

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 39 NO. 5 • MAY 2021

ADR Skills

'I Sometimes Catch Myself Looking Angry or Tired ...': The Impact of Mediating by Zoom

BY DWIGHT GOLANN

To learn how mediating over the Internet is changing mediation, I asked 20 leading mediators from the U.S., Canada, and Britain, who together had conducted more than 1,000 Zoom mediations, what was different about mediating by video. Here is what they told me.

We like it much better than we thought. In the past mediators had voiced great doubt about practicing over the internet. Work-

ing through virtual windows with emotional people to solve difficult conflicts seemed impractical, they thought, making it at best only a temporary substitute for the in-person process.

After a few months mediators had very different views. One commented that, "The difference is remarkable from seven months ago," and another said, "I was very, very skeptical. ... Surprisingly, I am a huge fan." What explains this new enthusiasm?

Everyone is more relaxed, and we often feel as or even more connected. The greatest worry was that they would not be able to form the kinds of personal connections needed to be effective. But most said this was not so. Parties often mediate from their homes, making them more comfortable and relaxed than they would be in a sterile conference room. They may talk about daily life, or something in the background will strike a spark.

Zoom mediations conducted from home are subject to unexpected interruptions, most often from pets and children. These may disrupt participants from focusing on the case, but also allow

people to relate to each other informally, sometimes introducing pets to each other. (Children, it appears, are less likely to be introduced).

Mediators working over the Internet say they miss the ability to use food to connect with participants, for example by bringing treats to the office or "breaking bread" over lunch. But they were consistently surprised by their ability to connect through computer screens.

Parties are more active, and the lawyers less controlling. Parties are more active in virtual mediation. This is probably partly due to being at home, but the video format is also important.

Rather than having a lawyer sitting next to them, each person has a window separate from and equal in size to everyone else's. Peoples' windows light up when they have the mic, and technology prevents others from interrupting them.

Los Angeles mediator Jan Frankel Schau says, "The clients have the same 'front row' seat to the mediator (and the other participants) and seem to feel more empowered by this." The effect is that parties engage more readily and lawyers find it more difficult to block or override them. It makes parties more accessible to the mediator in a virtual process.

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working, a company that owns a network infrastructure can raise the cost of doing business on the network as the network becomes larger and more ubiquitous.

As discussed above, a blockchain provides an ability to operate a network or marketplace without a centralized intermediary, therefore, resulting in lowered network costs which could provide profound pro-competitive implications.

Opposite situations may also occur as a result of restricted networks arising from the use of permissioned blockchains. There, access to the blockchain's underlying distributed ledger and its beneficial effects could be restricted (through use of, e.g., specialized access credentials or tokens)

to certain market participants with anti-competitive concerns and concomitant antitrust liability potentially stemming out of whatever criteria formed the basis of the restriction.

A key question for antitrust inquiries would be whether use of a blockchain in a commercial setting prevents or limits the concentration of market power. The dream of blockchain developers is that blockchains will enable all the benefits of network effects, while minimizing or eliminating market power that usually comes with those benefits.

With commercial blockchain deployment still in its infancy, it is far too early to determine whether this dream will become reality

or not. The U.S. Justice Department is studying blockchain technology to enhance and improve its enforcement efforts in this area. See "Assistant Attorney General Makan Delrahim Delivers Remarks at the Thirteenth Annual Conference on Innovation Economics—Never Break the Chain: Pursuing Antifragility in Antitrust Enforcement" (Aug. 27, 2020) (available at <http://bit.ly/3q5ncxj>).

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In the June Part 3 conclusion, Pete Michaelson and Sandra Jeskie focus on the resolution of Blockchain Ledger disputes by arbitration, which the authors state is "the only viable approach." 

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Participants' behavior has improved, and also mediators'.

"O, wad some Power the giftie gie us
To see oursels as others see us!
It wad frae monie a blunder free us,
An' foolish notion."

Zoom has given mediation participants something poet Robert Burns believed rested with God—the ability to see oneself in real time. Doing so has improved people's behavior.

