

mediation became something we had to do, but soon that will no longer be true. Part II describes the remote mediation process and then explains how to conduct these types of meditations. The question now facing the legal community is whether we should continue to use online mediation and develop it more going forward in the future. Part III explores this question by detailing the benefits and challenges of online mediation. Because COVID-19 variants are ever-evolving, practical insight on how to accomplish a successful remote mediation will be delineated in Part IV. It includes ten tips that can aid mediators and others attempting to settle disputes online. Thus, online mediation can be done, it can be successful, and there can be benefits to doing a virtual process. Is it the wave of the future? Ultimately, Part V concludes that online mediation will become a permanent method of alternative dispute resolution.

II. REMOTE MEDIATION IN PRACTICE

Alternative dispute resolution (ADR) is a process that uses tools such as mediation and arbitration as alternatives to trial.¹¹ Mediation is a process in which a neutral third party, the mediator, assists two parties in dispute at arriving at a mutually agreeable solution or settlement outside of the courtroom.¹² A well-conducted mediation can bring an end to many longstanding conflicts or disputes and avoid costs and the uncertainty that often exist with trials. Skilled mediators work with entrenched parties and their attorneys to move the dispute toward resolution by focusing the parties on ultimate goals and the advantages of resolving the dispute and moving forward.

It is generally accepted that trust is an essential element for the process to be successful and, for years, mediators accepted that trust is best forged in a face-to-face setting.¹³ Prior to the pandemic, mediators would use online mediation only if necessary, and often defaulted to an email or telephone method.¹⁴ As lawyers, it is hard to imagine a process that for years we have done in person as something we now do online.

11.

A. *Transitioning to Remote Mediation*

As courthouses and businesses closed doors, attorneys found themselves working remotely and adapting to new technologies. Given this, it was only logical that the mediation world would quickly adapt, evolve, and adjust to different methods of online resolution, allowing parties to negotiate remotely. During the COVID-19 crisis, remote or virtual participation in mediation sessions, arbitration hearings, and bench trials become increasingly common, and we even saw the exploration of virtual civil jury trials.¹⁵ The use of the telephone and email, methods often used pre-pandemic, continued to be used but could not meet the needs of the backlog of cases suddenly demanding attention. Video and videoconferencing suddenly emerged and rose to the forefront of the dispute resolution process.¹⁶ Zoom became a four-letter word that filled everyone's vocabulary, and lawyers began exploring virtual dispute resolution through the use of computers, smartphones, and tablets.

III. WEIGHING

B. Online Mediation: Ongoing Remote Mediation Challenges

As the pandemic hit, the legal world was not prepared for a universal move to a remote world.³² Unlike business and the educational arenas, the legal system was not reliant on the internet and the processes regularly used in the justice system were not based on the use of the internet.³³

Remote mediation does not exist without some challenges and considerations. Initially, finding the right technology posed a problem. The internet was not specifically designed for dispute resolution, it was not a

Moreover, they need to be comfortable interacting with and reading each other onscreen as opposed to in person. While there may be challenges of logistics and personal style, many experienced mediators are finding that virtual mediations have significant benefits and that their success rate is similar to that of in-person mediations. Therefore, online mediation is likely to continue to be an important tool for mediators and advocates for the foreseeable future.

IV. ONLINE MEDIATION: KEYS TO A SUCCESSFUL MEDIATION

The world of online mediation is a rapidly evolving one. Online mediation is becoming even more accepted as lawyers become increasingly familiar with cyber tools and other technology available to them. The client of today is used to social media, status updates, online exchanges, and communicating with total strangers online. In fact, some people prefer this medium to the face-to-face medium most lawyers tend to prefer.³⁷

The key to online mediation is to embrace change and be committed to the process. It is not a one size fits all approach. It is not for everyone. It is not for every case. But, for some people and some cases, it is a perfect solution.

To allow for the online mediation process to be successful, there are some key elements and tips that are essential:

#1 Be Familiar with the Medium Used

Currently, there are a variety of online video options available for hosting online mediations. The choice of medium will often be directed by the mediator who should host the mediation. Participants should be familiar with the medium used and have basic knowledge of the forum to be used. Issues related to security, privacy, and technology need to be considered. These issues should be raised before the mediation if they are a concern.

Security and privacy are always concerns and can be even more of a concern in an online method of dispute resolution. Computers and cell phones record with ease. Mediators can and should include prohibitions in a mediation agreement, prohibiting recording by any party, attorney, and anyone else. The spirit of mediation is the essence of a third party connecting with parties in a confidential forum.³⁸ Making sure this is done and finding

37. John Helie & James C. Melamed, *Online Dispute Resolution in the U.S.*, *MEDIATE.COM* (Oct. 1998), <https://mediate.com/articles/ecodir1.cfm>.

38. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 *IND. L.J.* 591, 594 (2001).

the best ways to preserve confidences and privacy, while at the same time forging connections, is essential to a successful online mediation.

#2 Select the Right Mediator

Anyone can claim to be a mediator. Yet, that does not mean he or she will be a successful mediator. Online mediation creates options for the selection of a wider range of mediators by removing geographical constraints and other issues. Online mediation also highlights the need to choose a mediator with effective communication skills. A mediator must understand online constraints and elements and effectively use technology to develop the

process that takes time. Online mediations can easily end with the click of a button. It is important to stress that it should be the mediator, not the client, that ends the process; the client should not shut down the process, literally, if he or she gets frustrated. The mediation process needs to run its course if it is to be effective.

#5 Be Ready to Settle

Cases settle in online mediation. That means parties need to be prepared to settle prior to the online mediation. Lien issues, subrogation matters, and outstanding bills, for example, all need to be addressed. All necessary parties and decision-makers need to be included. Online mediation, with prepared parties and counsel and an effective mediator, can be very effective.

#6 Let Mediators Do What Mediators Do Best – Settle the Case

Attorneys are often used to taking control of legal situations. Attorneys like to carry the show and often enjoy being the center of attention in a mediation. In some face-to-face mediations, it can seem that the mediator is the person who makes the coffee, introduces the parties, and provides the conference rooms.

In an online mediation, the mediator controls everything and is very much the focus.⁴² The mediator is the one who meets with the clients initially, needs to get the clients talking, and develops rapport. Online mediators know that is essential. A client needs to answer the questions and respond to the mediator; initially it is the client, not the attorney, that needs to do the talking. The role of the lawyer becomes more pronounced as the mediation moves forward. Lawyers will often find themselves working together and exploring creative outlets.

All parties need to focus on the online mediation. There is always other work or distractions, such as emails and messages to check, and, while that may be important, it is crucial to leave it alone and focus on the mediation at hand. Just because one can do two things at once, does not mean one should.

#7 Don't Be Afraid to Send an SOS Signal

A mediator needs to be aware of all issues and matters, evident or not, in order to address the undercurrents in a mediation. With a history of representing the client, the attorneys may be aware of issues not immediately evident to a mediator in an online forum. In an in-person mediation, it is easy to say to a mediator, "I need to speak to you alone," something that is not

42. See Beck & de Courcy, *supra* note 24.

always so easy to say or do online. However, pre-mediation conferences or the use of separate conference rooms and caucus rooms make it possible. For example, in online mediations, I always set up a room for attorney caucuses only and advise counsel to text me a code. When they do so, I will interrupt, make an excuse to pull the attorney out, and address the issues.

