

by Wendy Kramer

Closing Argument

Who could have imagined that 2020 would wind down with Californians still in basic lockdown, conducting business mostly via virtual platforms such as Zoom, Webex, and FaceTime? Who would have imagined how swiftly lawyers and mediators would take a deep dive into new technology and rapidly gain proficiency? Lawyers are indeed a hardy bunch!

Virtual appearances in courthouses for depositions and mediations are no longer a temporary fix but are likely to stay well beyond the COVID-19 pandemic. Thousands of virtual mediations have been conducted. Issues surrounding privacy and confidentiality have been successfully addressed with waiting rooms, break-out rooms, and passwords. It turns out that virtual mediations are highly effective in resolving disputes.

One of the biggest benefits is the ability to attend without wearing a mask. Masks will continue to be legally required for the foreseeable future. Numerous studies have shown that our ability to effectively communicate is hampered by face coverings. Paul Ekman, a world-renowned communications expert, has identified seven universal emotions: anger, contempt, disgust, enjoyment, fear, sadness, and surprise.¹ Although eyes are involved in expressing these

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emotions, noses and mouths play significant roles. Fear and anger are big upper face emotions observed in widened eyes or furrowed brows. However, disgust is primarily observed in the curling of the upper and lower lip and the nose. Consider the numerous types of smiles: polite, dominating, warm and friendly, all obscured by masks.

The ability of lawyers to communicate effectively with clients and of mediators to read and manage emotions is hampered by masks. This means that if clients are attending a virtual mediation by logging in from the lawyer's office conference room, it is more effective to provide clients with separate rooms or screens in order to go maskless. If a participant is unfamiliar with technology, a premediation lesson is helpful.

Mediation participants no longer need experience the stress of negotiating freeways and unfamiliar office build-

ings, finding parking and elevators, and landing in a strange conference room. Also gone are the amenities: bagels, catered lunches, freshly baked cookies, and the collegiality of friends and colleagues. Although these are sorely missed, they are replaced by the heightened comfort that accompanies being in one's own environment (dogs, cats, kids, spouses, significant others). These interruptions and the conversations that blossom around them increase a mediator's ability to create intimacy and trust.

Virtual mediations have resulted in increased participation by real decision makers (insurance professionals, business owners, or family members crucial to decision making). Expert and lay witnesses can attend. Those who did not have the opportunity to assess a witness can now do so. With a mouse click, mediators can create additional break-out rooms for people to meet privately.

Proximity is a bonus leading to enhanced communication and trust. In face-to-face communication, one simply does not get "up close and personal" with a stranger, invading personal space. On screens, however, people are just inches away from one another. Mediators need not stay masked, 6 to 15 feet away, depending upon various governmental orders.

Being on camera positively affects the behavior of mediation participants. People seemingly put their best foot/face forward (as if posing for a photo) which generates more civility, less interrupted conversation, fewer unreasonable positions and more sharing of information. According to Debra Dupree, PsyD/LMF, a San Diego-based mediator, in high conflict situations, people can be physiologically triggered while in the same room. This is decreased and/or mitigated in a virtual setting, leading to less emotional intensity and a decrease in disruptive conversations.

There will still be disputes best served by in-person mediations; however, virtual platforms do not pose insurmountable impediments to successful conflict resolution. Post-pandemic mediation consumers will have the choice of attending mediations virtually or in person and will tailor their choice to achieve optimum results. ■

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¹ PAUL EKMAN, EMOTIONS REVEALED (Henry Holt & Co. 2003).