

BEST PRACTICES FOR VIRTUAL MEDIATIONS

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Virtual (online) Mediations are the “new normal” for this time of the Covid-19 and are sure to be more regularly used even once the days of Covid-19 are in our rear-view mirrors. At the very least, video-conference mediations (and hearings/meetings in general) have become something not for the future but for today, certain to become as common place in our court systems as “court-call” telephonic appearances became. By way of example, the following orders were published by the USDC for the Central District of CA in March 2020:

... Effective immediately and until further notice, the Court grants to mediators the authority to excuse a party, a party’s representative, or an attorney from in-person attendance at a mediation conducted under General Order No. 11-10. At the discretion of the assigned mediator, mediations held through the Court’s ADR Program may be conducted by video or telephone conference.

... Hearings in civil cases will continue to proceed by video or telephonic conference. Hearings in emergency civil matters may proceed in-court when Phase 2 is implemented, at the discretion of the assigned Judge.

On June 2, 2020, the Los Angeles Superior Court announced the implementation of its new *Here For You | Safe For You* program, which introduced the legal community to LACourtConnect, launched for attorneys to make remote appearances in Los Angeles County courtrooms for all Limited Civil, Unlimited Civil and Complex, Family Law, and Traffic courtrooms.

“Attorneys and self-represented litigants will have the option to make audio or video appearances in Los Angeles County courtrooms by using the Court’s new LACourtConnect technology that will provide a secure, safe and convenient way to attend hearings remotely. A key element of the Court’s new Here For You | Safe For You restoration of services and access to justice, LACourtConnect will contribute to social distancing requirements and dramatically change the traditional in-person courtroom appearance model. ...”

On June 4, 2020, the Los Angeles Superior Court issued a further press release with instructions to attorneys for accessing the LACourtConnect Attorney Portal, explaining:

“... Part of the Court’s Here For You | Safe For You plan, LACourtConnect provides a safe and convenient alternative to in-person appearances. This Court-developed technology allows parties to appear in court via video or audio, without having to come to court. LACourtConnect provides the following benefits: • Promotes convenience and choice through cost-effective audio and video options; • Reduces the number of court visitors, which assists with social distancing protocols; • Eliminates driving and parking costs; and • Saves commute time to courthouses. ...”

These courts are of course not alone in doing so. Courts across the country and around the world are embracing video-conference technology for many types of hearings, including jury trials. And so, the tech evolution in the law continues and in the opinion of this author, there is no turning back. Remote court appearances, mediations, trials, hearing, etc., by whatever name you call them, i.e. virtual, remote, online, videoconference, are here to stay. Not as a complete substitute for in-person proceedings, of course, but certainly as a substitute for many, many proceedings that just a few short months ago one would not have thought able to be held remotely.

That said, in line with ABA and state Rules of Professional Conduct requiring lawyers to be technologically competent and to maintain confidences, lawyers need to familiarize themselves with best practices for using video-conference platforms, including for mediation.

So, What is a Virtual Mediation Like?

Once you become familiar with the virtual mediation process, also referred to as ODR (Online Dispute Resolution), you will become comfortable with it and realize both that the virtual process is very much like mediating your cases in person and that the fact that the mediation is being handled online is not an impediment to settlement. Virtual mediations allow for private breakout rooms where attorneys and clients can talk confidentially with each other and the mediator, just as if meeting in person. The mediator and participants can move from room to room seamlessly. Documents and photos can be shared and documents signed. It is extremely personal - in some ways even more personal than traditional in-person mediations because you are sitting face to face with each other. Zoom is a typically used platform by mediators for a number of reasons, primarily because of its breakout rooms and ease of use.¹ There are several other available platforms, designed for Mediations and also with security, such as Modron, CREK, and Legaler, as well as meeting apps such as Teams and WebEx.

What do I Wear?

Dress is usually a mix of traditional business attire and business casual. You cannot go wrong dressing as you would if going to a traditional in-person mediation or court.

How Do I Prepare Myself and My Client for the Mediation?

Prepare to mediate the substance of your case as you would normally. In terms of logistics, mediators will have provided the attorneys with a link to be used by the parties, attorneys, claims representatives and others to sign into the mediation session. The link is private and will include a meeting identifier and a password. Confirm how and to whom the link is to be provided.

