

# MEDIATION IN THE COVID-19 ERA: IS ONLINE MEDIATION HERE TO STAY?

---

Kristi J. Paulson\*

## I. INTRODUCTION

For many lawyers, the early days of 2020 meant calendars filled with trials, arbitrations, and mediations. Mediators had practice calendars filling up with parties hopeful for dispute resolution already booking into the summer and fall. That mediation would take place “in person” was all but a given, and considerations such as the location of the mediation, travel time, and accommodations factored into the planning. Mainstream lawyers and mediators insisted that mediation needed to be in person to allow for the “human factor” to work its charm. Allowing mediators to read body language, listen to clients, and get face-to-face with people to build the trust, empathy, and rapport is so essential to an effective mediation.<sup>1</sup>

In March of 2020, a microscopic virus circulating through the air suddenly brought the justice system to a screeching halt. The COVID-19 pandemic shut courthouse doors across the nation in a historical and almost unthinkable manner as the coronavirus began raging, and we found ourselves

---

\* Kristi J. Paulson is an accomplished trial lawyer with over twenty-five years of experience in the courtroom and with ADR processes. She conducts both in-person and online mediations in areas of civil law and family law and is nationally recognized as a leader in online mediation. Paulson is a member of the American Board of Trial Advocates (ABOTA) and a past president of the Douglas K. Amdahl Inn of Court. In 2020, she was appointed by the Minnesota Supreme Court to serve on both the Minnesota Lawyers Professional Responsibility Board and the ADR Ethics Board. Paulson is the President of PowerHouse Mediation, a center that provides online and in-person mediation and ADR skills training and education nationally.

1. See Jean R. Sternlight & Jennifer K. Robbennolt, *High-Tech Dispute Resolution: Lessons from Psychology for a Post-Covid-19 Era*, DEPAUL L. REV. (forthcoming 2021) (manuscript at 5, 16-17), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3896021](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896021); Amy J. Schmitz, *Arbitration in the Age of COVID: Examining Arbitration’s Move Online*, 22 CARDOZO J. CONFLICT RESOL. 245, 249 (2021).

at war with this unseen microscopic opponent.<sup>2</sup> The wheels of justice came to a standstill. Mediations, it appeared, all but stopped for a brief period of time.

Stay-at-home orders were entered, safety measures were implemented, and “social distancing” became the new buzzword.<sup>3</sup> Along with debilitating illness and the tragic loss of life, COVID-19 caused unprecedented court closures, trial calendar continuances, and interruptions in civil litigation and the dispute resolution process on a scale never seen before. Virtual alternative dispute resolution (ADR) processes, sometimes referred to as online dispute resolution (ODR), while not new tools for resolving disputes, were rarely if ever used by lawyers, mediators, arbitrators, and judges.<sup>4</sup> Suddenly, ODR was not just an option: it was the only option.

Mediation simply could not be done as it had always been done in person.<sup>5</sup> Innovative and creative lawyers found ways to keep justice moving forward as they explored online mediations, virtual arbitrations and hearings, and remote client meetings. Online mediation became commonplace as the pandemic raged around us.<sup>6</sup>

Most states are now lifting restrictions on the ability to meet in person, and many courthouses have, once again, opened the doors to justice.<sup>7</sup> Courts face new challenges with a large backlog of cases and new disputes in need of resolution.<sup>8</sup> The news is filled with questions about the future as new variants of the virus, concerns about vaccines, and the return to “normal” fill the air, all raising questions about what has been, what is, and what could be.<sup>9</sup>

Though a return to in-person mediation may be inevitable, this Essay outlines how online mediation worked and how it worked well.<sup>10</sup> Online

---

2. *State Court Closures in Response to the Coronavirus (COVID-19) Pandemic Between March and November, 2020*, BALLOTPEdia, [https://ballotpedia.org/State\\_court\\_closures\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_between\\_March\\_and\\_November\\_2020](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic_between_March_and_November_2020) (Nov. 4, 2020).

