

## *On-Line Mediation in the Wake of Covid-19: A Mediator's Perspective*

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Now that many Neutrals have moved to on-line practice platforms such as Zoom, Webex, GoToMeeting and others, a question has arisen as to whether these conferences are “real”. Do they resolve cases? Are the participants truly there in a gallery tile in Zoom the way they are in a conference room when we caucus at mediation?

My informal, non-scientific-controlled review of the mediations I have done on-line in the last month since Covid-19 required social distancing and mandated that in-person mediations become on-line proceedings instead have led me to a few conclusions, which I share below.

1. How You Dress Matters. We are all at our respective homes or in our cars, treehouses, or other quiet places where we hope we will not be disturbed by the other members in our family units also sheltering in place for the mediation's duration. Nonetheless, if your client is on the screen wearing a shirt and tie, and you appear in your workout gear or other casual wear, you send a message with your attire. Are you really prepared for the conference? Have you and your client spent time together to prepare? Are you having trouble keeping yourself organized and up-to-speed as the stay-at-home orders continue? Do you think it is a positive development to have the mediator and/or the opposing side wondering about these thoughts as the mediation proceeds? Plus, how do you show you are “rolling up your sleeves and getting down to brass tacks” when you do not have sleeves? Especially on camera, do not underestimate the impact of a well-placed, well-timed theatrical gesture.
2. Participants Should Practice, Part 1. The parties and counsel should receive information from the mediator about what to expect during an on-line mediation, including an identification of the platform and how to sign-on to the conference. Those rules of the road can alert the parties to any problems that might arise as result of the technical requirements. In addition, the parties (and counsels') technical proficiencies and equipment may differ. Have you ever tried your computer microphone? Does it buzz, crackle, hum, etc.? If so you may need to replace it with a separate mic that stands alone or a headset/mic combination that you can use to hear everyone clearly as well as ensure that what you say does not get lost because of poor mic quality and the other participants' ensuing irritation at that deficiency. Another item to practice – mute your mic when you are not talking. You may be “deaf” to the typical noises of your household, but trust me, the participants in your mediation are not.
3. Practice, Part 2. Do you know how you appear on camera? Practice so that this revelation doesn't startle you. Do you know how you appear when you make a particular rhetorical

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- flourish (such as whipping off your glasses to emphasize a point)? Also, you need to become desensitized to how you look. Otherwise, you may see all the parties just looking at themselves in the gallery, leaving the mediator to wonder whether anyone is tuned into the proceedings.
4. Lights, Camera, Action. In a similar vein, counsel in an online mediation get to see how they look and sound. Lawyers seldom get to watch themselves perform. Some have speculated that being on-screen encourages better behavior, much like the idea that a video-taped deponent will be less likely to engage in non-verbal behaviors that are not transcribed but carry a message. In my experience, attorneys who are comfortable on-screen do not change from their usual behavior. I have also experienced counsel who is typically larger than life and takes up the room become more circumspect as the video screen wall seems to diminish counsel's behavior. Likewise, I have experienced counsel who is typically fairly straightforward become emboldened and demanding, as if the video wall insulates counsel from the reaction of the other side.
  5. Call the Director, Please! Much has been made of the fact that when mediations are done remotely and on-line, the "actual" decision-maker can participate, instead of sending a representative to engage in the proceedings locally. Be careful what you wish for – if the decision-maker is too involved in other responsibilities, that circumstance may prevent that person from fully participating in the on-line proceedings and you may end up with less attention than you were anticipating from that side. On the other hand, having a direct channel to a decision-maker who can view the opening and see all the participants and how they present themselves may have an impact on the ultimate value placed on the case in that decision-maker's mind. Later, when the parties reach their last few rounds and need to close the gap to reach resolution, the impact of the decision-maker's participation in the early part of the proceedings might yield a benefit.
  6. Screen Fatigue. More breaks are necessary in on-line mediations than in-person mediations. Perhaps neuroscientists will tell us why participation in a screen-interactive environment is more tiring than a face-to-face one and why it is harder to keep the participants from checking out mentally after a while. In an in-person mediation, one technique mediators use to maintain interest and keep party engagement is food. Have you been to a mediation where cookies have been baked and served? Or coffee brewed up fresh and hot in mid-afternoon? The sensory stimulation of food and its consumption are intuitively used to keep the parties working, even when there is no satisfaction or gratification coming in the form of the offers/demands. Obviously, this technique is not available in the on-line world. Instead, the mediator has to work harder to keep a careful track of how long caucuses and joint conferences take place so that everyone (including the Neutral) has a chance to recharge and move forward.
  7. Down-Time and Multi-Tasking. Just as in the in-person mediation, the party who is not working directly with the mediator has time on their hands. Dismiss that party to their "breakout room" with the instruction to text if they leave the mediation to do something else that is necessary – check emails, respond to other clients, let the dogs outside, find the missing box of Cheerios that a child has requested, bathroom or food breaks, etc. Get everyone's cell numbers so that the Neutral can text them when ready to convey information from the other room and move into their breakout session. A Mediator will

not lose momentum necessarily under these circumstances, but the Neutral needs to be thinking about this aspect while meeting with each side.

8. Document and Screen Sharing. Working together on a settlement terms memorandum or a full-bown settlement agreement and release in the context of a mediation is often recommended. The same is true in the on-line world. However, think about what you are sharing and how. Is using the conference platform's screen sharing option the best way to do this securely? Should you consider using e-mail to send out the document once everyone has input? As an example, Microsoft Teams incorporates Adobe Sign as an App in that platform so that participants can collaborate, mark-up, finalize and sign a document. That is unquestionably convenient, but the entire course of the document's genesis and modification is recorded far more obviously than just in the meta-data of a word processing program. Before you agree, be sure to consider what approach best suits the interests of you and your client.

Are on-line mediations more difficult for the mediator? My very unscientific poll of my mediator colleagues is that on-line is a more difficult environment for the Neutral. A lot has to be managed that is not necessarily present at an in-person mediation, such as technology and different participants' comfort level and skill level with using computers. The mediation dynamics are different, as this brief discussion illustrates. Mediators may find it harder to establish rapport with parties "through the screen." And, as was often repeated before Covid-19 made on-line a prominent part of our workplace reality, if on-line proceedings were clearly better, their convenience and efficiency would have made them the venue of choice long before the corona virus came along.

On-line mediations are likely here to stay, even once Covid-19 concerns are less rampant. The impact of the on-line format will evolve as more Neutrals and participants engage in more mediations arising from cases ranging the gamut of court dockets. Assuming the parties and counsel have the appropriate equipment (a computer and a secure internet connection), it appears to be much easier to set an on-line conference than an in-person meeting requiring travel. Of course, at the moment, the shelter-in-place orders operating throughout the country make other activities less of an obstacle to availability. Whether the convenience factor remains once we move forward remains to be seen, just as we will see whether on-line mediation retains its current popular status.