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Viral Changes in ADR During the Pandemic



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Online Mediation in a Time of Coronavirus

Simeon H. Baum

Necessity Is the Mother of Invention

We are living in strange times. COVID-19 has locked down the world, bringing unthinkable harm—the death of loved ones, colleagues and community members; disease; unemployment; and disaster for many businesses. Yet just as the plagues in Egypt were a harbinger of liberation for the Hebrews, today’s coronavirus homestay has combined with other social forces to offer a boom time for mediation.

A year prior to coronavirus, Chief Judge DiFiore commissioned a task force on increasing used of ADR processes in the New York State court system. Incorporating the task force recommendations in her State of the Judiciary and subsequent orders, Chief Judge DiFiore called for a significant increase in ADR use throughout the state court system. Administrative Judges were charged with creating ADR plans by September 2019. Since then, new ADR Coordinators have been hired, mediation and other dispute resolution trainings have ramped up, and an extensive increase in the use of a variety of creative dispute resolution processes—with a spotlight on mediation—is upon us.

Then came coronavirus. With courts shut down, many litigators were having tea and biscuits at home, with little else to do. Many of their business clients were facing major losses, with stores closed and a dramatically reduced workforce. Both commercial landlords and tenants have been suffering. With ensuing cash shortages, plaintiffs have even greater needs for immediate recoveries; and parties on both sides of the adversarial equation would prefer not to spend a fortune on litigation.

At least at its inception—prior to the deeply unfortunate and nation rending events of recent weeks in the wake of the George Floyd tragedy—COVID-19 was a unifying force. We were all in this disaster together. From the standpoint of case resolution, we were seeing the Christmas spirit on steroids. The time has been overripe for mediation.

The fundamental question facing mediators when lockdown began was whether it is possible to continue mediation while we are all at a social distance. Mediation, at core, is a process of bringing people together in a manner that enables us to recognize and address one another in our wholeness, as complete persons. It offers a confidential session where empathy, recognition, attention to body language, enhanced communication, the communal meal (whether coffee and danish, or the

later lunch) work their magic. Through interpersonal interbeing (to steal a phrase from Thich Nhat Hanh),¹ we are enabled to cut through positional bargaining and adversarial postures, to enhance understanding, augment free exercise of choices on many levels, and engage in productive deal making. We mediators work to create an environment where safe disclosures may occur. Even for complex business matters this is a zone of possible intimacy, where personal touch and insight matter.

The question we have faced is how this can be done when we are stuck at home. And then came Zoom.² Although many of us are technosaurs, we soon found ourselves functioning like the sage of the *Tao te Ching*:

Without leaving his door
He knows everything under heaven.
Without looking out of his window
He knows all the ways of heaven.
For the further one travels
The less one knows.
Therefore the Sage arrives without going,
Sees all without looking,
Does nothing, yet achieves everything.³

While contrary to the essential and calmly contemplative message of this passage, the reality of the past months has been nearly frenetic interactivity with the world while we conduct full lives remotely from a computer desk at home. We have linked into our office computers with TeamViewer or the like; had Zoom cocktails and dinners with family and friends; ordered all personal household needs via Amazon, Fresh Direct, or other providers; and generally lived with tremendous interactivity while staying at home.

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Similarly, thanks to online videoconferencing technology, over the last few months there has been a dramatic shift to online mediation.

In this article, we will consider online mediation, with a focus on Zoom in particular. In order to assess the utility or effectiveness of this medium, we must consider what it is we are seeking to accomplish. Thus we will first take a brief look at mediation itself to flesh out the sensibility used to assess the use of this modality. We will then turn to a nuts and bolts review of key Zoom features as used in mediation. Then follows a consideration of broader issues with the Zoom platform as they relate to mediation: confidentiality, security and the management of parties in a manner consistent with one's mediation orientation. Having addressed core features of Zoom *sub specie mediationis*, we then consider how to integrate Zoom into our mediation practice. This starts with introducing Zoom to parties and counsel, to aid in their shift to this modality. It then moves to practical considerations of Zoom use at various stages of the mediation process. Then, based on this user's experience and reports from other mediators and users, we will offer practice tips, and reflect on new opportunities and challenges with Zoom. Finally, we will look to the future with questions of how this will impact the practice of mediation once we all return to our offices and are free again to hold mediation sessions in person.

If the Medium Is the Message, What Question Does It Answer?

As we consider whether Zoom or other versions of online mediation are effective for mediation, we might keep in mind that our understanding of mediation and its potential determines the answer to the question of the utility of this modality. We enter the Zoom zone now after decades of experience with mediation. We have seen how in person mediations sessions function, had dialogue in the mediation field on a variety of orientations and approaches to mediation, and are aware the promise of mediation and its potential. We take this awareness with us into online mediation as critique and aspiration for this new mode. Beyond this, ideally, we might keep our eyes open to new possibilities.