3. Linda A. Sharp, Annotation, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. Fed. 3d Art. 3 (2020).

4. See Meredith McBride, *ODR in the Era of COVID-19*, ABA (Oct. 27, 2020), [https://www.americanbar.org/groups/family\\_law/committees/alternative-dispute-resolution/odr/](https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/).

5. Bobby M. Harges, *Mediating on the Internet*, 68 LA. BAR J. 174, 175 (2020), <https://www.lsba.org/documents/publications/BarJournal/Feature2-Harges-Oct-Nov-2020.pdf>.

6. *Id.*

7. See Palma Paciocco, *Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19*, 57 OSGOODE HALL L.J. 835, 836 (2020).

8. *Id.* at 836-37.

9. See Sui-Lee Wee, *How Nations Are Learning to “Let It Go” and Live with Covid*, N.Y. TIMES, <https://www.nytimes.com/2021/07/21/world/asia/living-with-covid-coronavirus.html> (July 30, 2021).

10. See Harges, *supra* note 5, at 175.

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Prior to the pandemic, mediators would use online mediation only if necessary, and often defaulted to an email or telephone method.<sup>14</sup> As lawyers, it is hard to imagine a process that for years we have done in person as something we now do online.

---

11. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651.

12. CAL. CIV. PROC. CODE §1775.1(a) (Deering 2021).

13. See Noam Ebner & Jeff Thompson, @ *Face Value?: Non-Verbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DISP. RESOL. 103, 105 (2014).

14. See *id.* at 104-05; see Harges, *supra* note 5, at 175.

### 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.<sup>15</sup> 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.<sup>16</sup> 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.

Using videoconferencing platforms such as Zoom, Teams, WebEx, and Go To Meeting, mediators discovered that they could adapt the in-person mediation process and caucus or meet with parties in different rooms, bringing them together or keeping them apart, and communicate with parties to help them negotiate and navigate solutions.<sup>17</sup> Mediators quickly learned that there were advantages and disadvantages to each of the various platforms. Thus, by exploring the digital age of settlement, they homed in on successfully conducting remote mediations.

It was really only a matter of time before the internet became one of the most dominant and flexible tools existing in a mediator's toolbox. The pandemic saw an explosion of ideas, approaches, and shared resources as people embraced online approaches capabilities and adapted the mediation process from the traditional face-to-face process.<sup>18</sup> Mediators, while skeptical at first, learned they would still develop the trust, empathy, and rapport essential to the process, and that, in some situations, they could do so

---

15. See Emily Martin, *The Rise of Online Mediation: Lessons from the E-Commerce Marketplace*, 38 GPSOLO 39, 39-40 (2021); Sozi Pedro Tulante et al., *Demystifying the Virtual Civil Jury Trial Experience*, L. 360: EXPERT ANALYSIS (Apr. 29, 2021, 4:51 PM), <https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience>.

16. See Sternlight & Robbenolt, *supra* note 1 (manuscript at 1-2).

17. Douglas Witten, *Video Mediation During the Coronavirus Pandemic: How Online Dispute Resolution Works*, NOLO, <https://www.nolo.com/legal-encyclopedia/video-mediation-during-the-coronavirus-pandemic-how-online-dispute-resolution-works.html> (last visited Sept. 22, 2021).

18. See Sternlight & Robbenolt, *supra* note 1 (manuscript at 1-2).

more quickly and efficiently. As a result of the COVID-19 era, online mediation became the norm, rather than the exception.<sup>19</sup>

### *B. Online Mediation: Conducting Remote Mediations*

Mediation is about communication. The goal of a successful mediation is to have parties leave feeling like they have reached an accord on their own.<sup>20</sup> Why is that important? It deepens the commitment to an agreement. The mediator is a neutral third party who assists in the negotiation process to move the parties toward resolution.<sup>21</sup> In any mediation, relationship building is an essential element. Once trust and rapport are established, the mediator can begin exploring options with the parties and working toward creative resolution of the matters at hand.

