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TO ZOOM OR NOT TO ZOOM?: MEDIATORS' PERSPECTIVES ON VIRTUAL MEDIATION

Penina Gershbaum

In mediation, conflicting parties meet with a mediator, a neutral party, to help them resolve their dispute.¹ Mediations have traditionally been conducted in person, due to the importance of nonverbal communication in the mediation process.² During Covid-19, however, states issued stay-at-home orders to prevent the spread of the virus.³ This mandate led to mediations conducted virtually through the use of videoconferencing platforms like Zoom.⁴ I interviewed ten mediators who mediate across different areas of law to hear their thoughts on the differences between mediating virtually and in person, difficulties with mediating virtually, and if they will return to in person mediation.

Out of ten mediators, nine mediators were initially hesitant to conduct mediations virtually. Most of the mediators were skeptical about using Zoom because they were not technologically adept. Only one mediator was concerned about mediating virtually because he thought it would be difficult to build rapport with the parties.⁵ However, after the mediators gained more experience with Zoom, they all felt able to mediate as effectively on Zoom as they were in person. Nine mediators felt that there was either minimal or no difference in their ability to mediate over Zoom than in person. One mediator said that there was a slight loss when mediating over Zoom, but that it was not significant enough to stop mediating virtually.⁶ Another mediator said that he was able to build the same level of rapport over Zoom as he was in person and that mediating virtually was

¹*Mediation Defined: What is Mediation?*, JAMS, <https://www.jamsadr.com/mediation-defined/> [<https://perma.cc/4CNV-H27N>] (last visited Feb. 19, 2023).

² Kristi J. Paulson, *Mediation in the Covid-19 Era: Is Online Mediation Here to Stay?*, 51 SW. L. REV. 142, 142 (2021).

³ *Id.* at 143.

⁴ *Id.* at 145.

⁵ Telephone Interview with Mediator 7 (Oct. 31, 2022).

⁶ Interview with Mediator 1, in New York, N.Y. (Oct. 20, 2022).

as effective as in person.⁷ Another felt that mediating virtually might be more intimate than mediating in person because when mediation is in person the parties sit across a table in a conference room, thereby creating space between the parties and the mediator.⁸ Mediation over zoom is more intimate because the parties on the screen are directly in front of the mediator.⁹ Only one mediator felt a significant difference between mediating in person and mediating virtually.¹⁰ This mediator felt that it was almost impossible to replicate non-verbal cues over Zoom as it is hard to see the parties' body language because Zoom only shows the parties from the chest up.¹¹ This mediator also felt that Zoom fails to capture the "energy" in the room during an in person mediation, an energy that parties feed off.¹²

Many mediators said virtual mediations were beneficial because they saved travel time and costs. One mediator thought that because virtual mediations are more convenient than in person mediations, parties might be more willing to participate in mediations because they won't need to travel.¹³ Another mediator felt that virtual mediation makes it easier to accommodate people's schedules.¹⁴ Three mediators said that virtual mediation expands a mediator's practice because mediators are no longer confined to having clients in areas that are geographically close to them.¹⁵ Zoom also allows mediation to take place in rural areas where in-person mediation was not always an option.¹⁶

⁷ Telephone Interview with Mediator 7, *supra* note 5.

⁸ Telephone Interview with Mediator 5 (Nov. 2, 2022).

⁹ *Id.*

¹⁰ Telephone Interview with Mediator 4 (Nov. 2, 2022).

¹¹ *Id.*

¹² *Id.*

¹³ Telephone Interview with Mediator 3 (Oct. 31, 2022).

¹⁴ Telephone Interview with Mediator 2 (Oct. 24, 2022).

¹⁵ Interview with Mediator 1, *supra* note 6; *Id.*; Telephone Interview with Mediator 4 *supra* note 10.

¹⁶ Telephone Interview with Mediator 4, *supra* note 10.

Despite the benefits of Zoom, seven mediators found that parties pay less attention while participating in virtual mediation. One mediator found that parties don't take virtual mediation as seriously and that the parties multitask.¹⁷ Another mediator found that parties get tired from staring at a screen during virtual mediations.¹⁸ To fix this, the mediator found that he needed to schedule breaks in the mediation.¹⁹

Regarding the future of mediation, four mediators said they will only conduct mediations virtually. Five mediators said they will conduct both in-person and virtual mediations based on the parties' preference. One mediator said his default method is to mediate virtually, but if the parties would want to conduct mediations in person, he would oblige.²⁰

These ten mediators feel that they can conduct virtual mediation effectively. Mediators are prepared to continue conducting virtual mediation, holding in-person mediation if the parties prefer it. This suggests that mediators will not solely conduct mediations virtually but will use virtual mediation as an alternative to in-person mediation to help parties reach resolution.

¹⁷ Telephone Interview with Mediator 2, *supra* note 14.

¹⁸ Telephone Interview with Mediator 7, *supra* note 5.

¹⁹ *Id.*

²⁰ *Id.*