Lawyers are less likely to be nasty or insulting or seek to bully an opponent. Philadelphia mediator Bennett G. Picker finds that parties also change their behavior. "One very angry CEO told

me in a caucus session that he was adopting a more reasonable position, in part, because he saw how angry and mean-spirited he looked when in the joint session. He did not like himself very much."

Mediators can also see themselves, providing a new level of insight. One mediator commented that "there is an interesting component of 'self-awareness' that comes from the onscreen version of ADR. I sometimes catch myself looking angry or tired, and I think the participants do too."

Set Design

A former judge who mediates construction disputes often finds herself the only woman in the process. When she begins a case on video, she makes a point of using a virtual wall with her office logo behind her to establish her authority. Later, to make personal connections, she shows herself in her study.

Another mediator reported that on Zoom, "Parties and lawyers are less confrontational, more friendly. And I *know* I am more friendly."

It's cheaper and much more convenient. Parties almost unanimously prefer to mediate virtually. Executives, insurance adjusters and lawyers are delighted to avoid spending the time and expense required to travel to a mediation site.

After an experience with Internet bargaining, a lawyer told Southern California mediator Scott Markus, "I will not be driving to Los Angeles for mediations, and I have a lot of business in Los Angeles. Nor will my clients be spending a day in a conference room away from their office where they could be accomplishing other

Impatient Signals

I was talking by Zoom with an executive who was explaining, for what seemed like the hundredth time, why a damning email he had sent to the other side would have no impact on a judge or jury. As he talked, I saw myself looking impatient and realized that he was seeing the same thing, probably making him angrier. I quickly adjusted my expression, and afterward wondered what signals I have been unconsciously sending to disputants when no camera was present.

things. I will be participating by Zoom or not at all. It's a voluntary process, right?"

Cases are also easier to schedule if there is no travel involved. And mediators who live far from their offices and can work from home are happy to avoid the commute.

Key decisionmakers are more likely to be present. Mediators almost unanimously welcome the fact that a virtual format makes it much easier to get decisionmakers involved. Executives who would never travel to a mediator's office will participate in the process if it is held over the web.

Using video allows mediators to get to know insurance adjusters who were previously only voices over the telephone. The effect, mediators say, is that parties more often make decisions on issues that in an in-person process would be taken back to the office.

It's easier to talk privately. A virtual format makes it easier to talk privately with a lawyer
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Instant Connection

Scottish mediator John Sturrock was talking with a party whose partner was present to provide support. He asked what the partner was doing that day; "Making a model of a Lancaster bomber," he replied. Sturrock mentioned that his father had been a navigator in a Lancaster and that he had recently rediscovered his logbook. The effect was to make an instant connection with the partner, and provide reassurance to the party. Connections, Sturrock says, can be "most intimate ... candid ... sometimes people even say that they forget they're on Zoom."

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without a client feeling left out. In an in-person process, one might look for a diplomatic way to get a lawyer out of a caucus room to speak with her privately, but in a virtual process it's possible to send a private chat message or arrange to talk in a breakout room. (Of course this can also be done in an in-person process by texting, but I at least had never thought of doing that.)

Zoom's waiting and breakout room format also facilitates discussions. British mediator Michel Kallipetis, based in London, admits clients to breakout rooms first if he wants a chance to talk with lawyers privately. Mediators commented, though, that a virtual format deprives them of the opportunities they have in an in-person process to meet lawyers and parties casually at a coffee machine or in a hallway.

More problems with time differences. Eliminating the need for travel also makes it easier to set up nationwide and intercontinental processes. Some mediators saw an increase in the number of international disputes they received when they became available by Zoom.

The lack of travel also means, however, that participants may be in different time zones. This can uncomfortably compress the available time. In a mediation between parties on the East and West

Coasts, for instance, starting at 9 a.m. Seattle time means Atlanta participants don't begin until noon.

