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COLUMN

To Zoom or not to Zoom? That's the question.

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Judging by the popularity of virtual mediations, California lawyers see few, if any, disadvantages to mediating on Zoom rather than in person. That's not surprising. As I learned while presiding in an LASC complex litigation court, lawyers can advocate as skillfully on Zoom as they do in person. Knowing they'll use the same skills as advocates in mediation and enjoy the comfort of working from home or office, it's no wonder lawyers opt for Zoom. Unless the case involves sex abuse, divorce, workplace harassment or other sensitive issues, there's an assumption the mediator's ability to forge a personal relationship with the clients is not critical to achieving a settlement.

Based on my experience settling hundreds of cases before, during and after my stint on the bench, I have a concern this assumption is not well founded and that we may be underestimating the benefits of mediating in person -- particularly when corporate clients are involved. This column analyzes the differences between mediating in person and on Zoom, focusing on how those differences impact the mediator's performance.

By its very nature, Zoom limits the mediator's access to important information. Working to settle a case rather than decide it, the mediator's success is all about reading the room and tailoring an approach that resonates with the key participants. To accurately

read personalities and motivations, the mediator needs to take in as much verbal and nonverbal information as possible. This takes time and can be complicated when a corporation is represented by multiple attorneys, executives, and employees with varying expectations and levels of responsibility.

Zoom restricts the available nonverbal information because the mediator can only see people from the shoulders up and facing forward. Knowing they're on camera, the participants sit still and avoid making distracting movements. For purposes of observing and interpreting body language, Zoom is a disadvantageous platform for the mediator.

Zoom also impairs the mediator's intake of verbal communication. With everyone facing forward, side conversations between clients are relatively rare. Zoom can also curtail the mediator's participation in conversations. It doesn't feel rude when a lawyer asks the mediator to click the "leave room" button and the lawyers don't hesitate to do so. This is particularly true for lawyers' whose instinct is to protect their clients from direct conversations with the mediator - a strategy that ironically undermines the mediator's efforts to get to know and understand them.

The worst set up for Zoom mediations is where a client is not on camera or sits in the shadows of a darkened room. The second worst set up is where lawyer and client sit across from each other and the

camera hangs on a wall at the far end of the room. With the camera far away and the faces in profile, the mediator can't see facial expressions or assess the speakers' credibility or sincerity. To avoid these problems, I recommend seating each participant in front of a soundmuted laptop and talking to the mediator through a single shared microphone.

When the parties mediate in person, there's much more verbal and nonverbal information for the mediator to process, especially when there are multiple client representatives in the same room. Introductory handshakes and informal chitchat help the mediator build trust and gain insight into personalities and temperaments. From the outset, the mediator can see who's sitting where and who's chatting with whom. As the day goes on, the mediator sees who's leaning back in their chair, looking down at their keyboard, or tapping their fingers on the table.

Lawyers are more likely to include the mediator in group discussions when the mediation is in person. For most lawyers, it seems impolite to tell a respected mediator to get up and walk out of the conference room. To avoid feeling rude, they will keep the mediator with them unless there's a good reason not to. For the mediator, listening and taking part in group conversations is immensely helpful for identifying friendships and alignments and

understanding the power dynamic in the room. Using that information, the mediator can customize their approach depending on whether the shot-caller is house counsel, the chief financial officer, or another executive who may or may not be present. Chance encounters and hallway conversations are prime learning opportunities for the mediator. Eating lunch at the same table is a golden opportunity to get to know and understand the various players.

These upsides for the mediator may not be obvious to attorneys who are focused on their own effectiveness and catering to clients who prefer the convenience of mediating from their homes or offices. Having carefully selected a highly skilled mediator, the parties should recognize that Zoom has an impact on the mediator's effectiveness, particularly when a corporate client is involved.