Use of technology itself generates choice points from which we encounter our choices and are given an opportunity to question what, in fact, we are seeking – which reveals something about our orientation. It offers us reflective opportunities to assess how those choices and capacities impact, influence, and serve participants (parties and representatives); and whether there are new possibilities from this modality which have value.

As we make these choices, we are also called upon to keep in mind the deepest potential of mediation, and to seek ways to maximize this potential. Let us now briefly review expressions of this potential.

Core Mediation Orientations—Who Do the Voodoo That You Do So Well?

In an article of this kind, we will make just summary observations about major expressions of mediation orientation.

Facilitated Problem Solving or Evaluative Process?

Since the emergence of Riskin's Grid for the Perplexed⁴, the mediation field has been sensitive to the question of whether mediators offer parties evaluations of their case strengths and weaknesses, the benefit or detriment of a deal or even broader considerations of the appropriateness of process moves, past behavior, community impact or potential outcomes.⁵ Do mediators tell parties what to do? Or are mediators fundamentally facilitators of the parties' own dialogue, negotiation and reflection?

Centrists in the field train using insights from *Getting to Yes*⁶, viewing the role of mediator as a facilitator—one who helps the parties help themselves in working through a process characterized by joint, mutual gains, cooperative problem solving. Mediators grease the wheels of the parties' own negotiation, guided by the Fisher Ury model. Negotiators are encouraged to be soft on the parties and hard on the issues. We use active listening—validating, empathizing, clarifying, and summarizing—to enable parties to feel heard and to encourage productive disclosure of information that can serve as the medium of exchange in the negotiation process. We help parties shift from rigid positional bargaining to uncovering and disclosing their interests, and cultivate development of options to meet the parties' needs and interests. We use standards to move the talk away from a battle of wills to constructive consideration of jointly held principles or criteria that might help with distribution of assets, assessing values in transactions, or determination of appropriate outcomes. And we use the "BATNA"—the best alternative to a negotiated agreement – to consider where the existing or potential in the parties' life context suggest that it is better to walk away than take the deal proposal on the table.

As a process, mediations guided by this model are confidential sessions in which the parties typically hold talks jointly and also break out into private meetings, or "caucuses," with the mediator. Caucuses offer a good opportunity to develop rapport; hear and express empathy for stories that might be difficult to express in the presence of the other parties who are perceived as adversaries; uncover interests that might otherwise be withheld for reasons of strategy or simply lack of reflection; gain understanding of perspectives from the other room without the risk of strategic loss through acknowledgement or loss of "face"; encounter case or deal risks; brainstorm to develop options for deal proposals; and assess proposals made by the other parties.

Understanding-Based Model

For roughly 40 years, Jack Himmelstein and Gary Friedman, through their Center for Understanding in Conflict, have promoted an approach to mediation that sees Understanding as its foundation and goal. As people in conflict gain a better sense of themselves and the others, digging beneath the “v” in *Jones v. Smith*, they come to recognize commonality, appreciate differences, recognize that we are all in this world together, and work through their common situation to a deeper understanding and acceptance of the life reality that is and embraces them.

The mediator and others engaged in this process employ a mode of listening that Himmelstein and Friedman coin as “looping.” This is an iterative process in which the listener, with a genuine intent of encouraging full expression and gaining understanding, feeds back to the speaker reflective expression of what has been said, with openness to adjustment, correction, modification, and amplification, until the speaker—feeling more deeply understood—expresses, in effect, with satisfaction, that the looping listener has got it.

Parties engaged in this mode of mediation have gone through a process of contracting and convening, where they buy into the notion that looping and the entire mediation process will be conducted openly, in joint session. The view is that the mediator brings peace into the room and does not reinforce barriers between the parties by use of caucus. The mediator here is not a power person, toting messages and deal proposals from room to room. Rather, understanding is cultivated through transparent looping in the view that as all are mirrored, collective understanding—and acceptance—will deepen; and resolution will ensue.

Transformative Mediation

In 1994, Bush and Folger published *The Promise of Mediation*,⁷ a clarion call for the school known as transformative mediation. Emerging from their experience with community mediation—of matters found in New York’s Community Dispute Resolution Centers (CDRCs), such as landlord tenant, neighbor/neighbor, family, and minor criminal court matters—Bush and Folger made a stunning pronouncement. The purpose of the mediator is not to settle the matter. Nor is it to cultivate joint, mutual gains problem solving. Rather, the purpose of the mediator is twofold: fostering party empowerment and recognition.