Prior to the mediation session, most mediators will email each attorney certain documents for signature by anyone who will be appearing at the mediation - a Confidentiality Agreement and their own "Guidelines for Online Mediation". The Guidelines provide detail about the process,

¹ As of May 30, 2020, Zoom has completed its 5.0 integration, with significantly updated security, encryption, etc.

security protocols, and expectations and should be shared with all participants.² Schedule a pre-mediation conference call with your mediator to discuss not just the substance of the case but also the logistics. He or she will be happy to answer your questions and to arrange a “test run” if you would like. That said, best practices include:

1. Plan to attend from an interruption free area of your home or office, with a private, secure, and strong internet connection. Do not use public Wi-Fi.
2. Test your equipment in advance. Ensure that sound and video is working OK.
3. Test the virtual platform to be used with someone if you have not done this before.
4. Turn off ringers on phones and close windows/doors to limit outside noise.
5. Position your device’s camera at eye level, sitting on boxes and/or books.
6. Lighting should be in front of and beside you, not behind you. Natural lighting is best.
7. Your background is your choice - your home office, a living room, etc. The background should not be overly distracting but does not need to be a blank wall either! Remember that people will see what is around you so take a critical look at what is showing before the mediation starts. Some people use virtual backgrounds, of which there are now plenty available for free on the internet. [Unsplash](https://unsplash.com/) has a large selection.
8. Have documents you might want or need to “share” easily available.
9. Close all other apps on your computer and disable notifications.
10. Set your screen to “gallery view” so that multiple participants can be seen in a grid on the screen at the same time.
11. Email the signed confidentiality agreement and mediator’s guideline documents to the mediator, if not already returned.
12. Sign in for the mediation session early, to make sure that you can connect without any issues.
13. Make sure that participants have the cell phone numbers for their attorney, client and mediator and that mediator has the cell numbers for the attorneys.
14. Plan to provide your own drinks, lunch and/or snacks!

What Should Participants Expect Once in the Mediation Session?

The attendees sign in on their computers, tablets, or phones shortly before the appointed time and enter a “waiting room”. They do not see or hear anyone else in the waiting room. Everyone generally appears via video, so that they can be seen, but there are times that people will choose to mute their video so that only their name shows, for example. If someone does not have access to a device with video – or just does not want to be seen – they can either call in to one of the phone numbers provided with the invite and only the phone shows. Or they can “mute” their Video and leave their audio unmuted.

The mediator will admit each person into the mediation session from the “waiting room” in one of two ways, depending on the case - either all at once and everyone says hello to each other as they would if meeting in an office lobby, before being moved into their respective private breakout rooms (counsel and clients in same breakout room) just as they would move into a conference room if in person; or they might be admitted directly into private breakout rooms.

The mediator will generally take the time to make sure everyone can see/hear and is otherwise comfortable, acquaint each group with features such as how to call him or her back into their

² For an example of Guidelines, please see the “Virtual Mediations” page on the author’s website. www.lawleradr.com.

breakout room (eg. using the “ask for help” button), how the mediator will “knock” to let them know he or she is returning to their room (eg. using the broadcast function), and to answer any questions. If a full-day mediation, plan for breaks.

And then the negotiations begin, with the mediator moving from room to room and bringing counsel and/or parties or experts together as appropriate - again, just as would be done in person. Joint sessions are as equally available as individual sessions. It is a comfortable experience and one quickly forgets that they are remote from each other.

Some points to remember:

- “Unmute” both your audio and video once admitted to the Mediation Session.
- “Join” the breakout room if that option shows on your screen when the mediator tells you that you are being moved to it.
- Once in your private breakout room, locate the “Ask for Help” button to use to call the mediator back to your room.
- If you step out of the room for any reason, remember to mute your audio AND video - especially if you are on a phone or tablet and carrying it with you.

Do Not Panic if something does not go as expected. Any glitch can be handled and remember that Plan B is always available. Often signing out and signing in again will fix everything (much like rebooting your computer). Ultimately, if you cannot sign in with the video link, use one of the provided meeting phone numbers to call in to the mediation. The mediator may share a new link or otherwise help solve your problem. Ultimately, the mediator will make sure that everyone is online and able to see and/or hear at the outset of the mediation.

How Are Documents Shared?

