

# *Understanding Mediation:* A Critique of Virtual Process in Mediation

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## *A Critique of Virtual Process in Mediation (with stories)*

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*To be clear, this article is not intended to address situations where virtual mediation – or at least virtual attendance by one participant – may be necessary. My remarks are not directed to virtual mediation processes that may be required to accommodate those in sick beds, death beds or jail.*

As the corporate world gallops into the use of virtual meeting technology, its objective not only to avoid COVID-19, but to harvest the substantial savings possible by minimizing executive travel, COVID-19 is pushing mediation in the direction of virtual technology, as well. I was moved to write this article because I think the trend to virtual mediation is damaging to mediation itself.

Face-to-face mediation is possible, notwithstanding the existence of COVID-19, if mask-wearing and distancing are built into the mediation process. I conducted mediations in that format this summer. We used a large conference room for joint sessions, and thus were able to maintain distances more than 6 feet between participants. Otherwise, the parties stayed in their separate caucus rooms, and I shuttled back and forth between them, in order to minimize movement and contact. No food was set out to be shared for snacks or lunch. We had hand sanitizer on every table. Masks were worn all day by everyone. Through these adjustments to the mediation process, we were able to comply with the safety protocols relating to COVID-19.

I would point out that the reporters' offices are suffering in the pandemic, too. Because of the impact on their businesses, we found that there was almost no one else present in their premises, which is hard for them, but served our interests by lowering risk. They had protocols for dealing with COVID-19 themselves, and we found that they were happy to work with us to create a safe environment for our mediations.

Putting aside the issue of COVID-19, the principal argument in favour of virtual mediation is that it saves travel time and expense. I believe choosing to make those savings a priority is a false economy. They cannot compare to what will be spent in legal fees by all the parties, taken together, not only in the mediation but in going forward to pre-trial and trial, if settlement fails. Settlement is of critical concern to the parties and an effective mediation of their interests ought to be the priority. I believe that virtual mediation, and any travel savings associated with it, should be put aside in favour of a face-to-face mediation, because face-to-face mediation is more likely to be effective in reaching a settlement.

Why do I say a face-to-face mediation is more likely to result in settlement? Because interpersonal dynamics – which are the real subject with which the mediator is working – can be hard to bring into play at a virtual mediation and may not work properly at all.

Mediation is not simply a form of pre-trial. Although assessment like that made at a pre-trial may be given at mediation, mediators have many other functions, such as these:

Ally	Listener
Assessor	Mentor
Chair	Model of conduct
Confidant	Negotiator
Coach	Observer
Diplomat	Organizer
Energizer	Problem-solver
Facilitator	Re-framer
Information source	Referee
Intervenor	Teacher

*(If you haven't seen your mediator acting in such roles, either (a) you have a skilled and subtle mediator; or (b) the person with whom you are working isn't a mediator at all. Give it some thought!).*

All of these roles involve active interpersonal work between the mediator and the other participants, through which the mediator earns their trust. The work is best done face-to-face, because earning that trust can be sensitive work, and it is made more difficult by the separation imposed in virtual process. Even if the mediator is able to establish that trust, work in any of the other capacities is made more difficult by that separation, too.

*Rather than arguing the point any further in the abstract, I thought I would illustrate with some cases from my practice. Each of these is a case in which what turned out to be the critical dynamic would not have arisen if the mediation had been conducted virtually:*

### ***The non-party player:***

This was a mediation in a debt case in which the defendant was a self-representing young man who was surly and distant in the opening session.

Many mediators refuse to caucus alone with self-representing parties – and I don't always do so, depending on my assessment of risk – but in this situation I decided to try to work with him directly because it was so clear that nothing could be accomplished unless he decided to participate.

In caucus, he avoided my gaze and gave nothing better than monosyllabic answers. He was restless in his chair and was beating out a non-stop drum solo with his thumbs. He didn't appear to be under the influence, but there was something going on with him, and I didn't know what it was.

As I left the caucus, I noticed that he was already dialing his phone. Outside the room I couldn't hear what he was saying, but I could tell his voice was loud, high-pitched and angry. And while he wouldn't talk to me, he was voluble in talking to the person on the phone.

I concluded from this that the person on the phone might be what I call a "non-party player", a person who is interested in the case in some way, and pulling the strings behind the scenes, but who is not a party to the lawsuit and not present at the mediation session.

