

Perspective

Video Conferencing and Mediation In the New Normal

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While the news on COVID-19 grows worse and more confusing each day, one thing is clear: We are heading into a period of great uncertainty. No one knows how far the virus will spread, how much our daily lives will be impacted, whether travel and supply chains will be slowed or shut down completely, or how much our most vulnerable may suffer.

We are in the business of mediating complex disputes, and while we anticipate that the in-person participation of key individuals is going to be a challenge in the near future, we believe that the effective use of video conferencing holds promise for keeping mediations on track. In this article, we analyze the benefits of in-person participation, the historical challenges of video conferencing, and simple strategies for overcoming these hurdles.

One of the core principles of mediation and primary strategies of a successful mediator is to have “the



right people at the table.” On a *normal* day, this often involves considerable travel and disruption of routine for the participants. There is method to this madness and that method (and accompanying madness) is now threatened with quarantines, travel restrictions, and increasingly legitimate concerns of being in close proximity of others. In the past few weeks, we have struggled through awkward greetings, post-settlement elbow bumps, as well as reflexive grimacing when someone in a conference room sneezes.

While video conferencing technology has become increasingly commonplace in many business sectors, it is rare and has historically been discouraged in mediation. Recently, we have had several parties in our mediations request to participate by video or change venue to avoid potential quarantine restrictions that travelers might face upon return home. Several large insurance companies have now banned travel and many others have indicated that they are preparing to do the same. One

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lawyer who was recently in South Korea couldn't attend due to their firm's self quarantine policy and law firms are increasingly discouraging all but necessary travel.

In order for the show to go on, it is inevitable that over the coming weeks video conferencing will become increasingly necessary as part of the mediation process. The challenge mediators, parties, and their lawyers face is to make sure that the mediation process remains productive and looks to recreate the magic of having the right people at the table at the mediation when some or all of those people will be participating remotely (and probably wearing pajama bottoms).

There is no question that the in-person participation of the "right" people is currently the preferable choice when setting up a mediation session. We frequently spend a lot of time pre-mediation when structuring a session wrestling with who the "right" participants are, a subject warranting an article in and of itself. Below, we discuss some of the benefits of having the right people in-person at the table.

First: When a party attends a mediation in-person, they have the opportunity to speak directly to the mediator and their adversary. This opportunity to be heard impacts both sides in a mediation. When a party feels that they have had their turn and opportunity to explain how a given dispute has impacted them—whether it is them personally, their company, or the transaction they were responsible for, the hope is that they feel they have had their opportunity to impact the outcome. This is especially true when the mediation is facilitated by a skilled mediator who makes all parties feel heard, helps to effectively frame and reframe their views, and assists

in making those views known to the other side with finesse and when done well, persuasion. Being heard, and similarly digesting the views of the opposing party, can impact the outcome of a mediation. When a settlement is reached, most parties would probably admit that they either paid more or took less than they had expected to when they walked in the door. The question is how to make "virtually" walking in the door lead to the same result. We don't argue with

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the proposition that being in-person amplifies the value of the exchange and while it can be recreated via video, the point is that eye contact, body language, and the mood in the room impacts the outcome as each side assesses what their options are and the seriousness of their adversaries' approach.

Second: Attending a mediation in-person drives a party's psychological investment in the process and, by extension, finding a constructive outcome. This happens for several reasons. People fundamentally don't like to fail. Human nature is to desire to tell a success story. Preparing for, traveling to, and participating in a mediation leads a person to want to find success in that endeavor. Also, if the mediator is doing his or her job and appears to be working hard for settlement, parties (we hope!) will not want to disappoint their mediator. As daylight starts to disappear, and after a party has spent all day watching and listening to the process of exchanging

views and begins to understand what is in the realm of the possible, we see a growing psychological investment in finding common ground.

Third: At long last, fatigue sets in. The process can be grueling. Spending all day in a conference room, waiting for the next (inevitably disappointing) response, overindulging in sugary snacks, recovering from travel, and anticipating a long trip home can mean that by the end of the day the parties are fatigued and want to go home. A mediation in the hands of an indefatigable mediator can lead the parties to come to the conclusion that the key to going home is compromise and settlement.

