

ONLINE MEDIATION GOES MAINSTREAM

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I don't need to tell anyone that the coronavirus has changed our lives forever. But not all changes are for the worse. With orders to shelter at home and the imposition of social distancing, traditional mediations where all attorneys and parties meet in person are on an indefinite hold.

Before coronavirus entered our vocabulary, little did most of us know that there was a tried and tested solution to this problem. Online mediation is not a new concept, although for many it is still uncharted territory. Fear no more, online mediation has joined the mainstream thanks to the coronavirus and all of the restrictions it has imposed on us. So for those of you who have never heard of online mediation or are hesitant to explore it, my advice to you is, "try it, you'll like it!"

WHAT IS ONLINE MEDIATION

At the outset, let me distinguish between pure cyber mediation and online mediation before a live mediator. While there are services now available for parties to participate in on online mediation without the benefit of a live mediator, also called cyber mediation, that is not the subject of this article. This article will focus on "online mediation," with parties participating live from remote locations before a live mediator. Online mediations can and are being successfully conducted where none of the participants are in the same physical location, let alone the same city, state or country.

THE MEDIATOR AS THE HOST

The mediator's role in online mediation differs little from traditional mediation. As the "host," the mediator controls how communication occurs between the mediator and the parties, and between the parties themselves. In online mediation, the mediator still controls who he or she will meet with – whether individually, grouped by parties, or only counsel – and the order in which these meetings will occur. In each instance, only the mediator can add or subtract participants in a caucus session. The mediator can still present or listen to white board presentations with the parties.

BENEFITS OF ONLINE MEDIATION

There are many advantages to online mediation over traditional mediation. Foremost is the ability to achieve faster resolution of disputes. Because online mediation is more flexible in terms of scheduling and geographic location, mediations can be scheduled within minutes, resulting in earlier resolution of disputes.

Online mediation can also result in cost savings to both parties. Online mediation does not require the participants to travel to the mediator's location, as is typical with traditional mediation. Virtually anyone with a computer and internet access can participate in an online mediation no matter their geographic location (more on this later). Oftentimes with traditional mediation, not all parties could attend and when they did, participated on a very limited basis by phone. This was primarily due to travel or time restrictions. Online mediation solves this problem. This gives the mediator and parties greater access to final decision makers in real time, enhancing the likelihood of a successful mediation. We have all experienced the situation where a decision maker is not physically present at the mediation, and the communication to and from has been unintentionally miscommunicated or downright falsely reported, thus hampering the mediation. With travel restrictions no longer a consideration, important decision makers have no excuse not to fully participate in an online mediation. For mediators, this is invaluable.

Scheduling also becomes easier with online mediations. Time zone differences that impact availability for traditional mediation become less of a factor. Out of state participants can be more flexible with participating online if not tied to the typical 9-5 work day. For those in differing time zones who would

traditionally have only participated telephonically, it's now easy for them to join in the online video mediation without the worry of being in their office.

Location, location, location. Law offices can be intimidating, and the last thing a mediator wants is for any participant to feel ill at ease or at a disadvantage. With online mediations, participants choose from where they will participate, giving them a sense of security in an environment that they are most comfortable in. Think of it as truly leveling the playing field for all parties. This benefit cannot be overlooked when working toward a successful resolution.

Some disputes also simply lend themselves better to anonymity by the participants. Highly-emotional disputes or disputes involving parties of diverse socioeconomic status or education benefit from virtual participation. Unlike with traditional mediations, any concerns regarding security or physical violence are completely removed with online mediation.

Document exchange during an online mediation can actually be much more efficient than in traditional mediation. Because all participants are already in front of their computer, documents can easily be shared, edited and created electronically and disseminated with the touch of a button. In traditional in-person mediations, a party may introduce a new document not previously shared with the mediator or participants, resulting in scrambling by the mediator to make physical copies and personally distribute them to all participants, then additional time for all parties to review the new document. If any changes are required, the process is repeated. This can result in significant time delay and additional expense to the parties.

POTENTIAL DRAWBACKS TO ONLINE MEDIATION

Some will argue that there is no substitute for face-to-face communication. Some litigants simply want the opportunity for in-person interaction with their adversary. There is certainly merit to this argument, however, with the virtual face-to-face interaction offered through online mediation, the potential drawback is significantly diminished. There is still the ability to have face-to-face communication in an online mediation, it just does not occur with the participants in the same physical room.

Another potential concern with online mediation is that participants can sometimes feel less engaged. When not in direct conference with the mediator, participants are typically placed in virtual "waiting rooms" or "breakout rooms." While waiting, participants are in a virtual "cone of silence" and cannot communicate with the mediator or other participants unless authorized by the mediator. This can lead to participants becoming impatient or frustrated, analogous to sitting in a conference room in the mediator's office waiting for your mediator to return from another party's room. Rest assured that your experienced online mediator is aware of this concern and will mitigate it by keeping all participants informed of the mediator's activities, whether by "chat" features or text.

