

# Virtual Mediation: Key Issues and Considerations

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A Practice Note explaining the principal issues, benefits, and concerns in holding a mediation using a video teleconferencing platform (VTC), including various practical, technical, and strategic considerations.

This document may be particularly relevant in light of the extreme limits on in-person meetings during the 2019 novel coronavirus disease (COVID-19) crisis but may be adapted for other situations in which some or all mediation participants appear remotely.

Participation by remote means in a legal proceeding is not new, but practitioners, mediators, arbitrators, and judges rarely employed them. Virtual ADR processes (also known as online dispute resolution (ODR)) are not wholly new tools for resolving disputes. During the COVID-19 crisis, remote or virtual participation in mediation sessions, arbitration hearings, and even bench trials, whether by using an audio or video teleconferencing (VTC) platform, are becoming increasingly common.

When circumstances do not permit one or more participants to a mediation session to gather together in-person, mediations have traditionally accommodated their remote participation in the process by using the telephone or some VTC platform. During COVID-19, everyone is generally participating remotely using either a single platform or a combination of audio and video technologies. Because of this, mediations can be conducted entirely in a virtual format and are not specific to any particular platform, audio or video, which are, today, driven by underlying software programs.

As with all software-driven platforms, each VTC has its own special features and limitations. The key for the participants is to understand

the salient features and limitations of the chosen platform and to become familiar and comfortable enough with the technology to focus on the core of the mediation process, namely, achieving a mutually acceptable resolution of the participants' own making.

The virtual mediation process generally follows the same path as any other mediation (see Stages of a Mediation Checklist ([9-204-0392](#))). For a collection of resources to assist counsel with the mediation process, see Mediation Toolkit ([1-505-0918](#)). For more information about alternative dispute resolution in general, see Practice Note, ADR Mechanisms in the US: Overview ([1-617-5663](#)).

## BASIC PREREQUISITES FOR A VIRTUAL MEDIATION

Mediation is particularly conducive to being converted from an in-person format to an online format. For a virtual mediation to be successful, all participants must prepare.

## PLATFORM CONSIDERATIONS

The platform merely provides the virtual space in which everyone gathers for the mediation. A platform should permit participants to:

- Access the platform from an electronic device (such as a desktop computer, laptop, tablet, or smartphone).
- See and hear all other participants.
- Interact with all other participants in real-time.
- Engage in both joint and private caucus sessions, so that various groupings of participants can meet in a secure environment.

The version of the software application suitable for each device is likely to differ. Therefore, because each participant's experience on and control over the platform may be slightly different depending on the device in question, participants must understand how their devices access the platform.

There are many VTC platforms in the marketplace. Principally due to its feature-rich options, recent and ongoing adoption of security and privacy updates and widespread familiarity and usage, Zoom has become a perennial favorite among many mediators and counsel. However, there are many other VTC platforms, each with their own

distinct features, limitations, and security and privacy issues, such as (in alphabetical order):

- Apple FaceTime.
- BlueJeans.
- Cisco WebEx
- Google Meet (formerly Hangouts Meet).
- GoToMeeting.
- Highfive.
- Immediation.
- Legaler.
- Microsoft Teams.
- Modron.
- Skype for Business (being replaced by Microsoft Teams on July 31, 2021).
- Sonexis.

When selecting a platform, participants should consider their anticipated needs, available technical and financial resources, and experience with various platforms.

Platform security and privacy enhancements vary tremendously and are constantly changing and being updated. For further guidance, see the ICCA-NYC Bar-CPR's Protocol on Cybersecurity in International Arbitrations, the AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy, and the New York State Bar Association's Cybersecurity Alert: Tips for Working Securely While Working Remotely. Some law firms and organizations also subscribe to enterprise versions of VTC platforms that they selected for security or privacy reasons. These preexisting arrangements may dictate the choice of platform for a mediation session.