Zoom and the other platforms provide for various ways to “share” screens and documents and each mediator will have his or her preferred approach, which will have been explained in advance. In the interest of keeping shared documents private, many mediators prefer to have the party who needs to share a photo or other document email it to them, either in advance or during the mediation session. After approval from that party re what can be shared with opposing counsel, the mediator will “share” the photo or document using his or her computer, iPad, or iPhone to show the document on the mediation screen. That way, an opposing counsel does not have possession of a private document and it remains simply visually shared under the mediation privilege. This works fine. If there is need to have parties share directly, that can be arranged. Zoom and other programs also have a “white board” but many mediators find it best to use their iPad for that purpose.

What about Signing Settlement Agreements?

Mediators will generally have counsel come together during the mediation to finalize terms of an agreement and how the settlement agreement is to be signed. Preferably, one counsel has a settlement agreement, term sheet or MOU form on their computer, which they can email to the other attorney (with the mediator on the email to preserve the mediation privilege) for review and edits, and the document can be signed at the conclusion of the mediation via DocuSign, Adobe or other electronic means - or by printing, signing and scanning or taking a picture of a signature - and then email to one another. Original signatures can be mailed to

counsel as may be appropriate. If not able to finalize the settlement document during the mediation session, then it is generally confirmed between counsel via email and the settlement agreement finalized and signatures exchanged within a day or two thereafter.

What Kind of Glitches Might Happen?

Occasionally someone will accidentally disconnect and must sign back in or must play with unmuting their audio or video. Those situations are usually quickly resolved, with “reboot” (i.e. sign out and sign in again) being a good fallback. If there is slow internet, people and sound may sometimes freeze. Remain flexible to deal with any situation that might arise. Just remember that there is always a Plan B in place (see the Mediator’s Guidelines) with cell numbers at the ready to serve as an alternative way of alerting the mediator to a need.

What Sort of Security and Privacy Protocols Should Your Mediator Be Using?

Your mediator should be using a number of basic security and privacy settings. In a nutshell, the mediator’s settings should absolutely be set to “not record”, sign-in should be by private invitation and password only – and other settings such as these Zoom settings mentioned below should be in place to protect privacy and confidentiality.³

1. Set the "record" option to OFF. No recording allowed by anybody. This is critical.
2. Set the "chat" options to OFF.⁴
3. Set the meeting to start using the "waiting room", until the mediator opens the meeting. No one sees or hears anyone else in the “waiting room”.
4. Admit each participant from the waiting room to the meeting individually if any question about who is in the waiting room; mute participants upon entry. Unmute manually.
5. Set "Display participant names on their videos" to ON. For phone numbers, use the setting to not display the full phone number.
6. Use a randomly generated meeting link instead of a personal meeting ID.
7. Require password.
8. Set "screen sharing" to host only - to avoid uninvited material.⁵
9. Disable any feedback option, end of meeting survey, etc.
10. Allow host to remove participants.
11. Remind everyone to use a secure internet connection - not public Wi-Fi - and to be in a private place.
12. Set the data center region for meetings hosted by the mediator’s account to “United States” (this can be changed to add other specific geographic areas for international participants).⁶

³ Zoom’s updated platform is Zoom 5.0. As of May 30, 2020, everyone’s Zoom platform by default utilizes GCM encryption and other security features. For more details, see the zoom.us website and <https://blog.zoom.us/wordpress/category/announcements/new-releases/>

⁴ Some mediators will allow the “chat” function as an easy way to communicate, but for greater security, it is suggested that other ways of communicating be used.

⁵ During the mediation, this can be changed if it is decided to have participants share documents directly, rather than emailing to the mediator to then share.

⁶ This can be set to the United States, Canada, the UK, the EU, or other geographic area. Does not default to any non-selected jurisdiction.

13. "Lock" the meeting after everyone has arrived. The mediator can unlock it to let someone back in if necessary. (Hence, the need for cell phone numbers for a person who needs to be let back into the mediation session to notify the mediator.)
14. Turn the setting to require encryption for 3rd party endpoints ON.

What Other Resources Might Be Helpful?

- *Learn to Mediate Online Website and Podcasts*, by Susan Guthrie. She has personally trained well over 1,000 mediators and has excellent podcasts on what attorneys should expect and how they can prepare their clients for a virtual mediation. learntomEDIATEonline.com
- Zoom Tutorials - <https://support.zoom.us>
- ABA and State Rules of Professional Conduct for Lawyers re Confidentiality, Technology and Competence