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WILL MEDIATION RETURN TO IN-PERSON ONLY OR WILL THE FUTURE
HOLD FOR AN OPTION OF ZOOM MEDIATION?

Sydney Grant

March 2020 rapidly changed the way the legal world operated. Before the pandemic, 100% of mediations were conducted in-person.¹ However, due to health concerns, the ADR community had to quickly come up with a solution on how to continue conducting mediations in a safe, efficient, and effective manner. Questions arose about whether virtual mediations would be as effective as in-person ones and if the mediator would be able to establish the same rapport with the parties as they were able to in-person.²

At first, it was a rocky transition.³ Mediators were accustomed to being in-person. They were skeptical that virtual mediation would be successful.⁴ Building trust and rapport with counsel and parties is extremely important.⁵ Without trust and rapport, seldom can disputes be settled.⁶ As time went on and mediators became more comfortable and adapted to Zoom, or other videoconferencing systems, mediators were once again able to find ways to establish trust, and empathy with the parties.⁷ Although many mediators were able to find ways to build rapport

¹ Shira A. Scheindlin, *Virtual v. in Person ADR: What Does the Future Hold*, REUTERS, (Mar. 8, 2022), <https://www.reuters.com/legal/legalindustry/virtual-v-person-adr-what-does-future-hold-2022-03-08/> [<https://perma.cc/FJ9R-GWPC>].

² *Id.*

³ Eric Galton, *The Remarkable (and Often Very Surprising) Benefits of Virtual Mediation*, MEDIATE.COM EVERYTHING MEDIATION, (Jun. 25, 2021), <https://www.mediate.com/the-remarkable-and-often-very-surprising-benefits-of-virtual-mediation/> [<https://perma.cc/UU5Z-H76H>].

⁴ Caroline Antonacci, *Virtual Mediation in Today's World: A Pandemic Success Story*, MEDIATE.COM, (Nov. 22, 2021), <https://www.mediate.com/virtual-mediation-in-todays-world-a-pandemic-success-story/> [<https://perma.cc/2NJD-25KK>].

⁵ *Id.*

⁶ Phyllis Pollack, *How to Have a Successful Mediation*, MEDIATE.COM, (Jan. 7, 2022), <https://www.mediate.com/how-to-have-a-successful-mediation/> [<https://perma.cc/9G4M-Q2SQ>].

⁷ Kristi J. Paulson, *Mediation in the Covid-19 Era: Is Online Mediation Here to Stay?*, 51 SW. L. REV., 142, (2021) [<https://perma.cc/4FDW-3RVJ>].

virtually, in a study of about 500 surveyed mediators, 42% said it was difficult for them to do so online,⁸ indicating that virtual mediation may not be the preferred way for all mediators in the future.

As mediators continued conducting virtual mediations, they soon saw the many benefits it has to offer. With virtual mediation, there are no longer geographical constraints.⁹ Therefore, parties have more flexibility in choosing an appropriate mediator (when choice is permissible), eliminating the need to travel, resulting in reduced costs and time, and increasing the likelihood that key decision makers will be able to attend.¹⁰ Furthermore, anxiety and stress can be decreased or even eliminated by using virtual mediation. Virtual mediations create a safe space for participants.¹¹ In high conflict situations, people can be physiologically triggered while being in the same room.¹² Parties also no longer have the stress of navigating unfamiliar office buildings or finding parking, creating a more time efficient and cheaper process.¹³ Being in the comfort of one's own home or known environment allows parties to be more relaxed, open, and engaged.¹⁴ Lastly, while the mediator is caucusing with one party, the other party can use their time more efficiently and shift their attention to other work.¹⁵

⁸ James Claxton, *Mediators Like Online and Other Verifiable Facts*, WOLTERS KLUWER, (May 17, 2021), <http://mediationblog.kluwerarbitration.com/2021/05/17/mediators-like-online-mediation-and-other-verifiable-facts/> [https://perma.cc/L375-WQA7].

⁹ Paulson, *supra* note 7.

¹⁰ Cassandra Franklin, *ADR in a Virtual World: Here Today and Likely for the Foreseeable Future*, ADR TIMES, (Jun. 2, 2021), <https://www.jamsadr.com/publications/2021/franklin-cassandra-adr-times-adr-in-a-virtual-world-06-2021> [https://perma.cc/D557-E3CQ].

