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PERSPECTIVE

Mediation in the time of coronavirus

By Howard B. Miller

With the growing reluctance for in person meetings there has been a demand for mediation done remotely with online video. Seen by many as a temporary necessary request the demand does raise the question: can a mediation be as effective done online with Zoom video or equivalent technology?

The answer may be yes. Properly used, video mediations can at least function as well as in person mediations. But video mediations may also open up whole new technologies of communication, preparation and use of time. Dead time may be made productive. More precise and clear agreements may be drafted. New channels of communication may help resolution. A new culture fostering and making settlement more efficient may develop.

One immediate issue given the emphasis in mediation training on psychological understanding and empathy for motivations is some expressed belief that direct personal interaction is necessary. That may not be so.

Context is important. A great deal of the current mediation process is not done in person. Extensive pre-mediation calls, not even in video but on the telephone, between a mediator and each counsel often advance the process faster than if it had

begun in person. A great many mediations do not settle in the in person conference, and there are hours if not days of telephone communication between the mediator and counsel that ultimately resolve the issue.

Video is widely used in dispute resolution. Video depositions have become standard, and showing their edited version in court is regularly done. Many trial lawyers now basically prepare the equivalent of a television program as part of their presentation — not just depositions but expert testimony enhanced by a video presentation. A full face video of a cross examined witness on a large TV screen may give more clues to credibility than a sideview from the jury panel of a witness sitting in the witness chair.

In addition to the regular use of video in the legal profession, there is important data also from other professions. Psychiatry is sometimes done by telemedicine. The patient in one location, the psychiatrist in another, connected online. Peer reviewed studies have indicated that can be as clinically effective as in person counseling. (See “The Effectiveness of Telemental Health,” <https://doi.org/10.1089/tmj.2013.0075>, the leading citation among thousands on Google Scholar on the effectiveness of online psychiatric care, which is also HIPAA compliant). Online psychiatry being therapeutically

effective could allay some concerns whether online mediation that simply mimics in person mediation though online video caucuses can have the same thoughtful and emotional resonance as in person mediation.

Even beyond that, focusing on how video mediation is done may show potential new methods more effective than traditional mediation. The technology permits use of separate caucus rooms, as well as a joint caucus room if desired. They are simply viewed on a computer screen rather than in person. Either with one computer or two there are two separate Zoom video channels, one for each counsel. Each client and counsel are together in the lawyer’s office. There is a separate Zoom video channel for the mediator either on one computer or if the mediator prefers on each of two computers. The mediator conducts the equivalent of separate caucuses on each Zoom channel. A joint session can also be arranged through another channel. The video process follows pre-mediation telephone calls between the mediator and each counsel, as are done with in person mediation.

The culture of mediation changes when the client and counsel are in the lawyer’s office rather than a caucus in separate physical conference room in another location.

The key to a successful mediation is the mediator affect-

ing the analysis of risk for each party in the absence of a settlement. Precise information and seamless communication channels available in video mediation can increase the mediator’s opportunities to influence the analysis of risk.

An example can illustrate the change in possibilities. Suppose in a separate caucus one counsel argues a key opposing witness has been “destroyed” on cross examination. In a usual mediation the mediator will then shuttle back and forth to each caucus room to hear each counsel argue why that is or is not so. With the online video mediation and each counsel in his or her office *the entire file, all video, all text, all evidence, is instantly available for the mediator to view*. The mediator can ask counsel to play in the separate caucus channel part of the deposition if it is a video deposition. If text is involved it ordinary will also be in a digital text file and can be transmitted instantly. The mediator then has several options not easily available in an in-person meeting. The mediator can switch to the opposing side’s separate caucus channel and show the deposition there; or switch to a joint caucus channel for both counsel and client to view the deposition; or switch to another channel with just counsel. At any stage there could be side channel communications by cell phone text or email with counsel. All this can be done

seamlessly and immediately. And that is true with any piece of evidence that can influence the risk analysis of the parties.

Other things change because of the technology. For example, it is not unusual, but completely counterproductive, for an in-person mediation to end with a frantic scramble at the end of the day to put an agreement in writing. Often done under pressure, that process at the end of the day has caused a fair amount of difficulty in the finality of mediation settlements.

Of course, it is possible with in person mediations for counsel to be on the phone during the mediation with staff back at the office to be drafting proposals and transmitting them to the mediation. But for very human reasons that does not often happen. Counsel and staff are in different locations, phone calls have to be made, people are not together working on language. And so while the mediator is in the separate caucus with the other side there is essentially dead time for clients and counsel. We all remember as lawyers just sitting and waiting for the other caucus to end while until the mediator comes back to us.

The culture of video mediations, however, can be to

encourage each side, now with full resources in counsel's office to begin the precise drafting of proposed terms and consider the consequences. This can happen during what otherwise would be dead time just waiting for the next communication from the mediator. There can be consultation if necessary with other lawyers or staff in the office. This can be especially important in complex commercial cases. How often has there been an agreement in which the tax consequences of the hastily drafted end of the day agreement were not fully analyzed.

Video mediation, especially permitting use of what otherwise would be dead waiting time, enables more easily all relevant legal considerations to be dealt with, and avoid the sometimes embarrassing explanations for why certain things were not thought of during the mediation. Documents can be displayed in a video caucus either on the share capacity within Zoom, or as preferred by many mediators separate email exchanges through regular email with email being exchanged between each counsel and the mediator.

In addition mediators often

have the need for quite legitimate reasons to consult separately with counsel. That may be to alert counsel to something the mediator is considering saying to the client, or to engage counsel in a more candid conversation about the mediation. In the physical space the mediator needs to ask counsel to leave the room counsel and client are in together, which no matter how apparently accepting can be awkward. In the physical space it also may be possible to send a cell phone text communicating some information. But everyone sees what is happening, with the mediator and with counsel.

On the other hand, with each counsel in his or her own office there are unobtrusive ways the mediator can communicate with counsel: emails or texts can be sent, phone calls can be made to others in each counsel's office. Using the full range of Zoom, email, cell phone texts and calls permits separate critical communications done with confidence but without dead time or awkwardness in the physical space of an in person mediation. With more experience in the potential of video mediation the realization may come that the usual in person

mediation is an analog process in a digital world. There may be two perspectives with that understanding. One is that for the moment video mediation must be done, because necessity drives change and adaptability drives success. The second is regardless of necessity the advantages of video mediation may lead permanently to its greater use. ■

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