

Preparation and Practice Are Key to Successful Remote Mediations



By Elizabeth Yarbrough
Attorney/TSC Rule 31 listed Family Mediator (DV)

Like it or not, remote mediation is here to stay.

Now that we are all living under the constant threat of contracting or unwittingly transmitting coronavirus, many mediators (myself included), lawyers and parties may be unwilling or unable to participate in mediation in person. Fortunately, remote mediation allows for continued access to this process even when in person meetings are not possible. While many practitioners are wary of remote mediation, the most common concerns can be addressed with a shift in thinking and the acquisition of some new skills and a few new software products.

Remote mediation need not compromise the value of the experience for the participants or limit business opportunities for mediators. Concerns about the privacy and confidentiality of the process can be addressed through proper use of your platform and appropriate instructions to the parties memorialized in your materials and agreement. The remote option is safer, more convenient and more cost effective when no one is having to travel to a mediator's office or pay their lawyer for travel time. Remote mediation offers improved safety both in terms of potential contagion during a pandemic, and in cases where there is a potential for violence or emotional intimidation of one party by another. Participants who live in rural areas where there is no mediator nearby will gain access to the process they may not otherwise have.

If you are not already offering remote mediation, I would encourage you to try it. The best way to become comfortable with remote mediation is to start offering this service, but first equip yourself with the knowledge you need to succeed. Below are some strategies that have been helpful to me and colleagues who have kindly shared their experiences with me.

Set the tone and create rapport and trust. Just as you would in your own office, you are responsible for setting the tone for the mediation and you need to establish a

rapport and build trust with the participants—lawyers and parties. Because remote mediation is new to many, you need to focus on how to build trust in using this platform. When mediating at my office, I always make a point to chat with lawyers and parties for a few minutes and offer coffee and donuts as participants arrive and unpack. Now I try to make contact ahead of time with a phone call to the lawyer, especially if the lawyer is one with whom I have not worked recently.

When you schedule the mediation, send a confirmation letter along with a brief description of the process, a summary of what clients and lawyers should expect, and what they will need to participate. Remind the lawyer and his or her client that they can be remote from one another, and they can share documents without either of them having to go to an office. It is a good idea to invite the lawyer and client to participate in a brief pre-mediation session of maybe ten or fifteen minutes during which you can show them how your video conference platform works. This will not only make them feel more comfortable participating remotely, it is also a great opportunity to establish rapport between yourself and the participants. This is a good way to foster their trust in you as the mediator who is well prepared and professional. They will see that the video conference platform is easy for them to use and feel more confident going into mediation.

Create a safe space and emphasize privacy and confidentiality. One of the main objections I have heard from lawyers who still prefer in person mediations is that they do not feel remote mediations can be kept private and confidential. While it is true that any participant in a remote mediation could record the process surreptitiously, or have another person in the room who is eavesdropping off camera, the same is true of an in-person mediation. There is nothing but your mediation agreement, or perhaps a court order, stopping a participant at an in-person mediation from wearing an inexpensive recording device, activating a recording app on their smart phone, or calling another individual on the phone and leaving their phone on the table. This is a problem that may feel like more of a threat for remote mediations, but that simply is not the case.

Your mediation agreement should already provide that there may be no recording of the mediation, and that the process is private and confidential. You should update your existing agreement to include language specifically stating that all provisions apply to remote mediations as well, and consider including examples of what is not allowed or appropriate (e.g. using the Wi-Fi at Starbucks to join the remote session, or participating from the living room of a participant's home where other family members would hear or see the session). Ideally, during a pre-mediation session or in your confirmation letter, emphasize with both the lawyer and his or her client that the rules regarding privacy are being prioritized for the benefit of both parties. Most online platforms allow the host to prevent direct recording, so choose one with this functionality. Demonstrating the video conference platform and discussing the built in security features and reviewing the privacy provisions in your agreement will allow you to show the participants that you are providing them a safe space and prioritizing their privacy.

Using breakout rooms ensures total privacy from the other side in a manner that is superior to that available in most offices. At my small office, I use Sonos speakers playing classical music in the hallway between my conference rooms, and white noise generators placed throughout my suite, but I still have to caution mediation clients to keep their voices low. Any raised voices might be overheard in person, but in a breakout room, there is no way for the other side to hear what is happening in the other side's room. If you are using Zoom (my platform of choice), you can ensure privacy from unintended observers by generating a unique meeting ID and requiring a password, which is only provided to counsel and parties. Utilizing a virtual waiting room function and locking the meeting after all participants have arrived will provide additional security. Specifically enumerating all these precautions in your mediation agreement and demonstrating them in a pre-mediation session will build confidence in the safety of the remote setting for both the attorney and his or her client.

Be prepared and help participants be prepared. The mediator's comfort and confidence in the process and the platform will come across to the other participants and help them to focus on resolving their dispute. This will help to ensure a successful mediation. It is important that you as the mediator can conduct the session with

confidence. Preparation and practice with the platform you are using will ensure that you can smoothly operate the platform.

