COVID-19 & virtual mediation

Virtual mediation: what next for ADR after COVID-19, asks Professor Suzanne Rab

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IN BRIEF

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▶ Virtual mediation: a dispute resolution solution that does not revolve around physical meetings.

The outbreak of the coronavirus (COVID-19) pandemic continues to affect the legal profession alongside other major industries in unprecedented ways. Lockdowns and social distancing measures, have required court closures notwithstanding their progressive relaxation. This situation has shown that with more limited virtual alternatives, and in dealing with the accumulated backlogs creative solutions are needed. In order to deal with this novel situation, the profession's response is largely going to focus on leveraging tech-based solutions to keep the wheels of justice moving. Even before the pandemic, courts were using video conferencing technology to conduct hearings. While significant flexibility has been shown by both judges and litigants in participating in video-hearings, more radical shifts are required to manage the impact on both existing and pipeline cases. Furthermore, supply-chain issues, employment disputes and other commercial matters emerging from the pandemic itself will further burden the justice system in the coming weeks and months. It is therefore inevitable that the thrust towards increasing use of technology solutions will be accompanied by a shift towards more use of alternative forms of conflict resolution which can deliver results with agility and at reduced cost.

Mediation is an accepted effective method of dispute resolution and enjoys an 89% success rate (*https://www.cedr.com/foundation/mediation-audit/*). It relies on using a neutral third party through a series of joint and individual meetings with parties to seek to disrupt entrenched positions and reach settlements based on mutually converging interests. Face-to-face interaction is often key to mediation as a mediator uses non-verbal and body language cues from parties to guide and iterate their approach. Forms of online dispute resolution closely resembling the mediation process have existed in B2C settings through retail websites such as eBay for years. Telephone mediations have also been conducted for some time. However, until recently these methods have not fully or effectively captured the sophistication of a real-life mediation experience in a virtual setting. Online platforms like Zoom Video make this increasingly possible through high quality video and audio communications, as well as dynamic features allowing for both individual and plenary meetings.

While modern technology has the potential to make virtual mediation as accessible and effective as its real-life form, mediators and advisors need go the extra mile to familiarise themselves with necessary protocols and guarantee a smooth experience. The skills that they have honed in using more traditional forms of ADR in a physical environment will need to adapt as digitisation presents new opportunities. Understanding how the technology works and developing systems to draw users into the process is crucial. The pre-mediation approach must be geared towards ensuring that all parties are comfortable dealing in a new context. Security and confidentiality must be considered closely, given potential for novice users inadvertently revealing sensitive information which is shared wider than intended. The recent example of where the prime minister raised security concerns when he tweeted a picture of a virtual cabinet meeting but did not remove the meeting ID number is a sobering reminder of the risks (*https://bit.ly/2XBYGZJ*).

The following guidance can be used as a first-stage guide for advisors and mediators to manage the virtual mediation process.

Platform & equipment

Choosing the right video platform is a crucial judgement call. Two paramount concerns are functionality and confidentiality. Most leading video conference service providers such as Microsoft Teams, Adobe Connect, Zoom and Skype for Business are equipped with similar functionality. A mediation requires individual and plenary meetings with parties so a private breakout room function or its equivalent is key.

In terms of confidentially and security, the most important aspect to consider is end-to-end encryption of calls and data protection policies. Platforms should be compliant with GDPR requirements and those co-ordinating the mediation should be aware of what data is collected, for what purpose and how it is stored. It is advisable that IT specialists be consulted when vetting platforms from a security perspective.

Platforms should be rigorously tested in advance to ensure video and audio capability is not compromised by multiple participants and long duration calls. This is crucial given that mediations can last entire days or even several days. While most platforms are free to register and use for users, it is important to ensure that all required functionality is included in the basic package. There might be a need for the host to purchase a premium subscription for enhanced features.

Hardware and equipment requirements also tend to contain some uniform features across most software. Users should ensure that they have a strong, secure and private internet connection. The device (laptop, pc) should also be equipped with audio (speakers and microphones) and video capabilities. If such equipment is not built

into the device the user might have to use external resources like headphones and webcams. The chosen provider should have their unique equipment and operating system requirements which should be incarnated in a bespoke virtual mediation user guide manual prepared for the mediation session (see below).

Pre-mediation

Pre-mediation engagement between the mediator and parties is crucial in developing rapport and building confidence for the upcoming mediation. This is even more important in a virtual setting where all parties need to be confident not only with the mediator and the process but also the technology being used. In order to do this, it is best for the parties to experience for themselves how closely a face-to-face interaction can be achieved using the video conference software, as well as figure out any technical issues well in advance of the mediation. To achieve this, it is usually best to create a brief software user-guide for participants. On the back of this guide, those organising the session should set up individual pre-mediation sessions with parties to demonstrate the software as well as break the ice.

