

Nuts and Bolts of Videoconference Dispute Resolution in the Time of COVID-19

By Marc Alexander



Marc Alexander is a mediator and litigator at AlvaradoSmith APC. He authors the blog *California Mediation and Arbitration* (www.calmediation.org) and co-contributes to the blog *California Attorneys Fees* (www.calattorneysfees.com). His email is malexander@alvaradosmith.com.

By necessity, I have started to conduct mediations via videoconference. This was an unanticipated development in my practice. Our local rules in California's Central District only contemplated that, at the discretion of the mediator, parties residing outside the Central District could have a representative with final settlement authority available by phone during the entire proceeding in lieu of a personal appearance. Evidently, the local rules did not contemplate a pandemic. All of that changed with COVID-19 amid valid concerns about public health and safety.

Also, in the Central District, the largest group of cases that must be mediated are Americans with Disabilities Act cases. The ADA plaintiffs have disabilities affecting access, and a significant number are immunocompromised. Under current conditions, the alternatives are to cancel mediations, continue mediations, conduct mediations by phone, chat, or email, or conduct mediations by videoconference. In many of the ADA cases that must be mediated, a videoconference could be the best alternative in the absence of personal appearances.

In March, responding to the COVID-19 crisis, the ABA and the California Lawyers Association provided webinar offerings about online mediation.

The advantages to a videoconference are numerous. It can be done efficiently, without traveling by the attorneys, clients, or insurance company representatives. Costs and time are less than with in-person meetings. The technology is flexible, allowing for joint sessions, separate caucuses, screen sharing, chat, and document exchange. A videoconference, like a phone call, can be initiated early during a lawsuit, and it is easy to schedule follow-up sessions. It can be lower-keyed than an in-person confrontation, helping some parties to focus on interests, rather than emotions. Videoconferencing seems familiar, because we are all familiar with absorbing information from computer and television screens, and familiar with the human face. Videoconferencing provides visual and audio information, which is very important to those who are visually oriented. And videoconferencing allows for social distancing, at a

time when we are required by state and local governments to “shelter in place.”

There are disadvantages to videoconferencing. We may lose the nuances of demeanor: Did the attorneys roll their eyes? Did the client sigh? Did a note get passed between attorney and client? Some persons have disabilities that are not suited to videoconferencing. In fact, some ADA lawsuits are now brought because websites allegedly fail to provide proper access to the visually impaired. Retired judges who mediate may believe the aura of authority that comes with having been clothed in judicial robes will be dimmed, and mediators with forceful personalities may believe they lose an advantage in a videoconference. Also, the very ease with which a videoconference can be conducted may make participants feel less invested in the process. Confidentiality, a requirement for all mediations, can be breached with greater ease in a videoconference, and a smartphone screenshot could end up posted to a website. In costly bet-the-farm intellectual property litigation, there may be intense concerns about confidentiality. Zoom, however, has addressed confidentiality concerns by requiring passwords and creating virtual waiting rooms, allowing the host to admit or remove a participant. Perhaps the most serious problem is simply that some people are very comfortable with technology and others are not, based on their personality, ability, and economic opportunity. It could be unfair to conduct a videoconference if one side does not have the skills or the necessary hardware and software to handle it. In short, videoconferencing is not for every dispute, but it can be effective in many disputes, as well as for resolving part of a dispute.

There are several platforms for videoconferencing that can be used for mediation, including Zoom, RingCentral Meetings (powered by Zoom), Legaler (designed for lawyers),

and CREK ODR (online dispute resolution). Free versions tend to have limitations making them unsuitable for lengthy or multi-party mediations. CREK ODR, which I have not yet used, offers the interesting solution of a Virtual Mediation Room, coming with domain, private and joint caucus, document authoring and management, custom intake, email communication, and video integration features. Whichever platform one chooses, one should consider the level of security provided: what encryption is provided, how audio and video are stored, where they are stored, how long they are stored, and who controls the ability to record.

What “best practices” are emerging? The California Lawyers Association has posted a helpful checklist of best practices for using Zoom, which are also good suggestions for other videoconference platforms. For participants, the tips include: (1) performance is optimized when the Zoom software/app is used, instead of calling in; (2) log in ten minutes early to test audio/video settings, and be prepared to download a free app; (3) mute audio unless speaking; (4) use headset or earbuds to improve audio; (5) if you use more than one device, mute all but one to avoid feedback; (6) if you’re having trouble with audio or video, disconnect and log in again; (7) check the platform website to learn the status of technical problems; and (8) instructions and guides can be found on the platform website.

