

Unintended Consequences of Virtual Hearings in Employment Mediations

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BY CAROL WITTENBERG

In March 2020, when our world stopped due to COVID-19 and we were no longer able to conduct in-person mediations, we wondered whether mediations would continue at all during the pandemic and, if so, whether parties would agree to mediate virtually. More than a year and a half later, it is evident that not only have virtual mediations been extremely successful, but there have also been some positive unintended consequences of virtual hearings.

Once virtual mediations commenced, it became clear quickly that there were some positive aspects of using virtual platforms. Most evident was that participants did not have to

travel. Additionally, case managers did not have to schedule “hard stops” after eight or ten hours to accommodate someone who needed to catch a plane or train home. Eliminating travel also made it possible for all participants to be available for the duration of a mediation, allowing the process to play out without interruption. Parties also realized that they could use mediators from different parts of the country without incurring hotel and travel expenses, expanding the roster of mediators substantially.

Many worried that the use of virtual hearings would reduce a mediator’s ability to relate to participants, particularly the plaintiff, by not being in the same room. How would a mediator read someone’s body



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language, assess their demeanor and judge credibility? Our experience is that the ability to view participants close up, including the plaintiff, on a virtual platform has not prevented us from connecting to people in the same way we have done in person. Viewing someone on Zoom over the course of a day allows the mediator to inspect the

person's facial expressions and assess their demeanor and credibility. In some cases, the virtual platform actually enhances individual connections. For example, we often meet someone's spouse or partner, observe their children running into and out of the room, or see or hear their pets, opening up avenues for some personal conversations. Moreover, observing someone's background can prompt conversation about how all of us are coping with COVID-19. The way many of us dress for virtual mediations has also changed. It is not unusual for people to dress more casually for virtual mediations than when they were appearing in person. One can argue that more casual dress results in a more relaxed process.

One of the most beneficial unintended consequences has occurred in the defense-side room. Whereas it was unusual for high-level executives to attend a mediation, even where the plaintiff was a high-level executive, it is no longer unusual for them to attend a virtual mediation, if not for the entire day, then certainly for the caucuses. This allows decision-makers to participate in the proceedings and

close a gap without having to be present for the entire session. They can get a better understanding of and appreciation for the give-and-take of the process, as well as the emotional realities of employment mediation. The same is true for insurance carriers. Instead of simply being available by phone for calls to increase an attorney's authority, the insurance carrier can be an active participant in the process. This is important because those who participate in mediations are more invested in the process and thus in reaching a settlement.

Another unintended consequence of virtual mediation is that everyone who participates, whether through Zoom or another virtual platform, is more likely to interact with the mediator than they might have had the session been conducted in person. The mediator can ask questions directly to those on screen, instead of having most of the interactions involve counsel. There is a direct benefit to having more people be active participants in the process.

Furthermore, most of us have found no difference in the results of virtual mediation in comparison to in-person



mediations. Cases are settling at essentially the same rate, so the process has been extremely successful. Even when it is safe to return to in-person hearings, we expect many parties to continue to choose virtual mediations or hybrid mediations, where some participants are in person and others participate through Zoom.

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