

Not Remotely Law as Usual: Don't Settle for Delays – Settle at Remote Mediation

Part Two of the Series Addressing How Technology is Changing the Litigation Landscape

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Litigation Alert

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The emergence and rapid spread of COVID-19 has created extraordinary circumstances that have significantly impacted how we go about living, working and interacting with one another. The practice of law is no exception.

While most cases have been postponed and some extended indefinitely, the issues and disputes that first triggered the litigation remain. In fact, the burdens created by social distancing and other responses to the COVID-19 outbreak have served to only increase these disputes and create an urgent need in some for quick resolution.

In our previous article, we summarized some of the best practices that should be applied when taking and defending depositions in a remote, virtual setting. That technology can also offer the same benefits for alternative dispute resolutions. If planned properly, the use of technology allows remote mediations to be conducted as seamlessly as in-person mediations and, in some circumstances, affords additional benefits that can achieve the best possible resolution for all sides.

This article summarizes the opportunities technology has created by which parties can attempt to resolve their disputes through alternative dispute resolution methods, even in a time of social distancing.

What is Remote Mediation?

The use of a neutral third party to assist with dispute resolution is commonplace in our judicial system. The traditional mediation is largely conducted in-person at one location and with all parties and their attorneys in attendance. Needless to say, many logistical obstacles are created when trying to conduct an in-person mediation, particularly when parties and necessary participants in the mediation process are not local to one another.

A remote mediation is a medium through which parties can attempt to resolve their differences virtually without the need for in-person appearances. Remote mediations can be conducted through video or teleconference. Many alternative dispute resolution companies have the technology and facilities to create a virtual mediation setting. Applications like the online platform Zoom now allow smaller mediation agencies, including solo mediator practices, to create the virtual environment on their own. Remote mediations allow the parties to create multiple (virtual) meeting rooms as typically presented at an in-person mediation and allows the mediator to conduct "shuttle diplomacy" by shifting back and forth through the virtual mediation rooms which are fully secure and confidential.

Written submissions such as mediation statements, key documents, demonstrative exhibits or video presentations can be facilitated through secure, cloud-based platforms or more simply through "screen sharing" over the Zoom platform. Document editing such as highlighting and "call-out" boxes can be utilized in real-time with the mediator to emphasize critical points supporting a party's position.

Simply put, all of the tools available to a litigator to advocate a client's position are also available in a remote mediation setting.

Why Remote Mediation?

Little, if anything, is lost by conducting a mediation remotely versus in-person. In fact, there are several advantages in a remote mediation setting. Remote mediations create a more cost-effective means through which dispute resolution can be achieved. The time and cost associated with travel to a joint mediation site is eliminated. Remote mediations also offer more flexibility than in-person mediations, be it time, location and the opportunity for wider party participation. Most importantly, remote mediations can be conducted in a safe and healthy manner regardless of the limitations created by the social environment in which we live.

Remote mediations also permit the parties the same private setting as with in-person meetings to discuss developments and resolution strategy. Separate video streams can be established outside of those within the remote mediation setting for a party to have confidential discussions outside of the purview of the mediator and the other party.

While some "traditionalists" have suggested that the ability to read body language and facial expression "reveals" are lost, the technology allows for a gallery view of all during joint sessions and the ability to focus on specific individuals as well. In addition, when the mediator enters your private break-out room, you will have a similar opportunity to observe any such "reveal."

What Are the Results So Far?

Very positive. Our firm recently organized and produced a remote mediation that successfully resolved a dispute with the assistance of a mediator. The mediation was required to be conducted via video conference because of court closures and directives related to COVID-19. Instead of delaying the mediation for months, our firm utilized the Zoom platform to host the mediation allowing party representatives from across the country to participate in a day-long mediation. The remote medium permitted the settlement talks to progress organically without the time constraints that oftentimes accompany many in-person mediations. Documents and video presentations were utilized effectively to communicate critical positions for each party that brought about an amicable resolution for all sides.

What Does the Future Hold?

While in-person mediations will not go away, the remote mediation medium is here to stay. As the social distancing directive continues, remote mediations afford parties to a lawsuit or dispute the opportunity to continue to advance important issues and achieves a sum certainty as it relates to resolving potential liabilities or expected monetary gains. In those situations that we have all faced where one party, because of logistics, wants to appear by telephone only, the remote video approach to mediation can also be used as a condition of going forward.

Even after the social distancing mandate is lifted, the use of remote mediations, or even a blended approach of in-person attendance and virtual attendance by clients or claims professionals not local to the mediation location, will be just another tool in the litigation tool box to achieve the best and most cost-effective conclusion to disputed matters.

Please be sure to check back in as we will be posting additional articles on technology's impact on the practice of law in the near future. Read part one of the series, Remote Depositions – The Same But Different.

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