Less fatiguing for lawyers and parties. Lawyers and parties describe virtual processes as less demanding and fatiguing than in-person mediation. For parties, the key is being able to participate from home, allowing them to disengage from the process simply by walking out of the room. Lawyers also feel less pressured and may welcome not spending long hours cooped up in a room with a client (and vice-versa).

It's easier to read people and the room—unless they are together and we're on Zoom. Mediators are split on the personal impact of Internet mediation. Some find it easier because they can work from home, but others find it hard to read people as well.

Although there's a split on the ability to read people, mediators said it was easier to observe everyone in a group while talking to one person. There was also a consensus that it's hard to work with lawyers and parties who are assembled in a single conference room when you are only a presence on a screen.

If only one person at a time appears on screen, the effect is even more pronounced, because the mediator cannot see what others are doing. This is a particular problem in highly emotional cases, and Salt Lake City mediator Karin Hobbs requires that each person be on a separate device so she can connect with them in a more personal way.

Boundaries are fluid: Easier to meet before and

after and sometimes shorter sessions. The need to travel created boundaries for the process that do not exist in a virtual process, which can be both good and bad. Video makes it much easier to meet in advance with lawyers and parties, for example.

But to the extent that traveling creates a "settlement event," the effect is weaker with Zoom, where parties can disengage at will. Some mediators say their sessions have become shorter when parties mediate from home, while others say sessions go longer because no one has to catch a flight.

Paul Van Osselear, of Austin, Texas, finds that when he leaves the Zoom screen on after a session has ended, he will often return an hour or more later to find lawyers still talking with their clients.

Mediators were initially concerned that this would lead to fewer settlements, but for most, settlement rates in a virtual format remain the same or in some cases increase. It may be that any effect of not having traveled is offset by the greater availability of people with the authority to close a deal.

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A final observation: Mediators began working with Zoom in the midst of a pandemic, making it impossible to know to what extent their experiences are due to the new format or to the special conditions imposed by the times. They are clear, however: Mediating by Zoom is a much more positive experience than they had expected and will be a large part of the field in the future. ■

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services beyond pharmacy, and ultimately leading to the Aetna acquisition. Over the three years that he held the post, the company acquired and integrated five publicly traded and privately held companies, including devising a strategy that led to the creation of Red Oak Sourcing (<https://redoaksourcing.com>), which sources generic drugs globally. Moriarty served as Red Oak's chairman, responsible for developing a long-term strategic plan.

Moriarty is a graduate of the University of Virginia School of Law and Lafayette College.

Allen Waxman, President & CEO of CPR (and publisher of this newsletter), said in announcing the honorees last year, "CVS Health has been a leader in ADR with strong workplace and other dispute resolution programs. The work it also has done in helping its customers navigate the pandemic is but another example of the company's focused approach in addressing conflict and disruption so as to enable others to achieve their purpose. We are excited to celebrate these efforts and the

leadership of Tom Moriarty at our marquee event."

Moriarty said in a statement, "The thought leadership and insight that we have received from CPR over the years have been instrumental in helping us develop industry-leading programs on dispute prevention and resolution." He added, "We appreciate this recognition and look forward to our continued collaboration with the CPR team in the future."

CVS Health and Moriarty join the most recent CLA honorees from November 2019, the Ford Motor Co. and its then-Chief Administrative Officer and General Counsel, Bradley Gayton. Other honorees include 2018 CLA recipient Johnson & Johnson—its second CLA, the only company twice honored so far—and its General Counsel Michael Ullmann; AT&T Inc. and GC David R. McAtee II (2017); General Motors Co. and GC Craig B. Glidden (2016); 3M and GC Ivan K. Fong (2015); United Technologies Corp. and GC Charles D. Gill (2014); Hewlett-Packard Co. and GC John F. Schultz (2013); Royal Dutch Shell plc and Peter J. Rees, QC, Legal Director (2012); GlaxoSmithKline plc and GC Dan Troy (2011); Amgen Inc. and GC David Scott, and FMC Technologies Inc. and GC Jef-