This is rooted in the transformative theory of conflict as a crisis in the parties’ relationship, as manifested in their mode of communication. A transformative insight is that parties in conflict are deeply uncomfortable with this condition. They are hunkered down. The conflict feels ugly. The parties’ feel at risk and are defensively enmeshed in self-concern. This limits the capacity to

recognize the other party’s reality—feelings, perspective, needs, interests, or legitimacy. Through raising up opportunities for parties to make choices at the mediation table, the mediator fosters party empowerment. As a party recognizes the capacity to make process choices, to speak or not to speak, what to say, to make proposals or not, how to respond to expressions or proposals by the other party, what deal to accept—in short a host of possible choices the party gains a greater sense of freedom and control. This party empowerment enables parties to feel more secure, to relax a bit, and for the first time to find the freedom to look beyond their ambit of self-concern to recognize the other. This ensuing growth in empathy is the moral transformation from which the transformative mediation school derives its name.

The mediator’s attitude in the transformative model is that of pure facilitation. The parties drive the car of the process. The mediator sits in the back seat raising up opportunities for empowerment and recognition. The mediator has no macro criteria—such as interests, options, standards and BATNA—to ring bells to be captured as communication ensues. Rather, the mediator listens with a microfocus, with plain reflection back of immediate party expression in the moment.

Transformative mediation accommodates caucuses as well as joint session.

Protean Shape Shifters—the 360-Degree Mediator

For many mediators and users, the above problem-solving facilitation, understanding based, and transformative models of mediation might serve as ideal types offering guidance and a sense of rich potential in mediation, while not limiting the approach taken in a given mediation. Rather one might take the approach recommended by Peter Adler in his piece on *Protean Negotiation*,⁸ and do what is appropriate under the circumstances.

As a set of general observations, characteristics of mediation can include creating a forum where parties can express themselves with authenticity and find potential for empathy. It is a zone where mediators work to bridge the trust deficit found in disputes, and engage all present in a collective effort towards enhanced communication and resolution. Your current author tends to turn to the *Tao te Ching*, of Lao Tzu, as a bible for mediators, as it were, encouraging deep listening, relatedness, receptivity, participation, flexibility, and waiting in patience and humility to let the process happen and enable parties to work things out.⁹ It can be seen as a forum for the integration of the norms of justice and harmony.¹⁰

At core for this author, after 30 years laboring at the mediation vines, parties gain productive guidance in seeing mediation as flexible process, accommodating any configuration of groups, in an effort at building understanding and deal-making.

Now to Zoom in on Zoom

With the forgoing questions and sense of mediation's scope, depth and potential in mind, let us take a closer look at online, video-conferenced mediation. Prior to the onset of coronavirus, over the years, this office has had experience bringing parties to the table using Skype or other videoconferencing platforms. Typically, though, this was occasioned by the difficulty of bringing a particular party from a distant venue. The absent party would take a seat at the conference table—by laptop or on a videoscreen—where the rest of us were gathered in person. Following coronavirus homestay, however, all parties and the mediator have been gathering together on the two-dimensional format of the laptop's screen; and this author's experience has been in using the Zoom platform. For this reason, and with no intended denigration of other applications and platforms, this piece will focus on Zoom.

Nuts and Bolts of Zoom Features of Use in Mediation

Zoom presents a fairly stable online platform offering a handful of key features that are very useful in mediation. For mediators, the Zoom Pro plan makes sense because it permits meetings of up to 24 hours for groups of up to 100 participants. The Zoom account holder who sets up the meetings is known as the Host.

Invitations and Settings

Zoom enables the Host to schedule meetings and to manage the meeting environment in advance through the Settings feature. Once scheduled, the Host can copy a hyperlink and password for the meeting and transmit it to the invited guests. Links can be streamlined to embed passwords for a single click feature for use by the invited guests, although security is heightened by requiring separate entry of the password. Further enhancing security and control, the Host is given the option of having guests wait in a "Waiting Room" prior to entering the meeting, until they are "admitted" by the Host.

Basic Video and Audio Display

Parties are able to speak together on a single screen. Their video images appear in boxes, with their names at the bottom. Parties may click the "rename" option offered through the ellipsis displayed on their image in order to change the name shown under their video image. The Host also has the power to rename parties shown on screen.

Where users lack video camera capacity, they are also able to call into the Zoom meeting and join in solely audio form.¹¹

Audio and Video "Muting"

Using two of various icons that appear typically at the bottom of the user's screen, participants have the power to mute themselves and to shut their video cameras, at which point a screen appears displaying that participant's name. The Zoom Host (typically the mediator who has set up this Zoom meeting), also has the power to mute or stop the video of any party. The Host can also unmute the parties whom the Host has muted, but must ask permission to return to video from any party whose video the Host has stopped.

Participants Screen

A "Participants" screen is available to all participants, showing the number of participants and the names of all participants in the Zoom meeting room. Depending on the features selected by the Host in Settings, this can also display polling features (with "yes" or "no" choices) a raise hand function (also to gain views on a given question from a large group), and certain other features. The Host's Participants window offers other features, including the notorious "Mute All" button. More on that later.

