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PERSPECTIVE

In-person mediation or Zoom?

Since the Covid pandemic, virtual mediation via platforms like Zoom has become the dominant method in California, with approximately 75% of mediation now taking place online, but in-person mediation remains the more effective option due to its advantages in human connection, communication, and commitment.

By Ray Artiano

In 2020, the practice of mediation underwent its most significant transformation ever. Due to the Covid pandemic and the need for social distancing, virtual mediation provided a solution, enabling parties, attorneys and mediators to continue with efforts to resolve cases despite the opportunity to interact on a face-to-face basis.

Now, five years later, virtual platforms such as Zoom have become the preferred (or at least the most used) vehicle for mediation in California. While numbers among mediators vary to a slight degree, it is safe to say that approximately 75% of mediations in California (with some variation depending upon geographical locations) are conducted via Zoom. The reasons for this are understandable: Zoom mediations are cost-effective, time efficient, convenient and offer great flexibility. Notwithstanding, the benefits of in-person mediation clearly outweigh those offered by Zoom.

Advantages of zoom mediation

Zoom mediations do offer actual benefits, most significantly convenience and cost. To begin with, parties and counsel can participate in the mediation from anywhere in the world. This is particularly important where attorneys and clients are geographically dispersed. When this occurs, it is often difficult to even schedule a mediation date that accommodates everyone. Costs associated with travel, lodging and attendant attorney time are also important considerations, especially



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in matters of smaller value where case budgets are limited.

At times, even when the parties are in the same geographical area, there is a desire to work with a mediator who is not. This may occur because of a previous relationship or because the mediator has a particular area of specialty in the matter at hand. If the mediator has no intention of traveling, Zoom may be the best option.

Finally, there are circumstances where one or more of the parties to the litigation are physically unable to attend. In all of these instances, Zoom is an appropriate alternative. Outside of these logistical reasons for conducting mediation through the Zoom platform, in-person me-

diation offers the best opportunity for reaching an optimal resolution.

Why should in-person mediation be preferred?

The absence of human connection should not be underestimated. Mediation, at its core, is a human process that relies heavily on all types of communication. From the mediator's standpoint, non-verbal cues such as body language or tone of voice may lend important assistance to enabling critical insight into the parties' state of mind, allowing a mediator to know when to persevere, back off or reframe an issue. A shifting posture, a deep sigh, a wink of an eye, a pat on the back or other signs of emotion may provide

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great assistance to not only the mediator, but to all parties, in “reading the room.” In a virtual setting, where parties are watching a computer screen, this becomes much more difficult.

Being physically present at mediation has a psychological weight to it. It suggests commitment. A decision-maker who travels from out of town in an attempt to resolve a case shows an investment in the mediation process. In addition, some defense attorneys have noticed that in cases where the decision-maker is a claims adjuster or assigned representatives not fully conversant with the case being mediated, can lower the likelihood that the case will resolve. Being away from distractions that might exist when participating remotely, perhaps from home, office or even in a car, fosters more focus and engagement in the process. It is much easier for the

mediator to maintain the energy in the process when all parties are present, even though they may not physically be in the same room. Sometimes, technical problems with virtual mediations can also lead to distractions, which cause parties to lose focus. The structured environment of in-person mediation encourages parties to stay engaged in the process.

The immediacy of the in-person mediation seems to make it more likely that participants will make every effort to resolve the conflict while all persons are present and there is no threat of someone just “tuning out.” Virtual mediations make it easier for one of the parties to reject proposals. A sense of being more distant makes it easier for a party to take an intractable stance, without the fear of how that might be interpreted.

Finally, there are some cases that may demand in-person mediation. An example of this may be an employment matter where it is important for the plaintiff to express to his employer why he or she was wronged, and for the employer to explain why it took the action to which the plaintiff objected. Trust may be promoted; there are times when the plaintiff and the employer’s representative can even work out non-monetary solutions to the employment problem.

When Zoom might be the preferred mediation forum

There are certain situations when Zoom may be the preferred, or only option. For instance, if one or more parties have health issues or are unable to travel for financial reasons, Zoom is the option. Similarly, in a multi-party case with partici-

pants throughout the country or internationally, Zoom usually is the preferred alternative. Another example may be a commercial case where the sole issue is monetary, and the mediator’s main role involves exchanging offers and demands.

Conclusion

In certain contexts, Zoom mediations can be a valuable or even indispensable tool. It should not, however, be the default. Outside of health or logistical considerations, in-person mediation, with the benefits of personal interaction and the ability to make more measured moves by all participants, offers the better alternative. In-person mediation offers a more effective process that is based upon human connection, subtle communication, and the power of presence.