## INTERNET CONNECTION

Participants should participate in the mediation from a location with secure, reliable, high-speed internet. They should test their respective internet speeds by searching "internet speed test" in the web browser. The minimum Mbps download and upload speeds needed for the platform depends on several factors, including the expected number of participants and the number of locations from where they are connecting to the platform.

If a participant's internet connection is unstable, weak, or prone to outages, the participant may remedy the situation by:

- Using a Wi-Fi booster.
- Using a smartphone's hotspot.
- Hardwiring the internet connection by installing a direct ethernet (T-1) connection.

## MICROPHONE, SPEAKER, AND CAMERA

Participants should have a functional microphone and speaker to transmit and receive audio. If using the built-in microphone and speaker in their devices creates feedback issues or otherwise produces less than desirable audio quality, a participant may use a separate headset or headphones that contains a microphone. This alternative also often reduces or completely blocks ambient noise, which allows the participant to hear and transmit audio more clearly. Sound clarity is especially important for participants working from

home with other people or pets present or when appliances (such as air conditioners) may generate significant ambient noise.

If participants are using a VTC platform, each participant should also either:

- Confirm that the device the participant is using to connect to the platform has a built-in camera that sufficiently transmits and receives video images.
- Obtain a separate webcam that the participant can connect to the participant's device and use to transmit and receive video images.

## Document Sharing

When evaluating VTCs, consider whether participants anticipate needing to simultaneously view a document in real time, such as:

- Photographs.
- Video clips.
- E-mail communications.
- PowerPoint presentations.

Some VTC platforms permit users to share their screens, so that all participants can view any document or file that a participant opens on the participant's own device.

## Collaboration

Some VTC platforms permit users to collaborate by editing a document within the platform. For example, when mediation results in a resolution, participants may view and edit a draft term sheet, memorandum of understanding (MOU), or settlement agreement (see Memorializing the Settlement Agreement).

## PRE-MEDIATION CONFERENCE

At a pre-mediation conference, the mediator and counsel discuss logistics and housekeeping matters in preparation for the mediation session. Clients and client representatives also may attend the pre-mediation conference. This conference may occur via telephone or on a VTC platform.

Whether in-person or remote, the participants in a pre-mediation conference should:

- Discuss the dispute's procedural posture, including whether:
  - the parties are currently in a litigation or arbitration proceeding;
  - the judge or arbitrator ordered mediation;
  - the parties have engaged in discovery.
- Discuss whether a limited, informal exchange of documents and information may lead to a more productive mediation and, if so, establish a framework for that exchange;
- Identify the attendees to the mediation session and clarify the participants' respective roles, including:
  - which participants have the authority to resolve the dispute; and
  - whether anyone with possible influence over the decision maker should also attend.
- Determine the contents, scheduling, and parameters for exchange of any pre-mediation submissions requested by the mediator.
- Set the date and start time of the mediation session.

- Identify the locations from which each participant is attending the mediation.
- Review the VTC platform features and protocols to which the participants must adhere during the virtual mediation session (see Platform Considerations).

## OTHER PRE-MEDIATION SESSION CONSIDERATIONS

### JOINING THE MEDIATION SESSION

Some platforms offer a separate room into which participants first enter (sometimes called a “waiting room” or “lobby”) and the mediator then transfers them into the main room. This process:

- Allows the mediator to ascertain that everyone scheduled to attend the session is present before allowing them all to appear in the main meeting room simultaneously, rather than having them appear one at a time.
- Preserves some sense of neutrality by not creating the impression that impartiality may have been compromised because the mediator, for example, was spending time with one or more participants before the other participants logged into the platform.

A time limit can also be agreed-on in advance before everyone is admitted into the main session room to manage the participants’ expectations. However, if participants desire an experience more akin to an in-person session, a mediator may forego this feature.

