

# Mediating During Separation: Embracing the Virtual Session

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During this time of COVID-19, California's statewide shelter-in-place order, social distancing, and court closures have caused civil cases to slow or even stop all together. But the fact that we are physically separated and unable to meet in person at the present time does not prevent us from resolving matters through mediation. Virtual mediation using online technology has been offered for years to resolve conflicts when face-to-face interaction was not possible or ideal. Mediators who are trained in virtual mediations are offering these specialized services and are available to assist you and your clients. So, embrace this technology and consider going virtual with your next mediation.

We all know that most civil disputes are resolved before trial and mediation can be integral to a lawsuit's resolution. During this time of uncertainty, your clients may be experiencing increased stress and unexpected financial struggles on top of an already ongoing legal matter. A virtual mediation offers to lessen this burden and achieve closure of their dispute – even while other legal and court processes may be stalled.

While there are many online platforms for virtual meetings, the most common platform for virtual mediations is Zoom. Zoom has been used by mediators for years because it offers features, including its Breakout Rooms (private virtual rooms), which are unique for managing confidential and private mediation sessions among multiple parties connected simultaneously. Essentially, the virtual mediation can be set up with the same features as any in-person mediation; for example, each party is given their own private space for the session, there can be joint session space – or not – whatever is right for each particular mediation, and the mediator is able to go back and forth between the separate rooms as they would in any in-person mediation. Recently, Zoom has come under criticism for some security pitfalls, and its CEO has indicated the Company is working to enhance features to exclude unwanted participants by, among other things, enabling a Waiting Room, password protection, and a locking feature by default for all sessions. Many mediators have already implemented these security settings to protect the fundamental principles of privacy and confidentiality in their mediation sessions. So, as lawyers working with mediators in virtual mediation sessions, you can expect to see these enhanced security features in place.

It's reasonable for lawyers to be daunted by implementing novel technology like this, given our need to protect privacy and confidentiality. But that doesn't eliminate the fact that cases must

continue where possible, and it is our obligation is to have basic competency in the relevant technology related to our practice (including the benefits and risks associated with its use). While many mediators are working to develop the skills necessary to conduct productive and secure virtual sessions, you can take the initiative to enhance your own comfort level with Zoom and other online platforms through general online tutorials, practicing with colleagues on a free or low cost Zoom account, and by accessing the many resources on virtual meetings and mediations offered online. If you have a comfort level with technology and have some time to hone these additional skills, consider offering yourself as a resource to colleagues who may not be as familiar and would appreciate the guidance to move their cases into the virtual mediation space.

We are all being asked to become comfortable with a new type of practice, and virtual mediation is a key piece to continuing cases toward resolution, especially now when traditional mediation is not available. Here are some tips to help prepare you, your office, and your clients for a productive virtual mediation session.

The following is a list of essential technology and other considerations needed by all parties for a productive virtual mediation:

1. A computer or electronic device with adequate memory and charger/battery (a smartphone will work but is not ideal, and the applicable app – Zoom – must be downloaded in advance)
2. A secure Wi-Fi (or wired) internet connection (a private connection ensures privacy and an unsecured public connection or mediating from a public space may not be allowed by the mediator)
3. A microphone, video camera (included or attached), and headset/headphones (to improve audio; your computer microphone and speakers are okay, but headphones are best)
4. Your cell phone readily available and charged (should the mediator need to contact you, should you need to contact the mediator, or should you need to contact your client)
5. A neutral/professional background with good lighting for clear visibility, and a professional appearance from the shoulders up (as you will be on video)

Informing your clients about virtual mediations and setting expectations in advance is crucial to ensuring a successful virtual mediation. Confidentiality and privacy are expected of all

mediations. Unlike in-person mediations, your client will not be sitting next to you, so managing these important aspects in a virtual mediation can be even more challenging. While you should expect to have time alone with your client in your private virtual room, the mediator will join you virtually and possibly with little to no advanced warning. This means you should speak with your client ahead of time to advise them on what is expected and allow them time to prepare. It is important that every mediation attendee plans for a private space, ensuring an interruption-free zone (no eavesdroppers) for the duration of the mediation. Electronic device notifications should be minimized (including computer, email, cell phone) to ensure the focus is on the mediation, and the communication necessary for success. Electronic communication can be challenging, so everyone should be aware to speak up or visually signal if they are unable to hear, notify others if they are not being heard or if their microphone is off, and try to avoid speaking over one another as much as possible.

Managing documents is another key consideration in virtual mediations. Since the mediation is being held virtually, any documents necessary to the mediation (the agreement to mediate, evidentiary documents, and a term sheet or settlement agreement) will need to be managed and circulated electronically. Online platforms (such as Zoom) offer screen sharing functions for review and sharing of documents during the mediation. To upload and save final documents, you should be prepared with a cloud sharing system or exchange via email, and to electronically sign documents you will need some type of electronic signature software. Your mediator might already have this software in place for the virtual mediation, but it is a good idea to think about the documents you intend to bring into the mediation and how you will bring them in virtually.

Many mediators are now offering the legal community virtual mediation sessions to help you and your clients find their resolution. Tough times challenge us to adapt and expand our capabilities. Virtual communication is a useful tool that may be implemented more frequently in the future. In these challenging times, we can do our part to keep our community safe and healthy by staying socially distanced, but still work together by embracing technology to give closure to client disputes through virtual mediated resolution.

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