Despite its many advantages, video conferencing has historically been frowned upon. We've watched the challenges of video conferencing impact investment and focus in the process, personal connection, and "tricks of the trade":

1. The investment is different when you are in the comfort of your own space without the inherent travel and the process of spending the day working on a problem with a group of people in person.
2. Participating remotely can mean that the remote party is not as focused. Instead of simply walking into a conference room, people have to be tracked down and digitally reconnected with. That person is almost certainly engaged in other work or activities in a way that they are not if they are in a conference room down the hall. A busy executive sitting in a conference room is likely much more focused than if she had remained at the office and participated remotely by dialing in sporadically throughout the day.
3. When a party participates via video conference, the personal

connections are different. It is far easier for someone to act “tough” (i.e., stubborn and obstinate) via video, than it is in person. It can also be difficult to make eye contact and by extension much easier to watch ESPN while other people are talking. Body language, expressions, and reactions are blurred and remote. When parties are sitting across a table from each other their reactions to each other in real time can influence how each person will act and react. Needless to say, it is easier to hang up, than to walk out.

4. You can’t have a “hallway conversation.” Progress in a mediation is sometimes made by bumping into someone in the hallway (intentionally, or not) and cornering them to get information or seek compromise. Mediators will often “stop in” to each room during a longer caucus to check in and preview and test arguments. This doesn’t happen in the same way with video, where the tendency is to wait until a party is ready to communicate an official message (while also giving quick updates via email).

In thinking about the challenges, and the magic of the in-person session, we have come up with three simple strategies for helping to overcome the problems related to video conferencing. This list of strategies is not meant to be exhaustive, but rather a starting place for thinking about and addressing the challenges associated with video participation in a mediation.

1. Be direct and tackle the focus issue as well as the challenges from the outset. Make sure that everyone will be available all day and will not have to be tracked down. For example, agree that the video “stays live” all day to better

approximate in person participation. This will make it much easier for the mediator to “stop in,” to update, reduce the delays associated with re-connecting, and will reinforce the commitment of full participation. This exact approach used in a recent mediation meant that the lawyer was updated and engaged throughout the day more approximating an in-person session. A good discussion can lead to mindfulness and more focus, and by extension more investment.

2. Address the technological logistics both in advance of the mediation and at the beginning of the day. In “mediator school” we spend a lot of time talking about the structure of the room and seating arrangements for in-person sessions. The same consideration should be given to the inclusion of video participants. At the mediation, take the time to set up cameras to recreate the feeling of sitting across the table from someone. Make sure that the camera is zoomed in and that the video participant takes up most of the frame. How many times have we watched blurred figures that take up a small portion of the screen, but not taken the time to adjust the room set up? Also, make sure that participants are not back lit (negotiating with a silhouette doesn’t make things easier) and make sure that the microphones are set up so that everyone can hear each other clearly—sometimes a conference call put on speakerphone is a better option than the video’s audio. Connect with the parties in advance of the mediation to ensure that everyone has the correct downloads, plug-ins, and any other associated technology with the video conferencing software.

3. Get comfortable with the technology. Most kids today use FaceTime and other video chat apps extensively because they are comfortable with watching themselves and interacting via video. Some adults may have limited experience with this technology and may struggle with it at first. For those who may be distracted by seeing themselves on a monitor, it can be turned off. Additionally, it may be helpful for participants to have a few practice runs to help them get comfortable with the technology and its features.

Perhaps as video conferencing becomes more common place in the mediation of complex disputes in the weeks ahead, the lessons and strategies learned might lead to a new comfort level with the use of the technology in the years ahead. We look forward to looking backward some months from now and revisiting this topic with fresh lessons learned. If we manage to successfully introduce video conferencing into the mediation process, and can overcome some of the well acknowledged challenges, we can potentially reduce travel costs and make scheduling easier, which might lead to greater access to key decision-makers who otherwise might not have participated.