In online mediation, mediators use virtual tools and videoconferencing to assist parties in reaching agreements in a wide range of disputes including civil, commercial, employment, and family areas.<sup>22</sup> Seminars and institutes dedicated to ODR and virtual mediation quickly popped up during that pandemic to offer skills training and tools to assist in ODR processes.<sup>23</sup>

Initially, mediators were most comfortable with an online process that replicated and mimicked the in-person mediations they were so used to conducting.<sup>24</sup> However, seizing this opportunity, mediators were quick to adapt the mediation process to the online medium.<sup>25</sup> Mediators learned how to reach out to the parties and their counsel, educating them about the online process, providing them with instructions on how to join an online mediation,

---

19. See Harges, *supra* note 5, at 175 (“[W]hat began as a necessity because of COVID-19 has now become an integral part of mediations in America. That is, even after stay-at-home orders were lifted, parties continued to mediate on the Internet.”).

20. See Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 895-96 (1997).

21. CAL. CIV. PROC. CODE §1775.1(a) (Deering 2021).

22. See Susan Nauss Exon & Soomi Lee, *Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution*, 49 STETSON L. REV. 109, 122-23 (2019).

23. See, e.g., *Dispute Resolution: Online Practice Tools*, ABA, [https://www.americanbar.org/groups/dispute\\_resolution/resources/resources-for-mediating-online/](https://www.americanbar.org/groups/dispute_resolution/resources/resources-for-mediating-online/) (last visited Sept. 22, 2021) (resources on ODR basics); *What Is ODR?*, NAT’L CTR. FOR ST. CTS. ODR, <https://www.ncsc.org/odr/guidance-and-tools> (last visited Sept. 22, 2021) (presentations and publications on ODR); *COVID-19 and Online Dispute Resolution: Pandemic Illuminates the Future of the Legal Profession*, WASH. ST. BAR ASS’N CLE STORE (June 30, 2020), <https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=251&productId=18417627> (seminar on online dispute resolution).

24. Phillipa Beck & Zoe de Courcy Arbiser, *Further Evolution of Remote Mediation Expected Post-Pandemic*, PINSENT MASON (May 24, 2021, 9:32 AM), <https://www.pinsentmasons.com/out-law/analysis/remote-mediation-post-pandemic>.

25. Witten, *supra* note 17.

and providing technical information to allow the mediation process to work and move forward. The pandemic resulted in revised mediation agreements, new rules and protocols for the mediation process, and the development of technology to assist in carrying out the mediations.<sup>26</sup>

So how does an online mediation work? Once the parties have agreed to a mediator and to the online process, a mediator will reach out and provide the preliminary instructions and create the forum for the online mediation. Given concerns for confidentiality and security, mediators will create passwords, separate rooms, and methods to ensure confidential proceedings are not influenced by third parties to the best of their abilities.

On the day of the mediation, the parties and lawyers will “join” the mediation by clicking on an electronic invitation prepared by the mediator. Mediators, much like they do in an in-person mediation, will often place parties in separate rooms online and will go between the online rooms to facilitate the negotiations and effectuate the settlement process. Mediators can explain the issues, address questions, listen to clients share information and stories, and move the parties forward toward resolution. Online mediation has evolved to where it now allows parties to share documents and screens and even execute and sign documents such as mediation agreements or settlement documents.

