

Mediating During a Pandemic

By Kathleen Wareham

Remote. Virtual. Online. Distant.

Nothing in these words conjures a personal connection. And yet during the last several months, we've been experiencing the necessity of remote, virtual, online, and distant meetings and experiences. Grandparents read to their grandchildren online, helping parents juggle homeschooling with working from home. Graduations, happy hours, court hearings, business meetings, and mediations are continuing, allowing social connection with physical distancing.

As one who highly values the in-person connection in mediation, I've been surprised by the ability to in fact have personal, lively, and effective connections and communications via videoconferencing. My settlement rate is as high with videoconferencing mediations as with in-person; my clients are finding the experience works quite well, with some saying they don't want to go back to the "old normal." And the "new normal" for in person meetings— with 6-foot physical distancing, the donning of facemasks, limiting the number of people in a room, and being separated by plexiglass— that we will most likely experience for quite some time, will be far less personal than videoconferencing. With videoconferencing, face-to-face communication, including verbal and nonverbal communication, takes place with ease on screens. Participants join from a space they choose. They don't face the uncomfortable circumstance of running into someone they don't want to see or don't know. Participants are assured password-protected, confidential, private conversations, with completely separate virtual "rooms." The mediator moves seamlessly between rooms. Additional breakout meetings can be easily set up, on the spot. Email and screen sharing allow sharing of documents, including a settlement agreement, before, during, and after a mediation. The mediator's connection via screen still allows the face-to-face benefits of challenging communications: establishing rapport; creating trust and confidence in the process; assessing risks of trial or arbitration; delivering unwanted news; discussing sensitive issues; interpreting thoughts and feelings; showing respect for the decision-makers; and closing a deal.

This new normal is a stretch of our experience. But, as noted by distinguished designer Sara Little Turnball, who founded and led the *Process of Change Laboratory for Innovation and Design* at the Stanford Graduate School of Business, "If you don't stretch, you won't know where the edge is."

As we've stretched to mediate during a global pandemic, with stay at home orders in place, we've discovered a new edge, and many advantages. In fact, many people are finding they are more comfortable mediating by video. The commute is a breeze; geographical barriers go away; scheduling can be more flexible and customized to the specific needs of the case. I'm finding people are more at ease in their own spaces. Some choose to use a virtual background, perhaps to maintain a separation

from their home spaces or protect their privacy. Others choose locations where artwork or bookshelves show some aspect of their personality. A cat walks across a desk in front of the screen; voices of children playing outside are heard in the background; a baby wakes from a nap. These everyday human experiences don't get in the way of the conversations; they enhance them. We still get the job done, in the same time frame, but there's a calm that I don't always find in the intensity of the "old normal." Instead, I'm finding an increased patience and focus. When clients are in the comfort of their own home or office, many are more comfortable, allowing a more effective connection and communication than when in a formal meeting room. In fact, I'm finding an enhanced connection between clients and their counsel, and between opposing parties: an extra bit of kindness. Interactions often begin with "how are you" and "how is your family." A global pandemic demonstrates the universal primacy of health and instills a deeper connection in spite of difference and dispute, and virtual mediation facilitates this connection.

It is more important now than ever to mediate, and to do so in a manner that feels comfortable and safe. Litigants, risk managers and claims representatives, who always face uncertainty forecasting a judicial outcome, now face courthouse closures and delays, and increased stress and uncertainty in the world at large and personally. A videoconference mediation allows disputes to be resolved despite the numerous limitations imposed by our public and personal health needs, and provides a low stress, personal, effective route to resolution. Rather than finding it a barrier to settlement, mediation participants are finding the videoconference format is both an effective and enjoyable way to mediate.

There will, of course, be a time again for live, face-to-face mediation; but until that time, "digital immigrants" can learn to have "face-to-face" connection on screens, and "digital natives" can teach the advantages of online platforms. Together we can embrace innovation and appreciate the many advantages of this necessary adaptation. Personally, I've learned by mediating with videoconferencing that millennials are right: you can have a "conversation" via text or email, and "virtual" connections can be personal, connected, and effective. And I think REM got this right: "It's the end of the world as we know it....and I feel fine." We've got this! If you haven't tried videoconferencing mediation yet, I hope you'll give it a try.

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