Speaker or Gallery Display

Each user can choose whether to display just the "Speaker" on screen, by selecting the "Speaker" button typically seen at the top right of the screen, or to display equally sized images of all participants by choosing the Gallery setting, instead.

The Magic of Breakout Rooms

Of notable significance to mediations, the Zoom Host is also able to create and assign parties to breakout rooms ("Breakout Rooms") for private discussions. The Host can assign participants manually – more appropriately for mediation—and may rename the rooms from "Breakout Room 1" to, e.g., "Smith Breakout Room." A party can be assigned to only one room at a time. Once the assignments are set, when it is time to move to caucus, the Host "Opens" the Breakout Rooms, automatically sending an invitation to join the specified Breakout Room to each assigned party. Once the party accepts the invitation, Zoom sends that party to his or her Breakout Room. At any time, parties are free to click "Leave Breakout Room" on the bottom right of the screen and Return to Main Session. From that point forward, unless Breakout Rooms are recreated, users may shuttle back and forth from Main Session to Breakout Room simply by clearing the Breakout Room box-shaped icon at the bottom right-hand section of their screen.

The Host has the magical power of being able to move to and from any Breakout Room or the Main Session in less than a second at any time. Should users within a given Breakout Room seek to speak with the Host (mediator) or need assistance, they may click the "Help" icon displayed in their Breakout Room. This sends a message to the Host, which the Host may accept – taking him or

her to the Breakout Room requesting Help—or decline at the moment by selecting “Later.” The Host might also prearrange a text message or cellphone contact for each room to “knock” on the door, either seeking permission to join the room, or simply advising the parties that the Host will be joining them.

As a general practice, it is wise for mediators to create extra Breakout Rooms. This enables the Mediator to create special caucus formations—say, principals speaking with principals, or attorney-only meetings, or any other form of mix and match.

The Host has the capacity at any time to invite parties back from the Breakout Rooms to rejoin the Main Session. The Host also has the power simply to click “Close Breakout Rooms.” This sends a notification to all participants in all Breakout Rooms to return to the Main Session. Should they fail to do so, in 59 seconds the Breakout Rooms automatically close, bringing all parties back to the Main Session. This directive process move, like exercising the Mute or Mute All feature, raises transformative and pure facilitative questions worthy of further consideration.

Documents, Whiteboards and Chat Feature

In both the main session (the mediation’s joint session) and in the Breakout Room (the mediation’s caucus), participants can share documents, pull up a Whiteboard to capture information, and send text messages to other participants through the “Chat” feature. Those in a given room—whether Breakout Room or Main Session—can “Chat” only with others in the same room, not those in any other room. Documents, Whiteboard displays, and Chats that are shared in a Breakout Room are private; they cannot be accessed by users outside that breakout room.

Documents and the Whiteboard are accessed through the green “Share Screen” icon at the bottom of one’s screen. In order to be shared, a document or any file—such as an image, expert’s report, deposition or hearing transcript, pleading, decision, motion papers, contract, email or other correspondence, insurance policy, spreadsheet, PowerPoint presentation, or even video or film clip—must first be open on the user’s computer screen.¹² Even if the document is not yet open at the time it is needed, the user is free moderately to exit the “full screen” mode; click another icon usually found at the bottom of one’s screen (e.g., the file folder, Outlook, Google Chrome, Word, or other usual icons); and then open the needed document or file. Once selecting “Share Screen” one can see all open files—including a Whiteboard option—on one’s screen, select the desired file, and share it.

The Host has control in Settings of whether parties other than the Host may share their screens. While barring sharing is a security guard against unwanted Zoom bombers who are fabled to share pornography in

public meetings or high school gatherings, it is wise for mediations—which involve a limited number of specially invited participants—to enable all users to share their screens. Typically, through Settings, the Host will gain primacy—being the first to share and retaining the power to take down documents or files shared by other participants, when needed.

It is good to keep in mind that parties in Breakout Rooms may make good use of the Share Screen feature privately to consider materials that they prefer not to share with other parties, or which they would like to analyze in private. Mediators entering party Breakout Rooms may opt to signal ahead of time that they are coming, in order not to surprise parties who are sharing documents in confidence.

As suggested by the enumeration of possible documents or files above, the Share Screen’s uses in mediation are myriad. It can be very helpful enabling parties to focus on information in common during a joint session (Main Meeting). The Whiteboard feature—or a blank Word document—can be used to capture the terms of a deal proposal. Similarly, parties or the mediator can post a form Memorandum of Understanding, Settlement Agreement, or Letter of Intent, and use it as a working Camp David accord type document to nail down, clarify, or modify the open terms in a nascent deal.

