



Plaintiff

Virtual Mediation: Give It A Chance

It's here to stay, and this mediator believes it's actually better than traditional in-person mediation

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Ready or not, virtual mediation is here to stay. And, frankly, I believe it is better than in-person mediation – both in practice and in the results it produces. In short, don't view virtual mediation as a poor substitute for the real thing; rather, embrace it as an efficacious tool that can help resolve cases *now*. (Nobody knows when the courts will reopen nor how long their backlog will be.)

The mediation process hasn't changed by substituting a conference room for a laptop. The mediator's skills remain as important as ever. She or he must simply become technically proficient in remote mediation. (Think of a jet pilot transitioning to a helicopter – same skills, different platform.)

I was initially intimidated by the thought of “controlling” multiple parties by toggling from room to room. Here are some fears I had before I ventured out of my comfort zone:

Fear #1: What if I accidentally put the plaintiff in a virtual breakout room with the defendant?

Fear #2: What if the insurance carrier's claims rep somehow ends up in the plaintiff's virtual breakout room?

Fear #3: What if people in one breakout room can hear those in another room?

Fear #4: What if I inadvertently end the meeting?

In my own experience, not one of those fears has been realized. Why? Because the virtual technology is both user-friendly and intuitive. Now I recognize that some might be more comfortable making the transition than others, but it's easier than one may think. After attending an instructional webinar, even I readily became proficient with the technology. (In fact, the only things I miss about in-person mediation sessions are the scrumptious lunches and the “steps” I earned from walking between conference rooms.)

Pre-virtual mediation

All the same rules apply: Prepare your client(s), ensure opposing counsel will have the right decision-makers in the breakout room, share your brief and exhibits with the other side(s) so they have time to digest and acquire adequate settlement authority, and contact the mediator if you have any procedural or confidential items to discuss. (In 2011, I wrote an article for Plaintiff magazine titled *Some things never change*.)

Entering the virtual mediation

It's just like stepping off the elevator for an office-based mediation. Just click on the "invite" link, type in the password and voilà(!), you are in the virtual lobby. A case manager will greet you, confirm that you've DocuSigned the confidentiality agreement and then place you into your virtual breakout room with the other members of your team.

Once you're in the appropriate breakout room, you can talk freely with others in your room, just as you would in a conference room (except there aren't any tissues, water or snacks). No one is recording anything nor listening in. The mediator will have communicated in advance to demystify the process and let counsel know the order in which he or she plans to meet with the various parties. (It's wise to get the mediator's email address and cell phone number beforehand so that you can email/text/call if your client is feeling left out or someone in your party gets disconnected.)

Three unique virtual mediation considerations: Attire, background, signing in

For both the attorney and client, I've found that the suit-and-tie approach is fashionable but not essential. Be neat and comfortable. Although I'll be decked out in my shirt and tie, folks in my mediations have worn anything from professional attire to t-shirts and sweatshirts. It doesn't seem to matter much. Folks become quite comfortable with the informality of virtual mediations.

As for the background, you can select one of the virtual backgrounds offered by the virtual mediation platform or situate yourself somewhere in your home or office that is comfortable. (Caution: Bookshelf backgrounds are preferable to kitchens sinks.)

If the mediation starts at 10:00 a.m., you and your team should start signing on at 9:45. Based on the axiom that "anything that can go wrong will," I've found that getting into the virtual mediation is the most angst-producing aspect of the process. Is there a password? Is there a platform app that needs to be downloaded? Are the video camera and microphone working? I recommend coordinating a "test run" with the mediator's case manager before the day of the mediation so that any connectivity issues can be resolved.

A list of virtual mediation advantages

1. Scheduling and cost: Because out-of-town participants (claims reps, experts, counsel, etc.) will not have to travel, scheduling virtual mediations is much easier. Plus, there will be no travel-related expenses.
2. No commutes, no tolls, no fuel costs, no parking expenses, no lobby lines nor elevator queues, no fancy attire beneath the waist!
3. Need to bring in a consultant/expert at the last minute? Just have the mediator send him or her an email "invitation."
4. Joint sessions, private caucuses or any variation of participant gatherings can be utilized. The mediator can place anyone/everyone in any breakout room.
5. Documents can be shared with all or selected participants via the screen-share function. (If you plan to participate from your office, you may have the added benefits of having all documents at hand and, perhaps, administrative support.)
6. The settlement agreement can be drafted, circulated and revised by counsel via the screen-share function, and then DocuSigned by the appropriate participants.

7. Downtime can be used efficiently: When participants aren't caucusing or meeting with the mediator, they can attend to other matters or take a break.

8. No masks, no social distancing and, most importantly for old mediators like me, no fear of contracting COVID-19.

There really is a long list of pros and, so far, I have not experienced any cons.

Two final observations

1. Civility: There is something about participants seeing themselves on-screen that causes them to be less antagonistic and adversarial and to become more collegial and collaborative. The merits of the case take center stage, rather than the occasional histrionics of the participants. Perhaps someday there will be a study to determine whether participants actually behave differently in virtual mediations vs. in-person mediations, but for now this view is based solely upon my experience and what I've learned from attorneys and colleagues.

2. Results: Since the advent of COVID-19, I've mediated cases ranging from partnership disputes, class actions, business, construction defect, professional malpractice, employment, landlord-tenant, maritime, aviation, to wrongful death and major injury cases. Although only anecdotally, I have found that virtual mediation settlement rates fare as well, if not better, than my past experience with face-to-face (or now, should I say, mask-to-mask?) mediations.

As I'm writing this article, COVID-19 cases are "headed in the wrong direction" (according to Dr. Fauci) and many states are further reining in permissible activities. Too, courts are not processing cases as quickly as we had hoped only a few months ago.

Hence, virtual mediation appears to be here to stay. I therefore encourage attorneys who are reluctant to engage in virtual mediation to give it a chance. You'll like it...your clients will like it...you'll close files...and it will give you something productive to do while sheltering-in-place!

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