



# Distance mediation

A look at what becomes crucial to success when agreeing to mediate by phone or video conference

BY NANCY NEAL YEEND

Long before the COVID-19 pandemic, distance mediation was used; however, not extensively, and historically settlement rates were significantly lower than with traditional face-to-face mediations. With social distancing now in place, mediating by phone and/or video conferencing is getting a closer look.

Although the mediation process essentially remains the same for distance mediations, it needs review to determine what is effective and what needs to be reconsidered. There are three key areas that require investigation: technology and equipment, preparation by the mediator as well as the participants, and

confidentiality. Tailoring the process for distance mediation will not only increase settlement rates, but also improve participant satisfaction.

## Technology and equipment

There are advantages and disadvantages to distance mediation modes. The advantage of being able to continue to provide mediation services, during this COVID-19 outbreak, is the ability to continue helping people resolve cases. There are many restrictions on courts during this pandemic and helping manage and/or even preventing a backlog of cases is important. There are many disadvantages related to distance mediation; however, if they are reviewed and considered in advance, the

settlement and satisfaction ratings will trend higher.

One of the first things to consider is getting agreement on how the distance mediation will be conducted, whether by phone or video conferencing. A significant consideration is access to equipment and the internet, especially bandwidth and speed. School closures have shined the spotlight on the lack of access to technology and equipment in many regions. It is estimated that in some rural areas of America nearly 40 percent of the population does not have internet access, and even in some urban areas the number is approaching 20 percent. It may be that some individuals do not have access to a computer; may not be well versed in the technology associated



with video conferencing, even if Wi-Fi connections are possible; and for some the expense of video conferencing may be prohibitive. Prior to scheduling a distance mediation, the mediator must confirm that all participants can access the necessary equipment and technology.

Although the equipment to be used is extremely important, there are a number of technical providers that can manage phone as well as video conferencing services. When considering these various providers, evaluate their security ratings. Recently, hacking of video conferencing platforms such as Zoom has increased significantly.

When using phone mediation some mediators have the capability to “patch in” all the callers, while others use conferencing services. Before using any video conferencing service, everyone needs to try out the software in advance. Understanding the time limitations is also important, since some videoconference services (most typically the free versions of video conferencing) cut off after 30 to 40 minutes.

### **This is not a casual matter**

At the time when individuals phone in, using a central exchange, being able to hear is typically not an issue, but conducting a sound check before any distance mediation starts may be prudent. For video conferences, the computer camera needs to have a clean lens and sharp focus. All participants need to sit “*front and center*” with no distracting background. Mediators need to dress professionally when using video conferencing, especially if mediating from their home. How a person dresses may influence how the mediation is conducted and tone of the conversations. If someone is dressed too casually, people are less likely to take the process seriously or even prepare, and settlement rates can be negatively impacted. A robe and bunny slippers are not appropriate!

Another significant consideration is not being in the same room with all the mediation participants. This is especially

important because it impacts everyone’s ability to effectively communicate. Only seven percent of a verbal message is the words, while 93 percent is made up of tone inflection, body language and facial expressions – especially eye movement. With video conferencing, some non-verbal indicators might be observed, like a nervous tic, furtive glance or perhaps even seeing someone’s face flush; however, many will be missed.

A related communication question is: Should everyone be on the screen at the same time, or only the speaker? If all of the mediation participants’ faces are on the screen at the same time, each one will become rather small and many of the visual communication factors will not be observable. In addition, it must be remembered that when using phone mediation, the only additional enhancement of communication is tone inflection.

To overcome some of the inadequacies of not having everyone assembled in the same place for the mediation, there are a few basic considerations to improve overall communication: enhance listening, ask open-ended questions and summarize.

Establishing a ground rule of only one person speaking at a time is very useful, and for phone mediation, having each speaker identify him/herself before talking ensures that everyone knows whose perspective is being expressed. Although the individual managing the teleconference can selectively mute participants to focus on one speaker, this actually discourages the parties from participating and may significantly reduce the settlement rate.

To further promote listening, a mediator will need to ask the person who is supposed to be listening what they understood the speaker to say. This does two things: demonstrates that the listener is paying attention and clarifies whether the message received is what the speaker intended.

Additionally, having the mediator summarize and paraphrase a speaker may

make it easier for the listener to hear the message, since it is coming from a neutral voice – the mediator. It also provides an opportunity for the speaker to know the mediator is paying attention and remaining impartial, which in turn, builds trust. Establishing rapport and building trust promote settlement.