More than even in person mediations, documents or files displayed through the Share Screen feature are up close and personal. One can really drive home a point, or foster genuine and contemplative analysis, by displaying a blown-up paragraph of a tricky contractual provision, complex damages or financial spreadsheet, or errant email for all to see. It is much sharper, and equally available to all eyes on the screen than any document viewed over the shoulders while crowding around one seated party at an in person mediation session – however much secondary bonding value there might be in the experience of that shared viewing effort. For those interested in decision tree-based risk analysis, a common chart or tree could be considered by all on screen.

Of course, in addition to documents shared on screen, nothing stops parties and counsel from simultaneously emailing documents for consideration during the Zoom session. It is amazing how much can be done contemporaneously and remotely.

The Chat feature can be useful, as well. It is accessed by clicking the “Chat” icon at the bottom of one’s screen. This then brings up a template with that user’s prior Chat history towards the top, and a label for “Everyone” at the bottom. In a Main Session, e.g., one may share comments with all present, by clicking the “Everyone” button, entering the text message below, and then transmitting it. One can also send messages privately by first clicking on the “Everyone” tab, which, in turn, displays the names of all others present in that meeting room. One should be sure

that the intended name is selected so that the private message gets delivered to the intended recipient. By planning ahead, users can anticipate sending messages to one another in this manner. For instance, counsel could Chat with the client: “stop talking. That mediator’s a fool. Do not give away the ship.” Or something to that effect.

Rest assured. From what this author has gleaned, even the Host has no access to private Chats between parties, whether held in the Main Session or in their Breakout Room. Should this be otherwise, we invite comments by the vigilant reader.

Confidentiality

The Host has the power to record meetings and can set up a feature enabling other users to record as well, after first seeking and receiving permission to record from the Host. A simple approach to ensuring the confidentiality of the mediation session is for the Host to select the Settings feature that eliminates the recording option by anyone, including the Host. Providing the parties with the option of recording the meeting after first obtaining the Host’s permission makes the recording issue more likely to arise.

This approach exemplifies a choice that triggers considerations affected by one’s mediation philosophy. To the extent one is transformative, there is an open question whether even process design effected through a Settings selection should be a conscious party choice rather than an implied decision by the mediator. A similar question might arise applying the Understanding-based school’s philosophy of transparency, which might call for this issue to be raised at the phase of contracting and convening. It would be interesting to learn the views of Messrs. Himmelstein and Friedman on this issue.

Echoes of the Marathon Man—Is It Safe? Zoom Security

With the advent of coronavirus lockdown, Zoom use proliferated. Not long after, concerns about Zoom security hit the blogosphere; and certain law firms and other users shied away. The chief expressed concerns were Zoom bombing, where random participants share unwanted materials on screen during Zoom meetings. As mentioned above one Security feature of Settings can prevent this: blocking Screen Share by anyone other than the Host.

Since the initial bomber scare, Zoom has ramped up its Security features. There is now a Security icon at the bottom of the Host’s screen. It enables the Host to lock the meeting and to enable the Waiting Room. It also permits the Host to grant or deny to other users the following powers: Share Screen, Chat, Rename themselves and Unmute themselves. Locking the meeting has its risks. A participant might fall off due to technical issues or inadvertently leave the locked meeting. The Host must then enter Settings, unlock the meeting, return to the main

room, and allow the participant back in from the Waiting room.

Where mediations are not widely publicized and invitations tend to go only to a few select parties, there is little risk of Zoom bombing. Use of an individualized link and password can also enhance security. Having users first go to a Waiting Room before they are admitted to the meeting by the Host further enhances security. Blocking the Rename feature impedes imposters. And to enhance control over the mediation session, where needed, Screen Sharing and Unmuting can be denied.

Overall, in this mediator’s experience to date, there has been no known intrusion or Security challenge. Now that the NYSBA House of Delegates has passed a recommendation that one Cybersecurity credit be part of the four required Ethics credits for biennial registration, we hope that future instruction on this issue with shed greater light on this area of concern.

Integrating Zoom Mediation into One’s Mediation Practice: Practical Tips and Considerations

At least during the foreseeable future, in the midst of continuing coronavirus concerns, Zoom mediations are a growing part of the dispute resolution landscape. Mediation practitioners would be wise to seize this opportunity to bring more matters into mediation, to gain competency in Zoom, and to grow sensitized to the subtleties of this medium.

Following are some practical tips and observations stemming from this practitioner’s experience with Zoom mediations and informed by some of the questions and views on the nature of mediation raised at the outset of this piece.

Easing Parties and Counsel into the Virtual Mediation Environment

As with any new modality, many of us are change averse. Mediators should give thought to ways to describe the Zoom platform and its functions so that parties and counsel can see the ways in which it flexibly mirrors the in-person mediation process. During early days of coronavirus lockdown, one approach to supporting this change was to have a Zoom meeting invitation accompany the initial joint pre-mediation conference call. Counsel could then shift during that call to a Zoom meeting for the balance of that initial conference. This offered the opportunity to show counsel how to use the Share Screen and Chat features, to get familiar with icons and other functions—such as Mute/Unmute; Stop Video; and Rename, to mention a few— and to take a test run of the Breakout Rooms.

