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REPORT

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VIRTUAL MEDIATION - LESSONS LEARNED FROM A PANDEMIC



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(Ret.)*

While we endure the challenges of the COVID-19 pandemic, many ask, “How will this experience change our world?” Commentators speculate that broad acceptance of remote work will remain universal. Virtual meetings, depositions, and hearings are now more comfortable and familiar for lawyers and judges. But what about virtual mediation?



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The pandemic did not abate the need for mediation—if anything, it created a greater demand. Even those lawyers who initially resisted virtual mediation eventually acquiesced, as government orders and safety concerns prevented in-person mediations from going forward. This article discusses lessons learned

from months of virtual mediation and proposes that virtual mediation, at least as an option for parties who want it, is here to stay.

When the world went virtual in March 2020, some lawyers embraced virtual mediation with enthusiasm. Others were skeptical. One hesitation might have been rooted in the fear that virtual mediation is too difficult or cumbersome for the technologically challenged. Fortunately, thanks to Zoom and similar technologies, this fear has proven unwarranted. Zoom created a simple, user-friendly interface for even the most tech-challenged individuals. Mediation providers also provided easy-to-use Zoom guides and extra IT support. And when problems

inevitably arose, such as compromised bandwidth or internet failure, patience and creative planning enabled the parties to work through the problem and continue the mediation.

We have also worked with clients who were unfamiliar with Zoom or who lacked access to a device. We learned to address this problem through additional pre-mediation preparation with the client or by having the client in a room with counsel, albeit in a socially distanced and safe manner.

Parties have expressed concerns about the security issues, particularly after press coverage of “Zoom bombing” events where uninvited parties crashed a Zoom meeting. Fortunately, Zoom has added significant security protocols, including password requirements, “waiting rooms”, and host control of admission to the mediation. Zoom has an option of multi-factor authentication for parties that seek even greater security protection. Parties and mediators should use the latest version of Zoom software to take advantage of security upgrades. (While other platforms are available and may have more desirable features, Zoom’s advantage lies in its widespread use and familiarity. These decrease the chance that technical problems will interfere with a mediation.)

Parties have also expressed concerns about confidentiality—for example, does the use of a virtual format create a risk that mediation discussions could be recorded? We are unaware of any evidence of an increase in secret recordings of mediations since the pandemic began—and it’s not as though secret recordings weren’t possible before. Furthermore, California law prohibits the admission of any such recording in civil proceedings, so the value of such a recording would be extremely limited. California Evidence Code Section 1119 prohibits the admission of any statement or writing made “for the purpose of a mediation.” (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117.) Even statements made outside the presence of the mediator are excluded. (*Eisendrath v. Superior Court* (2003)

109 Cal.App.4th 351, 358.) Zoom allows a host to disable the recording feature, and when that is done a recording could only be created through use of a phone or similar device—which, again, could happen during an in-person mediation as well. If parties are genuinely concerned about confidentiality issues, they should consider a pre-mediation agreement that expressly addresses confidentiality. Courts have upheld such agreements. (*Facebook, Inc. v. Pacific Northwest Software, Inc.* (9th Cir. 2011) 640 F.3d 1034, 1040-1041 [confidentiality agreement precluded admission of statements made during mediation].)

Many lawyers have expressed the view that virtual mediation simply does not work as well as in-person mediation. This view is consistent with traditional mediation training, including ours. Traditional mediation training teaches that having the decisionmaker physically present is critical to the success of the mediation. As one lawyer commented when objecting to the virtual mediation format, “you gotta have skin in the game”—a decisionmaker must be physically present to fully appreciate the mediation experience. Parties want a mediator to “twist the other side’s arm,” and some lawyers believe that this cannot happen virtually. That’s what *we* thought, too, at the outset of the pandemic

However, the success rate of virtual mediation has undermined this view—it’s essentially the same as in-person mediations. How is that possible? Perhaps the assumption of “physical presence” as the critical factor oversimplified what is truly essential for a successful mediation. The critical factor may not be so much physical presence as a strong, sincere commitment to the mediation process, regardless of whether that process is virtual or in-person. We have seen success in virtual mediations even when parties started the mediation doubting that they could settle, where participants on all sides were nevertheless genuinely committed to seeking resolution. After all, nothing forces parties to stay in the room, regardless of whether the room is real or virtual—they can walk out of an in-person mediation or turn off their computers. The critical factor to success is how deeply parties wish to resolve their dispute.

It is possible that some of the other benefits of virtual mediation are contributing to the high success rate. Virtual mediations are easier to convene and travel costs are eliminated, making it easier for decisionmakers in distant locations to participate. When the mediator is working with another party, lawyers and clients can work in their offices and be productive on other matters during the inevitable downtime, making for a more efficient workday.

Parties and lawyers may be more comfortable participating from their home offices. Personal relationships can be improved by seeing parties in a more relaxed setting, such as with family photos next to them or with their pets wandering into the room.

We have also learned some virtual mediation “best practices” for increasing the likelihood of success. Among these are (1) extensive pre-mediation preparation and information-sharing with client and mediator; (2) a practice session with the client to review technology, lighting, sound, etc.; (3) an exchange of documents electronically in advance of the mediation with mediator and opponent; (4) the use of pre-mediation agreements regarding security, confidentiality, participation details, and other critical factors.

But we cannot lose sight of how the pandemic has highlighted this fact: We desperately need our courts. Without rulings on critical motions, deadlines to create pressure points in litigation, or the threat of an ultimate ruling from judge or jury, parties may lack motivation to engage in meaningful settlement discussions. The mediator can try to persuade parties of the advantages of settlement, but functioning courts clearly assist the parties in focusing on the benefits of a voluntary resolution.

John Adams supposedly said that “every problem is an opportunity in disguise.” In the midst of these difficult times, we have learned that technology, combined with preparation and commitment, provides the opportunity for successful virtual mediation. We believe that the benefits of virtual mediation are substantial enough that they will persist long after the pandemic recedes. We hope to take the lessons learned from these challenging times and continue to expand our ability to resolve disputes by using the virtual option.

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