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Virtual Mediation – How Do I Make It Work For Me?

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Mediation took the construction industry by storm in the late 1980's and has become a staple for resolving construction claims. Today, most construction contracts, including the ConsensusDocs, require mediation as a condition precedent to binding dispute resolution, whether it be arbitration or litigation. As a result, many construction executives have spent long hours sitting in conference rooms trying to reach resolution with their counterpart through mediation in order to avoid the alternative – costly arbitration or litigation that often produces an unsatisfactory result.

While many businesses have foreclosed the possibility of meeting in person due to the COVID-19 pandemic, the contractual requirements for mediation remain. Thus, in most cases, in-person or live mediation is no longer an option; however, attorneys and mediators have developed a virtual process to replace the live process. With a new process comes many questions: Does the virtual process work? What are the best practices and pitfalls for virtual mediation? Will virtual mediation continue when COVID-19 fades away? How do I make virtual mediation work for me? The answers to these questions and more are discussed below.

The Virtual Mediation Format

There are numerous platforms that can be used for virtual mediation, including Skype, Google Meet, WebEx, Zoom, and others. Of these, Zoom is the preferred platform for mediation because it provides breakout rooms for caucus sessions and is easy to use. Regardless of the platform you select for the mediation, you and your company's participants need to understand how it works for mediation and hold a practice session before you go online with the mediator.

In a live two-party mediation, there are typically three conference rooms — one for the parties to use for joint sessions, plus one each for the parties to use for private caucus sessions with their team and the mediator. This format does not change in a virtual mediation, except, instead of three physical rooms, there are three breakout rooms that are used for the joint and caucus sessions.

In a live mediation, the mediator often engages in informal chats in the hallway with the decision-makers or counsel, and the decision-makers and counsel do the same with each other. These informal discussions can be more productive than all the posturing in the formal meetings. Of course, there is no hallway on Zoom, however, there are unlimited breakout rooms where a meeting can be held separately with counsel or a decision-maker. The difference is that the informal hallway chat now becomes a formal meeting that must be

arranged in a separate breakout room, which may not be as productive as the informal hallway discussion. In any event, you need to beware of the availability of the extra breakout rooms for side meetings with the mediator or your counterpart and use them productively.

When considering which platform to use, you should consider the security of the platform and its compatibility with your company's operating system. As many contractors are aware, Zoom had security issues at the forefront of the COVID-19 crisis. Today, it appears that Zoom has corrected these issues and implemented protections such as password protection, the ability to lock meetings and waiting rooms. Regardless, you should work with your IT personnel to ensure that security concerns are addressed and that they will be able to successfully live-stream the mediation on the selected platform.

The Pre-Mediation Phase

Probably the most important change in construction mediation over the years has been the development of a robust pre-mediation phase. The pre-mediation session between the mediator, decision-maker, and counsel before the day of the formal mediation often is critical to the mediation's success. Many lawyers and parties, however, do not recognize its importance and treat pre-mediation only as an opportunity for a brief chat with the mediator for which no preparation is necessary. While it is an opportunity to talk to the mediator in an informal setting, it is much more, including an opportunity to educate and arm the mediator with your story, obtain documents that you need for the mediation, discover potential roadblocks to settlement, uncover adverse arguments and issues that you have not recognized, discuss people problems, evaluate nonmonetary solutions, plan for ways to break impasse when it occurs, and establish a strategy to achieve a settlement. You should never underestimate the importance of the pre-mediation session and come unprepared.

Going virtual has made the pre-mediation phase far more productive than it was prior to the use of Zoom and other platforms. No longer is it a short phone conference between counsel and the mediator. Now, in the pre-mediation session, the mediator will be looking you and your counsel in the eye over Zoom and beginning the mediation with an in-depth discussion of the issues, roadblocks, strategies, and other subjects, while at the same time beginning to develop a personal relationship with you. By the time you arrive at the formal mediation, the parties and mediators will be well along in the process – at the 9:00 am start of the virtual mediation, the parties will be at the 2:00 pm point in the normal live mediation. You must understand and take advantage of this difference or be left behind.

If your mediator does not initiate a robust virtual pre-mediation session, then you should request one. It is your opportunity to set the table for success.

The Joint Opening Session

While the pre-mediation session has become more robust, the joint opening session has been reduced, if not eliminated entirely, particularly in some parts of the country. In addition, the robust pre-mediation session has in some cases either replaced or lessened the need for the joint opening session. However, there still is a benefit of a joint opening session. Often the decision-maker for the other party has not heard your arguments articulated as convincingly as you can make them or has not heard what was said by counsel who may have sugar coated or understated the arguments. And, you may not have heard the other parties' arguments presented in their most stark terms. The opening session is your chance to talk directly to the other decision-maker and for you to hear the other party's best arguments.

