

The Pros and Cons of Virtual Mediation

By Andrew J. Carlowicz, Jr.

We have all done them. When the pandemic ends, will they become a thing of the past? Not a chance. As the old phrase goes: Necessity is the mother of invention. The need to mediate cases through virtual platforms became absolutely necessary beginning in or around April 2020. I still recall my first “zoom meeting” and it was a disaster. My particular web browser would not accommodate the zoom software, and my outdated laptop at the time was about as effective as using two old fashioned orange juice cans connected by a string. With a new laptop along with a change in web browser software (along with some helpful hints from a millennial on how to use these virtual platforms), it is now all systems go.

The obvious initial advantage is that none of the parties, nor any of the lawyers, need to travel. This is regarded as a significant benefit to anyone who is paying the bills and/or commuting on Interstate 287, the New Jersey Turnpike, or the Garden State Parkway between 8:00 am and 9:00 am on a weekday; especially during inclement weather. Additionally, almost every lawyer has appeared at a multi-defendant mediation session and not spoken to the mediator in a private caucus session until late in the afternoon. With a virtual mediation, sitting around idle is eliminated.

Of course, another clear advantage is the ability to wear pajamas, or at least “half pajamas,” but, when doing so, do not stand up abruptly if you want to be taken seriously.

More seriously, though, there really can be multiple, substantive advantages. In every mediation in which I am presiding as

the mediator, I always conduct a preliminary conference with counsel to discuss various logistics, including, but not limited to, what documents or information need to be exchanged before the parties can actually submit mediation statements to me and each other. A preliminary discussion of the issues and factual disputes is also helpful during the preliminary conference. Prior to the pandemic, this was invariably done by telephone conference, and, as everyone can attest, when there were numerous lawyers it was clunky and did not lend itself to a thoughtful and thorough exchange of information. With the advent of virtual meetings, I always conduct these sessions virtually, as it is much easier to avoid stepping on the words of another attendee at the meeting when you can actually see them.

Despite such efforts, it is not uncommon that, for a variety of reasons, during a mediation session, documents that would assist the parties in arriving at the same factual conclusion have not been exchanged between the parties beforehand, and, more importantly, they were not been provided to me as the mediator. In some instances, the lack of pre-mediation sharing of information even goes beyond the exchange of documentation despite the best of intentions, and despite the importance of such an exchange having been emphasized during a pre-mediation meeting.

If everyone has traveled to the in-person mediation session, and efforts toward resolution have been ongoing for several hours when this problem manifests itself, there is invariably the desire to forge ahead anyway for the remainder of the day to see if a settlement can be reached; often with a disappointing result. With a virtual mediation, though, it is much easier to call it a



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day early, and regroup for another half-day session in the very near future after the exchange of the necessary information. Momentum toward settlement is not so easily lost. I have personally suggested such an approach on multiple occasions in the last two years, and in each instance the next session was far more productive, and usually resulted in a settlement.

How many times have you appeared as a lawyer for a party in a mediation scheduled to begin at 10:00 am, but, because one or more parties or lawyers were stuck in traffic, nothing really began until 10:30 am? By 4:00 pm, one or more parties begins to get “hangry” even though the mediation session has only been in full swing for 5 to 6 hours. While it can be done for in-person mediation sessions, I have found counsel and clients to be far more receptive to agree to a “1:00 pm to 5:00 pm or even 6:00 pm” mediation session when it is done virtually. That has the advantage of leaving your morning free, and, at the same time, if the session does last until 6:00 pm, it is a short commute to the dinner table.

Before discussing the disadvantages of virtual mediations, allow me to first address what undoubtedly will become the new norm; namely a “hybrid” mediation. In a very recent case in which I was involved, there were two parties, and it became apparent that a third party

should be involved; albeit to a lesser extent. However, that party and their counsel were located in Texas. It was obvious that they could and should participate virtually, which they did, while the New York and New Jersey parties appeared in person. The Texas party appeared by zoom for the initial public session, and then for a private caucus, and then for a closing meeting when the matter was resolved. It worked seamlessly.

If one or more parties are insured and the carrier has decision-making authority, historically it is more common than not that the carrier representative will not personally attend. Pre-pandemic, the mediator would have virtually no direct contact with the carrier representative. Instead, counsel would go out in the hallway and (hopefully) speak with the carrier representative, and then come back to state their position. This is detrimental to the process. In my experience, in the last two years, more often than not the carrier representatives are willing and eager to participate virtually, and, in so doing, I have had the opportunity to speak directly with them in private caucus with their counsel present, of course. This assuredly benefits the mediation process which is the desire of all involved, and, thus, I cannot think of any good reason why parties will not so proceed on a going forward basis.

Of course, there are downsides to proceeding virtually. The obvious one is that the “personal touch” is potentially lost. There is seemingly a hierarchy of effective communication with in-person being at the top of the list, and texting at the bottom of the list. This potential problem, however, can be mitigated. Among other things, the mediator needs to make sure that he or she is capable of handling the technology. Additionally, all involved need to make sure that their background and camera angle and microphone are all “professional” in their operation which certainly enhances virtual communications. It is important for the mediator and the media-

tion participants, such as counsel and the parties, to be able to see each other’s faces and effectively talk to each other almost as if they are in the same room.

Another pitfall of virtual mediations is that the “hallway meetings” between counsel who are not presently in a private caucus with the mediator cease to exist. Often progress could be made toward resolution by such informal conversations; especially if it appears as though the mediator is not making progress toward a settlement. This too, can be mitigated somewhat by all counsel exchanging cell phone numbers at the commencement of the mediation so as to enable them to speak to each other at least by phone. Additionally, nothing prevents one party from spontaneously setting up a zoom meeting with just one other party to have an ad hoc, private discussion during the ongoing mediation session.

Another potential downside is that it is much easier to “leave” a virtual mediation than one in which you are participating in person. Rather than gathering one’s paper file, laptop, briefcase, coat, and car keys, a mere mouse click allows you to depart.

Obviously, reviewing documents together during a virtual mediation session can also be cumbersome at best, but this also can be mitigated by appropriate preparation and exchange of documents beforehand, as well as organizing them (e.g., named folders in a drop box, bates stamping, etc.) so that multiple participants can look at an electronic version of the same document at the same time. While screen sharing is a nice benefit of virtual platforms, you can rest assured there will be at least one party or lawyer who has no idea how to screen share.

In closing, resisting virtual mediations is probably a losing battle. In some form they are here to stay for the foreseeable future, and there are some significant benefits; especially with the use of a hybrid approach. For this “new normal” to be useful, though, professionalism is important. Like wearing your best suit when repre-



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senting an important client in a substantial case at a mediation session, it’s really important to make sure that your “appearance” to others is professional. The “little things” like camera angle so you can be seen, actually looking at the camera when speaking (as opposed to the panel that shows the person you are trying to talk to), and your lighting and background are very important. Undoubtedly, there is a market demand in the near term for these virtual platforms to improve dramatically, and clients are certainly going to be interested in cost savings that can be realized through the use of virtual appearances whenever practical. Therefore, it would behoove all of us to become comfortable with, and even proficient in, the use of virtual mediation sessions.

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