Mediation in the Courts of the D.C. Circuit During the Pandemic

By Carolyn Lerner, Chief Circuit Mediator

Since 1989, the Court has provided mediation, free of charge, to parties in the District Court, Bankruptcy Court and Court of Appeals’ cases. Utilizing a panel of volunteer mediators, as well as several staff mediators, nearly five thousand cases have been mediated over the past 30 years, with recent settlement rates around 60%.

When the coronavirus pandemic hit in March 2020, in-person mediations came to an abrupt halt. With the use of Zoom for Government and other technologies, the Mediation Program transitioned to mediating remotely. Now, rather than meeting with participants around a conference room table, mediators conduct their sessions “Hollywood Squares” style by Zoom, often with barking dogs, lawn mowers and children’s voices in the background.

While we could not have predicted it, virtual mediation offers an unexpectedly effective alternative with unanticipated benefits. In addition to eliminating travel time and its related costs for parties and counsel, mediating by video can be as or more enjoyable, efficient, and effective than in-person mediation. Parties have remarked that they feel comfortable participating from their homes rather than in the formal courthouse setting. We have found that the more relaxed environment often creates a less adversarial dynamic, with parties willing to be more transparent about their interests and what it will take for them to settle.

Initially, there were concerns about mediators building rapport and trust with the parties and counsel. But with video mediation, the mediators are still able to read body language and understand parties’ feelings. The ability to see a person’s face matters most, and when there are only a few faces on the screen the mediator can easily see expressions and monitor emotions. Indeed, video mediation may lead to more accurate perceptions since everything is viewed directly head-on.

With civil jury trials all but shut down for the immediate future, and criminal cases taking priority, parties understand that mediation may present the best option for moving their cases forward. The number of cases entering mediation this year in the Court of Appeals has doubled from last year (from 27 to 55 cases), and District
Court referrals have also increased (from 72 to 82 cases). The Court of Appeals’ settlement rate has increased, and the District Court settlement rate remained steady as compared to the same period last year. In addition to benefiting the parties, mediation will help the District Court reduce a bottleneck of backlogged civil cases when trials resume.

The logistics of video mediation are relatively simple and straightforward – before the mediation session, parties sign Agreements to Mediate remotely. And when a settlement is reached in principle at the conclusion of a mediation session, the mediator prepares a term sheet and, using the video screen share function, the parties can sign from their computers.

The Mediation Program has provided training and guidance on remote mediation to its volunteer mediators. In addition, both Circuit Mediator Robert Fisher and Mediation Program Administrator Madison Soltys have served as moderators in several cases, helping the volunteer mediator manage the logistics of the session. For example, the moderator can admit participants from the “waiting room” into the main conference room and move them into break-out rooms for individual meetings with the mediator or private conversations. When requested, we have also conducted pre-mediation practice sessions for mediators, counsel, and parties.

We emphasize the need to be flexible and prepare contingency plans for technical difficulties. If a party on the video has difficulty hearing or being heard because of problems with their computer, they can simultaneously connect by phone to improve the sound quality. Mediators exchange contact information with parties in advance to have alternative ways to reach those who may have technical problems before or during the video session. Overall, such glitches have been rare.

While there were initial public reports of security issues with Zoom, we have instituted procedures to maximize security and problems of this sort have not surfaced during our mediations. All sessions are password protected, the recording function is disabled, and participants are initially placed into a “waiting room,” and cannot enter the meeting until the moderator allows them in. Once all participants have joined, the mediator “locks” the meeting to prevent anyone else from joining.
Some aspects of traditional in-person mediations have remained the same. Mediators usually conduct separate pre-mediation phone calls with the parties and counsel, and that practice continues. Mediators also continue to meet individually with each side during the mediation session through Zoom’s break-out room function, which provides a seamless way to move between virtual conference rooms.

While we all look forward to court operations returning to normal, this extraordinary time may make using computer technology quite routine in mediations going forward.