Over time counsel have grown more secure. With Zoom, there may be increased meetings with counsel and one party in advance of the mediation session, again in

order to acquaint them with Zoom and assuage concerns. This is a wonderful opportunity for developing trust and rapport in advance of the first mediation session. It can also open up opportunities for pre-mediation caucuses on substantive and significant procedural considerations.

Now that Zoom has taken further hold of the scene, it has become more natural for initial joint pre-mediation conferences to be scheduled as Zoom meetings from the outset. Again, this offers the mediator an opportunity to help counsel feel secure, and enhance their Zoom competence, again building trust and rapport.

Holding and publicizing Zoom mediation webinar and spreading articles on Zoom mediation can further encourage the transition of counsel and parties into use of the modality.

In addition, success stories can help. One early foray into Zoom mediation involved a complex, high-stakes class action with parties and counsel having planned to fly into New York City from various states across the U.S. This would have generated substantial travel costs for airfare, meals, and hotels, and a definite commitment of at least one or two business days in New York.

During the initial joint session, this mediator inquired whether these experienced, professional and highly sophisticated counsel would be interested in discussing damages together. As a result of that conversation, counsel realized that there was a significant divergence in their views. This produced a need for private breakouts, where the bargaining teams could huddle. It took only seconds to place them in their Breakout Rooms. In the rooms, counsel and their clients were able to review documents via the Share Screen feature and identify a zone where further investigation was merited. As a result, the participants and the mediator next reconvened in a joint session and determined to reschedule the mediation for a time when further study and assessment of the damages picture would be completed.

The entire mediation session took less than a half an hour. Throughout the process, perhaps not only because of their professionalism, but also because they had not incurred the sunk cost of travel from all across country to New York, counsel and parties were remarkably non-plussed by this development. Perhaps it was also a result of being able to see everyone's face equally facing forward together on the screen, knowing that one was being seen, and also having the screen as a mirror of one's own appearance and behavior. In short, rather than spend a day in New York and substantial funds on the trip, the parties efficiently cut their most and moved forward admirably in problem solving mode.

This clearly highlights some advantages that stemmed uniquely from this Zoom mode of mediation.

Preparation for Zoom Mediation

In many respects, preparing for Zoom mediations is similar to preparation for in person mediations. There continues to be a need for pre-mediation statements. As always, it is important to extract a commitment that parties with full authority to resolve the matter will be present and available throughout the mediation session until the matter is resolved. It is helpful to be sure that one is available to conduct pre-mediation conferences to the extent they can be helpful in preparing the mediator and the parties for a fully productive mediation session.

The chief differences are that these initial pre-mediation conferences can now be conducted via Zoom.

Avatars and Appearance

One tip that mediators can share with counsel and parties is to consider how they will present themselves in the Zoom environment. While we are conducting conferences by Zoom, participants have varying awareness of the way they might appear in the Zoom environment. As we have all been working from home, there has grown an increased tolerance for variations in presentation. During the pre-COVID days, counsel, and many parties, would appear at mediations in business attire. These days, however, we see a wide variety in appearance. During the class action mediation, male attire ranged from a jacket and tie, to collared shirt and sports jacket to a lawyer from Florida dressed in shorts and a hoodie. In one insurance coverage mediation, some party representatives participated from their office, others from impressive home scenes, and another from his home basement.

To adjust for environmental differences, some participants take advantage of Zoom's Virtual background. This enables one to select from a library of backgrounds or from photo images available from one's own photo files or from databases online. For many, who lack a "green screen" or newer computers, these backgrounds appear more like hallucinogenic imagery, in which the subject blends and disappears into the virtual background. It would be wise for users to acquaint themselves with the availability and effectiveness of these virtual backgrounds to create the image with which they are comfortable before entering the Zoom mediation. Nevertheless, these variations, including the presence of spouses, children and pets parading across the background actually have a humanizing effect as we all adopt to the new reality of working from home.

Wait, Wait . . . Don't Tell Me!

One question for mediators is whether to hold parties in the waiting room until all are present before bringing folks into the initial joint session, in the Meeting Room. Another option is to admit participants as they arrive and engage in small talk until all are assembled. Yet another option is to move parties into their assigned Breakout

Rooms, permitting them to prepare until all parties have arrived and are ready for the opening joint session.

Depending upon one's mediation orientation, the choices here might differ. To offset the loss of the personal touch afforded by in person mediations, one might consider permitting parties and counsel to enter as soon as they arrive, and engage in small talk, unless there have been reasons to move parties directly into caucuses. These choices present opportunities for sensitive mediators to reflect on their practice style, principles, and orientation.