When I returned to caucus with him, I asked who he had been talking to on the phone. Although he didn't want to talk about the case, he was happy to talk about the player who, he claimed, "got the money", and began to talk to me about the circumstances of the debt.

Eventually, at my urging, the young man called the player back and began talking to him more reasonably about the situation. He persuaded the player to talk, first, to me, and then to opposing counsel. It turned out that he was an older family member to whom the young man had given the money he had borrowed. The player was not a party to the loan transaction, even though he got the benefit of it. He confessed some sympathy for the young man, who had been left holding the bag.

After that, there was useful communication in every direction and, with the player's participation, the case was ultimately settled. Since mediation is a consent process, and a mediation result is a consent result, it did not signify that the player was not a party to the lawsuit – he could become a party to our mediation, and to the settlement, and he did.

Consider what would have happened had this been a virtual mediation. When my first caucus session with the young man broke up, I would have had no knowledge of his telephone use or the resulting change in his demeanor – those developments would literally have been "off camera" in a virtual mediation. I would never have discovered the real dynamic as to who was driving the case and would not have had any opportunity to work with it. I expect the mediation would have blown up in relatively short order, without any useful result.

## ***One foot out the door:***

This was a mediation in an action relating to a modest commercial contract. The plaintiff was represented by an older lawyer from a small town. This happened a long time ago, and this mediation might very well have been that lawyer's first mediation.

The conduct of the plaintiff's lawyer in the session left a lot to be desired. He was aggressive, talking over other participants at the table, and referring frequently to "fraud" – but it was a breach of contract case and no fraud was pleaded. He ultimately got himself so worked up that he turned quite red in the face and leapt to

his feet, saying ferociously that he wasn't going to stand for this for another moment, and that he was leaving immediately.

We were working at a small table and he had literally been sitting at my elbow. As he rose to his feet, I rose to mine. Our noses were about a foot apart.

I said, "This process is not about you".

Puffing out his nose, he looked at me for a moment, blinked, and then, to his credit, sat back down and the mediation proceeded.

This lawyer had not consulted with his client about withdrawing, and apparently was leaving without him. In a virtual mediation, if the client were on the screen, the raging lawyer might not be, and might already have left their caucus room altogether. In such circumstances, the mediator might not know that a withdrawal from the mediation was in progress, and thus would have no opportunity to attempt to intervene.

More importantly, as the participants in a virtual mediation are working from premises that are separate from the location of the mediator, the mediator would have no opportunity to physically confront a lawyer who was withdrawing, as I did – nor, for that matter, to follow a client who was attempting to withdraw, with a view to persuading him or her to return to the mediation.

I consider the loss of the opportunity to intervene in a withdrawal to be a critical loss to the mediation process: one of the principal tasks of the mediator is to do everything possible to keep the mediation together, with everyone present, and the ball rolling. The separation inherent in virtual process prevents a physical intervention.

### ***Confrontation may be necessary to the process:***

This mediation took place in an action for recovery of a debt. The elderly defendant was representing himself in the action and at the mediation. Plaintiff's counsel, who had recently been called to the Bar, was well-prepared and serious about getting a result at mediation.

The two men were sitting directly face-to-face at a fairly narrow table. Plaintiff's counsel was polite – not disrespectful – but he was pushing hard, treating the session a bit like a judgment-debtor examination. The defendant was starting to get a bit hot under the collar, and then plaintiff's counsel made a crack about the good-looking wristwatch the defendant was wearing. The defendant ripped the watch off his wrist, said "You like it? *Take it*" and tossed the watch across the table.

There were a lot of ways things could have gone from that point, many of which would have ended the mediation, but an interesting thing happened: the lawyer instantly, thoughtfully, carefully, picked up the watch, said something to the effect that he was sorry, he had pushed too hard and he would try to do better, and gave the watch back into the defendant's hand.

The spontaneity and kindness with which the lawyer responded took all the heat out of the defendant. After a moment, he apologized for losing his temper, and said that it was strange for him to be answering to a lawyer who could be his grandson, but that he understood that the lawyer had a job to do. Then they both settled down and worked cooperatively for the rest of the session.

Sometimes a party at a mediation is angry and frustrated, and settlement may not be possible while he or she is swept up in those feelings. In such a situation, it can be important to get some of the emotional content out of the way. In this situation, those feelings blew up quite spontaneously because the parties were working close-up and face-to-face, the lawyer was aggressive, and the defendant made the provocative gesture of throwing his watch across the table. Thanks to the civilized behavior of both men, what began as an acrimonious exchange between them resolved amiably and made it possible for them to go forward.

