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Can online videoconferencing tools help the mediation process?

So where on the globe are you?

This is the question I recently found myself asking one very cold morning at the beginning of a private caucus session in a case I was mediating.

I was serving as the mediator in a simulated online mediation to assist a colleague with her international alternative dispute resolution certification course. The participants, however, were quite real and were participating from Serbia, Georgia and the Bahamas.

Because we were limited to an audio connection and could not see each other, I was concerned we would have difficulty building a rapport, which could affect the mediation process. As it turned out, however, we were able to proceed and the mediation went smoothly despite the limitation.

Many mediators are comfortable using Skype or FaceTime and have integrated these tools into traditional face-to-face mediations as a hybrid process, but I have to admit that I approach the use of online tools in mediation with caution.

Scientists have proven that the power of the in-person interaction is critical to success in negotiation or mediation. Most human communication is non-verbal and we build trust by matching affect to spoken words. We are able to express our emotions with a vocabulary of facial expressions understood by everyone around the world. (Scientists have established that the isolated inhabitants of Papua, New Guinea in the 1950s, and babies who are born blind all use these same expressions.)

Studies on the power of mimicking body language are mind-bending, as are the studies that show we have "mirror" neurons, which fire when we see another human doing something — the same neurons that fire when we are doing that activity ourselves. Because of this scientific evidence, the importance of actually seeing one another's face and body in a mediation cannot be overstated.

Videoconferencing in mediation can also increase the risk of a violation of confidentiality. When parties use computers to communicate instead of meeting in a conference room, it is much easier for them to record communications and make it public. With the numerous jurisdictional questions relating to Internet communication and the patchwork of existing mediation privilege and confidentiality laws, reliance on the law to prevent such disclosure is a shaky proposition.

And yet, we cannot ignore that we inhabit a world that is increasingly global in its business transactions and so accepting of online communication that even friendships and romances are now routinely conducted online. Moreover, technology is finally catching up to our need to see one another.

Online mediation tools have come a long way in the last decade. I once coached a team in an online international mediation competition and the communication between the mediator and the parties was limited to asynchronous typed messages. While we are not yet at the point of easy access to realistic holograms for online mediation, as suggested by Dean Susan Nauss Exon at the University of LaVerne College of Law in Ontario, Calif., things are improving.

For example, the platform I was using for the international ADR course, Webex, allowed for real-time interaction with faces appearing on a screen. Although we were audio-only for the concurrent mediations, I experienced the video feature when the faculty members met, and we were able to see one another — albeit in a somewhat blurry fashion.

Professor Vikki Rogers of Pace University in New York selected Webex for her international ADR certificate course from a number of platforms because she finds the connectivity is reliable, a key consideration. Some of the other

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available platforms for online videoconferencing include Zoom, Skype Premium, Google Hangouts, GoToMeeting, Adobe Connect, ooVoo and Fuze Meeting.

Giuseppe Leone, a former technology company CEO and longtime mediator, has made a study of the relative merits of various virtual conferencing platforms and posted the results at virtualmediationlab.com.

Leone compared ease of use; ability to switch from joint to private sessions; user-friendliness; audio and visual quality; security; ability to share documents/photos/screen; ability to annotate documents (drawing on them, using a pointer, etc.); and the availability of an online whiteboard with which to write down agenda items, party interests, a memorandum of understanding, etc.

Leone's review, conducted with the input of a number of other mediators, raises a number of interesting issues.

For example, according to Leone, in order to use Google Hangouts, the participants must use a Gmail account. Clearly, not all mediation participants will want to create such an account or to share their Gmail address with the other parties in a contentious mediation. Also, if the parties want to annotate a

document, they must download particular apps, which might be challenging for those not comfortable with technology. As Leone puts it, the experience for the parties should be about the mediation, not the technology.

Some of the platforms, such as Fuze, are free, while others, usually those designed for large webinars, may cost \$40 per month. Leone currently prefers using the Zoom platform. The American Arbitration Association has a new videoconferencing tool offered through Courtroom Connect and charges \$50 for set up and \$175 per hour for two sites.

In addition to the obvious benefit of the ease of connecting parties who are thousands of miles apart, online videoconferencing technology can also increase efficiency by replacing a pre- or post-mediation meeting or telephone call and can provide a party who would otherwise feel too physically intimidated with the security of mediating from her own home or office.

Whether or not one is comfortable with videoconferencing in mediation, it is clear that more online negotiations, mediations and arbitrations are headed our way. Colin Rule, a leader in this field who helped build the online dispute resolution platform for eBay and PayPal that settles more than 60 million cases per year, has started a new company, Modria.

Modria is setting up online dispute resolution systems for businesses and government agencies. The cases are usually small and range from consumer complaints to property tax appeals.

The process uses algorithms to suggest possible solutions, and if that does not work, a human mediator or arbitrator gets involved. According to Rule, because the judicial system is slow, expensive and geographically bound, the rapid growth in e-commerce and cross-boundary transactions is creating a need for more online dispute resolution.