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## Why Virtual Mediation Is Here to Stay

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BY DIANE M. WELSH

Since the COVID-19 pandemic forced Philadelphia's courts to close their doors, judges and their staff have carried on admirably. Although trials have been suspended, judges have been conducting settlement conferences telephonically and holding oral arguments.

As new case filings maintain a steady pace, judges are also aggressively enforcing discovery deadlines and denying requests for pandemic-related extensions, ordering depositions to proceed either by telephone or video.

But it's worth asking: To what end are clients and trial lawyers enduring rigorous case management schedules? Realistically, jury trials will not be held for a long time, and when they are, they will look very different.

Judges, jurors, attorneys and witnesses will need to maintain six feet of separation, and everyone will need to wear masks. Moreover, potential jurors may be uncomfortable coming to the courthouse. And when trials do eventually resume,

there will be a significant backlog, with criminal trials and hearings taking priority over civil trials.

Perhaps not surprisingly, mediation in this environment has become an even more attractive alternative to traditional litigation than it was before the pandemic. Just like conventional litigation, mediation has also changed, but in my mind, it has changed for the better.

### From Skeptic to Convert

Most mediations today are being conducted virtually through online platforms like Zoom. However, at the outset of the pandemic, it was unclear whether lawyers and mediators would embrace virtual mediation. Many were hesitant.

I was one of those skeptics. My previous experience with remote attendance at mediation was limited to the use of Skype, an application that was filled with delays in the transmission of images and sounds as well as long pauses, which made for an awkward session.

Much has changed since then. Technology has vastly improved, and alternative dispute resolution (ADR) providers like JAMS have dedicated support services to ensure proceedings run smoothly. Now



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that I have over 120 virtual mediations under my belt, I can declare that I am a virtual mediation convert. What's more, I am convinced that virtual mediation will be with us for a long time. The advantages are too powerful.

### Greater Participation

In-person mediations often preclude the participation of key decision-makers, like the CEO or General Counsel of major companies. The cost of traveling cross-country to attend a mediation in person is substantial terms of both money and time. Also, finding dates that fit into everyone's

schedule can be difficult. As a result of these challenges, key decision makers often have to receive calls from their subordinates and counsel to keep apprised of critical developments.

Of course, with virtual mediation, there is no need to travel. The only requirements are a strong internet connection and a computer or smartphone. In my experience, the increased level of engagement and participation in virtual mediations have led to more efficient and successful resolutions.

### **More Civility**

It happens too often: In the middle of a presentation, someone in the mediation room begins whispering to a colleague or client. Or opposing counsel begins dramatically flipping through his file, pulling out documents in anticipation of rebutting an argument. I have noticed that these kinds of interruptions, distractions and other rude behaviors have been missing from virtual mediations.

I believe that this is because participants are literally and figuratively seeing themselves in the mirror (of their screens), which seems to imbue them with more empathy, civility and respect for others. This heightened self-awareness that virtual mediations foster also appears to focus the attention of the participants. Whereas many people don't think twice about multitasking on a conference call, they seem to be more reluctant to do so in a virtual setting, perhaps because they know that others are watching them.

### **De-escalation of Emotion**

Emotionally charged cases, like those involving claims of sexual abuse or wrongful death, can be draining to the parties. Virtual mediations don't eliminate those emotions, but they can take away some of the emotional weight. For example, plaintiffs' lawyers have told me that their clients feel more comfortable and can concentrate better when they appear remotely. In a familiar setting, the stress and anxiety of being in a formal conference room with the opposing party are reduced.

Appearing virtually is also much easier on people who have physical limitations, are dealing with pain or are taking medication. When a mediation lasts into the evening or adjourns without a settlement for post-session follow-up, people can take advantage of the comfort that comes with being at home.

### **More Focused Presentations**

In general, advocacy and preparation for virtual sessions are the same as they are for in-person sessions. But I've noticed some nuanced differences in presentations. Presentations in virtual mediations have been crisper and more focused; lawyers have tended not to ramble or rehash material in their written memos. Instead, they highlight the most persuasive pieces of documentary or deposition evidence and respond to the opposing counsel's arguments.

Attorneys are also using video and PowerPoint presentations

effectively in virtual mediations. The screen-sharing tool, which allows participants to see counsel's screen, is also particularly effective; observers can see the presentation up close, not several feet away as they would in a conference room.

### **More Efficient Negotiations**

Of course, the goal of mediation is to reach a settlement, and I have found that virtual mediation can help focus negotiations. Counsel and their clients have been more eager to get down to business. That doesn't mean that complex cases are always settled quickly, but the demand-and-offer process has been accelerated in virtual mediations.

Mediating virtually also means that participants don't have to spend hours in a room as the mediator goes back and forth communicating offers. They can attend to their work or walk away from their laptops until they are notified that it's time to return.

Will virtual mediation completely displace in-person mediation? No, but the advantages of virtual mediation suggest that it will be deeply embedded in the ADR landscape long after the pandemic is over.

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