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## A Look at Mediation Today: In the Room, Via Zoom and the Advent of Hybrid Proceedings

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In its infancy, mediation mirrored a courtroom proceeding in some ways: There were a claimant and a respondent, as well as attorneys armed with law degrees, codes, statutes, negotiation tools and, well, fancy words. Each side constantly thrust and parried as they both sought an advantage on the battlefield. Instead of a judge who ruled from the bench, into the fray stepped a mediator, and the nature of battle between parties was changed forever into a new, sleek dispute-resolving machine.

Our time-honored judicial system is almost beyond reproach and is without equal in the world today; frequently, it is the best and only alternative for those seeking justice. Mediation was, in part, created to ease the overburdened trial dockets of our courts and to speed up the process.

Even keeping that in mind, the advantages of that new dispute resolving machine were undeniable: It was streamlined, fast, cost-efficient and effective. For the parties in a mediation, gone was the possibly intimidating presence of a judge and perhaps a jury and gone were the hallowed grounds of the jury box, the courtroom and the courthouse, all sacrosanct and not to be regarded lightly. Participants were afforded the opportunity to resolve their disputes in a confidential and safe setting with an alternative dispute resolution professional.

In mediation, parties were invited and encouraged to tell their stories, giving them a much-needed voice in the proceedings. With that came vocal inflections; body language and, dare we say, hand gestures; and facial expressions that would never be seen at a poker table. Emotional baggage was unloaded, willy-nilly, and emotions such as hate, anger, pride, vindictiveness, anxiety and fear were strewn liberally about the room blocking the flow of communication, an essential element to the dispute resolution process. Mediation gave parties the opportunity for a private, confidential catharsis, something that usually cannot be obtained in a courthouse.

The neutral waded into the conflict, sorting the emotional baggage into neat stacks and restoring the lines of communication, easing the strains of combat and pacifying here and soothing there, as she assisted the parties in finding their unique solution. The

process, aided by a skilled neutral, flowed from scheduling and planning a date for the mediation to the filing of confidential statements by the parties to physical attendance at the mediation and through evaluation, negotiation and collaboration to closure.

From these beginnings, the dispute resolution process in its many guises—such as settlement conferences, neutral evaluations, summary jury trials and minitrials—evolved, and it has been serving the needs of disputants with increasing regularity and success. These processes became comfortable, and ADR professionals became ever more proficient and skilled in their negotiations and facilitations.

Then, along came Covid-19, and the dispute-resolving machine that had worked so well for so long had to be lubricated and overhauled. The seemingly small demand of social distancing meant that parties in conflict had to bide their time until some undetermined date in the future when they could all be face-to-face again.

Out of the chaos and unprecedented social distancing fostered by the COVID-19 pandemic, the dispute resolution processes were retooled and reborn as virtual mediation. This newly refurbished machine had the glamor and gleam of technology (as well as the problems that are intrinsic with it) and the lure of contact with the outside world, albeit virtually. This virtual machine struggled to gain traction and momentum, there were fleeting security and confidentiality issues, but with the tightening of a bolt here and the turning of a screw there, those issues have been eliminated. In particular, the confidentiality of medical records required by HIPAA was a particular concern for many litigants, and this was addressed through heightened security protocols. Technology, like a shiny new penny set amongst coins of old, drew us moth-like to the online event platforms (think Zoom, BlueJeans, Webex and Microsoft Teams) and all the hip, new dispute resolution possibilities they offered.

With this virtual evolution of mediation came the need to develop an online presence that served the same purpose in communication as body language, facial expressions and hand gestures do in person. Physical manifestation

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is its own subtle form of communication, an arrival on the battlefield, but in a virtual setting, participants can be separated by great distances, which doesn't have the same immediacy and vulnerability as physical presence. Virtual breakout rooms allow the mediator to move people from room to room as needed.

Counsel often report that their clients appreciate the opportunity in virtual mediations to maintain a comfortable physical and, therefore, emotional distance between themselves and their opponents. This is particularly true in cases where intimacy and privacy may be challenged, such as in sexual harassment disputes.

All participants in virtual mediation must learn the etiquettes peculiar to the process: They should keep their devices fully charged, look into the camera when speaking and use the "mute" and "help" buttons appropriately. We have learned that Zoom fatigue is real and that steps must be taken to offset it. Zoom participants should take frequent breaks, enjoy lunch, drink plenty of water and stand up to help relieve the effects of Zoom fatigue.

To achieve the smoothest Zoom proceedings, JAMS offers the added benefit of a dedicated moderator who is available for the duration of every session to manage the interaction of the participants on the Zoom platform. The moderator handles any technology hiccups so that the mediator can focus on the parties, issues and resolution.

The advantages of virtual mediation are also undeniable: It is cost-efficient (saving the participants the expenses of travel and the demands on time), as well as being just as quick, confidential and successful. The basic progression and tenets of the mediation process are unchanged: Participants are still assured of privacy and confidentiality, and the ethics and mechanics of a facilitated negotiation survived the metamorphosis into cyberspace intact.

An added bonus is that parties can select a neutral from anywhere in the world; they are no longer bound by geography. A party from California with a Colorado attorney may attend a mediation with the opposing party in New York City represented by their Florida counsel—all with a Dallas or Houston neutral. That's a remarkable savings in airfare, hotels and other related travel expenses. Participants who may be hard-pressed to physically attend a mediation—doctors, in-house counsel, CEOs and CFOs—may have much greater availability to attend a virtual mediation. Key decision-maker no longer have to devote their time to the entire process, instead they can appear at appropriate moments.

The technology community rose to the occasion, providing platforms suitable for the demands of virtual negotiations and tweaking them for peak performance and resolving early problems. We happily settled in to the virtual process.

Now that many of us are vaccinated, herd immunity is the next milestone in the fight

against the coronavirus. We are emerging cautiously, often still masked, into the sunshine of the post-pandemic world, squinting at the brightness as we observe how much the world has changed the interim. Mediators' offices are now equipped with sneeze screens and hand sanitizer, and masks are optional for most.

All the while, a new process was blooming: the hybrid mixture of virtual and in-person mediation. A "hybrid," by definition, is the offspring of two plants or animals of different species or varieties, or a thing made by the combination of two different elements. So, from the roots of mediation in a face-to-face venue and the budding virtual mediation springs the hybrid form of ADR processes. The hybrid model involves virtual participation by some and in-person participation by others.

Those participants who desire the physicality of face-to-face negotiation may appear in person; those who don't may appear virtually. Technology has allowed everyone a place at the negotiation table, either physically or virtually as they prefer. This hybrid vehicle carries with it the best features of both of its predecessors, and a hybrid negotiations can be conducted with greater dispatch and efficiency.

Much like how the world changed in Thomas Wolfe's novel *You Can't Go Home Again*, I predict that face-to-face mediations will not be as popular as they were before the pandemic. Those early dispute resolution processes linger in the background after having been put on pause for the sparkling, new virtual processes, eyeing them as one generation often eyes the next with a certain amount of suspicion, superiority and trepidation.

While face-to-face processes will still be the preference of some and virtual processes will frequently be the preference of many, the hybrid process is emerging as a viable option. With its multifaceted structure, the needs of all participants can be successfully met in hybrid ADR processes.

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