Overcoming Depersonalization

Regardless of their orientation and style, most mediators find ways to express empathy and cultivate trust and rapport with parties and counsel. Gathering on a two-dimensional computer screen presents the risk that parties will operate at a distance from one another and that the humanizing magic of mediation, which affirms the whole person, might be lost.

As we increase the use of Zoom for mediations, mediators will be on the lookout for ways to continue catching and reflecting back party emotions and perceptions. We will continue to find ways to engage in effective active listening—validating, empathizing, clarifying and summarizing party expressions. Mediators should be alert to these challenges and seek ways to bridge the gap to restore or find different ways to acknowledge the personal dimension and humanistic orientation of mediation.

Good listening includes attention to body language. How can mediators and parties attend to body language when we are made flat by the screen? This should be an ongoing question prodding mediators to a higher degree of attention. Interestingly, with everyone equally displayed in Gallery view, Zoom at times offers an even greater sense of parties' reactions with all faces front and center.

Today, many of us have a second monitor that has us face away from the camera eye. Mediators must be careful to make virtual eye contact and show interactivity even while we might be taking notes or consulting a mediation statement displayed on screen number two. It might even be wise to let the parties know that one is shuttling between screens during the mediation session, so that actually attention not be taken as disengagement as a consequence of turning towards the second monitor.

Opening Statements in Joint Session

Over the last several years, there has been a growing tendency initiated on the West Coast to move away from significant communications in joint session. Counsel have expressed the concern that substantive opening statements will mimic openings as trial, freeze parties into hard and fast positions, and create negative reactions in response to openings by adversaries. Adherents of the Understanding-based orientation towards mediation are

not alone in the sense that something important is being lost with the vanishing joint session.

For Zoom, as with in-person mediation sessions, representatives might be guided by the twin goals of building understanding and deal making. If one's presentation in the joint session is made in a manner that enhances understanding rather than shutting it down, and keeps people at the bargaining table rather than pushing them away, one is advancing the process goals and moving towards maximizing the potential of mediation.

An ideal for representatives or parties in mediation is the dual image of the open hand and the iron fist in the velvet glove. With open hand, one communicates that one is at the bargaining table in the hope of sharing information and welcoming information from the other party, all in the hope of arriving at a better understanding and a deal. The iron fist in the velvet glove suggests the ability to communicate one's strengths—the legal, deal and life BATNA—in a manner not designed to provoke reactivity, but rather in a way that still shows consideration for the other party and a disposition to make peace, if possible.

With all this in mind, one might observe, nevertheless, a tendency in Zoom mediations that seems to pull harder away from protracted joint sessions. It is not clear what is at the root of this, but it is worth keeping tabs on this development.

New Opportunities and Patterns in Zoom Mediation

With people not needing to travel, attendance on Zoom is actually easier than ever. There seems to be an increasing pattern of mediations continuing for several sessions over a number of days. It is easier to start and stop Zoom sessions. Conversely, it is easy to leave the Zoom screen open while the mediator is in caucus with the other parties and move onto other productive work. Then, when the mediator returns, the parties are already on screen and ready to recommence. One tip for Zoom mediation practitioners is to be sure to get cellphone numbers for all participants. That way, if there is a technical difficulty, or if someone is kicked off the session, there is a lifeline to bring them back.

It is possible to schedule Zoom caucuses through emails over a period of days. In pre-COVID mediations, it was not unusual to follow up with parties by telephone after the first in person mediation session. Often, matters were resolved through telephonic shuttle diplomacy.

Today, Zoom offers the chance for what would have been telephone follow up to be conducted with videoconferencing. This offers major advantages in enhanced capacity to read party body language, direct participation of the principals, and in continuing development of rapport.

In one matter involving two substantial family businesses, repeated Zoom caucuses, conducted over a period of several weeks were effective in bringing this significant commercial matter to closure. Thanks to Zoom, rather than follow up calls with counsel, each successive Zoom conference was attended not only by outside counsel but also by the principals, their business colleagues, and their in-house counsel. Zoom enabled the mediator to read facial expressions and body language throughout these discussions. It produced a deepening sense of rapport as family members remained involved – and direct access to the ultimate decision makers. It also enabled parties, counsel, and the mediator to develop and review through document sharing spreadsheets on sales and other financial information that were pertinent to assessing risk, deal value and leading to resolution.

One additional observation applies. With everyone together on screen, the impressions of everyone in the group could be read at once. This produces a much better sense of collective reaction than might be possible even in a common room, where people face in a number of directions at any time.

