

# Virtual mediations for real settlements

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The image of the lawyer as a Luddite is not without some merit. Our profession has been particularly resistant to technological change compared to other industries and professions. We resisted online research for as long as possible. (Does anyone miss Shepardizing cases in books?) We still insist on working from paper. (Electronic discovery be damned.) We cringe when advised to upgrade computers or software. (Whatever happened to WordPerfect?)

New technology is disorienting, and we often fail to see how it can benefit our clients or our bottom lines. There is no denying that the pandemic has had a jarring impact on the ability of attorneys to litigate cases, and it is imperative that the profession embrace available technologies to deal with the pandemic's lasting realities. As Bob Dylan says, "[we] better start swimmin' or [we'll] sink like a stone for the times they are a-changin'."

One of these changes is the ubiquity of video communications. It is one thing to have a virtual happy hour with friends. It is quite another to litigate or mediate by video.

High-stakes communications are now taking place daily via video. Depositions and hearings are being held via video conference, and nearly all mediations are regularly being conducted remotely. The sooner attorneys can acclimate to the technologies, the sooner they can best advocate for their clients using them.

Without question, mediation at which all decision makers are present in person is the gold standard, and by no means do I suggest that virtual mediations are an equivalent substitute. However, even as emergency orders are relaxed, it will be some time



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before in-person mediations return to the norm.

Skepticism toward virtual mediations is waning because the success rate for mediations has remained high since the pandemic's onset. Litigants are learning that virtual mediations provide a viable alternative to face-to-face mediations. Cost savings and scheduling flexibility also will factor into the continued use of video conferencing for mediations. It is also expected that insurers and other companies will be restricting travel in the foreseeable future to only that which is necessary.

To maximize opportunities for success in virtual mediations, attorneys should be developing familiarity with the technological and logistical issues associated with video platforms. Here are some things to consider to best enhance communication and the prospects for settlement in these mediations.

**Get acquainted with video conference services.**

There are many video conferencing services on the market. Most mediations are conducted using Cisco Webex or Zoom. You can access these platforms from a laptop, desktop computer, tablet, and mobile phone, provided the device has a microphone and a camera. When necessary, participating only by phone audio is available.

The video conference can be accessed through an email link, web browser, or via the service's "app," which can be downloaded onto the desktop or mobile device. After joining a video conference, navigating the user interface is fairly simple. There are buttons for changing views, audio options, and the chat (messaging) feature.

The platforms all have a "share screen"

function, which permits the sharing of documents, presentations, videos, or other materials from a computer. Evidence can be shared with participants at any time during the mediation. For example, in an opening statement, counsel can display a PowerPoint presentation and discuss those slides much as one would in person.

Once the virtual mediation begins, it is conducted much like a regular one. After logging into the meeting, everyone appears in the same virtual room. The mediator gives opening remarks, and the parties are free to provide opening statements.

After the opening session concludes, the mediator then caucuses with the parties in separate video and/or telephonic conferences. The “hallway conversations” that often prove beneficial in a regular mediation also occur remotely. Mediators and attorneys can utilize the chat functions offered with the technology, and private phone conversations are always an option.

Prior to the mediation, do not hesitate to ask the mediator for one or more test runs of the technology. The pre-mediation conference provides an excellent opportunity to communicate with the mediator on the platform.

Additionally, the mediation firm should have someone available to provide tutorials to the attorneys and/or clients on the steps needed to participate effectively. Experience has shown that attorneys and clients are surprised at how easy the technology is to use in a mediation setting.

While most mediation participants use the camera and microphone provided with the computer device, there are reasonably priced additions that can substantially

increase the quality of one’s virtual presence. External webcams and microphones do improve visual and sound capabilities.

External 360-degree camera/microphone/speaker systems, such as those from Owl Labs, have proven to be very beneficial to virtual mediations. These devices free participants from staring at a laptop camera by providing a high-resolution, panoramic view of the meeting room. If there are multiple participants in a room, these cameras will automatically focus on different speakers as they talk. Participants can move around the room and utilize whiteboards or projection devices. These devices create a more comfortable and realistic meeting space and facilitate effective communication.

### **Set the stage for persuasion.**

Prior to the mediation, experiment with different ways to ensure that the attorney and client are portrayed in a positive fashion. I recommend an uncluttered and professional background. Less is more, as the goal is to have the other participants focus on the people and nothing else.

Orient the devices so that there is a clear, well-lit view of participants. Lighting and angles are very important in video conferencing. Fluorescent lights are often unavoidable, but they can cast shadows. It is often best to place the primary light source behind the camera so that the light and camera point in the same direction.