After all participants are in the main room, the mediator may close or lock the main room to prevent anyone else from entering the session. However, if the mediator uses this feature, a participant disconnecting from the platform (voluntarily or involuntarily) cannot rejoin the session unless the mediator takes steps to unlock the main room and transfer the participant in to the room (see Disconnected Participants).

The mediator may remind participants to agree that no one else is to be present with a participant unless previously disclosed to all the other participants. Doing so prevents any unwanted or unintended eavesdropping and assists in preserving mediation confidentiality, as well as the confidentiality of any attorney-client privileged communications.

Once all participants are present in the main room and the mediator issues any final reminders or instructions, a virtual mediation session proceeds in similar fashion to an in-person session in a single conference room. Specifically, the mediator convenes the session by beginning with greetings and introductions, followed by welcoming remarks and the setting of ground rules. The other participants may take advantage of having all participants gathered in a single (virtual) room to provide their own opening remarks, share their particular perspectives, and otherwise engage in a typical joint session. As the discussion progresses as facilitated by the mediator, the discourse is not likely to be that much different than if all the participants were in the same physical room. With virtual conference calls so ubiquitous, most participants are likely to find this setting quite familiar.

### RECORDING THE SESSION

With the possible exception of memorializing any resolution that is achieved at the session (see Memorializing the Settlement Agreement), because mediation is intended to be a confidential

process, most participants likely presume that no one intends to record the mediation session. However, given the technological interface being used and the inability to have any visibility beyond the small view provided by the camera, the mediator should take steps to ensure that there is to be no recording of any kind, such as:

- A video streaming capture software program pre-loaded on a participant’s device.
- An otherwise hidden, disguised, or off-screen audio or video recorder (including the voice memo feature on some smartphones).
- The recording feature available on some VTC platforms. (Mediators hosting the session should disable that feature.)

Should the participants choose to record some or all of the session using the VTC platform’s built-in recording feature, various issues regarding that recording should be discussed, including:

- Which participants should have recording privileges.
- Whether the recording should be stored:
  - locally; or
  - in the cloud.
- Which parties should be given access to the recording.
- Who maintains the recording.
- Whether the recording is to be stored or deleted after the mediation ends.

### INADVERTENT ACCESS TO CONFIDENTIAL COMMUNICATIONS

Like any software, a VTC platform is susceptible to technical bugs or glitches. Although rare, participants on a VTC platform may inadvertently overhear or see something that they were not intended to see. The mediator and participants should discuss how to respond should this occur. For example, the participants may agree that the participant receiving the inadvertent communication must immediately:

- Stop and refrain from further listening or viewing and inform the affected participants (that is, essentially creating a default procedure akin to the inadvertent receipt of privileged documents in another party’s production).
- Inform the mediator so that the mediator may take further steps.

### PRIVATE CAUCUSES

As in any mediation, there may be a need for the participants to confer privately in various configurations of participants, with or without the mediator, in a room that is separate from the main mediation session room (see Practice Note, Complex US Mediation: Key Issues and Considerations: Private Caucuses ([1-575-6667](#))). Different platforms refer to separate caucus rooms by different names, such as breakout rooms (Zoom) or breakout sessions (WebEx). In platforms that offer caucusing, the mediator can virtually place or assign participants so that they can communicate privately and in confidence with each other. In essence, it is no different than had the mediator assigned individuals to physical rooms across or down the hall in the in-person context.

The participants can also establish some kind of protocol to permit the mediator’s entry into the caucus rooms to help discussion within and among the various participant groupings, preserve attorney-client privileged communications, and ensure confidentiality.

However, most VTC platforms do not have a virtual knock or chime feature to announce when someone is about to enter a caucus room. Having the mediator suddenly appear in a caucus room can not only be jarring and rude, but also potentially breach a confidential communication (perhaps even one protected under the attorney-client privilege) occurring in the room. To minimize the risk of an unexpected intrusion, the mediator and participants should agree on how the mediator is to announce that the mediator is ready to enter a caucus room. For example, mediators may:

- Announce their intention to enter a caucus room using a broadcast chat feature (like that available on Zoom) which, once participants are separated into their own rooms, allows mediators to send a message to all participants.
- Call, text, or e-mail in advance one or more of the participants in a caucus room (typically counsel) to indicate the participant's intention to enter the room.

