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Avoiding Ethical Pitfalls In Virtual Mediations, Auctions And Committee Meetings

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VIRTUAL MEDIATION AND CONFIDENTIALITY

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The COVID-19 pandemic created many new challenges for courts. States and cities locked down for extended periods of time, social distancing and masks became our new normal, and judges, lawyers, and bankruptcy professionals transitioned to working remotely. Some courts transitioned to holding telephonic hearings, while others transitioned to video hearings using online platforms like Zoom, Webex, and GoToMeeting.

Judges and bankruptcy professionals also conducted more virtual mediations. Virtual mediations existed well before the pandemic, but this was new for many bankruptcy professionals. Traditional mediations—where adverse parties met in an agreed location and a mediator transitioned between rooms to facilitate a deal—were no longer possible. But virtual mediations proved to be very effective. First, everyone participated in a safe environment. Second, schedule and travel concerns were minimized. Third, mediations continued without traditional disruptions because parties could take breaks for dinner, go to their hotels, and take the virtual mediator wherever they went using smartphones, computers, and tablets.

I am sure many professionals and mediators can't wait to get back to in-person mediations. But I believe bankruptcy-related virtual mediations are here to stay in some form.

Virtual mediations afford many benefits, but they also present some new ethical issues that professionals and their clients must consider. Confidentiality is one consideration. Let's assume that a corporate debtor files a chapter 11 case in the Southern District of Texas. The debtor and two important creditors agree to mediate a dispute virtually. The creditors assert claims against the debtor, the debtor's CEO, and against each other. A fellow bankruptcy judge agrees to serve as mediator. On the mediation date, the debtor's attorneys are in California, the debtor's CEO is in New Jersey, the debtor's financial advisor is in New York, creditor 1's attorney is in Illinois and the client representative is in Ohio, creditor 2's attorneys are in Georgia and the client representative is in Oklahoma, and the mediating judge is in Texas. All parties agree the mediation is confidential. But does confidentiality mean the same thing to all parties? And which law applies to protect the confidentiality if the mediation fails or, if successful, one party seeks to enforce the mediation agreement post-effective date? Is it federal law? State law? If state law, which one? Is an oral agreement on confidentiality enough? What does the mediation referral order say? The ADR community is discussing this issue. I think bankruptcy professionals should discuss it too.

Confidentiality is a key component to mediations. But statutes and local court rules don't often define it. So parties could agree that a mediation is confidential, but for one party that could mean communications and information are shielded from open court disclosure during a hearing, and for another party it could

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