Asking questions not only helps with listening and clarification, but also places the responsibility for settlement back on the parties. The person who asks the question controls the conversation. Mediators need to ask solid, open-ended questions and must avoid leading or “why” questions, which place people on the psychological defensive. People cannot negotiate without information. If the mediation participants do not share information with one another, then they will not be able to settle.

### **Comprehensive preparation**

In order for a mediator to prepare, the participants must provide the mediator with a short brief, which answers a variety of questions. When the mediator has received all requisite information and the participants prepare, mediations take less time. This is important, since mediations conducted remotely often necessitate shorter sessions, which in turn means that there may be more sessions. Distance mediation sessions typically are scheduled for about two hours. Sitting holding a phone or looking at a computer screen for longer periods of time are not productive.

Case initiation and intake are the times for mediators to gather this critical information, which will enable them to prepare for the mediation, to anticipate challenges that may arise, and to develop strategies to prevent impasse, or breaking an impasse, should one occur. For example, looking at changes that need to be made with respect to initial opening remarks, how to foster productive negotiation, and build trust, not only in the mediator and process, but also between the parties, will shorten sessions.



A major challenge with distance mediation is keeping everyone engaged and working toward an agreement. Giving assignments to be completed prior to the mediation session and developing ones to be used during caucus saves time and will help keep the parties focused on finding resolution.

Intake becomes much more critical for distance-mediations, because it is harder, if not impossible to get all the non-verbal messages, especially if mediating by phone. In addition, people who are unprepared for the mediation are far less likely to settle. It is easier to say “no” when everyone is not sitting at the same table, and this too contributes to the lower distance mediation settlement rates.

Mediators need to reevaluate everything that they typically do, including reviewing their opening statement, how they manage the process, and how they instill trust among and between the parties. Making sure that the participants are empowered may be more challenging with distance mediation, and the parties may be more likely to look to the mediator to “tell” them what to do, rather than taking responsibility for finding a resolution that will meet their own unique needs.

With distance mediation, making sure that everyone understands the process, the mediator’s role, defining settlement authority, confidentiality and its exceptions, is critical. Establishing who will participate in the mediation, their role and settlement authority is a fundamental step; and clarifying *full* authority is key. In addition to attending to those necessary details, making sure that there will be enough lines for phone mediations, and technology available for video conferencing is essential. Also, confirming the time zones will ensure that everyone is connected at the right time – a simple step, but often overlooked.

There are fundamental pieces of information that are useful for the mediator: the facts (both disputed and undisputed); history that includes offers and demands; case analysis (strengths and

weaknesses from each side’s perspective); decision-making criteria (both attorney’s and client’s); and identification of all issues to be resolved and potential options.

The mediator’s opening can be shortened by providing all the participants with information about the process and answering questions prior to the session, including information on confidentiality, explaining caucus, and outlining and getting agreement on the ground rules.

Under no circumstances should mediator or participant opening remarks be eliminated. Sessions are also shortened when mediators send out their resume in advance, rather than wasting time prattling on about themselves during the opening. People are often only able to listen for five to seven minutes, so keeping mediator openings short is critical!

Preparation enables both the mediator and the participants to spend less time on opening remarks. This in turn reduces the unproductive posturing and the inevitable “dance of the peacocks” openings. Condensed openings mean that there is increased negotiation time. One suggestion to shorten participant openings is requesting that parties initially just identify the issues they want resolved. The history and details can come later. This technique helps build rapport and trust, because participant openings are less vitriolic.

### **Confidentiality**

Confidentiality is mediation’s foundation. People are more likely to be candid and disclose information when they believe such information will not be used against them later. Confidential information might include an admission of wrongdoing – for instance in a medical malpractice case, the doctor admits a mistake followed by a sincere apology, which may go a long way to help settle a case. Perhaps a company wants the terms of the settlement kept confidential to prevent copycat cases. Making sure that distance mediations are structured

so information remains confidential is critical to a successful outcome.

There are three critical steps a mediator must take to help ensure that what is discussed remains confidential. First, everyone needs to sign a confidentiality agreement in advance of the mediation. Second, the mediator needs to make an effort to prevent unauthorized people from listening in or recording any portion of the mediation. Third, when caucusing, explicit tones or announcements must indicate when someone leaves or joins the session. For video conferencing there are a number of caucusing options. For example, WebEx offers “breakout rooms.”

