

Confronting The Challenges Of Virtual Mediation

By **Daniel Garrie** (April 1, 2020, 3:25 PM EDT)

The ongoing coronavirus pandemic has affected the operations of all industries. While some have been completely halted, others have had to transition to virtual platforms. This includes resolving disputes.

Conducting mediation via videoconference poses significant challenges, including the difficulty of reading people when you are not with them in person. Add to that the technical difficulties that can arise, and mediation via video can be daunting.

Much of a mediator's job involves things like reading body language, listening to what is not said, interpreting subtext, reading the room, and taking cues from a party's eye contact or tone of voice. The way a mediator responds to these cues can be the difference between a successfully settled dispute and one that falls apart.



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Below are six tips for both mediators and parties to consider when conducting mediation via videoconference to mitigate these challenges and limitations. I have found these tips to be vital when mediating and settling disputes using virtual tools and videoconferencing solutions.

1. Make sure your video and virtual conferencing tools are secure.

It is critical for the mediator to demonstrate that the video and virtual conferencing tools being used by the mediator and parties is secure in order to ensure that the information exchanged during the mediation remains confidential, secure and protected. Counsel should ask the mediator to explain how the mediation is secured and demonstrate to the parties that the videoconferencing tool has been properly configured to facilitate confidential mediation.

Counsel should request that the mediator provide this information prior to finalizing the mediator, and counsel should insist that the mediator demonstrate the security during the premediation meeting.

2. Make sure you clarify with parties if recording of the mediation is permitted.

When parties use virtual tools and videoconferencing, the mediator must discuss with counsel if recording the mediation is going to be permitted or not. Once the mediator obtains this information, it is equally critical that the mediator ensure the tool is properly configured to reflect the decision of the parties.

Counsel should request that the mediator demonstrate the tools are configured to reflect the privacy parameters selected by the parties for the mediation.

3. Make sure your videoconferencing tool works and you know how to use it.

The quickest way to get off on the wrong foot for a remote mediation is for you not to connect with the parties. That's why it is critical to verify ahead of time that you and the parties can log in successfully and that the video and audio work for all participants. Remember that videoconferencing tools may be blocked based on certain firewall, network or PC configurations, so you may need to verify with IT staff for all parties that the software will work for their particular environments as configured.

Consider scheduling a test run well before the mediation so any technical issues that may arise can be resolved before the mediation taking place. It is equally important that the parties know how to use the mute functionality and how to use the messaging tool, as nothing is worse for a mediation than when people forget the other side can hear what is being communicated.

Counsel should request that the mediator arrange a premediation meeting that uses the virtual and videoconferencing tools so the parties can practice using the tools.

4. Make sure you have reliable internet connection.

This one is simple, but critical. All-day videoconferencing may be more bandwidth-intensive than your network is used to. If you rarely use videoconferencing at the location you will be for the remote mediation, then make sure your network can handle it. This is another reason to schedule a test run ahead of time as all participants can make sure their connections are strong together. If you are having problems with lag or connection, consider upgrading your service as an ill-timed loss of connection can ruin your mediation.

The internet offers a great number of tools to perform an internet speed test. It is critical that counsel and mediators test their internet connection and speed prior to mediation.

5. Make sure you can see, hear and identify everyone.

For remote mediation to be effective, you need to, at the very least, be able to clearly see, hear and identify each participant. Before starting the mediation, make sure everyone is positioned so they can be seen and heard by all participants. Don't hesitate to tell people to move around or adjust their microphones or cameras. Investing the time at the beginning will be well worth it at hour eight when no one has to strain to see or hear the parties.

Also consider setting some ground rules for speaking during the mediation to make it easier to know who is talking and avoid having people talk over each other (e.g., have the parties announce themselves before speaking or have the parties speak at your prompting). The limitations of remote mediation make it especially important that you set some ground rules that make communication easier.

Ask the mediator to set ground rules as to where people are sitting, who is talking, and if necessary, spend a couple of hundred dollars to make sure you have quality microphones and cameras properly positioned and integrated.

6. Consider alternative mediation approaches to account for the limitations of videoconferencing.

Because you lose much of the social nuance by remote mediating, consider tweaking your typical approach to the mediation to make up for what is lost. This could mean scheduling extra one-on-one time with each party to build more of a relationship with them independently, taking a more direct approach in your manner of speaking to avoid being misunderstood, or other adjustments that serve to enhance your particular mediation style and mitigate concerns unique to the parties or the mediation's subject matter.

Be flexible. The mediator and counsel should both think critically about how to best to adapt one's mediation style when mediating remotely through videoconference.

Conclusion

While I have successfully mediated many disputes using virtual tools and videoconferencing, I cannot stress how critical it is that counsel and the mediator go the extra mile when videoconferencing. Remember, too, that even as you tweak your approach and the format of the mediation to fit the videoconference format, you will want to make sure you remain rock-solid on the substantive fundamentals and case background.

By doing so, the mediator and party counsel will be doing everything they need to do to maximize their effectiveness and the mediation's likely success. It is most important to build trust and instill confidence with the parties, especially during turbulent and unsteady times such as these.

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