

Mediation - “The COVID-19 Edition”

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The COVID-19 pandemic has massively impacted all aspects of our lives. With a state-wide Stay Home Order and the social distancing required to curb this crisis, we have all quickly adapted to a new normal including telephone and video chat holidays, family gatherings, school classes and workplace meetings. The legal world is not insulated from the crisis and we too must adapt to a new normal and continue to diligently represent our clients during this worldwide pandemic. Litigation activities that traditionally involve direct interaction with other parties, such as trials, hearings, depositions, site inspections, etc. have either been postponed until the crisis abates or converted to a more creative and remote platform that allows business to proceed. Mediation is no exception. Mediation has always served a great purpose in conflict and litigation resolution. In fact, mediation, even conducted under a contingency plan, may serve an even greater purpose today. In the face of COVID-19, at a time when so many courts are not conducting in-person hearings and are postponing trials, finding a way to conduct online or telephone mediations becomes essential for many parties and attorneys to conclude litigation and financial risks and to continue their personal lives and businesses.

In considering whether to move forward with a remote mediation, attorneys must evaluate the new incentives and leverage positions that arise out of the current crisis. For example, litigation becomes less of a threat to some parties when hearings and trials are cancelled. Yet, anticipated docket congestion resulting from the Stay Home Order and the accompanying unknown delay of litigation resolution makes personal and business planning for the parties extremely difficult. For many parties there is also a greater need for immediate funds caused by workplace furloughs and layoffs which may give both incentive and leverage to mediate where it did not exist before. Additionally, a defendant party’s solvency or decreased ability to satisfy a judgment caused by the economic fallout of nationwide Stay Home Orders may also affect the decision to mediate now rather than waiting until the crisis ends. Under these circumstances, mediation offers certainty and resolution which are valuable commodities in the current COVID-19 climate.

In making a strategic decision on whether to recommend a case for remote mediation, it is important to note that attorney, client, and mediator schedules are now more flexible as calendars have cleared. As a bonus, the costs associated with travel and in-person attendance are eliminated.

Once a remote mediation is scheduled, the parties will have additional options to facilitate a successful mediation including video conferencing, telephone conferencing, or a combination of both. Traditionally, mediation is most effective in person, with all decision makers physically present. It is very important to be able to see people during the mediation to develop trust and rapport, and to read and evaluate expressions during the process. Humans by nature connect with each other and evaluate one another in various ways, but eye contact and body language are especially important visual cues that can assist in negotiation and in ultimately reaching a resolution. Yet, during this crisis mediations by video conference and even via telephone conference, have proven to be very effective in getting the job done.

Online tools, such as WebEx and Zoom have satisfied that "in-person" touch that so many mediators and participants need because they allow the parties to hear and see each other "live" via webcams. These programs also allow for separate sessions to be created, thereby mimicking the joint and private caucuses most attorneys have come to value in traditional mediation settings. It is important to remember that not everyone is comfortable with or is even trusting of this technology; some parties may not have the means to implement video conferencing. Under these circumstances, a diligent attorney must consider whether a telephone mediation is a viable effective solution, especially if their client(s) could benefit from timely resolution of the litigation during this unprecedented crisis.

Tips to follow when preparing for and participating in a COVID-19 remote mediation:

1. Contact your mediator in advance of the mediation to discuss the best options to proceed based on the facts of your case, the stage of your case, whether the attorney's and/or clients have met before, the ability of the attorneys and/or clients to participate in the various web technology needed for video conferencing, and whether the parties will be "present" for the mediation. Some mediations are most effective with a video conference opening session with all parties and counsel present to allow for visual introductions and statements and a connection to the person on the other side. This initial visual contact helps the mediator and the parties "read the room" when talking with each other during the mediation day. Once the initial opening statement is concluded, the parties may elect to continue caucuses via video conference or may elect to move to individual telephone conferences. Alternatively, if the attorneys are familiar with each other, the mediator and the case, the parties may elect to participate in the entire mediation by telephone conference with the mediator initiating an opening call with all parties then moving to separate telephone conference caucuses. Any combination of the above can be effective after consideration of the case and consultation with the mediator.
2. If you choose to mediate via video conferencing, schedule a time before the actual mediation to virtually "meet" with the mediator, including clients, to be sure everyone is equally comfortable with the technology.
3. Mediation confidentiality is provided by statute or agreement. The parties must respect this confidential process and should not be on public WIFI and should conduct the mediation in a private area with good connectivity to avoid disruptions to the process.
4. Counsel should have access to email to allow for the easy sharing of documents or exhibits and to allow completion of the mediation settlement agreement(s).
5. During the mediation, stay present! This is extremely important. With all participants working remotely under varying circumstances it is important to dedicate the same amount of time and focus to the mediation as if it were an in-person mediation. Also, while the occasional dog barking or child talking may be unavoidable, make all efforts to designate a place in your home or remote place of work to provide minimal distractions. If all parties stay present in the task at hand, the mediation will be more efficient and effective, and the chance of success is greatly increased.
6. Lastly, be professional. A more casual appearance is acceptable under our new normal. However, consider the importance of the case to your client and the opposing

party. Let them know this is business as usual, albeit modified, and everyone involved takes the case and the mediation seriously.

Hopefully, the challenges we are facing brought on by the COVID-19 pandemic diminishes over the short term but right now none of us truly knows what the future holds. What we do know, however, is that litigation impacts the lives of many people and businesses. For many clients now is the exact right time to mediate to resolve pending litigation and to offer some degree of closure and financial resolution in these unsettling times.