More confidentiality agreements are becoming explicit about what is and must remain confidential, listing definitive statutory exceptions, and inserting severe penalty clauses for breach. To prevent confidentiality lapses occurring during “pillow talk,” more mediators are asking that a participant’s spouse, partner or significant other, sign the confidentiality agreement, even though that individual is not a named party in the dispute.

When all video-conference mediation participants are connected, the mediator needs to have everyone confirm that no one else is present, can overhear the conversations, and that there are no recording devices. During this time of social distancing, some attorneys and clients are at the same location, remaining six feet apart and wearing masks. In those instances, mediators are asking counsel to verify and confirm that the rooms is private with no one else able to listen in or record the session. Asking each participant to scan the room with the camera also helps ensure the session will be confidential.

In cases where both parties are self-represented litigants (such as in family law), the co-mediation model is being used. This provides a benefit if the mediator is in the same physical location as one party and the co-mediator is in another location with the other party.



The mediators are then sure that no one else is present and that the session is not being recorded. Of course, social distancing practices are used.

### Caucusing presents challenges

Caucusing presents additional confidentiality challenges but is possible with both phone and video conferencing. As mentioned previously, video conferencing is not immune from hacking. With phone mediations, making sure that ring tones sound when people exit the call, and are announced when they return to the joint session is important. Most video conferencing providers have ways to separate the participants with “chat” or “breakout” rooms.

Mediators must be sure to give time checks and assignments before starting a caucus – focusing the parties on trying to find a settlement. When people are participating from their homes, they are less likely to focus on settlement, when the mediator is working with the other side. Time checks are critical, so if the caucus is going to take more than the 10 minutes planned, the mediator needs to check in with the other side, letting them know how much more time is needed, ask how they are coming along with the assignment, and assure them that they will have equal time. This also helps maintain trust and continues to empower the parties to find a solution.

Since the information gained during a caucus is confidential, people are often more willing to disclose information or even consider options that they had previously rejected. When parties are in caucus sessions, there are a number of

assignments that they can work on which will help them focus on finding a settlement that meets their unique needs.

Because distance mediation sessions are shorter than the typical face-to-face sessions, effectively using every minute becomes extremely important. Having the parties generate a list of possible options for each issue being negotiated helps reduce the tendency of “positional bargaining,” which significantly slows the process.

### “I didn’t know that”

Caucuses are also an excellent time for attorneys to talk candidly to their clients. Often these one-on-one conversations have not happened, especially during these pandemic times, and it is interesting to note how frequently each learns something new from the other! For instance, just having the attorney hear, for perhaps the first time, what is important to the client: finality, confidentiality, prevention, etc. can enhance settlement. Understanding what is important to the client often reveals the criteria that the client is using to make a decision to accept or reject an offer. Lawyers tend to use the law as their primary decision-making criteria – clients rarely do.

Of course, there are a number of other useful assignments, such as asking open-ended questions that bring out useful information. Getting the parties to generate options is a good assignment, and asking the attorney, “In your experience, what have other clients done?” draws out additional ideas.

### Conclusion

During this unique time in history, which is placing an unprecedented strain on court resources, distance mediation provides an invaluable benefit – reducing case backlogs. Distance mediation faces some unique challenges, especially as it relates to technology and confidentiality; however, with extensive pre-mediation preparation by the parties and the mediator, the settlement rate can be increased. Utilizing all the tools in the proverbial mediator’s toolbox will also enhance the experience for the participants.

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### Endnotes:

<sup>1</sup> Mediating exclusively via email, also known as e-mediation or online dispute resolution, ORD, began in the 1980s, to handle disputes resulting from online purchases. It is rarely used for other litigated matters. This article focuses exclusively on mediations conducted via phone or video conferencing.

<sup>2</sup> Kanazawa, S., *Tips for Online Mediation in the Age of Social Distancing*, Law360, March 2020.

<sup>3</sup> There are phone services such as Conference America and video conferencing providers like GoToMeetings and WebEx.

<sup>4</sup> Yeend, N., *Avoiding Communication Disasters*, Plaintiff Magazine, January 2013.

<sup>5</sup> Yeend, N., *Can Opening Statements for Mediation be Skipped? Tips for Attorneys and Mediators*, MultiBriefs, January 25, 2020.