

Mediations Forever Changed

Seeing the advantage of using videoconferencing, I'm convinced that, in mediations, we're not going to back to status quo after COVID-19.

By Hon. Vaughn Walker (Ret.)

The COVID-19 pandemic and shelter-in-place orders under which most of us have been living have changed many aspects of our lives. Although not the most significant change in the larger scheme of things, mediations will likely never be the same. The changes go beyond merely substituting video mediations for face-to-face sessions. Acceptance of videoconferencing in mediations enables three material changes to the mediation process: (1) mediations can become more front loaded; (2) the face-to-face mediation session should diminish in importance to the mediation process; and (3) mediators can add more value to the process. Before taking up these changes, let's look at how mediations now generally work.

Most mediations follow a well-established pattern. Historically, they have centered on a face-to-face or all-hands mediation session. After submission of mediation statements, representatives of all sides show up at the mediation venue expecting (or, at least hoping) that the other side



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will finally see the light. When that light fails to dawn, because the parties are in such different orbits, the process breaks down. It's important, therefore, to get the parties thinking about how to settle the case at the outset.

Invariably, I begin with a telephone conference call. This needs to accomplish more than confirm a date and start time for the mediation session, schedule submission of mediation statement whether they are to

be exchanged or not. Getting a preliminary settlement dialogue going can be accomplished in telephone conference, a video conference is an even more effective tool. Videoconferencing allows the counsel and mediator to see one another and gauge their respective reactions much more closely. Videoconferencing enhances the value of these preliminary conferences.

As lawyers and mediators become more comfortable using

videoconferencing capability, the mediation process can become more front-loaded. Success is less dependent on that Eureka moment at a mediation session when the parties reach an agreement. The mediator can more easily move from talking to both sides to individual discussions and back again with video than with a telephone conference. This allows the mediator at the very beginning to search for points of agreement. These discussions will likely point to issues that the mediator believes will be helpful to a resolution.

The mediator can tell the parties what seems likely to move toward a resolution and discourage the all too frequent regurgitation of tendentious litigating positions in mediation statements. Talking to the parties via videoconference, the mediator can get a much clearer picture of the parties' respective positions and expectations. Videoconferencing facilitates making the pre-mediation conference into a mini-mediation session by integrating naturally and effectively into the whole mediation process. While this can be accomplished without videoconferencing, this technology makes the task easier and more natural.

There's another advantage to starting the process early. The participants in the preliminary conference are often the key players, and a videoconference with them can establish a rapport not likely to be achieved by telephone. Or, it may identify a person or obstacle that usually doesn't reveal itself until the for-

mal mediation session. Part of the value of a videoconference at the very outset is that the parties and mediator are required to set aside more time to this important first step than the usually brief telephone pre-mediation call. Again, videoconferencing is not a magic potion, but it makes the mediation process easier to get underway at the very beginning.

An important part of mediation is tempering the parties' expectations. When the respective merits or lack thereof of the case do not emerge until the face-to-face mediation session, the task of tempering becomes more difficult to achieve.

The root of the problem is an unreasonable expectation of what a face-to-face mediation session can achieve. Mediation is a process. The acceptance by counsel, their clients (and insurers) of videoconferencing allows that process to begin earlier and move forward more effectively and at less cost and inconvenience.

Diminishing the primacy of the face-to-face or all-hands mediation session represents the greatest value-add of videoconferencing capability. In terms of travel and possible overnight accommodation, to say nothing of conference space and charges, the costs of these sessions are obvious and considerable. By opening alternatives, videoconferencing avoids or mitigates many of these costs. In some cases, face-to-face mediation sessions may prove unnecessary as a video mediation session will suffice to produce a settlement

or demonstrate that the case is not yet ready for settlement until some future development.

My observation is that too many people typically attend those face-to-face mediation sessions, anyway. A multitude of voices in one room or both rooms can hinder reaching a settlement. Lawyers want to put a spin this way or that on every demand or offer. Having traveled to the mediation session at some expense to the client, lawyers who are not the key decision-makers seem compelled to put in two-cents worth, which generally proves to have exactly that value, if not being counterproductive.

Videoconferencing does not eliminate the "too many cooks spoiling the stew" problem but may diminish it as participants can remain at their offices with the helpful distractions that attend these locations. An important part of the process is getting the participants who matter engaged, and side-lining those who are unimportant to the process. Videoconferencing can help in achieving this.

Mediations are, of course, dynamic. Sometimes, issues thought to be secondary prove crucial. Videoconferencing permits persons necessary for airing those issues to be brought into the conversation not just with the individuals on that side of the case, but also with the mediator.

Of course, videoconferencing may not eliminate all face-to-face mediation sessions. After all, there is still value that derives from the mediator and lawyers

being in the same physical location. I call it the value of fogging a person's glasses. Let's face it: most mediations come down to money. Despite this, many mediations start with the parties having failed to exchange an opening demand and offer, or having any substantive conversation beforehand. A lot of time is frequently spent just getting to opening positions. Preceding a formal mediation session with preliminary or mini-video sessions allows those starting positions to be developed. Moreover, by accelerating the exchange of information and, possibly at least an exchange of an initial demand and offer through earlier video sessions, the in-person mediation session builds on progress already made.

Every mediation is in part a process of facilitating the parties' dialogue as well as evaluating their respective positions. Submitting mediation statements a few days before a face-to-face mediation session sometimes does not give the mediator time enough to absorb the important facts, the law or both, much less to do serious reflection about the issues. Effective evaluation of parties' positions requires more than the mediator saying, "Well, I think a jury's likely to do this or that," or "Judge So&So will view this part of the case dimly."

With more tools to learn about the case, like videoconferencing, the mediator can render more effective assistance to the parties. A mediator's evaluation of

the case may often be unpalatable to one or, perhaps, both sides. It takes a party time to digest this and sometimes a party can bring out evidence or law that affects the mediator's evaluation. Again, mediation is a process.

Generally, after some serious evaluation of the case by the mediator and the parties, mediations come down to facilitating a settlement. By getting mediation started before a formal session, videoconferencing can contribute to both aspects of the mediator's job.

One of the important tasks for the mediator is to identify the key decision-makers. In standard pre-mediation telephone conference calls, identifying the key player or players usually stops with one side or the mediator insisting that the parties bring "someone with authority." But the key player certainly isn't always the person with so-called "authority." More often, it's the person on one side who enjoys enough credibility to be persuasive with colleagues on that side of the case. Building credibility with that key player or players is an important step in moving toward a settlement. Videoconferencing enables the mediator to identify that person or persons and begin building rapport.

There's another aspect of facilitation that videoconferencing aids. At the risk of destroying illusions, the truth is that candor in mediations is usually in short supply. Opening demands and offers seldom are anywhere in the

vicinity of reality or where the parties are willing to settle. They simply signal whether a dialogue promises to be fruitful. And bottom lines have a way of becoming points along a path of revision. Again, front-loading the mediation process with more substantive pre-mediation sessions allows the mediator to obtain a sense of a party's willingness to be flexible.

It remains, of course, that the fundamental skills of mediation are the most important ingredient of a successful mediation. Videoconferencing doesn't supply those skills if they are otherwise lacking. And videoconferencing has been around for some time. But thanks to the pandemic, those of us who have never used these tools in mediations have been forced to do so. Having done so, and seeing the advantage of using these tools, I'm convinced, that in mediations, we're not going to back to status quo ante COVID-19.

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