COVID-19: comparison of institutional arrangements and virtual services

by *Practical Law Arbitration*

Maintained • **Australia, China, England, France, Germany, Hong Kong - PRC, International, Malaysia, Singapore, Sweden, USA (National/Federal), Wales**

A comparative table of measures introduced by some of the key arbitral institutions in response to the 2019 novel coronavirus disease (COVID-19), along with their capabilities for filing documents online and virtual hearings.

The 2019 novel coronavirus disease (COVID-19) has had a huge impact on international arbitration across all jurisdictions. This comparative table (see *COVID-19: comparison of institutional arrangements and virtual services*) sets out measures introduced by some of the key arbitral institutions in response to COVID-19, along with their capabilities for filing documents online and virtual hearings. It also includes information on the measures that are in place at the offices of the institutions and whether meetings and hearings are allowed in person, as well as links to institutional guidance.

Arbitral institutions and centres have also collaborated in response to the pandemic. In April 2020, 13 institutions issued a joint statement expressing their commitment to work together in their response to COVID-19 (see *Arbitration and COVID-19*). In May 2020, three hearing centres in Canada, England and Singapore set up an alliance to provide "Global Hybrid Hearings" through a combination of physical and virtual methods, so that all participants can take part easily no matter where they are located (see *IDRC: Leading ADR-service rivals from England, Singapore, and Canada launch International Arbitration Centre Alliance*).

The comparative table sets out the measures in place at the following key institutions:

- American Arbitration Association / International Centre for Dispute Resolution (AAA/ICDR).
- Australian Centre for International Commercial Arbitration (ACICA).
- Asian International Arbitration Centre (AIAC).
- China International Economic and Trade Arbitration Commission (CIETAC).
- Hong Kong International Arbitration Centre (HKIAC).
- International Chamber of Commerce (ICC).
- International Centre for the Settlement of Investment Disputes (ICSID).
- London Court of International Arbitration (LCIA).
- Singapore International Arbitration Centre (SIAC).

- Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

See *COVID-19: comparison of institutional arrangements and virtual services*.

How to Prepare a Client for Mediation

by Practical Law Litigation

Maintained • USA (National/Federal)

A Practice Note explaining issues for counsel to consider when preparing a client to participate in a mediation session. This Note describes factors that may affect counsel's approach to client preparation, such as the procedural posture of the dispute, voluntary versus mandatory mediation, the appropriate client representative to participate, and the involvement of third parties in the dispute. It also explains mediation issues counsel should discuss with the client, including the general mediation process, confidentiality, and a framework for analyzing substantive issues.

Mediation is a form of **alternative dispute resolution** (ADR) where a neutral third party helps the parties work toward a negotiated settlement of their dispute. Parties usually meet with their counsel before the mediation occurs to discuss key issues and develop their approach. This Practice Note outlines key considerations for counsel when preparing a client to participate in a mediation, including factors that may affect counsel's approach to the client's preparation, and explains issues counsel should discuss with the client before the mediation occurs.

For information on mediation generally, see Practice Note, Complex US Mediation: Key Issues and Considerations. For information on ADR in the US generally, see Practice Note, ADR Mechanisms in the US: Overview.

Issues That May Affect Client Preparation

Counsel preparing a client for a mediation session should consider and discuss with the client certain nonsubstantive, procedural issues that may have an impact on the mediation and therefore on the client's preparation.

Procedural Posture of the Dispute

The procedural posture of the parties' dispute may affect the nature of the mediation. Parties mediate for various reasons, such as:

- They decide mediation is preferable to starting or continuing a lawsuit or arbitration.
- Their contract requires mediation before a party may start a lawsuit or arbitration proceedings (see Practice Note, Hybrid, multi-tiered and carve-out dispute resolution clauses).
- A court orders or a local rule requires the parties to mediate an existing lawsuit (see, for example, Practice Note, Court-Annexed Mediation in the Federal District Courts in New York).

Before Litigation or Arbitration

When a mediation occurs in an early stage of dispute, before the start of any litigation or arbitration, each party may have only a limited understanding of the other party's position. The parties or their counsel may have communicated to each other little more than their respective baseline positions by, for example:

- Participating in phone calls.
- Exchanging letters or emails and perhaps providing to each other a few documents supporting their respective positions.