There is an enormous amount of support available to learn to use video conference platforms. Most products have extensive tutorials included in the platform, and a quick Google search will typically yield simple instructive articles and video tutorials for free. Many bar associations are offering CLE hours on how to use Zoom and other platforms. Use these resources until you become familiar enough to feel comfortable and then start practicing what you have learned.

Practicing what you have learned can be fun. Have each of your kids go to their own room with an iPad and play with the breakout rooms. Tell one child a word or phrase and let the others guess it. Host a Zoom cocktail hour or book club with friends and practice sharing photos using file sharing and screen sharing. You will have fun and feel confident and secure in your abilities when you conduct your online mediation. A confident mediator will ensure a less stressful experience for your participants that will be conducive to their ability to resolve their dispute.

Make sure that you and all the participants have all the technology and equipment needed. Having access to your video conference platform is not the only software you need to ensure the mediation process goes smoothly. You will also need to have the ability to provide a means to sign both your mediation agreement and the agreements you create at mediation. DocuSign and Adobe Acrobat are popular and accessible. If notary services are needed, make sure you have the ability to provide that.

Notarize.com is an online service that you can use for a nominal fee per signature if you are not authorized to notarize online, or if you prefer not to do so. You will also need to have a way of collecting payment electronically unless you have received payment in advance. LawPay, PayPal and Venmo are all easy to use and are not prohibitively expensive payment processing options.

Plan for needed hardware and equipment for yourself, and remind the participants about the need to have a reliable, wired internet connection. Have access to a second

device in case of device failure. Remind all participants to have laptops charged with access to a power supply. Do not assume that the participants will have thought of these issues.

Remind participants about other considerations. Have a plan in place for what to do if a participant loses their internet connection. Provide your phone number and get the cell numbers of each participant so that you have an alternate means of getting in touch with them if they lose their connection. Make sure that all participants have a private place free from interruptions and that they have time to devote their full attention to mediation. Participants who are attending from home may not think about arranging for childcare and participants who are attending from their own office may not think about clearing their calendar, so it is incumbent upon the mediator to raise these issues.

Show participants how to mute themselves or cover their camera so that they will not feel embarrassed if they get up to take a bathroom break and the entire mediation hears the toilet flushing. Help clients get the added benefits available with the remote mediation. Wearing more comfortable clothes, sitting in a place in their home that is soothing, or having a pet nearby can be of enormous benefit to parties who are nervous or emotional. I recently conducted a remote mediation and one of the parties became extremely distraught while discussing a parenting plan modification. I watched as her cat climbed into her lap and she experienced such comfort from petting the cat and I realized that having access to pets can be an enormous benefit not available at the mediator's office. My own dog is usually asleep at my feet when I am mediating, which we both enjoy.

Be patient with yourself and others and focus on using your skills as a mediator. Realize that online mediation is new to most of us, and we are all learning a new way of doing things. It is important to be kind and patient not only with participants but also with yourself, as the inevitable hiccups occur. Prepare, do your best, and give yourself and others a bit of grace. Realize that you will make mistakes and do not over-react when this happens. A bit of awkwardness on the part of the mediator who is learning a new way of mediating can be an asset in relating to the parties, as it may make them

less nervous about their own lack of familiarity with the setting. Focus on using the skills you always use as a mediator: listening and observing more than talking, and identifying the unmet needs of each party and how their agreement can best meet those needs, reframing ideas as proactive, solution-focused and related to the identified needs of the parties, and by compromise and guided decision making. Empower attorneys to support their clients in reaching a good settlement by providing legal advice and strategic advice, but encourage them to allow their clients to avail themselves of a voluntary settlement opportunity.

Get comfortable because remote mediation is not going anywhere. Even though many mediators are still offering in person mediations, and many attorneys still prefer that setting, remote mediation is an option that is gaining popularity, with good reason. Remote mediations offer many benefits to all participants, that make it an attractive choice that will no doubt remain popular after the threat of spreading Covid19 is over.

Elizabeth Yarbrough is a solo practitioner in Germantown, Tennessee. She is a Tennessee Supreme Court Rule 31 listed Family Mediator with the Domestic Violence training designation. She is a 2001 graduate of the University of Memphis, Cecil C. Humphreys School of Law, and a member of the Memphis Bar Association, the Tennessee Bar Association, the Tennessee Association of Professional Mediators, and the International Academy of Collaborative Professionals. She serves on the Board of Directors for the Memphis Collaborative Alliance and on the Board of Directors of SuperVision/SuperVisits and often serves as a volunteer attorney for Memphis Area Legal Services.

Elizabeth focuses entirely on family law matters and offers both traditional litigation-based advocacy and collaborative law services in addition to mediation. She offers an entirely virtual experience for the safety and convenience of her clients. More information can be found on her website www.familylawmemphis.com.