

# Virtual mediation can work well with proper preparation

By Kimberly Stamatelos

Watching the law shifting amidst COVID 19, I am taken back to 1987. That was the year I returned to Iowa from practicing law in Dallas, Texas, excited about a new concept I'd learned about. It was mediation, and law was about to shift.

Back then, I traveled all over Iowa, then all over the Midwest, trying to get people excited about mediation, schlepping big poster boards that I kept in the trunk of my car. When applying for CLE credits I was careful to clarify it was mediation not meditation I was talking about. The response I got was mixed.

I've since learned that I'm one of 2.5 percent of the population who are innovators. We are people who like to take

risks, try new things in business and hang out with other innovators. Early Adopters (13.5 percent of the population) realize that whether or not they like the innovation, adopting it will help them maintain position. The Early Majority (34 percent) don't adopt until they see everyone else doing it and figure they should get on board or be left behind. The Last Majority (34 percent) are naturally skeptical and come along kicking and screaming. Laggards (16 percent) vocally complain and highlight flaws with innovation, saying "it will never work." Acceptance to my message of mediation in those early days tracked those categories.

I've continued being an innovator, launching the online divorce platform

UnHitchUs.com in 2019 and automating my law practice, working remotely for weeks at a time doing virtual mediation and parenting coordination. I've plugged into the legal tech community and have been excited about how technology is changing the law. But none of us ever in our wildest dreams imagined the changes we are seeing coming overnight, as a result of COVID-19.

The first question every lawyer reading this should ask themselves is this: Where will I be on the adaptation scale for virtual mediation? I have calls and coffee dates with endless numbers of lawyers asking me how to build a successful mediation practice. The truth is, I don't know the answer for people who decided to do it 35 years after it first got going.

The window for virtual mediation is now open. If you want to get out there, now's the time.

The possibilities are endless for ways to serve our clients through mediation in new and exciting ways. If there were skeptics among us before, this pandemic has forced us to break free of old paradigms and think more creatively about where the law will go from here. I have mediated several cases by video chat both as a mediator and as an advocate and we are getting cases settled.

I'm delighted to share the highlights of what I know, so far.

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**1 Mindset.** It's critical to have a growth mindset about technology. It's a stereotype to think that millennials and other young people are techie and that boomers are not. When I first started following legal tech and future of the law reports, I bemoaned to my adult children that I was incompetent around technology. "Mom, the difference between you and us is that you don't press buttons because you think you will break things. We just push things and scope around until we figure it out."

Bingo! That mindset set me free. Now I dive in and explore. I welcome you to have that same openness to using technology in mediation.

**2 Meeting the clients where they are.** Not every client will feel secure around technology. Automatically pushing them into an online or virtual mediation may be "too much too soon." Keep in mind telephone mediation is still alive and well.

Many clients (and lawyers) feel they need to have webcams, microphones and fancy gadgets to do this type of mediation, and that's not necessary. Most smart phones work well for mediation and most humans have smartphones, even those who qualify for pro bono mediation. Participants can use most platforms like Zoom, Google Hangouts, FaceTime, Skype and others from their phones. Often there is an app they can download. Work with your clients to identify their comfort level and willingness to use technology knowing phone instead of video is a solid option too. Make sure your mediator knows and understands your client's limits.

**3 Set up your work station.** I like to have all my gadgets handy. I have my desktop to run the mediation but have my laptop, iPad and phone nearby. I also have folders of handouts that I typically use in mediation in case I need to scan and send to the clients if I can't pull them up during a screen share quickly. Make sure you have everything fully charged and that you are near an outlet with charging cords in case the mediation goes long and you run down on power. Wearing earbuds is a great idea to minimize noise, but be sure to have them fully charged.

You don't need to buy expensive equipment. For example, scanning can be done with apps on your phone such

as Genius Scan or Turbo Scan. Pictures on telephones can also work, and be texted or emailed. Making sure you have backups also allows you to quickly call a participant on the phone if you lose connection or need to regroup if things go wrong. Be sure you have collected all phone numbers and emails before the commencement of the mediation.

Make sure your background looks professional and that the lighting is good. I'm not a fan of fake backgrounds, which often make the silhouette of the person talking from in front of them look blurry. You must have enough bandwidth in your internet, and even wifi has to be secure. You might consider plugging directly into your modem or getting ethernet.

Software for online signatures can be helpful. Adobe, Docusign and Hellosign are options. Remember you can still use the "print, sign, scan and send back" option or even just email something to the client and have them email back, "I approve and give permission to sign" return email.

Our state now allows online notary and it's not costly to set up. I found DocVerify to be a good option. Remember, you can't have someone hold up a document and sign while you watch, and then you notarize it with your traditional notary stamp. The Iowa Secretary of State has details on this notary option and you must register there to perform virtual notary.

