

Wills, Trusts & Estates

Mediation in age of Zoom: Is there any going back? | Richard Worsfold

By **Richard Worsfold**

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(May 27, 2022, 9:23 AM EDT) -- A recent practice direction from the Superior Court of Ontario provides that mediations and discoveries in civil actions are to be held in person, unless the parties agree to a virtual attendance or the court orders otherwise. The thinking from the court seems to be that in-person mediations are more effective and that we should be returning to them as the dangers of in-person contact have receded.

A survey of experienced mediators suggests, however, that mediations in the age of Zoom were equally effective and that there are some clear advantages to remote mediation that should not be quickly discarded.

Cooper Mediations, headed by Vance Cooper, did an analysis of a total of 768 mediations performed by their office, both in the year before March 23, 2020, and the year after and found that their settlement rate was virtually identical. The settlement rate for multiparty mediations was actually significantly higher for Cooper, an increase of 27 per cent.

Jeff Morris, another experienced mediator, found that his success rate was also identical and notes that there were distinct advantages to the virtual format, saying: "People are more relaxed or comfortable in their home environment and this contributes to settlement. Commuting downtown to be in the presence of your adversary is anxiety producing and can inhibit the negotiation process."

Howard Black, an experienced estates mediator, finds that remote mediations allow key decision-makers to be present who might otherwise be reluctant to travel to an in-person mediation. Morris agrees noting: "Getting the senior people with authority to a mediation is far easier with Zoom as they do not need to travel and do not necessarily need to commit to the entire day of mediation."

Michael Silver, who was one of the founding core mediators of the ADR Centre in the 1990s, was originally against Zoom mediations and encouraged his fellow mediators to simply postpone their mediations when the pandemic arrived, fearing that the magic of in-person mediations would be lost. He reports that he is pleased to say he was "dead wrong" and that he would be very happy never going back to in-person mediations, saying: "Mediations can be held much more efficiently remotely. You can move the necessary parties in and out quickly and bring in decision-makers from outside where necessary. People are comfortable and better able to make important decisions about their case."

The fear of many was that remote mediations would not permit mediators to read the body language of participants. With full screen close-ups of the participants' faces, however, this has not been a problem for Silver: "You can see every head shake or eye twitch much more easily on Zoom."

Morris agrees, but notes that with virtual mediations he must take the time to confirm intentions and positions verbally, checking to make sure that all nuances of a position are understood, and nothing is missed though the lack of "body language."

Our survey of mediators notes that an additional advantage that Zoom mediation provides is the flexibility of scheduling multiple attendances, and more easily adjourning sessions and then

rescheduling them, to ensure that all information has been obtained so that a resolution can be achieved.

An in-person mediation where all parties have committed the entire day and have travelled a considerable distance to the mediation location can create an "all or nothing" scenario which can lead to a failed mediation.

Cooper further notes that the pressures of beating rush-hour traffic or meeting at-home responsibilities are easily overcome with Zoom mediations which can go into "overtime" with much greater ease. Parties are not trapped in a room without food and can attend to their home responsibilities and return to complete the mediation remotely.

The only type of mediations where an in-person attendance is said to be preferred is one where the ongoing relationship is important and needs to be preserved. Silver notes that occasionally with in-person mediations the "cathartic thing happens" and parties may reform their relationship as part of the conclusion of the mediation.

These mediations, however, are rare and counsel always have the option of scheduling in-person mediations if there is an ongoing relationship that is sought to be preserved by the successful conclusion of the conflict.

By mandating that mediations are presumed to be in person, the courts may have not fully considered all the advantages that have been gained through the use of remote technology. Access to the court system from one's living room is an important benefit and the security and convenience of participating in mediations and indeed in participating in the entire court process from a position of comfort should not be quickly discarded.

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