The gesture of throwing the watch across the table may have been confrontational, but it was also critical to the success of the mediation. Had the watch not been thrown, there would have been nothing to trigger the lawyer's putting the brakes on his aggressive questioning, giving an apology, and gently returning the watch to the defendant, and without those gestures, there would have been nothing to trigger the defendant's change of heart.

And the throwing of the watch could not have occurred in a virtual mediation.

### ***Reconciliation may be necessary to the process:***

This mediation arose in a case issued by a young man against his mother and father. As a family, they had lived and worked together under one roof. The son had worked in the family business for many years without compensation, and he was fed up. He had married and wanted to be able to afford a home and life of his own. Eventually, he and his wife left the family home, got an apartment elsewhere, and he started a business, which prospered. In his lawsuit against his parents, the son claimed compensation for his unpaid work in the family business in an amount like half a million dollars.

One of the lawyers hosted the mediation at his office, which meant that our surroundings were more casual and welcoming than a reporter's office. No joint session was conducted at the start of the mediation, because counsel were concerned that face-to-face work at the table might blow the lid off what was already a very fragile situation.

In my first caucus with the son, he was uncommunicative and a bit sullen. He had no proposal as to how the case might be resolved.

His parents were something else. When I joined them in caucus, his father was weeping uncontrollably. His mother had stopped crying, but she was sniffing, and her voice cracked when she tried to talk to me.

It was clear to me almost immediately that money was no issue for the parents – they would have thrown barrels of it at their son, had that been the way to solve their problem. But it wasn't. Their principal problem was the hurt pride of their son and his wife, who felt slighted while they lived with his parents. More importantly, there was a new baby granddaughter in the picture, and being estranged from her was breaking their hearts.

The only question the parents had for me was whether I could get a face-to-face meeting with their son, a private one, in the absence of the lawyers and me. They told me that they had thought hard about their son's allegations, and now understood that their son was right to want a life of his own. They were glad to pay him for the years he worked for the family – but they did not want to be seen to be "buying" a reconciliation by paying compensation to him. They told me the amount they were willing to pay to him but told me to keep the amount to myself while I tried to negotiate the meeting with their son that they longed for.

When I went back to caucus with the son, I asked him how he thought his parents were doing. He said he thought they were both crying so hard that they couldn't stand up. I asked him why he thought they would be doing that – was it about the money? He said, he didn't think so, that is was about family. So, I asked him to tell me about his family, and he did, and in the process, he began to loosen up. It was clear that he knew his parents were in pain, and that the family situation was more difficult for him than he had been letting on.

When he was deep in the feelings surrounding his family, I asked the son whether he would be willing to meet his parents face-to-face, telling him that this was his parents' dearest wish. He said he was willing to do so but said that he was afraid if he met with them, they would feel he had softened on his position about the money. I could see that he was genuinely torn and that he did sincerely want to meet with his parents. In the circumstances, I told him that his parents had come to understand his wish to be paid for his work, and that they had talked to me about an amount they had in mind to pay him. While I could not disclose the amount, I felt I could tell him that it was a serious figure, and I thought he would be pleased, but that his parents' real hope was that he would meet with them.

The result of these discussions was that we closeted the 3 clients together in one of the meeting rooms, without their lawyers or me. We could hear a good deal of crying, some quiet talking, then louder, more jubilant talking, some more tears, etc. etc. Not long afterwards the clients emerged together from the room, laughing and radiantly happy. The son said, "Their number is fine with me", simple as that. His mother cast her eyes down and told me quietly "I'm going to see my granddaughter!". His father hugged me so hard I heard my spine crack.

Having all of the parties in one place at one time, seeing and hearing each other, is part of what makes a mediation like this work. In the absence of those conditions, how could this case have been resolved in a virtual mediation?



***Intervening to protect the vulnerable client:***

This was a mediation in a personal injury case in which it was revealed that the lawyer for the plaintiff was acting on contingency. The plaintiff was a modest, unsophisticated person with marginal skills in English, who was very intimidated with respect to the whole process.

I had been in caucus with the plaintiff and his lawyer. The defence had made an offer of some substance, and that was the subject of our discussion in the caucus. As had been the case through the whole day, the lawyer was doing the talking and the client was mostly looking confused. But he did not speak while this caucus was in session.

