

LAW WEEK

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Family Law: The Impact of Remote Mediation in the COVID-19 Era

By

Law Week Contributor

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By [Margot F. Alicks, Esq.](#)

BAM Family Law

We were all just drafted as participants in a two-year inadvertent study on remote mediation, and the results are in.

The mediator's toolbox is heavily weighted towards an ability to read the room. Especially in family law, where the litigation at hand concerns the breaking up of families, getting the parties to agree can often require a precarious balancing act of reason and emotion. A simple facial reaction can tell an entire story.

The usual approach to family law mediation prior to the pandemic was to decide whether to have all parties in one room, or to engage in "shuttle" mediation. The shuttle approach involves the mediator moving between two separate rooms to negotiate without having the parties too distracted by their animosity toward each other to consider any offers. In either approach, the mediator would assess the issues, areas of intransigence and respective needs and wants of the parties and make efforts to get the parties to compromise and resolve their matters without further litigation. The sort of emotional awareness typically required to get agitated parties to consider compromise has traditionally been considered something that must be achieved in person.

And then, out of nowhere, COVID-19 changed all of that.

After a brief period of holding completely still, during which the Colorado courts briefly closed, the family law bench and bar scrambled to come up with ways to allow families to continue to have access to justice without having to expose themselves unnecessarily to an unknown and dangerous virus. Courts started to utilize WebEx for disputed hearings, and moved most court conferences to telephone settings. And mediators largely turned to Zoom.

While Zoom mediation is certainly not the exclusive mode of remote mediation, it has become ubiquitous over the last two years. Its functionality allowed mediators to mimic both the "shuttle" approach and the more traditional approach of having everyone together in one space. The waiting room ensured that opposing parties need not "run into each other" in the cyber mediation lobby. Breakout rooms allowed parties and their counsel to

have their own “conference rooms” in which they could remain throughout the session. It also allowed the professionals to join each other separately, to discuss amongst counsel and the mediator any issues that might be better addressed outside the hearing of the sometimes overly agitated parties, giving them a much-needed break from escalating emotions.

Remote mediation also allows screen sharing, so that parties and/or their counsel can work together on a single draft settlement document, maintenance or child support worksheets or asset/debt spreadsheets, to expedite reaching an agreement right then and there in the session. Programs such as DocuSign and HelloSign allowed parties to execute their final agreements without the overnight delay that can often serve as the kiss of death for agreements parties believed they reached in mediation, only to lose them to Monday morning quarterbacking and second guessing.

But with those helpful functionalities came some pitfalls. Many mediators had to add to their introductory remarks warnings about allowing any third parties to be within hearing distance of the party’s remote mediation session. Parties also have to be warned not to record mediation sessions. Without that in person accountability, these concerns became intensified.

Beyond that, the extremely relaxed physical circumstances of the parties — who sometimes dial into a mediation session from their beds and even in their pajamas — can often create an environment that only exacerbates the preexisting temptation to allow the emotional side of the discussion to take over. And one cannot discount technological issues, such as computers freezing (often at rather inconvenient moments), automatically restarting, overheating or having internet interruptions, all of which can have a far greater impact on remote mediation than they would on in person mediation.

But what of the mediator's ability to read the room, when the mediator is nowhere near the room from which the parties or their counsel are attending? Balancing the emotions with the issues while seeing the parties in a small square on a small screen presents certain challenges.

While the experience certainly varies from mediator to mediator, what has become clear is that the rate of settlement in mediation does not appear to have been negatively impacted, even with the various concerns and challenges presented by moving an emotionally sensitive negotiating process into the technological ether. Having had the perspective of both the mediator conducting a significant number of Zoom mediation sessions, as well as party's counsel participating in Zoom mediation sessions conducted by others, while the experience of mediation is certainly altered, the results do not seem to have been impacted. The impact of a mediator's skills in conflict resolution, creative problem solving and emotional management seem to have a far greater impact on the likelihood of success in a mediation, rather than their mode of conducting the session in person or remote.

- Margot F. Alicks, Esq., is a mediator and litigator with BAM Family Law, the boutique family law firm she co-founded in Denver in 2015. Contact her at mfa@bamfamlaw.com or at 303-331-6432.