Patience and time are important to building rapport and making sure parties are engaged. Most mediators excel at observing verbal and nonverbal cues; one of the reasons face-to-face mediation is so often preferred.<sup>27</sup> With time, mediators are learning to adapt and assess these factors through the online medium. Mediators have discovered that once interpersonal connections are established, they can be just as effective online at building areas of agreement, addressing conflict and moving toward compromise, and assisting the parties in finding mutual solutions and creative settlements to resolve disputes.<sup>28</sup>

Cases settle because parties are able to reach a mutually agreeable resolution. However, sometimes cases do not settle. This is true of cases mediated in person as well as online. Online mediation adds one more tool to the arsenal of settlement tools and options readily available to lawyers and individuals with disputes. Online mediation is a process. The key is to give the process a chance and be committed to the fact it can and does work.

---

26. Beck & de Courcy, *supra* note 24.

27. See Negeen Rivani, *Online Mediation: If the Shoe Fits*, MEDIATE.COM (May 2013), <https://www.mediate.com/articles/RivaniN1.cfm>.

28. See Witten, *supra* note 17.

### III. WEIGHING ONLINE MEDIATION

#### A. *Benefits of Online Mediation*

Once the pandemic yields, online mediation will no longer be the only tool available to those in dispute. Rather, it will be an option; one that removes geographical constraints, promotes expediency, and uses a medium that certain parts of our population communicate through regularly. Over the past year, mediators, parties, and counsel have discovered many benefits and advantages to online mediation, such as:

- Savings in travel time and expenses
- Ease in coordinating scheduling
- Participation in the process of individuals and decision-makers who otherwise may have been hindered by time or travel considerations (access to authority)
- Geographical considerations are no longer barriers
- Wider selection of available and qualified mediators
- Reduction of fear or intimidation of the process for clients
- Easier to take breaks and continue the process at another time if needed
- Allows for parties to be in surroundings they are familiar with and comfortable in
- Flexibility of scheduling widens business hours and makes time barriers less of an issue
- Easier to incorporate experts or professionals who may assist in resolving the dispute; and
- Arguably, reducing the spread of COVID-19.<sup>29</sup>

Online mediation is likely going to become the “new normal” for the foreseeable future. It is an attractive option for some people embroiled in civil or family disputes.<sup>30</sup> It is a process that can assist courts in reducing case volume while settling contested matters. Online mediation is a tool that allows mediators to continue to expand and enhance skillsets and even connect and learn from other mediators nationally. There seems little doubt that, even in a post-COVID-19 era, online mediation will continue forward as an effective and efficient method of settling disputes.<sup>31</sup>

---

29. See Jenna Blackmon, *Online Mediation During the COVID-19 Pandemic and Beyond*, HELLO DIVORCE: BLOG (Mar. 31, 2020), <https://hellodivorce.com/online-mediation-coronavirus/>.

30. *Id.*

31. See James Claxton, *Mediators Like Online Mediation and Other Verifiable Facts*, MEDIATE.COM (June 2021), <https://www.mediate.com/articles/claxton-verifiable-facts.cfm>.

### *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.<sup>32</sup> 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.<sup>33</sup>

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 platform commonly used, and it lacked resources. Replication of the face-to-face mediation model was not something as easy as pushing a button on a computer.

The past year saw tremendous improvement in existing platforms.<sup>34</sup> As online mediation became essential, enhancements followed quickly. Increased security features, ease in allowing for the joining and separation of parties, and increased methods to share information were introduced quickly following the national lockdown. Limitations existed in the technology available to parties and some remote areas had difficulties establishing effective internet connections.<sup>35</sup> Mediators began to find ways to deal with background interruptions from children and pets, to nicely point out that clothing was not optional, and to restore the flow of the mediation that was interrupted such as when a participant would get a package delivered and the doorbell would ring.

Online mediation brings unique challenges to the table for mediators and participants, which can include:

- Technological challenges or limitations
- Limits on the ability to read and access credibility and verbal and nonverbal cues
- A feeling of disassociation from the process by parties
- Challenges to preserving the confidentiality and security of the mediation process; and
- Experiencing fatigue during the process.<sup>36</sup>

There are certainly challenges with virtual proceedings. Parties need to be comfortable with the technology and have the proper equipment.

