

International risk team

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Mediating in a time of social distancing

The new, and arguably more relaxed, government guidance notwithstanding, it seems inevitable that the COVID-19 crisis will leave people more cautious about face-to-face meetings. Nonetheless, disputes will continue, and so must efforts to resolve them. Not being able to meet physically does not necessarily need to hamper alternative dispute resolution: mediating by Zoom or similar platforms may not be that new but the current climate has brought it into sharp focus as a viable and effective means of bringing cases to a successful conclusion.

The process has some advantages and disadvantages over a conventional mediation. The purpose of this piece is to summarise some of these and to give some pointers for consideration in preparing for and attending a virtual mediation.

Advantages

Believe it or not, there are a few areas where mediating from home beats being locked in a series of conference rooms until the parties either compromise or bust.

- Mediations can (over)run a long time: if you're mediating from home or even from the office, using an electronic platform, it will be easier to take a break, get something to eat other than stale biscuits and cold conference room coffee, or simply focus on something else for a short period. This can help the participants keep their minds fresh for when the discussions reach the important phase – normally later in the day.
- Mediation from home or office can mean that you can make sure in advance that any 'less relevant' documents are with you, no matter how voluminous, as there is no need to cart them down to a mediation venue and back again. This means that, if someone throws up something that's not in the mediation bundle or available on your laptop, you might just be able to find it rather than plead that you don't have it with you so you can't answer the point now.
- Depending on the platform, it can be helpful if there's a point you want to make from a document: the document can often be displayed on the screen next to, or in lieu of, your own image – enabling people easily to see the point to which you're referring without the need to hook into a large screen TV in a conference room.
- It is unnecessary for people to travel in to be present at a physical mediation.

This means that less diary time needs to be taken up and the mediation can often happen sooner rather than later. Furthermore, more of the people who need to attend can attend.

Disadvantages

Inevitably, there are some disadvantages to mediating remotely.

- The fact that you can escape the pressure of the mediation means your opponents can too. This can lessen the momentum towards settlement that can sometimes be key in the latter stages to the successful resolution of a matter. One of the practical drivers of a deal getting done is that people just want to get away from the windowless conference rooms and warm, curly sandwiches. Sometimes, 'it's never the same unless you're there at the game'. Just as a lack of comfort in the later stages can force settlement, the comfort that comes from being at home may hamper this.
- Similarly, although the mediator can be 'virtually' present, they cannot (self-evidently) be physically present. A mediator's success depends heavily on their interpersonal skills, and the impact of their presence is lessened by their unavoidable remoteness. This can hamper the effectiveness of their message.
- There can be security concerns with a remote mediation. Questions have been raised as to the security of some e-platforms, including regarding the ability of strangers to intrude and interrupt the mediation process. This may, however, be able to be ameliorated (see below).
- You are reliant on everyone having sufficient technology for the platform to operate effectively. You are therefore at the mercy of poor or non-responsive broadband and Wi-Fi connections. It can be a frustrating experience when the person to whom you wish to make your most compelling point cannot

see or hear what you are saying due to a temporal outage in their Internet connection. It may, however, be possible to address this in advance, at least to some extent (see below).

- If you're at home, try as you might, domestic concerns can intrude – especially if the mediation is well into extra time and you'd promised to be 'home' hours ago. In a physical mediation, there's nothing the family can do as you're stuck somewhere in a conference room. Not so with a virtual mediation: you might be 'virtually' in a mediation room but, physically, you've not gone anywhere.
- If you're trying to contact the mediator, your opponent, your client, or your lawyer, and they've gone off to get a cup of tea, it might not be so easy to summon them back. They've left their screen and so are out of contact. There are, however, ways to address this (see below).

Pointers for mediating virtually

Below are some things to consider in preparation for a virtual mediation.

Before the mediation

- Make sure you're happy that the e-platform you're using is sufficiently secure (or that the risk is one you're comfortable with). There may be things that can be done to reduce the risk of a security breach on your chosen mediation platform: eg password-protected access and agreement on limitations on sharing sensitive documents over the e-platform.
- It's useful to have a dry run of the mediation technology prior to the day with all parties, including clients. The point of this is not to have the parties start discussions early (although that might also be useful) but to make sure they can all get together on the e-platform, that the technology works, and that everyone can hear and see each other.

- Work out in advance, as best you can, who is speaking and when. It can be confusing enough when people talk over each other in the same room. It can be chaos in a virtual context.

During the mediation

- Communication with the mediator: as mentioned, summoning the mediator into your virtual mediation room can be difficult if they've stepped away. If you have their mobile phone number, however, a simple text can alert them that you need to speak. If they're busy with your opponent, they can say so. So too, a text from them that they'd like to enter your virtual mediation room can act as the equivalent to a knock on the door.
- Communication between lawyers and clients: a WhatsApp or similar group can be useful to send and receive messages during the mediation – to summon people back to the screen or to discuss things privately – for instance during a plenary session.
- Be mindful as to whether or not your microphone is on. You can usually mute yourself. This is important if you're not speaking, especially if you find that you need to make or take a phone call or deal with a domestic issue.
- Similarly, with your video feed: if people can't hear you, it's possible they can lip read. If you don't want them to know what you're saying, turn the video off or turn away from your screen.
- Remote mediations generally use virtual break-out rooms for each of the parties. It's worth making sure no one is in your break-out room who shouldn't be there before you discuss what you really think of your opponent's latest offer.
- If all else fails, pick up the phone! If the technology gets in the way (eg on the fine tuning of a settlement agreement), it can be useful to wind the technology back a bit and just pick up the telephone.

Finally

Virtual mediation can be an effective means of alternative dispute resolution. It may not always be ideal, but it does work and can offer some advantages over conventional, in person, mediation. Like a conventional mediation it needs perseverance and patience. If there is a willingness to do a deal, however, you may find that it can essentially be done over an e-platform just as well as it can be done face to face.



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