Without any meaningful discussion with his client, the lawyer simply declined the offer out-of-hand and made a substantially higher counteroffer. I could see that this frightened his client, but he said nothing, and the lawyer indicated that I should present the counteroffer. As I left the room, before I could shut the door, I heard the client start to ask a question in a querulous voice, to which the lawyer responded, quite venomously, “*Shut the f\*\*k up, this isn’t about you anymore!*”.

This was one of the rare occasions when I went and sat in the fire escape by myself for a few minutes. This presented a very complex problem. The easy part was recognizing that the lawyer had crossed the line, and his right to a contingency fee was being permitted to interfere with his obligations to his client. The hard part was figuring out what to do to address the problem.

The classic remedy for a mediator is to abort the mediation if it is clear that the process has been irreparably compromised, but how would that help this client in the longer run? If he stayed with this lawyer, the problem would repeat itself. If he got a new lawyer, he would need to pay that lawyer to catch up on the action from the beginning and to do a fresh mediation, at least. Getting the new lawyer up to speed would take at least a year, maybe more, and even if that lawyer got a better result for the client, additional costs would be incurred to get to that result, which could wipe out any gain. But the client was obviously exhausted, and wanted out, and his counsel could no longer properly represent him.

My personal decision on this occasion was not to abort the mediation, but to railroad the next plaintiff’s caucus by directing all my remarks to the plaintiff personally, rather than to his lawyer. I could see that the lawyer considered withdrawing from the mediation, but by then his client was pouring his heart out to me, and he could not be certain the client would go with him if he left, so he stayed. What I learned from the plaintiff was that he was quite worried and tired. He was content with the offer made by the defence, and he wanted to accept it.

It is upsetting to me to think about being in this situation in a virtual mediation. I heard the lawyer’s hateful remark by accident while leaving the room, so I doubt very much that I would have heard it in a virtual process – the remark was made when caucus was over, and the virtual “camera” would have moved on by then. His lawyer – who was obviously bullying and intimidating him – was still in the caucus room with him. At least, in a face-

to-face mediation, I could go back into the room, but, in a virtual situation, the client would have been alone with the lawyer. Constrained as he was by his lawyer's presence, the client was unlikely to open up. For the mediator, working with an unsophisticated, frightened party who had limited English and was sitting alone in the caucus room with the lawyer who was intimidating him, would have been far more difficult because of the separation imposed by virtual process. And without the active engagement of the client, seizing control of the subsequent caucus and running it to exclude the personal ambitions of the plaintiff's lawyer might not have been possible.

\* \* \*

Now, dear reader, it is your turn. Pretend you are the mediator at a virtual mediation in the following scenarios, and consider how to "read" each case, and how to deal with it:

You may not be able to see the client's hands on-screen – and most assuredly you cannot see them if he decides to conceal them from you:

Does the client have his phone on the table out of your view, using it to transmit the session live to someone off-site? or to tape the session?

You are looking at a client on-screen in caucus. The client's eye contact is poor, and she is distracted and non-responsive. Your attempts to engage her are unsuccessful.

Can you tell if the client is being coached – or even coerced – by her lawyer or someone else who is off camera?

At a face-to-face mediation, I often find it useful to have the lawyers meet informally, without their clients, in the proverbial "corridor" outside the meeting rooms. There is no opportunity for a similar meeting in a virtual mediation, when they are working from separate premises. One could put them together on the phone – but they have been working on the case for 18 months already, and every day of that time they could have spoken together on the phone.

Putting them on camera together for a private meeting in a virtual mediation presents all the same distancing issues as exist with the clients, defeats the informal, collegial atmosphere of a meeting in the corridor and highlights the fact that the meeting is occurring to all the other participants, which adds pressure and may be counter-productive.

If you agree that it is useful, how would you create an opportunity for a private, informal meeting of counsel in a virtual mediation?

When your virtual caucus with one client and his lawyer ends, and you "go" virtually to another "room", what do the client and his lawyer do?

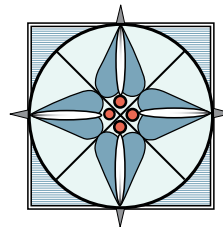


Does the lawyer stay with the client to mentor and advise him with respect to the mediation, or does the lawyer go off to do business of her own?

In the absence of his lawyer, is the client listening to the advice of an interested friend, perhaps his barber, which is spot on and will be a great help ...

Have either or both of the client and the lawyer gone across the street to a pub? They return and are on camera again, beaming, by the time you return to caucus with them ...

*The thing is – how would you know?*



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