---

32. See Witten, *supra* note 17.

33. See Matt Reynolds, *Going Virtual: Courts Attempt to Balance Innovation with Access in Remote Proceedings*, 107 ABA J. 44, 45 (2021).

34. Beck & de Courcy, *supra* note 24.

35. See Reynolds, *supra* note 33, at 48.

36. Beck & de Courcy, *supra* note 24; McBride, *supra* note 4; Joshua Javits, *Virtual v. In-Person Hearings in a COVID World and Beyond*, MEDiate.COM (Apr. 2021), <https://www.mediate.com/articles/virtualvsinpersonhearingsincovid.cfm>.

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.<sup>37</sup>

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.<sup>38</sup> 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 rapport and communication essential for the client to feel part of the process. A mediator must be adept at reading verbal and nonverbal cues and using those cues to effectuate settlement.<sup>39</sup>

### #3 Prepare for the Mediation

No one would attend a mediation in person without providing the mediator with a mediation statement and adequate materials to evaluate the claim.<sup>40</sup> Ironically, in online mediation, often these same attorneys and parties will provide a two-paragraph, eleventh-hour email to an online mediator. The mediator needs to have full and adequate information to evaluate the matter in order to begin and successfully mediate the claim.<sup>41</sup> Information to be used in the mediation needs to be complete and provided in advance of the mediation.

### #4 Prepare Clients for Mediation

Clients are often fairly tech-savvy. Online mediation forums have unique nuances, and it is important that a client fully understands the online format being used. Clients need to be educated about the mediation process generally and about how it will be conducted virtually. Clients need to understand the role of the mediator, specifically that the mediator is not a decision-maker and will not decide the case. They should understand the role of the opposing party and side and how to handle any joint sessions. A client needs to understand that mediation—including online mediation—is a

---

39. Amy Starr & Norman Page, *Dealing with Nonverbal Cues: A Key to Mediator Effectiveness*, *MEDIATE.COM* (Mar. 2005), <https://www.mediate.com/articles/starrpage1.cfm>.

40. *See Mediation Statements: What They Are and Why They Are Important*, SHAPIRO MEDIATION SERVS.: BLOG, <https://shapiromediators.com/mediation-statements-important/> (last visited Sept. 22, 2021).

41. *See Mediators Ethics Guidelines*, JAMS MEDIATION, ARB., & ADR SERVS., <https://www.jamsadr.com/mediators-ethics/> (last visited Sept. 22, 2021).

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.<sup>42</sup> 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.

In an online mediation, the elephant in the room always needs to be made known.

#### #8 Be Patient. Online Mediations Take Time.

People expect the online world to be instant. Instant information. Endless Options. Results now. In an online mediation, the parties and counsel need to allow enough time for this process to work. Some cases may move faster than others. Online mediations that are rushed will often not be successful. As with in-person mediations, each client has different needs and expectations that will control the amount of time necessary. An online mediator needs time to (1) establish rapport, (2) build trust, and then (3) do the settlement dance.<sup>43</sup>

#### # 9 Be Prepared to Develop a Final Binding Settlement Document

Online mediation presents unique opportunities for attorneys to confer, work together, and leave the mediation with documents ready to file with the court. This can go way beyond the mediation agreement, often handwritten, that lawyers are used to receiving at the conclusion of an in-person mediation. Utilizing the time and tools online mediation affords, attorneys can work together to prepare settlement documents. Downtime can be a productive time. Online mediations can conclude with settlement agreements containing final language already hammered out, agreed upon, and sometimes even signed and ready for filing. This saves the clients time and money, which eliminates the chance that the client will overthink things after the mediation, change his or her mind, or exhibit “buyer’s remorse” after the settlement.