Here are additional tips: avoid backlighting, make sure you have adequate bandwidth and a reliable internet connection, dress comfortably but do not wear shiny clothing, remove background distractions, clean up your desktop and browser bookmarks, turn off audible notifications and your smart phone, if you are not using it. Let persons know that you

have a scheduled conference and do not wish to be interrupted. Corral pets and small children.

Mediators acting as conference hosts can set ground rules in advance. And they may wish to consider adding important ground rules to a retention letter. Address the options available for participation: dialing in by computer, tablet, or phone, and whether the session will be video or audio. Find out if anyone has an objection to being seen by video, or if anyone has accessibility issues. State whether or not recording will be permitted, and if so, reemphasize the importance of maintaining confidentiality. Provide all parties with an opportunity to participate in a test run before the actual mediation session. Establish who may be present in the session. Explain that it will be possible to hold private separate caucuses online. Direct parties to an online user's guide for the platform you will use. Address how documents will be presented and signed. And have a backup plan in case of technical failure: get cell numbers, landline numbers, and fax numbers. In case of a technology breakdown, what will you do first? Log in again? Call cell numbers? Send text messages? Invite questions about procedure.

With Zoom and many other platforms, mediators' invitations to participate are delivered by email and can be scheduled for any date and time. Track who accepts invitations to participate. Before beginning a session, study the platform settings with care, including options for "advanced" settings. When the session begins, take roll, as it is easy to lose track of participants online. By taking roll, the mediator learns if someone who should be present has failed to show up. Ask if anyone is present whom you cannot hear or see. Take a few minutes to describe the tool bar, and the views that are available, such as a view of the speaker, or a gallery view of all participants. Mediators

should further note: the mediator's/host's view of the screen will not be identical to the other participants' views, because the mediator will have controls that other participants may not have. For example, the mediator may be able to control participation and create and manage breakout rooms, and other participants may lack those controls and icons on their screens.

One of the most frequent questions asked of mediators is: when do you do joint sessions, and when do you separately caucus with the parties? In California, the trend is to separately caucus, at least before the mediator has a sense of how the parties will react in a joint meeting, and whether a joint meeting can serve a useful purpose. While an initial joint session can be efficient for gathering information and laying down ground rules, an in-person joint session can be fraught with risk if the parties and counsel are emotional or angry. In my experience, the social distance in a videoconference makes joint sessions less emotional and more civil.

When online mediation ends, I like to go to a joint session, because this offers the parties an opportunity for valedictory words and a courteous, albeit virtual, "handshake" analogous to the one that I like to see at the end of an in-person meeting. I prefer to do this whether or not the dispute settles.

If the parties reach agreement and want to sign a document during the mediation, this can be done by fax or email, provided that the agreement explains that fax, email and counterparts are adequate for signing. Some of the platforms allow for the immediate exchange of documents without going to an outside service. Also, there are additional platforms that enable parties to electronically sign documents, such as HelloSign, VineSign, Adobe Sign, and DocuSign.

I am learning by doing, and there is no substitute for practice. However, there are resources I found to be particularly helpful: YouTube videos demonstrating the different platforms, online instructions and guides for the different platforms, and Simon Boehme's very helpful slides showing how to use Zoom, available for free at www.odrzoom.com/.

Online dispute resolution is a relatively new field with emerging standards and principles. The National Center for Technology and Dispute Resolution lists some of those emerging standards and principles at the web site odr.info/standards/. ICODR, the International Council for Online Dispute Resolution, has stated that quality online dispute resolution

must be accessible, accountable, competent, confidential, equal, fair/impartial/neutral, legal, secure and transparent.

After COVID-19 has faded, online mediation will only grow in strength and acceptance. Just as it took litigators time to become accustomed to the use of CourtCall, they will become familiar with mediation videoconferences. Perhaps one day the courts will also accept that tool for mandatory settlement conferences. Mediation videoconferences will not be the best dispute resolution tool for all types of litigation, but the efficiency, time saving, cost saving, and flexibility offered by videoconference platforms will make them an appealing option for many mediations.

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