Zoom Challenges

Having considered some advantages, we may now take a look at some challenges of Zoom mediation

Zoom Burnout

Where previously the mediator would walk from caucus room to caucus room gathering one's thoughts, now one is able to fly between caucus rooms in the space of seconds. After a while, this can get exhausting. Of course, there is a natural impulse to get to the next caucus room as soon as possible to maintain momentum and address the building frustration of parties who have been waiting for the mediator to return. Nevertheless, mediators are human. We need a break and the opportunity to gather our thoughts and impressions and let them settle and integrate into a solid sense of the next appropriate development. Mediators will need to learn to take breaks—returning to the main session or to a separate Breakout Room—in order to stay fully effective.

Similarly parties too can burn out. We all must be attentive to this phenomenon. Burnout is made more likely when parties are required nonstop to stare straight ahead at a screen, as opposed to the freedom of looking at various angles around a three-dimensional room. Mediators must be alert to the need to give parties a break.

In-person sessions have Oslo accord moments with the morning danish or the afternoon lunch or dinner. Mediators now need to be on the lookout for ways to substitute other humanizing activities to compensate for the deficits of solo interactions from each party's own home. At the very least, when lunchtime rolls around, it is wise for the mediator to attend to natural party needs by

recommending that everyone hit the kitchen and return with some sustenance. Whether through unstructured opening small talk on how everyone is faring in this homestay time; or introduction of parties to the housecat that crosses one's screen; or other opportunities for "free play," we mediators should look for chances to rehumanize the participants to offset the distancing impact of indirect communication.

Further challenges include hyperactivity and distraction, and challenges to spontaneity. Mediators can make creative use of silence. There is an open question on whether Zoom permits the same use of silence, or whether, on the screen, people tend to jump in sooner to fill the void before the creative impact of silence can have its effect.

Zoom: A New Party at the Bargaining Table

One thing today is clear. There is a new party at the mediation table today. When parties and counsel are working out technical kinks, when audio fails to kick in, Zoom itself has become a topic of discussion. Beyond Marshall McLuhan's insight that the medium is the message, Zoom has taken another seat at the bargaining table. As with many realities, we make greater headway recognizing this than ignoring it. Participants and mediators can use the Zoom topic to develop a sense of commonality, as we all struggle with our shared plight.

Technology has us talking. It has us increasingly reflective about the process by which we negotiate and mediate. It presents us with a range of choices that raise questions about our mediation orientation. It challenges us to break through the I-It described by Martin Buber in his groundbreaking *I and Thou*, and struggle to maintain a sense of interpersonal dialogue and encounter. Remembering Marshall McLuhan, Zoom challenges us to question the extent to which it is a tool, and the extent to which it controls the message.

We are left, like the futurist McLuhan himself, wondering whether, once we return to our offices, mediation will return to old ways or to what extent our field will be forever altered.

Endnotes

1. See, e.g., Thich Nhat Hanh, *Interbeing* (1987); later republished as *Interbeing: Fourteen Guidelines for Engaged Buddhism* (1993).
2. This author's experience with online video-conferenced mediation has been with Zoom. Accordingly this article focuses on Zoom as a means of videoconferencing. In years past, we have used Skype to bring parties from Italy, Germany, and a number of other locations into the mediation conference room. We have not, however, conducted mediations with all parties appearing at first instance through the virtual platform until the onset of coronavirus. These have been conducted with the benefit of Zoom's fairly stable platform, its flexible breakout rooms offering the capacity to caucus. Focus on Zoom here, is simply a reflection of this author's experience and not a statement against any other videoconferencing applications or services. Thus, this is not intended to be a Zoom infomercial.
3. Waley, Arthur, trans., *The Way and Its Power: Lao Tzu's Tao Te Ching and Its Place in Chinese Thought*, Chapter 47 (1934).
4. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996).
5. Kimberlee K. Kovach, Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, Harvard Negotiation Law Review, (Vol. 3, No. 71, 1998).
6. Roger Fisher, William Ury, and 2d Edition with Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (1st edition, Houghton Mifflin 1981).
7. Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994).
8. Adler, Peter S., Protean Negotiation, from *The Negotiator's Field Book: The Desk Reference for the Experienced Negotiator*, Andrea Kupfer Schneider and Christopher Honeyman, Editors (American Bar Association, 2007).
9. See, e.g., Baum, Simeon H., The Technique of No Technique: A Paean to the Tao-Te Ching and Penultimate Word on Breaking Impasse, Ch. 19 in *Definitive Creative Impasse-Breaking Techniques in Mediation*, Klapper, Molly, editor, (NYSBA 2011).
10. See, e.g., Baum, Simeon H., Hawking Our Wares in the Marketplace of Values: Sell Quality, Not Cost, When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum, from *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers* (2011).
11. A useful workaround, if there are problems with sound, includes the ability of a user both to attend by video (and mute one's computer sound) and also attend by phone.
12. If the user has a second monitor, Zoom allows the user to choose the monitor screen the user wishes to share.

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