#### #10 HUG the “Fourth Party in the Room” (Technology) and Realize There Are Ups and Downs . . .

There are glitches in technology. At times, technology does not operate as it should: connections to the internet are not always clear, dogs bark, kids interrupt, doorbells ring, rooms may be dark, etc. Sometimes the problems result in the need to reschedule. But that happens in person as well. For the

---

43. See Steven G. Mehta, *Three Essential Traits of a Highly Successful Mediator*, MEDIATION OFFS. OF STEVEN G. MEHTA, ESQ.: BLOG (Sept. 2005), <https://stevemehta.com/essential-traits-of-a-successful-mediator/>.

most part, all of the providers are updating and working hard to make their systems work universally. It is a good idea for a mediator to test the forums they use. No one ever said that advance preparation and testing out systems was a bad thing, especially in online mediation.

#### V. CONCLUSION: VIRTUAL ONLINE MEDIATION – THE WAVE OF THE FUTURE?

Virtual proceedings and mediation can keep courts moving at a time when people fear gathering together and allow for the resolution of disputes in that process. The pandemic has established that dispute resolution and mediation can be done virtually and can be effective, particularly when the aforementioned tips are followed. As restrictions are lifted and people begin to gather again, there is a strong pull to return to what we know and to gather together again. That raises new issues related to online mediation.

Should a process that is equally effective and works be abandoned? Some lonely mediators craving contact with people would argue yes.<sup>44</sup> However, it seems safe to say that most parties, counsel, and mediators remain in favor of using an online mediation method or at least offering it as an alternative.<sup>45</sup>

Changes in how we think about dispute resolution methods as well as how we conduct them will be one of the legacies of the COVID-19 era. Remote mediation and other forms of ADR are here to stay. Online mediation has become a recognized form of ADR and is presently the new norm. Hybrid mediation, allowing a person to choose online or in-person or sometimes a combination of both, is what most mediators today offer. Some mediators have even gone further, continuing to offer only online mediation as a nod to the new normal.

Online mediation has quickly evolved as a result of the pandemic, and it is expected that this progress forward will continue.<sup>46</sup> Mediators and participants have embraced technology and allowed it to propel the mediation process forward into new realms. Online mediation is not perfect for every case, but it is not meant for every case or for everyone. However, the demonstrated success and the fact that the world seems to be committed to technology suggests we will see greater evolution as more and more people begin and continue to embrace online mediation.

Despite all of the tragedy this pandemic has brought, mediators, lawyers, and judges have demonstrated amazing resilience, creativity, and adaptability

---

44. See Javits, *supra* note 36.

45. *Id.*

46. Beck & de Courcy, *supra* note 24.

in keeping our systems of justice not only alive but moving forward. Together, we have found ways to come together and keep the wheels of justice alive. Change is never easy. But, perhaps, in the end, the lessons we have learned will be tools we can use to be even more effective at resolving disputes and advancing justice.

One day, COVID-19 will be something written about in history books and not circulating through the air we share. Vaccines and lessening numbers of active cases give us hope that we will return to in-person proceedings and mediations sooner than later.<sup>47</sup> Even so, there likely will continue to be COVID-19 protocols in place for the indeterminate future.

Yet, crisis is often an impetus for change. COVID-19 brought the mediation process into the virtual realm. Online mediation was not born as a result of the pandemic, but it did rise and develop out of necessity. Moving forward, there will be additional perfection to the art of mediation as mediators continue to refocus and advance the online mediation process, allowing it to redefine and improve.

The process of looking to the future demands we move forward and find better ways beyond means not originally designed. Mediators, lawyers, and parties have the skills and the ability to continue exploring and creating alternatives that ensure access to justice and to resolving disputes. In today's dispute resolution climate, remote mediations are the rule rather than the exception, with technologically savvy mediators stepping in to provide parties a chance to settle their disputes online. Online mediation is here to stay. Parties will become more creative as we continue to explore the process, and we will see further innovation as virtual online mediation moves forward as the wave of the future.

---

47. See Javits, *supra* note 36.