If the selected platform does not offer the ability to place participants in separate rooms, while a little cumbersome, participants can simply disconnect and reconnect to the platform in various configurations to accommodate the need for private caucusing. Traditional telephone mediations have operated in this manner for decades and, in fact, at least one VTC platform (Sonexis) has a pure audio conferencing version that provides for the creation of caucus rooms. With a little advance planning, participants can develop protocols for mirroring caucus rooms in the virtual world.

#### DISCONNECTED PARTICIPANTS

Platform issues, internet instability, and human error can all cause participants to become disconnected from the platform during the session. The participants should develop clear guidelines for how to respond if this occurs. For example, the participants may agree that the disconnected participant should:

- Try to reconnect to the platform (this often resolves the problem if the mediator did not lock the session).
- Contact the mediator (and possibly others) via e-mail or text message to alert the mediator of the connection issue.
- Use provided dial-in instructions to connect by telephone.

In a serious case where the participant cannot reconnect, suspension of the mediation may be necessary, and the mediator should shepherd that process. (The parties should have already exchanged email addresses and phone numbers to help off-platform communications.)

On Zoom, if a participant becomes disconnected from a breakout room, reconnecting to the session places that participant back in the main session room, not the breakout room. (The analogy in the in-person context is as if the participant had left the building entirely when the participant left the caucus room.) In that case, once reconnected, the mediator must return to the main session room and reassign that participant to the appropriate breakout room.

#### MEMORIALIZING THE SETTLEMENT AGREEMENT

At some point during the mediation session, the participants may need to memorialize any or all portions of the discussion (see, for example, *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 262-63 (2013) (holding that all settlement agreements reached resulting from mediation in New Jersey state courts must

be reduced to a signed writing or ascribed to in an audio or video recording)).

Participants may circulate drafts of documents via e-mail or use some kind of external collaboration tool, such as Google Docs or a shared Dropbox file. However, if the parties anticipate wanting to memorialize any agreement they reach and select a VTC platform with this capability, they should take advantage of this feature to draft and edit a term sheet or settlement agreement at the conclusion of the virtual mediation (see Collaboration).

Some VTC platforms offer related features that participants may use to:

- Affix a signature or other mark on a shared document, which the participants may then screenshot or download.
- "Whiteboard" freehand drawings or writings.

Other platforms allow users to incorporate third-party software applications to meet these needs, such as DocuSign or RightSignature.

If a platform does not offer the above features but does afford recording capability, the mediator may memorialize the resolution on video by:

- Orally reading the terms and conditions of any term sheet, MOU, or agreement in the presence of all the participants.
- Obtaining individual assent to the document from the participants.

#### CONNECTING TO THE MEDIATION SESSION

Well in advance of the mediation, each participant should:

- Download the platform software application, even if the platform permits access simply by using an internet browser, because the participant's experience on the platform and the features and options that may be available to the participant may differ if the full software application is not available on the device.
- Choose a location that offers an adequate internet connection, quiet, and privacy. If a private space is not available, select a location that minimizes foot traffic. Turn off any unnecessary appliances that may provide audio or visual distraction.
- If desired, arrange to have two screens available so that they can view other participants and documents at the same time.
- Participate in any available platform orientation sessions.
- Spend as much time as they need to become familiar and comfortable with the chosen VTC platform, how it operates, and the available features.
- Conduct a dry run of the platform and their individual set-ups during which they test and receive feedback on a variety of different aspects, including:
  - microphones;
  - speakers;
  - headsets;
  - sound (including feedback and background noise);
  - lighting (avoiding backlighting and facing cameras away from windows);
  - dresswear; and
  - camera angles and eye contact (positioning cameras at eye level or above (a laptop can be placed on a stack of books to achieve this)).

