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Will virtual mediations become the new “normal,” at least for the time being?

Practice Pointers for Virtual Mediations By Steven H. Kruis

Introduction. It was Plato who first observed that necessity is the mother of invention. The current COVID-19 pandemic necessitates virtual mediations for those who wish to mediate before California’s shelter in place order is lifted.

Will conducting mediations through teleconferencing become the new “normal,” at least for the time being? If so, how do we embrace a virtual process to settle cases?

Below are some practice pointers to help you effectively participate in mediations online. Here are the basics:

Technical Requirements. ADR providers use cloud-based and secure video conferencing software. Attorneys and clients will need laptop or desktop computers with web cameras and microphones, although a phone can be used for audio. A strong, secure internet connection is required. Public Wi-Fi networks should not be used in light of privacy and confidentiality concerns.

The Process. Mediation participants are provided a link prior to the hearing that allows them to enter a virtual “waiting room.” The host mediator admits the participants to the mediation and assigns them to their separate, virtual breakout rooms, similar to being placed in separate conference rooms for in-person mediations.

Breakout Rooms. When you are in a breakout room, you will not be able to see or hear the other parties or mediator, but you will be able to see and converse privately with your client. The mediator will then join your breakout room to caucus with you and your client throughout the mediation.

Other “Meetings” in additional Breakout Rooms. The mediator can conduct separate attorney meetings with just one party’s counsel, or hold an attorney meeting with all counsel. If the lawyers want a meeting with some or all of the participants, that can be done as well.

Everyone will have the ability to share their screen with the mediator and others. This allows them to share documents, pictures, PowerPoint presentations, or anything on their screen.



How do we embrace a virtual process to settle cases?

Practice pointers. As with in-person mediations, the online participation of all decision-makers, not just counsel, is strongly encouraged. Decision-makers must be directly engaged with the mediator and their counsel to enhance the chance of settlement.

Pre-mediation calls are important. During these calls the mediator may learn more about the dynamics underlying the dispute, discuss impediments to settlement, and hear counsel's suggestions on how to help their client make sound decisions.

Pre-mediation calls also provide the opportunity to discuss technical issues unique to virtual mediations. Cell numbers should be exchanged so that the mediator and counsel can communicate if technical difficulties arise with the video conferencing software. Finally, the mediator can discuss how to handle mediation confidentiality agreements as well as potential settlement agreements.

Issues unique to virtual mediations. How to maintain and insure confidentiality? Participants must agree to be in a private space where outside parties cannot hear any aspect of the process. They must also agree to not record any part of the mediation. Mediators should require participants to agree to virtual dispute resolution guidelines that address these issues.

Logistical issues. How to circulate and sign mediation and settlement agreements at the outset and conclusion of the mediation? Technology provides various solutions providing that some thought and planning are done prior the mediation.

Conclusion. While face-to-face interaction will always be preferable and more effective, virtual mediation may be the "new normal" until the crisis passes. We will get through this pandemic together and, looking back, may see it as a paradigm shift in becoming more open to using a virtual process to resolve disputes.

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