

Choosing Between Zoom and in-Person Mediations

At some point – maybe even in 2021 - we will be out of this pandemic and we will be able to actually choose between conducting a mediation via videoconference or holding it in person at a mutually agreed location. Each case will be different and each party will have their own wants and needs when selecting which process to use. Here are some thoughts on what you may wish to consider when that happy day arrives and we can get back to conducting business in person, should we so choose. I would be interested in any feedback or comments on this list.

1. Cost

This is obviously a feature that cannot be overlooked. I would encourage a broader view of “cost” and not just the extra expense of space rental and perhaps some added time for counsel. There is the more significant cost of missing an opportunity to settle a file and close it out when an in-person mediation may have done the trick. So yes, cost. Consider it. But not to the exclusion of all other factors.

2. Plaintiff’s need to be heard and acknowledged

In many cases, a plaintiff needs to be seen and acknowledged before they can overcome some of the emotional barriers that may be standing in the way of settlement. While there will obviously be a monetary range within which the plaintiff will be willing to resolve their claim, the importance of being seen in person, with eye contact and genuine empathy, can sometimes tilt the balance in favour of settlement.

3. Insurer’s need to see the plaintiff

In many cases, particularly where the credibility of the plaintiff may be a critical factor in the outcome of the case, an insurer may benefit significantly from actually seeing the plaintiff in person, hearing their voice, seeing their movements and assessing how they may perform in front a trier of fact. If defence counsel has been highlighting the plaintiff’s credibility as a key factor in the assessment of the case, sometimes the insurer may just want to see for themselves.

4. Number of parties

As mediators, many of us have developed our technical proficiency substantially since the start of the pandemic. Multiple parties are not a barrier to using the Zoom platform or any other video conferencing service. Each added party, however, does increase the risk of a technical glitch or that someone may go missing or that some other logistical issue may arise which will slow or scuttle the process.

5. Geographic location

One of the truly wonderful advances of the on-line platforms is the ability to now hold mediations with multiple parties in multiple locations, all without the need for any specialized technologies other than a laptop and an internet connection. Many participants simply use smartphones. So where the cost and logistics of gathering all the parties from around the corners of the province, or the country or even the world, are out of proportion to the value of the case, this factor may be determinative.

6. “It’ll never settle.”

The theory here is that the case will never settle so there is no point spending any added time or money meeting in person. Please. No. As mediators, we never say ‘never’ and there is always a chance a case can be resolved with the appropriate effort and thought. And even if a case does not fully settle at a mediation, much progress can be made and the right conditions can be created for future settlement. So please do not let this factor be determinative of your choice.