¹¹ Press Release, *EEOC's Pivot to Virtual Mediation Highly Successful, New Studies Find*, EEOC, (Jun. 1, 2022), <https://www.eeoc.gov/newsroom/eeocs-pivot-virtual-mediation-highly-successful-new-studies-find> [https://perma.cc/VGX6-78TN].

¹² Wendy Kramer, *The Pros and Cons of Virtual Mediation*, ADR SERVICES, INC., (Dec. 7, 2020), https://www.adrservices.com/wp-content/uploads/2020/12/LAL_CAKramer1220.pdf [https://perma.cc/36L8-YC7E].

¹³ *Id.*

¹⁴ Galton, *supra* note 3.

¹⁵ *Virtual Mediation in Today's World: A Pandemic Success Story – Why it Works so Well*, JD SUPRA, (Nov. 19, 2021), <https://www.jdsupra.com/legalnews/virtual-mediation-in-today-s-world-a-3853807/> [https://perma.cc/KX39-8FMN].

On the other hand, one of the big concerns surrounding virtual mediation is the technical problems that may arise.¹⁶ People may have poor internet connection which can interrupt the flow of the mediation, or have trouble hearing the other party or lawyer due to low quality microphones.¹⁷ They also may have Zoom fatigue from staring at a screen for too long.¹⁸ Additionally, it can be hard to read shared documents on zoom whereas in-person you can see physical copies of the documents.¹⁹ There are also confidentiality and privacy concerns.²⁰ However, such concerns have decreased since Zoom's implementation of security measures such as password protected sessions, waiting rooms, and the ability to lock the session once all participants have entered.²¹

The other big disadvantage to virtual mediations is the mediator's inability to read the parties' body language.²² Mediators use the body language of the parties to help determine the best course or strategy for resolution.²³ However, for some mediators, facial changes and body language can be more noticeable virtually when someone is speaking.²⁴

As the world continues to shift with technological advances and the younger generation continues to embrace technology,²⁵ it was only a matter of time before the ADR community would slowly shift to virtual mediation. Covid sped up the process by forcing the ADR community and

¹⁶ Scheindlin, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Nicole Rohan, *Virtual vs. In Person Mediation*, LYONS & ASSOCIATES, P.C., (Jul. 16, 2021), <https://www.lyonspc.com/2021/07/16/virtual-vs-person-mediation/> [<https://perma.cc/H9D2-MSWR>].

²⁰ Kramer, *supra* note 12.

²¹ Franklin, *supra* note 10.

²² *Id.*

²³ Rohan, *supra* note 19.

²⁴ Galton, *supra* note 3.

²⁵ Michael Diliberto, *The Pandemic's Silver Lining for the Courts*, MEDIATE.COM, (May 22, 2022), <https://www.mediate.com/the-pandemics-silver-lining-for-the-courts/> [<https://perma.cc/3VK8-PXR9>].

the courts to embrace new ways of operating.²⁶ Although, virtual mediation has its benefits, it should not totally replace in-person mediation.²⁷

There are still some areas that seem to struggle with virtual mediations. The New York Southern District annual report on the mediation program demonstrates certain areas with big disparities in mediation settlement rates: Civil rights mediations (~48% in 2019 compared to ~23% in 2021), ERISA mediations (~89% in 2019 compared to ~60% in 2021), and intellectual property mediations (~80% in 2019 compared to ~60% in 2021).²⁸ However, other areas such as ADA Title III, consumer credit, contract, employment, FLSA, and personal injury have roughly the same mediation settlement rates.²⁹ Mediations where there are no big gaps between in-person and virtual settlement rates, and mediations not involving high emotional matters, should be left to the parties to decide whether they prefer in-person or virtual mediation.

Virtual mediation presents new opportunities for mediators, parties, and counsel, but it should not be the only forum for mediation in the future. As the threat of Covid begin to wane, and life resumes to normalcy, the statistics on settlement rates for virtual and in-person mediation should be heavily considered in determining whether parties should have the choice to engage in virtual or in-person mediation.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Rebecca Price & Anne-Zeng-Huang, *Report of the Mediation Program*, NYSD, (Apr. 1, 2022), <https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Program%20Annual%20Reports/Mediation%20Program%20Report%202019%20to%202021.pdf> [<https://perma.cc/Y4SC-GWX6>].

²⁹ *Id.*