The mediator should also schedule the mediation within the platform. When setting up the session, the mediator should:

- Name the session using only the case number or some other innocuous name so as not to reveal the parties' names.
- Password-protect the session and creating a two-factor authentication requirement by:
  - not embedding the password in the link; and
  - conveying the link and the password by using separate mediums (for example, emailing the link and sending the password by text message).
- Caution participants not to share the conference link in any kind of public forum to increase the likelihood of unwanted attendees accessing the session, a phenomenon that has now come to be called "Zoombombing." (Zoombombing principally arose from compromised meeting links resulting from user error in releasing the link information publicly or having the Personal Meeting ID otherwise compromised, or both. Although there were many articles written on this subject during the early weeks of the pandemic, best practices for using Zoom, including enabling waiting rooms, password-protecting meetings, and exercising the host's removal powers, have largely eliminated this problem.)

When ready to join the mediation session, each participant should close unnecessary tabs and applications on the device to prevent battery drain and internet bandwidth usage. Turning off e-mail, calendar reminder, and other notifications, as well as silencing phones, also prevents unnecessary disruptions and distractions.

The participants can also discuss the various options for viewing other participants and the propriety and use of virtual backgrounds available in many VTC platforms. Participants should generally avoid virtual backgrounds because they mask the presence of others in the room and require additional bandwidth.

### CONCERNS WITH VIRTUAL MEDIATIONS

Virtual mediation brings unique challenges, including:

- Participants' inability to fully gauge credibility and read body language.
- The lack of control that some participants feel by being assigned and shuttled into different rooms by the mediator.
- Difficulties preserving the confidentiality and security of the proceeding.
- Inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet.

While most of these concerns can be overcome by using training, education, and continued practice and use of the chosen VTC platform, there are other concerns that relate to the psychological and neurological effects of communicating using VTC platforms. For example:

- The distortions and delays inherent in video communications:
  - confound the receipt of information and muddle well accepted subtle social cues to which participants are accustomed; and
  - create gaps in the participants perception of reality.
- Participants fill in any reality gaps in a way that leaves them feeling disturbed, uneasy, tired, isolated, anxious, and disconnected.

- Participants may struggle to concentrate or have difficulty developing empathy, rapport, credibility, and trust, all of which are generally critical to a successful session.

(See *Why Zoom is Terrible*, New York Times April 29, 2020 and Liz Foss Lien and Mollie West Duffy, *How to Combat Zoom Fatigue*, Harvard Business Review, Apr. 29 2020.)

If participants experience platform fatigue, they may benefit from:

- Refraining from multi-tasking while engaged in the session.
- Reducing on-screen stimuli from other sources (such as e-mail notifications, calendar reminders, and so on).
- Building-in regular breaks from the screen.
- Stopping a mediation session earlier than anticipated to prevent poor decision making by the participants due to platform fatigue and possible coercion by one participant on another, including the mediator.
- Switching to a different medium, such as using the telephone.

A mediator may explain the general principles of platform fatigue during the pre-mediation conference and schedule multiple session days in advance with the participants to account for this possibility.

### BENEFITS OF VIRTUAL MEDIATIONS

Virtual mediations offer many benefits, including:

- Enormous savings in travel time and expenses.
- Avoidance of logistical issues related to:
  - coordinating participants' schedules;
  - accounting for unexpected travel delays; and
  - securing a mediation space or participants' lodging.
- Removal of barriers to having additional participants attend who may otherwise have been precluded due to time or cost considerations (such as the ultimate decision maker at the company, the junior associate on the matter, the insurance carrier's adjuster, or an interpreter).

In fact, participants in a virtual mediation must only agree on an available date and time for the session to proceed. Relatedly, because mediation sessions can be scheduled more easily, they may be preferable for disputes that are time-sensitive or otherwise need a faster path to resolution.

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