**4 Move forward with confidence.** Whether mediator or lawyer, there is no need to apologize for online mediation, like it's an inconvenience. Move forward as though this is the new normal. The obstacles that are presenting now are based less on the technology and more on the uncertainty of our lives and the economy. How can you mediate issues

such as lost wages, child support or medical treatment for injuries, with uncertainty in our healthcare systems and current levels of unemployment?

It's time for mediators to be creative and offer ideas for solutions. Those mediators who have fallen into the habit of being a "water carrier" back and forth have a chance to be breakout stars who work hard to help parties find solutions by following these guidelines:

- ▶ Make sure you know how to use your chosen technology inside and out.
- ▶ Understand how to screen-share documents, how to move clients into private rooms so you can call a lawyers' caucus, and make sure you designate breakout rooms without accidentally leaving the disputing parties in a room by themselves.
- ▶ Make sure you know the technology as well as the mediator. You may have to assist if a mediator is in over his or her head, in a way that doesn't erode the confidence in the process. In some instances, you can do that in a confidential chat only to the mediator that is available on the screen in real time.

**5 Recognize that online focus is harder for everyone.** Staring at a screen puts your brain into a different place than sitting in a comfortable conference room picking up body language and sipping coffee together. For those of us who rely on our empathic skills to bond with clients we are not able to pick up on those cues as readily.

Eye contact is also more difficult. If you look on the screen at the person who is talking instead of into the camera on



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your computer, you don't appear to be making eye contact. Experiment with your settings on the computer to determine what works best. "Gallery view" is often a better option than "speaker view" to be able to read the dynamics. You may want to turn off access to seeing your own profile, as that can be distracting.

Conversely, recognize that your body language matters too. If you move your seat closer to the screen you may seem out of proportion and like a giant, just as if you move your chair back which makes you smaller and appear less in charge of the process. Keeping yourself in a position of welcoming and attentive presence is a full-time job online, whether you are the mediator or an advocate.

**6 Take care of your physical body.** Get up and walk around when you can between caucuses, and encourage clients and lawyers to do the same when you are caucusing with the other party. Sitting in a chair for several hours is draining in ways that you may not recognize. Have refreshments or snacks available and encourage participants to do the same.

**7 Be sure your Agreement to Mediate is updated.**

For example, some phrases I've added to mine are:

A video/virtual mediation will not be exactly the same, and may not be as complete, as a face-to-face service. There could be some technical problems that affect the video session. Mediators use systems that meet recommended

standards to protect the privacy and security of the video mediation; however the mediator cannot guarantee total protection against hacking or tapping into the video mediation by outsiders. This risk is small, but it does exist.

All third parties who are able to hear matters discussed in video mediation shall be disclosed to the mediator at the commencement of the mediation and shall sign the Agreement to Mediate if asked to do so by the mediator.

The parties understand that if they or others in the room during a virtual mediation record all or part of the mediation session the recording will not be admissible in court and the recording party could be subject to other sanctions from the court.

I like to have the mediation agreement signed ahead of time and sent to the mediator before the session to avoid delays and awkward coordination of signatures at the beginning of the session.

In your opening presentation make sure that you identify people within earshot who can hear the mediation. In one of my first virtual mediations years ago I realized a few hours in, that one party's significant other had been there the entire time, sitting outside of my vantage point. Now I ask up front.

Also, recognize that there are many ways people can record the mediation. Emphasize in your agreement and opening that recording is prohibited. Moving forward, we have to rely on trust and integrity to a higher degree because we are not in the same room as the parties to see what is going on.

**8 Competence.** Now more than ever it's important to be a competent mediator. If you haven't been trained in a comprehensive classroom 40-hour training, now is not the time to decide you will set up as a mediator. There is a reason this has been the standard of training for the past 40 years. Good mediation is grueling work and short cuts don't work. In fact, it's a good idea to take advantage of online mediation training even if you have been a "brick and mortar" mediator for years.

**9 Additional resources.** There are great resources available. For technology, Zoom is a popular platform and it has extensive tutorials online. Some videos help you customize your platform such as adding your firm logo in the virtual waiting room. For actual mediation-related guidance, Mediate.com has terrific resources and online training courses. Remember your fellow mediators are available for troubleshooting and sharing ideas.

Make sure you get paid for your work as an online mediator. LawPay can give you links for clients to enter a credit card at the conclusion of the mediation. Other payment methods are Venmo (I use Venmo to pay staff instead of issuing payroll checks) or Paypal. Make sure you set out your payment expectations clearly before the mediation begins.

Most important, don't worry. The changes in the law are coming fast and furiously at a time when we have anxiety about many other things. There will always be people who want to sit across the desk from their wise lawyer when social distancing is over. And in-person mediation will still be preferred. There is room for all ways and styles of practice. Emotional intelligence, empathy, active listening and the "counselor at law" skills we have can't be duplicated by a computer. The legal profession is alive and well and will thrive in years to come.

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