

## Why Online Mediation May Be Here To Stay

By **Sidney Kanazawa** (October 13, 2020, 6:08 PM EDT)

It's now been over six months since COVID-19 forced us to mediate online.

At first, I was a skeptic. Now, after six months of online mediations almost every week, usually several times a week, I am a raving fan. Virtually all of my mediator colleagues and litigation participants agree that the online platform does not make a difference in the outcome of the mediation. Those mediations that would have settled in-person are settling online.

But here's the exciting part. Most believe cases are settling faster, more often, more cordially, more efficiently and more fairly online. In other words, rather than being an impediment to settlement, the online medium is actually enhancing and transforming how we settle cases. Why? Here are some of the reasons.



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### Body Language

The inability to see the participants' whole body and movements on online platforms is often raised as a reason for the inferiority of online mediations. The reality is just the opposite. We actually see more online.

There is no question that visuals are important. In a frequently cited study on the importance of body language in our interpersonal communication, professor Albert Mehrabian at the University of California, Los Angeles, estimated that we rely 7% on the words stated, 38% on the tone of voice used, and 55% on the visual cues we see from the speaker's facial and body movements.

While the study context and percentages are often critiqued, we undoubtedly rely heavily on what we see to determine whether the words spoken are consistent or inconsistent with the tone we hear or the body language we see. The words, "I'm fine," are belied by a sullen delivery and facial and body expressions of pain.[1]

### Close-Up View of Everyone — Including Yourself

We see more facial and upper body details online than in person. To see only the face and shoulder of another person, and not their torso or legs, in a live setting, one would need to be practically nose-to-nose with the person — a socially unacceptable in-person distance.

Online, this close examination of another's face and upper body is acceptable. In fact, we can stare at the face of another on our screen without the person knowing and without the awkwardness of being caught staring. Nobody really knows what we are looking at on our own screen.

When we use the gallery view of participants, we can see close-ups of all the participants in one glance, which is not possible in a live setting with people arrayed at various distances and positions around a conference table. This close examination accentuates small telling movements of the face that we might not notice in person — a quick half smile, a slightly clenched jaw, a brief small furrowing of a brow, first reactions that provide windows into the heart and mind within.

More significantly, we see ourselves. Some of my mediator colleagues believe this ability to see how you appear to others in real-time may be one of the reasons most of the online mediations seem to be more cordial and polite than in-person mediations.

### **Background View**

Further, while we cannot see a person's whole body or shake their hand or break bread with them during online mediations, we can see their home, their office, their backyard, their plants, their art, their children, their pets and so many other things that we have become accustomed to seeing as we all work from home on online platforms and juggle our home and business life. Even their choice of virtual backgrounds is instructive. Online, we see a more rounded perspectives of each other than the tiny slices we see in someone else's office.

### **Comfort**

The comfort and security we enjoy by being wherever we want to be when we participate in an online mediation also seems to have an effect on the cooperativeness of those involved. There is less anxiety about getting home. They are already home.

Raising voices and acting disrespectful may also be less frequent because it would be frowned upon in front of kids and other family members who are in other parts of the house but not out of earshot of yelling. For participants with disabilities, the online mediations have been a godsend. They can participate with all of their special equipment readily available.

### **Worldwide Reach**

One of the biggest game changers in online mediations is the ability to involve key persons. No matter where they are and no matter how little time they can engage, key decision makers, experts and witnesses can join from anywhere for a few minutes or a few hours, continuously or intermittently, with no problem.

### **Easy Logistics**

The ease and simplicity of scheduling online mediations has changed the logistics of mediations. In the past, people struggled to find a time and place to physically convene. No more. Early morning, late night, 10 minutes, 10 hours, multiple meetings, two breakout rooms, or 20 breakout rooms are all possible online.

Some insurance adjusters and attorneys do not think they will ever want to return to in-person mediations after COVID-19. With online mediations, they can be in multiple cities and states on the same day.

### **No Marathons**

The ease and simplicity of scheduling online mediations is also changing the length of the mediations. There is no longer a need to continue to mediate late into the night just because everyone is present and it will be difficult to physically assemble everyone again.

With online mediations, we find no problem breaking after a few minutes to gather more information or to involve key decision makers or key experts. Convening is so logistically simple that there is no fear of getting everyone back together again.

### **No Cross-Talk**

Another interesting phenomenon is that there is virtually no cross-talk in online mediations. Most online platforms only allow one person to talk at a time. The mediator can mute a microphone if a person refuses to stop talking. In addition, seeing yourself also tends to temper abusive cross-talk.

### **No Prisoners**

In in-person mediations, there is a constant threat of a participant leaving the mediation. In the online world, the threat of leaving or refusing to reconvene is present but its effect is minimal.

First, people are already at home and do not have any excuse about avoiding traffic or catching a plane. Second, leaving involves just pressing an end button. There is no windup or packing up your bags to get ready to leave. You can leave at any time. In other words, the threat is hollow.

### **Personal Camera**

All of these effects have materialized because our separation has forced us to use individual cameras with our individual faces on screen. Conference room cameras do not generate the same level of personal engagement and commitment.

All of these factors, seems to have increased the speed, cordiality, efficiency and fairness of online mediations. Mediations are shorter, friendlier, more interesting — especially with different backgrounds and interferences by pets and children, more convenient, and more just, primarily because we are all seemingly looking each other straight in the eye. But there is more in this transformative change.

### **Early Dispute Resolution**

The prospect of early dispute resolution is now real. In the past, the logistics of getting people together in the same place at the same time with enough information to resolve a dispute dictated that the mediation could only take place just before trial. By then, the investigation, discovery and motions are done, the potential litigation expense savings are lost, and the parties are entrenched in their trial positions — an unfavorable settlement setting. Thus, the expression: "A good settlement is one where everyone walks away unhappy."

## **Online Mediation Changes Timing, Costs and Procedures**

By contrast, the easy logistics of online mediations allows for early meetings to hear each other, breaks to gather information, and convenient regrouping to brainstorm settlement possibilities before litigation costs are spent and before positions are hardened. Now, I hear litigants increasingly express appreciation and happiness after mediation because they have actually avoided the time, costs and difficulties of litigation.

### **Early Face-to-Face Meetings**

COVID-19 has also made online video so ubiquitous that every other mode of communication seems antiquated. Telephone conferences are now so frustrating. When you are on an audio call, you cannot see the other participants and do not know when to speak and when to hold back. You cannot see the subtle humor, anger, empathy and the range of human emotions that you can with video. It is even worse with emails and text.

Our COVID-19 acceptance of and comfort with online videoconferencing completely changes our norm for interactions. We can talk to each other — face to face — and connect in a manner not possible in print or voice, like we did when we were in smaller communities. Manufacturers, retailers and service providers can connect via the internet and solve service problems, complaints and disputes — in person — rather than in cold print or a distant voice. We can see and convey sincerity with our face in ways not possible in print or voice. This is the new norm.

### **Conclusion**

Like the introduction of the fax and email, it is hard to imagine us going backward after the COVID-19 restrictions are gone to just written, telephone and logistically difficult in-person dispute resolution. Face-to-face mediations can now be easily arranged from anywhere and at any time with an effectiveness that will likely change our entire dispute resolution culture and process long after vaccines for COVID-19 are developed.

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[1] To read more about the importance of the spoken word, body language and gestures, read my earlier Law360 guest article here.