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How To Make Remote Mediation Work For Your Cases

by Rachel Erlich

Mediation is a powerful tool that moves cases along the resolution spectrum. Over the past 30 years, in the mediation of tort, employment, and other cases that SFTLA members typically handle, we've been acculturated to expect that parties, lawyers, and insurers (if any) will get together with the mediator on a particular day and resolve the case.

Reinforcing expectations that mediation will be in person are State, Federal, and Local Rules such as California Rule of Court 3.894 that provides:

Attendance

1. All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
2. If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
3. The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.
4. Each party may have counsel present at all mediation sessions that concern the party.

The Federal District Court for the Northern District ADR Rule 6-10 provides as summarized by the Court itself:

Attendance:

The following individuals are required to attend the mediation session in person:

- clients with settlement authority and knowledge of the facts
- the lead trial attorney for each party
- insurers of parties, if their agreement would be necessary to achieve a settlement

Requests to permit attendance by phone rather than in person, which will be granted only under extraordinary circumstances, may be made to the ADR Magistrate Judge. Clients are strongly encouraged to participate actively in the mediation. (See ADR Rule 6-10 for full rule).

In the final weeks before “shelter in place” orders went into effect people attended mediation in person with trepidation. Every cough resulted in wary looks from people nearby and assurances from the cougher, “I don’t have COVID-19,” or, “It’s just allergies.” Before quarantine, mediation participants were asking for help brokering having parties who were at risk attend remotely and some people who were sick asked to attend remotely.

People were asking, “Rachel, can you do remote mediation?” On March 16, 2020, I did my first Pandemic-related, entirely remote attendance mediation session, in which most people were on video and just a couple of defendants were by phone – all mostly from home. During that day, shelter-in-place (“quarantine”) orders began issuing for Bay Area counties, we were experiencing the new normal for mediation as we were doing it.

Since that day, it is apparent that not everyone is comfortable with the idea of remote mediation. So, here are some things to make you more comfortable with it so that during the pandemic you are not deprived of the powerful resolution tool in your cases. First, know that feedback has been very positive for all of the remote mediations that I and others have conducted (the mediators who have received complaints will either adjust or will be available for in person again in the



Rachel Erlich A mediator of civil disputes in California and across the country, Rachel is based in the Bay Area and affiliated with Judicate West. She mediates insurance coverage and bad faith, personal injury, and real estate (including financing, purchases/disclosures, construction and landlord-tenant). Rachel mediates in Superior Court and Federal Court programs.

future). Second, remote mediation does not necessarily mean that mediation will be conducted by video on just one day, and that the case will settle on the day of mediation. Third, remote mediation requires a bit of adjusting to a new normal on timing, pacing, and modes of communication.

Remote Mediation - What is it?

Most people hear “remote mediation” and think, “video.” Remote mediation may include video but it leverages all communication modes available – video, phone, e-mail, text, and electronic transmission of documents, videos, and photos via secure portals.

Video mediation can use a number of different video-conferencing platforms. Many mediators are using Zoom, even those who previously used others such as Court Call or Skype. While Zoom has gotten some bad press recently and made people wary of it, the company itself is tightening security. There are measures that most mediators implemented immediately upon switching to video-mediation (waiting room, breakout rooms, recording and chat are disabled, and each mediation has a unique meeting ID with password). Using these safeguards, March 16 we went all day just as we might have done had we all been together in one office suite. At one point we needed to have all three defense rooms together, this was accomplished in far less time than we would have in person. I had another all video mediation that went more than twelve hours and concluded with a fully executed long form agreement that needed to be signed by six parties and their lawyers. In this regard, the plaintiffs’ bar is ahead because many of you have implemented DocuSign.

Practical things to expect in video. Expect that you will use text during mediation to communicate with the mediator, and possibly your client. At some point someone will have to leave the conference and return, this means that if your mediator is using a waiting room and breakout rooms the person who left will need to be readmitted from the waiting room and will have to be reassigned to their breakout room. If your mediator is using multiple video conferences then the waiting room may not be an issue but there will be other limitations. Audio quality seems to be best when using computer/device for audio. Have a work around planned if audio or internet connection speeds are poor – most mediators can help you with this and will pivot quickly. Mediators have different styles in how they let you know that they are coming into your private breakout room.

Expectations for the Process. You can reasonably expect everything that you would expect from the process in person. Party emotional needs can be met by a mediator who is skilled in video-conferencing, the opportunity to meet the other side can be done by a mediator who is adroit in using the technology and setting the table for such a meeting. If participants agree to have the mediation session happen over the course of days or weeks instead of all at once then the process may include a variety of technology including video, telephone, e-mail, and text. Regardless of whether you are using video or phone please do include the mediator in communications with your client throughout the process. Also let your client know that there will be times when the mediator communicates with you separately – certainly by text or e-mail and possibly in another



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Tanis Kelly, Esq.

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video breakout room.

Practical things to expect in a non-video process. If all have agreed to proceed telephonically, consider whether you want to have those communications occur entirely on one day or whether it might be more practical to work toward your mediation day with a goal of getting the case settled before “The Day.”

Preparatory Communications with Mediator and Clients. As with in person mediation, preparing for mediation is important. Including your mediator in those conversations early will give you a chance to learn and assess how adroit your mediator is in handling remote mediations. Getting people to commit to the process, to think about the logistics of mediation in the context of their household. Not everyone has space dedicated to a home office so people have done mediation from bedrooms and even closets. How the mediator works with you and your client on this non-technical but key rapport-building issue may set the stage for whether video or audio only communication is better.

Practice with the Technology. Download the application for your device more than a day before your first mediation using that technology. Guide your client through downloading the application too. Practice with your client so that you know that your client understands how it will be used on the game day.

The good news is that the days of defendants saying they and

their insurance people must be, “on standby,” are over. Years of experience in mediation have taught us that having the decision-maker’s direct participation (whether in person or remotely) makes a deal more likely. Insurance carriers are noticing the benefit of having the insurance claims professional be part of the mediation session throughout, even when not physically with the defense attorneys. This is due to hearing the progress of negotiations as they occur which benefits the defense just as it benefits the decision-makers on the plaintiff’s side. A big driver for carriers to not send people to mediation is the productivity cost of having a claims professional away from the desk for a full day or days. Obviously, remote participation reduces this lowered productivity (right now, while people are dealing with lack of childcare and the chaos of multiple people being at home there are other reasons that claims professionals are not participating throughout the day). The cost-savings to insurers of not putting a person on a plane have also always been part of the carrier’s decision-making. These factors can be addressed through remote mediation while getting the benefit of the decision-maker’s participation. This makes it likely that we will see carriers participate remotely even after quarantine ends.

The pandemic has brought participants to Mediation 2.0 a bit sooner than some might have liked. We do not have to use the wholly remote approach forever. Once we are no longer forced to be remote, we can design our processes in a way that works for everyone. The past two months have proven that full participation by everyone is possible just by leveraging technology that allows remote access using a device that fits in the palm of your hand. ■

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