Remote mediation: Best practices for lawyers

By John McCammon

In the blink of an eye, the pandemic changed everything. Even courts have curtailed their activities. Yet, the disputes confronting our citizens have not abated.

Lawyers have responded to these challenges by using phones, desktops, laptops, and tablets to mediate remotely. It’s working! Cases are settling. Importantly, people are safe. Lawyers and mediators are now refining the best practices for remote mediation.

Developing a technology plan

In the initial pre-mediation conference call, the mediator facilitates a conversation among the lawyers to create a technology plan for the mediation. This plan should consider the nature of the dispute, the number of parties and participants, and their locations. It must also consider the technological capabilities of those involved. The lawyers may have different levels of experience with video conferencing, different preferences, and different hardware. A variety of video conference platforms is available, and various configurations of technology may be considered. Flexibility is the watchword.

The lawyers configure and adopt a technology plan and control its implementation. The mediator facilitates the mediation session with the support of the technology plan.

The opening

The mediator chairs the opening of the mediation session involving all the participants. Typically, the lawyers will present their respective views of the dispute. The chosen video conference platform enables everyone to participate remotely. One of the lawyers or a third-party technician will handle the technical aspects, that is, “host” this video conference.

Caucuses

After the opening, the parties separate into caucuses. The mediator goes back and forth remotely among the caucuses, discussing the case and facilitating the negotiation of a resolution. Many caucus configurations can be used.

The simplest caucus configuration involves two parties, both individuals, each in a room with their respective lawyer. The mediator could work with each caucus simply by phone (with speaker, FaceTime?).

For many reasons (preference to visually connect with team members, their number or location, etc.), lawyers often choose to convene the caucus with a video conference including the mediator and all the team members.

Caucuses using any of these methods are often called “silos” because there is no electronic connection among the caucuses. This can be comforting to lawyers because it eliminates any concern about the risk of electronic seepage of confidential information from one caucus to another.

An alternative to “silos” uses more sophisticated technology. Some video conference platforms enable the host to place each caucus into a virtual “breakout room.” The host can facilitate the mediator’s entry and exit into each of these “breakout rooms.” Only the participants in the same “breakout room” can see and hear each other. Lawyers often prefer this model because it can provide a smoother and more efficient process than the silo approach particularly in cases that involve more people and/or added complexity.

These “breakout rooms” can be hosted by one of the lawyers, however, adverse lawyers may be uncomfortable with that arrangement. Alternatively, the lawyers may retain as host a third-party technician (court reporting service, IT firm) who is not affiliated with any of the parties.

Increasingly, lawyers are using this last model: video platforms (with “breakout rooms”) hosted by a third-party technician.

The deal

When agreement is reached, the lawyers should memorialize it during the mediation session. The drafting process involves the same remote techniques as those used throughout the day. Drafts can be exchanged and reviewed via email, text message, or video conference.

Follow-up

If the parties are unable to reach agreement during the mediation session, the mediator follows up with phone calls, emails and video conferences, as needed.

Practice tips

Team members’ capabilities and expectations – Lawyers should determine the competence and comfort of their team members with the techniques to be used. Counselling them on what to expect is important. Lawyers are free to arrange an ex parte (video) conference, preceding the mediation session, to allow the mediator to explain to an anxious party how the process will unfold.

Agreement to mediate – It is the responsibility of the lawyers to sign the agreement to mediate, procure the signatures of all affiliated participants, and send this documentation to the mediator. This should be accomplished before the day of the mediation session.

Use of documents – It is important that, before the day of the mediation session, lawyers distribute to opposing lawyers and the mediator copies of any documents to be used in the mediation session.

Preparing to paper the deal – It is helpful to distribute a template for the contemplated settlement agreement sometime before the day of the mediation session.

The future

We don’t know when the pandemic will end. However, we now know that there is an effective way to resolve disputes in the meantime. The professionalism of lawyers and mediators, effectively using available technology, will get us through.

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