

Virtual Caucuses Can Improve The Mediation Process

By **Marc Isserles** (May 8, 2020, 6:06 PM EDT)

Should we mediate now by videoconference, or wait to schedule an in-person session after the coronavirus pandemic ends? Lawyers, clients and neutrals all over the country are asking this question.

While the answer will depend on the particulars of each dispute, the question usually assumes that the mediation session will take place at a shared time — that mediation is a synchronous event that takes place either in person or on a videoconferencing platform.

But mediation is a process with discrete parts that unfold over time, and virtual platforms create the potential for asynchronous communication (i.e., at different times). So asking whether to mediate in person or online is not so much the wrong question, but an incomplete one.

We should also be asking how and whether to do both. In particular, we should be asking how we can incorporate asynchronous, online tools to complement or even improve the traditional mediation process.

Mediation as a Synchronous Event

The mediation session itself is designed largely as a synchronous event, and for good reason. A mediation session is a critically important "event" in the timeline of a dispute.

Devoting an entire day to a mediation session, and preparing for it, has a way of focusing the attention of busy lawyers and decision-makers on resolution. Investing the time and resources into the mediation event, and showing up prepared to work constructively, creates momentum and powerful incentives to succeed.

The Downside of the Synchronous Session: Time Pressure

But the synchronous nature of the traditional mediation session can have significant drawbacks, especially given the prevalence of the private caucus model.

A significant portion of a mediation session is usually spent in private caucuses, where the mediator will



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discuss a host of critical issues with each side: the background of the dispute, the parties' interests, the facts, the legal issues, damages and settlement considerations. And in complex, multiparty disputes, the mediator will need to discuss comparatively more complex facts and legal issues with multiple people.

This important work takes time, and the caucuses are but a prelude to the rest of the process: bargaining, and then hammering out and papering the deal. There are only so many hours in a mediation day (or two), and there never seems to be enough.

Giving caucuses the attention they deserve creates time pressure that can have negative consequences for the mediation process. The mediator may need to prioritize certain issues for caucus discussion, or even cut off an important conversation to move the process along. This can interfere with the mediator's objective of listening to the parties tell their stories, in their own way, so they can feel heard.

Despite a mediator's best efforts to move things along, the people in the room (or rooms) waiting for the mediator may understandably get impatient. And when the mediator finally arrives, their agitated emotional state can make it harder for them to listen, especially when the mediator is articulating the positions of a bitter adversary.

As the day draws to a close, the willingness to work toward resolution is often overshadowed by a collective sense of frustration and urgency. The negotiation has almost never gotten as far as anyone hoped at the start of the day. While this dynamic can sometimes propel the parties to a deal, there is a real cost to the synchronous model in the form of unnecessary stress, anxiety and emotionally driven decision-making — all of which can create a suboptimal negotiation process. On occasion, this pressure cooker environment may even precipitate otherwise avoidable impasse.

Enter the Asynchronous Virtual Caucus

Virtual caucusing, separated in time and space from the remaining phases of the mediation process, provides a way to correct some of these deficiencies. Beyond doing the organizational calls by videoconference (another useful application of the online format), the mediation session could actually begin online, with client participation, in the private caucus format over videoconference with the mediator.

These initial caucus discussions would be part of an overall asynchronous caucus model in which the mediator can meet with each side privately, at a convenient time of their own choosing, and without the participation (and ever-growing impatience) of the other side. Parties could commit to a virtual caucus model for a single round, or multiple rounds, until they are ready to come together — ideally in person, but not necessarily — for a synchronous session to complete the mediation process.

Using Virtual Caucuses During the Crisis and as a First Step

In the short term, this model would allow parties to initiate the mediation process during the current pandemic, when the online platform is the only realistic choice, but without committing to an exclusively virtual platform for the remainder of the process. After some virtual caucusing, it may be possible to once again get into a room to mediate.

This model could also work, after this crisis ends, for parties that would like to take some initial steps toward resolution but are not yet prepared to sit down and negotiate a deal.

Benefits of Integrating Virtual Caucuses: Productivity, Substantive Engagement and Better Bargaining

Integrating virtual caucusing into the mediation process also might help improve the overall quality of the process in at least three ways.

First, although moving the private caucuses to a virtual platform preceding the session might be seen as adding to the process, this would address and correct a major criticism of the current model: the inefficiencies and frustration associated with attending an in-person mediation session (potentially after a long journey), where much of the day is spent waiting around for the mediator to return from the other room. Handling some or all of caucus work beforehand on a virtual platform might lead to a more productive and efficient synchronous session, in which the parties are more actively (and happily) engaged throughout the day.

Second, virtual caucuses would allow the mediator and the parties to begin the hard work of the initial caucuses free from the time constraints of the synchronous mediation session. It would give the early rounds of mediation the "breathing space" that is often so lacking in the crucible of a one-day (or even a multiple-day) session. Substantive engagement might improve when discussions take place at a more measured pace, over time, and through a variety of communication channels (including email) that lend themselves to more reflection and deliberation, and fewer impulsive responses.

Virtual caucuses can be suspended, and later reconvened, to allow the parties to further explore or vet issues. And the mediator would have additional time to devote to the delicate art — usually performed during the short walk between the two conference rooms — of reframing a party's position in a way the other side can hear it.

Finally, a virtual caucus model might lead to a better bargaining process. Participation in a more deliberative, virtual caucus process may give parties a more thorough understanding of their counterparts' perspectives, a more realistic assessment of their own positions and a more objective sense of fair settlement value — all of which should improve the quality of the negotiation.

In addition, because the virtual caucus process would reduce the time constraints associated with a traditional mediation session, negotiators may find they can approach the bargaining process in a more levelheaded way, focusing more on the deal and less on how little time remains to get it done.

What About the Lost Benefits of an In-Person Caucus?

To be sure, a virtual caucus model would use a videoconference, rather than in-person engagement, for the initial meeting with the mediator, which is an important moment for forming a connection. But a virtual caucus model contemplates in-person engagement with the mediator and between the parties, just not right away.

Indeed, having spent quality, unhurried time with the mediator in the virtual caucuses, perhaps in several meetings over an extended period of time, the parties may feel a greater sense of connection and comfortability with the mediator when they gather in person for the synchronous mediation session. Moreover, while it is possible to realize some of these asynchronous benefits through pre-session in-person caucuses with the mediator, videoconferencing seems a more attractive alternative because of the increased opportunities for asynchronous engagement, as well as the convenience and cost efficiencies of virtual meetings.

Integrating Virtual Caucuses for the Long Term

This virtual caucus approach might not be appropriate in all cases, for example, where in-person engagement seems critical from the start or where a quick resolution in a single session is important. But it is well worth considering, especially in cases where the initial caucus discussions are likely to be numerous, lengthy or complex. Both during this crisis and in the future, asynchronous virtual caucuses provide the potential for integrating the best features of videoconferencing within the existing mediation structure to create an overall superior process.

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