

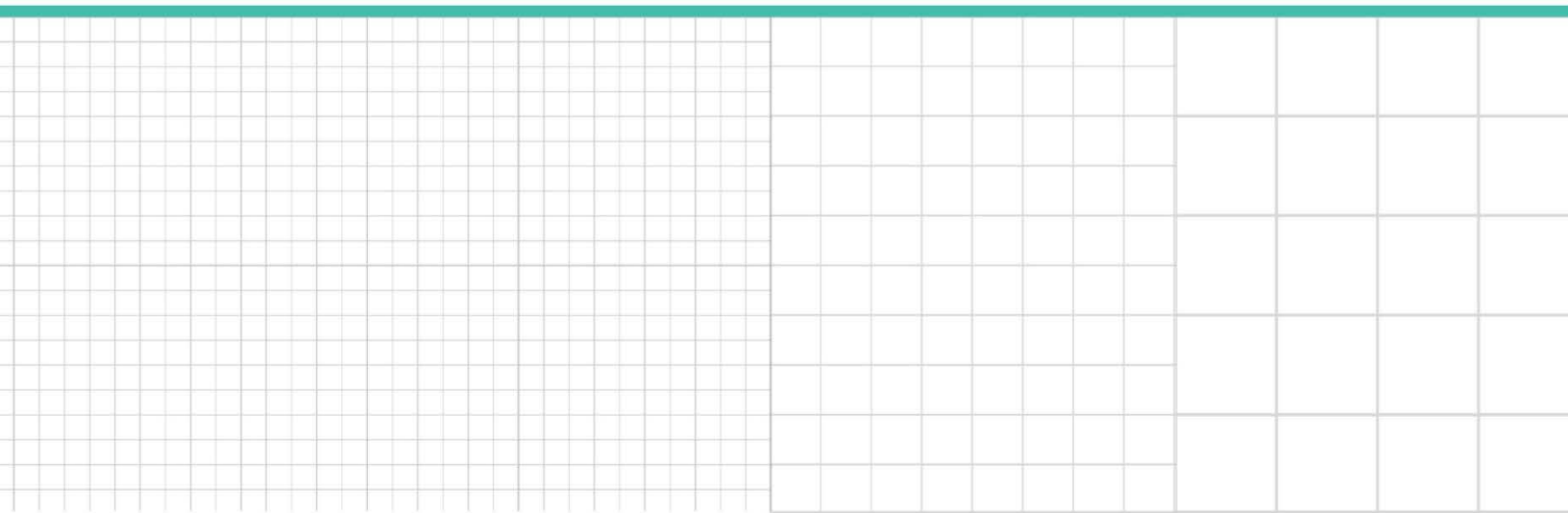


Professional Perspective

# Key Steps for Mastering Virtual Mediation

*Bruce Edwards, JAMS*

Reproduced with permission. Published June 2020. Copyright © 2020 The Bureau of National Affairs, Inc.  
800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



# Key Steps for Mastering Virtual Mediation

Contributed by *Bruce Edwards, JAMS*

Sheltering in place and conducting remote mediations have forced lawyers, their clients, and mediators to work outside of their comfort zones and learn new tools.

Here are some key steps for successful virtual mediations.

## Convening

The goal of the convening process is to gain the willing and meaningful participation of all stakeholders. This phase is even more important for virtual mediations. Consider doing the following:

**Write a pre-mediation letter.** The neutral may write a pre-mediation letter to all participants, explaining in great detail the methodology and technology that will be used in a virtual mediation.

**Hold a pre-mediation conference call.** If the parties have questions about virtual mediation, a pre-mediation conference call is the best vehicle to provide information and reduce anxiety. It also presents an opportunity to describe the experiences of others regarding what has worked and what hasn't.

**Troubleshoot potential problems.** Technology is only as good as its weakest link, so testing and making adjustments are important.

**Do a test run.** Having a practice session to become familiar with the technology is key to a successful virtual mediation. The parties may also want to have a preliminary joint session with experts and clients to present the case and ask each other questions, followed days later by a more traditional negotiation.

## Opening

The goal of the opening session is to ensure an environment of safety and hope in the virtual world.

