

► COMMENTARY



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Mediation Thrives in Virtual Conference Rooms as Virus Blocks In-Person Meetings

JOE MURPHEY

LET'S TAKE A journey into the near future. The date is Aug. 1, 2021. The headline reads, "Metro Area Courts Set to Resume Jury Trials Within 30 Days." And the story reads:

Today the Atlanta metropolitan area clerks of court, along with senior judges of the State and Superior Courts, issued a joint statement announcing that jury summonses will be mailed out within the next few weeks. Clerks and judges in other judicial circuits throughout the state are expected to make similar announcements. This marks the first time juries have been empaneled since spring of 2020 before the coronavirus pandemic effectively closed Georgia courts for many months.

Though many judges throughout the state have continued to conduct some matters through virtual conferencing—such as motion hearings, arraignments, and pleas—the inability to provide constitutionally guaranteed jury trials has wreaked havoc on the state judicial system.

The habeas corpus class action pending currently before the Georgia Supreme Court seeking dismissal of all pending criminal matters with unfulfilled "speedy trial" demands will be the first order of business for metro area courts, say legal experts. Said one insider, "If you have a civil case, don't expect to get it tried by jury for many, many more months to come. It's just not a priority with criminal cases languishing on the docket and the threat

of massive dismissals of these cases looming."

The scenario outlined above is not extreme. In fact, it's hard to imagine a timeline with a rosier outcome. Ask yourself this: How long will it be before the government can compel individuals to be sequestered in a closed room with 11 strangers? Certainly, this cannot happen before the novel coronavirus vaccine is developed, tested, approved, proven to be effective in practice and then made universally available to everyone. The bottom line is this: Jury trials for civil cases will not be happening for a long, long time under even the most optimistic versions of the timeline. But for civil litigators, there's another pathway that remains open for resolving your clients' cases—settlements.

Insurance adjusters, risk managers, third-party administrators and general counsels have been settling cases virtually (mostly over the phone) for decades. Attorneys have been doing this also. When phone calls, texts and emails won't do the trick, then the next option is typically mediation. Mediations offer two components that drive success in getting settlements—in-person contact and a "neutral" to facilitate the discussions and propel the litigants forward.

At first blush, the pandemic appears to put a hold on the mediation process too. After all, how can you get the benefit of in-person contact, and the hands-on guidance of a skilled mediator, when we can't even get into a room together?

Fortunately, virtual mediations through videoconferencing are working astoundingly well. The flow is exactly like that of an in-person mediation. Parties and counsel meet in a general session where the mediator does a brief intro and the attorneys present openings. The mediator then places the parties and counsel in their respective virtual breakout rooms. The mediator carries offers and demands and other information, back and forth until the case settles. (I would say, "Settles or impasses" except that, as of the time of this writing, all four of my virtual mediations have resulted in settlements. I've yet to experience a virtual impasse.)


The Zoom technology is remarkably easy to use. The virtual mediations I've done so far have involved participants covering the entire spectrum of computer prowess, and all have fared quite well. More importantly, the real

engine of successful mediations—personal connections—hits on all eight cylinders in the virtual format. Following one recent virtual mediation of a significant injury case, the defense attorney told me how she was able to adjust her comments in the opening by reading the reaction of the plaintiff on the video. Just as with in-person mediations, the real-time feedback is there.

So, from the perspective of our clients, virtual mediations have been an unequivocal success. And I can also say that, from a mediator's perspective, it is no less so. Success for mediators comes only when we can personally connect with the parties and counsel. A quote attributed to Teddy Roosevelt says, "People don't care how much you know until they know how much you care." At the mediation of any significant case, there comes a point when I am leading clients, step by step, to a place that, though necessary to get to, is tough terrain to traverse. If they don't trust my judgment and motivation, they won't take my hand. If you had asked me, even weeks ago, if this level of rapport could be established over a virtual medium, I would have said, "No way." I was wrong. Happily, thankfully, mercifully, I was very wrong.

In conclusion, I was talking a couple of weeks ago with the guy who cuts my hair. I was sort of "in between" haircuts, but as social distancing was starting to move from theory to practice, I decided to go in for a trim while I still could. My stylist said, "I envy you, Joe. Yours is a job that can be done virtually. Mine is not."

Those of us who handle civil litigation have been tossed a lifeline that so many others in the legal profession, and in the economy at large, have not. We have available to us tools to continue providing our clients the closure they need even in these days of isolation and quarantine. In such times, when many will be needing the money that comes from resolved civil litigation like never before, please join me and my colleagues who are mediating virtually as we seek not just to survive, but thrive in the "new normal."

And this I know for certain: Long after the lifeguard has signaled the "all clear" and we dive back into the pool of in-person contact, the lessons we've learned and the benefits of videoconferencing will remain, on some level, a permanent part of how we do business in the world of negotiated resolutions. 

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