Online mediation can also be less personal. It can be challenging to duplicate the informality of face-to-face communication that occurs with traditional mediation. The ability to express varying emotions and personality can be more difficult with online mediation, especially for first-timers. Emotion, which can be such a critical factor in mediation, can be tempered by the inability to express it face-to-face and instead through a computer screen. Because the mediator controls the online mediation process, participants do not have the same freedom to communicate with each other on an informal basis. This, however, can partly be addressed by simply requesting that your mediator enable party-to-party communications.

Even simple tasks – such as not talking over another party – can be more difficult with online mediation. However, this typically becomes less of an issue as the parties to an online mediation get comfortable with the process during the course of the mediation. This is an issue that can and should be addressed at the outset of an online mediation to minimize its effect on the mediation.

While videoconferencing has increased in recent years, it has not reached the mainstream for everyone, including those in legal. As with any emerging trend or new (to them) technology, there will be participants who are simply unable or unwilling to adapt and learn the basic skills needed to comfortably participate in online mediation. Until participants embrace this new means of communication, they will be hesitant to fully engage in the process. There will always be doubters as to whether mediation can be effective online.

To some extent, technology can also be a drawback. With proper thought and preparation, however, drawbacks are easily minimized. The most essential technology required for online mediation is also the most common difficulty to be aware of: internet connection. Not all participants may have access to reliable internet, may not be computer savvy, and in rare instances, may not have the necessary equipment to participate remotely. As a last resort, parties can participate using their smartphone (more on privacy later). Although any internet connection can fail unexpectedly, a hard wired, strong internet connection will rarely abandon you. A wireless connection will almost certainly provide delays in audio or video, resulting in a less than optimal online mediation experience.

While there are potential drawbacks to online mediation to consider, they are not insurmountable. With careful thought and planning, each of these drawbacks can be mitigated or removed. If conducted correctly, the benefits far outweigh any issues that arise.

HOW TO PARTICIPATE IN AN ONLINE MEDIATION

With online mediation, the mediator and participants log-in to a virtual video and audio conferencing platform, such as Zoom, GoToMeeting, Skype or WebEx. Participants join remotely from a location of their choosing, using a secure and stable internet connection. Although video capabilities are not required, your mediator (including this one) will likely strongly encourage video. There are many services offering virtual video and audio conferencing platforms, and many law firms have their own in-house preferences. Participants can join the online mediation session without a paid account, although the

mediator should have a paid account for privacy and security purposes. Regardless of your platform, you should test the program in advance and ensure your system is adequate for a successful online mediation session.

Once all participants have joined the online mediation, your mediator will assign each party to a "waiting room" or "breakout room," to wait until joined in caucus with the mediator and/or other parties. Only the mediator has the ability to control who he or she communicates with and how the parties and lawyers communicate with each other. The only tangible difference between traditional mediation and online mediation is that all participants participate remotely, rather than in person.

It is important to have an established back-up plan for participants in case of technological difficulties or other interruptions. Whether it's the mediator providing his/her cell phone number to participants, or connecting your audio through a phone instead of your computer, your experienced mediator should be prepared for the above-mentioned issues.

No matter the situation or platform used for your mediation, it is important to remember that all participants are engaged in this alternative dispute resolution in the hopes of avoiding further contention and potential litigation.

SECURITY CONSIDERATIONS

Because your mediator does not have the same control over the environment in an online mediation, there are some privacy and security considerations unique to online mediation. Participants must take ownership and be in control of their surroundings in order to affirm no unauthorized persons or inadvertent eavesdropping will occur during the mediation.

These and all concerns mentioned in this article can be addressed with appropriate guidelines and ground rules for online mediations. This includes restricting the online mediation session to authorized parties, requiring a password to access the session, and avoiding public WiFi as your internet source, which might jeopardize the privacy of the mediation. Using these precautions also will safeguard your mediation from "Zoombombing" incursions – when uninvited attendees break into and disrupt your meeting. Inadvertent disclosures caused by the rare technology glitch should be reported and terminated immediately. While most online services have the option to record online mediation sessions, this should be discouraged in most cases to minimize the unauthorized disclosure of confidential information.

THE FUTURE IS NOW

Online mediations have been safely and successfully conducted for many years. With proper preparation, guidelines and ground rules, parties should not hesitate to participate in online mediation. Online mediation is mainstream and here to stay. The sooner you embrace it, the sooner you and your clients will reap the benefits.

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Mark Zukowski has conducted more than 600 mediations and arbitrations throughout his 20+ years of providing ADR services. With social distancing affecting case progression, he now provides virtual face-to-face mediation services for all civil and tort claims. Parties can rely on the same professional resource without the risk of in-person meetings.

Mark has been a litigator for more than 39 years and has tried 25 cases to verdict. He received extensive training through the American Arbitration Association (AAA) and the Straus Institute for Dispute Resolution at Pepperdine University. He is a diplomate member of the prestigious National Academy of Distinguished Neutrals (NADN).

Please reach out to Mark if you have any questions about online mediations and how this secure, user-friendly digital solution can help you get things done efficiently.

This is a rapidly evolving situation. The content and suggestions provided in this article are accurate as of April 10, 2020. Please defer to current protocols to ensure the security of your online meetings.