The joint session may be the only time you see your counterpart in a virtual mediation. In a live mediation, you will necessarily encounter your counterpart in the hallway or the coffee room, where you can have informal conversations and interactions, judge your counterpart's demeanor, and further your personal relationship. Not so in a virtual mediation. If you don't see your counterpart in the joint session, then you may not be together again in the virtual mediation unless one of you or the mediator formally requests a side session in a breakout room. So, take the opportunity in the virtual mediation to sit in an opening session and look your counterpart in the eye before you break up and move into cyberspace.

One other helpful hint is to take advantage of demonstrative exhibits in the opening session of a virtual mediation. In a live mediation, the exhibit is flashed on a screen at the end of the room and often ignored by all. In contrast, in a virtual mediation, the exhibit is on the computer screen directly in front of the other decision-maker for an extended time, making it far more likely that the decision-maker will take the time to review it in detail. A critical photograph, contract clause, or letter may have a far greater impact under these circumstances.

The Caucus Session and Closing

After the joint session, the parties retreat to their separate caucus rooms. The caucus sessions are the heart and soul of the mediation – where the heavy lifting on settlement occurs and closing is achieved.

In a live mediation, the mediator spends the day moving between caucus rooms, meeting the parties and counsel. During this time, the mediator develops a relationship with the decision-makers and counsel, observes their body language, demonstrates the mediator's knowledge and understanding of the dispute, and begins developing trust. The mediator also listens carefully and observes the parties' body language during the caucus sessions to discover what is actually important to them – unearthing their interests, less so their positions. When the time comes, the mediator uses the relationships and knowledge garnered in the caucus sessions combined with tried and true closing procedures to help the parties reach a settlement.

So, can the mediator be as effective in caucus sessions through a video camera as in face to face sessions? The answer probably is no. However, the mediator can still be effective in helping the parties reach a settlement in a virtual setting, it may just require more help from you and more work and time to accomplish.

Your input must begin in the virtual pre-mediation phase. You need to make sure that the mediator is well on the way to settlement before the formal mediation begins. Virtual communication, and therefore virtual mediation, is more difficult than when it is face-to-face, and it takes longer to effectively communicate the same information and achieve the same results. So, start early and reduce what must be accomplished in the formal mediation session.

You should limit the number of people that you bring to the mediation. You don't need a room full of people available to answer any possible question like you might in a live mediation because your people are only a Zoom invite away from joining the virtual mediation. The more manageable group gives you more individual time with the mediator and removes the internal arguing and second guessing that goes on in a room full of people.

There is another reason that live mediations tend to close and do so at the end of the day. The parties have invested time and committed resources trying to settle. In a live mediation, everyone is about to leave to catch an airplane or at least go home and probably will not be available to recommence the live mediation for some time because they have a busy schedule and have moved on to the next project. The parties typically want to close before this happens and will often stay late into the evening to achieve that settlement. The dynamics are not the same in the virtual world. Many times the parties are at home, and if settlement does not occur, they will simply move to another room to have dinner or a drink. The end-of-day pressure point may not be as effective in that situation. However, the decision-makers and counsel likely will be in the same place the next day to continue the mediation. It is easier to get back together quickly for another day of virtual mediation and there is no cost to do so. This is a real change that you need to recognize in your preparation and negotiations.

Conclusion

So, what are the answers to the questions posed in the second paragraph above? Yes, virtual mediation works. Those cases that should clearly settle will settle virtually, while those that clearly shouldn't settle, won't. Those cases in the middle of the continuum, where settlement is dependent on the mediator's ability to develop a personal relationship with the parties and to use the mediator's personal charisma or apply pressure, are less likely to settle in the virtual forum than they would have in a live mediation.

Virtual mediation, however, is much less expensive and easier to fit into busy schedules. It is often hard to get the insurance carrier representative to the live mediation. That is not as true in a virtual mediation. Your experts and jobsite personnel are a click away. In addition, it is easier to reconvene for a second or subsequent day.

Virtual mediation, either in whole or in part, likely will stick around after the impacts resulting from COVID-19 subside. At a minimum, the virtual pre-mediation phase is a substantial upgrade over the old telephone call with counsel and likely will be the standard even if the formal mediation reverts to being live.

The parties will weigh the size of the claim, cost factors such as legal and expert fees, travel time, the need for personal relationships to close, and the ability to schedule the mediation to decide which mediations should be done virtually and which should be done in-person. The second session of mediation after relationships have been developed, information exchanged, and negotiations progressed, probably will be done virtually in most cases. Small mediations almost always will be done virtually.

Ultimately, yes, live and virtual mediations are different – but that does not mean that you should refrain from engaging in the dispute resolution process. A virtual mediation may be exactly what is needed to get a dispute resolved.