS & SETTLEMENTS

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Migrating away from traditional models of mediation

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Mediation is often viewed by lawyers as a “this” or “that” on the spectrum from facilitative to evaluative. In reality, experienced neutrals view mediation as a process customized to the needs of the parties in a particular case. Similarly, many lawyers view the mediation process as involving either joint sessions or individual caucuses, when in reality experienced neutrals will consider a blended approach.

Sometimes, an initial joint session may be preferred to allow the neutral to bring parties and counsel together for an optimistic welcome and setting of the ground rules. The parties may then decamp to individual rooms with the mediator shuttling between separate caucuses, perhaps bringing the attorneys and/or parties together for expert presentations and documenting the settlement. In another case, the initial joint session may not be necessary, so parties may proceed in individual caucuses until a joint session is needed for expert presentations or documenting the settlement. In brief, there are as many variations of this process as there are disputes.

Just as a flexible approach works best for the style of the mediator and the parties in the room, in this time of COVID-19, it makes sense to further customize the mediation process. The key is migrating away from the traditional assumption that a mediation should be a day-long event where both sides (or all sides in a multi-party dispute) spend the day, even virtually, waiting for the mediator to visit,

share information, and perhaps opine regarding the strengths and weaknesses of the positions of the parties until the back and forth on the numbers begins. Rather, more customized approaches are called for now, more than ever, to accommodate the challenges and issues arising because of the ongoing pandemic.

The term “hybrid mediation” is typically used in the literature to describe a dispute resolution process that involves using both mediation and arbitration. This is also commonly called the med-arb process. To avoid possible confusion over the terminology, we will describe a type of hybrid mediation using the term “tailored mediation,” the hallmark of which is the flexibility to have different “sessions” using different platforms on days and times that meet the needs of the attorneys and parties.

Consider a case where parties to a mediation are sophisticated businesses, one in India and another in New York. Rather than having a single, day-long mediation in person, we could split it up over a few days and offer the parties an option to attend virtually. Short, virtual mediation sessions provide greater scheduling flexibility and allow the mediation to take place in a less cumbersome manner.

Let’s break this down. Rather than having the neutral and both parties present in-person for one day, we would first schedule a time for them to meet virtually. During this initial session, the plaintiff provides its statement, and the session breaks for a few hours or days. After the break, all parties and the mediator reconvene for the defense to provide its rebuttal.

Next, the mediator could schedule a date for individual caucuses to take place. While the caucuses could be scheduled for the same day, they would be scheduled for specific times to avoid having one party wait while another is meeting with the mediator. The next day, the mediator and both parties all come together virtually for negotiations and settlement.

In addition, another hidden value to the parties and counsel is economic in nature: eliminating costly travel and billable hours spent in a room waiting are gone. Lawyers and clients alike want the most efficient and effective outcome and for mediations involving seasoned mediators and are business focused virtual mediation stands and delivers. The net-net is that virtual mediation delivers efficiency and substantial savings to parties that are frequent users of mediation. It also allows lawyers to deliver a cost-efficient outcome to their client, as most lawyers do

not like having to travel a day or even hours to and from a mediation, foregoing valuable time that can be sent working or picking up laundry.

In summary, tailored mediation enables parties situated in different parts of the world to come together and mediate. It also allows for the sessions to be shorter and permits parties to attend without actually having to travel. As long as everyone involved is committed to the process and gives it as much attention as they would the traditional mediation session, tailored mediations could streamline the mediation process to prevent delays and offer more customized solutions for problem solving in the midst of all the challenges and uncertainties brought about by COVID-19. ■

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