The camera should be as close to eye level as possible because a camera that points too low is distracting and unflattering. If a laptop is used, place something beneath it to raise its camera lens.

Faces should take up no more than one-third of the screen. There should be ample room for the participants to read not only facial expressions but body movements as well. While it takes time to get used to speaking to a computer, it is best to train yourself to focus on the camera. Eye contact remains a very important way to signal to participants that they are being seen and heard, so you should avoid the natural tendency to focus on your image on the screen or on other participants.

Active listening is critical in video mediations. I recommend that you use verbal and nonverbal cues. Short verbal affirmations, such as “I understand” or “I agree,” foster

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engagement. Physical signals of listening, such as leaning in or nodding, also help enhance the interpersonal connection.

I also recommend silencing all other devices in the room to eliminate background noise. And, where appropriate, utilize the mute button in the user interface. Muting the microphone when not speaking is a good habit when there are a large number of participants.

### **Pre-mediation communications are critical.**

Prior to the mediation, the parties should exchange all material information relevant to the settlement analysis. In remote mediations, exchange of new information is not as easy or as effective as doing so in person. Last-minute disclosures in a remote mediation often lead to delays and increases in the number of video meetings throughout the day.

Since settlement at mediation is the goal, one's best foot should be put forward well

before the mediation's inception. I cannot overemphasize that parties, and particularly insurance companies, need time to carefully analyze information and consider how it affects values or chances of prevailing in the litigation. Defendants base their settlement valuations on their attorney's evaluation of the evidence.

In many cases, settlement authority is vetted through different layers of management weeks before a mediation. The likelihood of new information appreciably changing the settlement calculus at mediation is low.

Parties are unlikely to change their values before they and their lawyers have had a chance to absorb all material information from the other side.

Devoting substantial attention to the position paper and exhibits is also most helpful to the mediator. If these items are not submitted or if they are hastily prepared, it will be more difficult for mediators in a virtual meeting to get up to speed.

## **Emerging legal issue: FUNDING**

JMF encourages you to read the following rulings to understand how they effect your client's funded medical expenses:

- *Williams v. IQS Insurance Risk Retention*, 2019 WL 937848 (slip opinion not yet published)
- *Hoffman v. 21st Century North American Insurance Co.*, 209 So.3d 702 (La.2015)

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Position papers are often advocacy pieces, not unlike dispositive motions or pretrial memoranda. While advocacy certainly has its place in a position paper, there is value in taking a realistic and measured tone. Transparency and reasonableness are hallmarks of an effective mediation strategy. Parties should consider and evaluate the other side's perspective, noting their strengths and weaknesses. Educate the mediator on what has prevented the case from settling and what needs to happen for the case to settle before the virtual mediation begins.

#### **Have your client actively participate in the mediation.**

An effective attorney/client partnership is needed at mediation to address impediments and recalibrate, but many clients do not have access to the technology needed to participate in a virtual mediation. In such situations, attorneys should determine whether it is safe and feasible to have their clients participate with them in their offices.

If not, the attorney should try to find another office or location where the client can meaningfully participate. While having the client available by telephone is an option, it is not a preferred one. To the extent possible, all participants in a virtual mediation should participate via the same medium. Everyone knows the disappointment of having parties fail to attend mediations in person; it is no different when that happens in virtual mediations.

Part of mediation's magic is the provision of a forum for the client to actively participate in the conflict-resolution process. Active participation by all parties drives the psychological investment in the outcome.

In most mediations, the dispute involves both rational and emotional components. Overlooking or minimizing the emotional component can cause impasse even when the legal or rational issues are resolvable. Clients want the other side and the mediator to hear their version of events and the effects of those events. Unlike a trial or deposition, a mediation provides an informal, confidential forum for clients to freely discuss the conflict and its effects on them. When not afforded this opportunity, the magic well may be lost.

Mediation is also a learning process for clients. In some mediations, attorneys need the mediator to provide a dose of reality, and the best means to do so is by having the client "present" so that he or she interacts with the mediator. The impact a mediator can have on a client is directly related to the mediator's ability to generate trust and rapport. Doing so in a phone call is a tall order.

#### **Go forth and settle.**

Virtual mediations are the present and likely the future. As with everything attorneys do, there is a significant correlation in mediations between preparation and success. Skills in the video mediation space need to be a part of the attorney toolbox. With time and attention, attorneys can effectively resolve cases for clients in this new medium.