**Meet and greet.** Participants should plan to be ready about 15 minutes before the scheduled start of the mediation. This allows for everyone to be greeted and placed into appropriate breakout rooms, if necessary. Importantly, if there are any technical glitches, they can be fixed beforehand. It is essential for the mediator to greet participants upon their arrival. The presence of the mediator will provide a measure of comfort and a sense that parties are in control of the technology and the mediation process.

**Plan for technical issues.** It is important to explain how technical issues will be handled. All parties should provide the mediator with their cell phone numbers. If there is a problem with the virtual platform that cannot immediately be fixed, the parties may wish to continue via conference call.

## Communication

The goal of communication is to encourage expression and understanding. In the virtual world, the two most significant issues that need to be addressed are confidentiality and establishing a meaningful connection.

**Ensure confidentiality.** Here are some steps that can be taken to protect security and privacy:

- Inform participants not to share the video invitation and its unique meeting code with anyone.
- Provide participants with a separate passcode for an added layer of security.
- Explain to participants that only the mediator and host can control the "record meeting" feature. Unless otherwise agreed to by all parties, this feature will remain disabled.
- In the joint session, clearly identify all participants.

- Educate participants on how to use the “screen share” function so that they share documents with their intended audience only. Consider disabling the function initially to ensure that the parties understand a screenshot will be seen by all.
- Ensure that the participants understand that unmuted conversations can be heard by everyone.

**Create a connection.** Obviously one of the great tradeoffs, or limitations, of virtual mediation is connecting with people in a virtual room. Especially in mediation, the majority of communication between individuals is expressed not with words, but through body language and other cues. To help address this limitation, everyone participating in a virtual mediation should appear via video.

Unfortunately, not everyone has a computer with a built-in camera, so they will need to participate by audio connection. For a variety of reasons, extra care needs to be directed to those participants to ensure they remain engaged, including using direct questions or specific tasks to gauge their level of involvement.

## Negotiation

The goal of the negotiation step is to explore the art of the possible. The following can be helpful:

**Use private breakout rooms.** Once the group session has exhausted its potential or reached stalemate, the parties can be easily returned to their private breakout rooms. This process is expedited when parties have been preassigned to breakout rooms at the beginning of the Zoom conference. Once separated, it's easy for the mediator to toggle back and forth between the parties to engage in private negotiations. Mediators can also use a mix of other technologies such as phone calls and emails to assist this key function.

**Confidentiality and security.** Early concerns about security breaches and confidentiality have largely been addressed by the service providers. That said, one of the limitations of many platforms is that they lack a doorbell feature to announce the arrival of the mediator in the breakout rooms which creates the risk of interrupting private conversations. Using text or email messaging to communicate with those in breakout conversations about when the mediator is invited back can avoid potentially awkward moments.

**Make effective use of downtime.** Because many Zoom participants may be working from home, or surrounded by distractions, it's important to keep them focused and engaged when the mediator is out of their virtual presence. The mediator should consider leaving the parties with specific questions to discuss or tasks to complete that will compel their ongoing attention.

**Patience and persistence.** The key to any effective negotiation is to persevere through challenging moments and to maintain patience in the presence of those who would abandon the process. This is especially important in a virtual environment where parties are just a click away from terminating their commitment. Don't overlook the potential for multiple shorter sessions rather than the more traditional focus on concluding negotiations in one sitting. This will provide parties a chance to reflect on new information and hopefully adjust their settlement positions

## Closing

The goal of the closing step is to reach a binding, agreed-upon resolution that reflects a complete understanding between the parties. In the virtual world, this raises the issues of timely and appropriate document sharing and obtaining signatures in real time.

**Agree on how the settlement will be documented.** It's important to preview how the settlement agreement will be reduced to writing with the parties in advance of the mediation. This sets the tone for settlement and ensures that the parties' “final dance” with technology will be a successful one.

**Use virtual signatures.** Reducing an agreement to writing as a prerequisite to enforceability in the virtual world might require the parties to download software that allows for virtual signatures, such as DocuSign.

While the world awaits the “all clear” signal to return to business as usual, however that will be defined, mediation is likely here to stay. There have always been instances in which parties were unable to meet in person.

While in-person mediation will likely resume at some point, the benefits of virtual mediation are too numerous to ignore.