User guide

The user guide should be an easily accessible manual that introduces parties to the software and how it can be used. It should use text, screenshot images and even screencasts or links to videos to demonstrate how the technology is installed and used. The manual should be written in jargon-free language and walk parties through all in-call functionality that will be used such as breakout rooms, chat-boxes and reactions (for example, the use of emojis).

The manual should also include any troubleshooting options in case the technology fails or is interrupted. It is recommended to have a three-tier tech-support approach. The first tier should allow the parties to use the in-conference chat function to communicate any audio or video issues with the host. Novice users can often run into basic issues which the host should be able to resolve without much trouble. If a user is unable to communicate in the call due to a technical failure, an internal helpline with support staff at the mediation provider, law firm or chambers should be provided for further guidance. The third support tier should be with the software provider itself to deal with more complex issues. Advisors should check to see if the technology package includes around the clock technology support. More sophisticated platforms will also allow participants in the breakout rooms to signal a virtual need for help to

the mediator who can then join them in the breakout room.

Pre-mediation call

During the pre-mediation call advisors should ensure that the parties have read the user guides and familiarised themselves with the software. Establishing a suitable dress code in advance is important although what this will be will depend on the mediation. However, borrowing from a bricks and mortar mediation it may be appropriate to suggest to participants that the dress code is formal if the mediation is a commercial matter. Participants will also want to consider what their background will be to create the right tone for the occasion. While the individual décor of a participant's living room should not matter to the mediation this can be a distraction if it is not reasonably neutral. The user guide should have a section on customised backgrounds (if the platform allows) and parties should be reminded of this. Parties should be in a separate private room during the mediation and make a commitment not to interrupt the session with external phone calls and other distractions. This is especially relevant for parties operating from their homes but will be challenging while self-isolation measures remain stricter.

Parties might be nervous about the confidentiality and privacy of the proceedings. Mediators and advisors should assure the parties that breakout rooms will be used to hold private discussions throughout the mediation and that the normal mediation principle of confidentiality applies.

In the pre-mediation phase, advisors should also consider who will attend the mediation itself. This is key for all mediations but particularly important in the context of virtual mediations. All parties will have to be provided with access to the software and meeting. In the interest of avoiding any unforeseen issues, numbers should be kept at a minimum. All parties should have their key decision makers either present or easily available on the day by phone or email, as with a traditional mediation.

In the pre-mediation phase, mediators and advisors should also consider whether the mediation agreement needs to be amended to include software-related provisions such as confidentiality agreements prohibiting the sharing of the meeting ID, recording of sessions or taking of photos or images.

Document exchange

Document exchange should be carefully planned and considered. Timelines and processes for preparing and developing the mediation bundles should be decided. As it is likely that most documents will be

exchanged electronically, advisors may find it useful to set up a shared drive where all parties can deposit their bundles. If hard copies are to be exchanged then this should be in accordance with the agreed timetables.

The mediation

Once the appropriate steps in the pre-mediation phase have been taken, the actual mediation should be broadly similar to a face-to-face session. Using video-conferencing software the mediator can structure the virtual mediation just as they would one that is conducted in person. Making use of the breakout rooms and other tools allows for the same level of privacy and flexibility as would otherwise be available in a bricks and mortar setting. However, those participating should expect that the process will be more stressful than a physical mediation. Engaging with a screen for several hours and using what may be unfamiliar technology can be draining and add to tensions already inherent in the mediation itself.

If a settlement is achieved, the parties will want to use the pre-selected method to draft the agreement. Parties can use online solutions like DocuSign to sign and formalise the agreement in real-time.

Comment

With the required preparation, virtual mediation can be incredibly effective and used at scale to provide a dispute resolution solution that does not revolve around physical meetings. As such, it may mitigate some impact of the pandemic on the legal profession by allowing business to continue, albeit not in the usual ways. The pandemic itself has forced the court system to grapple with an increasing need for digitised solutions but these are being tested in a real-life experiment. Dealing with the current challenges on a sustainable basis post-pandemic will require significant innovation, flexibility and enterprise from lawyers. Virtual mediation may be the best bet in these circumstances not only on a private basis but through government schemes aimed at settling emerging disputes on an urgent basis. The mainstreaming of mediation further opens new career pathways for lawyers as virtual mediation training courses are introduced by firms.   NLJ

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