In this situation, each party has an incomplete picture of the dispute when preparing for the mediation. Where the client is an entity, the client representative may not know all the relevant internal facts supporting or undermining the client's position. Counsel preparing a client for mediation at this stage serves to some extent as a fact finder. In this situation, counsel should:

- Ensure the client or its representative comes to the preparation session and then the mediation armed with as much information as possible, even if doing so requires the presence of several individuals (see Choosing the Best Client Representative).
- Gather background on the dispute from the client's perspective, to:
  - develop the factual and legal support for the client's position; and
  - identify, address, and resolve any inconsistencies in the client's position.
- Identify the client's best-case and worst-case scenarios for both:
  - the outcome of any lawsuit or arbitration; and
  - deal points.
- Assist the client in developing and explaining the client's objectives in the mediation.

During Litigation or Arbitration

When a mediation occurs during ongoing litigation or arbitration proceedings, the parties often have a deeper understanding of the dispute and have developed the factual record and legal arguments more fully. Counsel preparing a client for a mediation at this later stage of a dispute serves less as a fact finder and more as a sounding board and framer of issues. Counsel in this situation should:

- Review with the client:
    - the objectives for the mediation; and
    - the client's best case and worse case litigation outcomes and deal points.
- Help the client shape its presentation, especially if the client representative may be a witness in the proceedings. The mediation session may:
    - provide an opportunity to showcase for the other party a preview of the client's powerful testimony; or
    - if the client is not well prepared, expose the weaknesses of the client's testimony.

Even if litigation is underway, the parties may still have a limited understanding of the legal and factual issues. The parties may not have completed discovery or there may be a pending motion to dismiss. Counsel in this situation should review with the client, among other things:

- How much discovery the parties have completed.
- Whether discovery will continue while the parties pursue mediation.
- The chances of success on any pending dispositive motion.

Voluntary Versus Mandatory Mediation

The parties' willingness to engage in meaningful negotiation during a mediation may depend in part on whether they are participating voluntarily. For example, where mediation is mandatory because a court orders it or a pre-dispute mediation agreement requires it, one or more parties initially may not be willing to engage fully with the mediation process. Instead, they may:

- View the process as a waste of time.
- Be reluctant to speak candidly with the mediator.
- Reject or be suspicious of any good faith gestures by the other party.
- Approach the process with a closed mind and entrenched position.

Counsel preparing a client for a mediation in this situation may face the client's resistance to the entire process, including preparation. Counsel may need to spend time explaining the importance of participating in the mediation and the risk of not cooperating. Counsel in this position may find it helpful to explain the potential benefits of mediation even when a party is initially resistant, such as the possibility that:

- By hearing the other party's presentation, the client may receive:
    - informal discovery;
    - a preview of the opponent's legal argument; and
    - a sneak peek at the strength of a likely witness's testimony.
- The client may get a concession or proposal from the other side that may lead to a resolution.

Conversely, where the parties mutually and voluntarily agree to attempt a resolution of their dispute through mediation, each party may approach the process with a more open mind and a belief in the other side's willingness to negotiate in good faith. Counsel preparing a client for a mediation in this situation may focus less on overcoming the client's resistance to being there and more on developing substantive points to reach a negotiated deal.

Choosing the Best Client Representative

Many disputes need only one individual to serve as the client representative during a mediation, but complex cases may require several individuals. No matter how many client representatives are appropriate, counsel preparing a client for mediation must ensure the best client representatives participate. The factors for choosing the best client representative depend on the nature of the dispute, the stage of the proceedings, and the makeup of the client.

In a two-party dispute between individuals, typically the only possible client participants are the individuals themselves. In more complex mediations, however, counsel should work with the client as soon as the possibility of mediation arises to identify the best individuals to achieve the client's objectives.

Generally, the best client representative is an individual:

- With a good understanding of:
    - the facts surrounding the dispute;
    - the client's needs and objectives; and
    - the adversary's needs and objectives, if possible.
- With decision-making authority.

- Who, if the adversary has identified its representative:
    - knows the adversary's representative;
    - has a cordial relationship with the adversary's representative; and
    - is an individual the adversary's representative respects.
- Who is a skilled negotiator.

In working with the client to identify the best client representative for the mediation, counsel should:

- Identify the pool of potential candidates who satisfy the criteria for best representatives.
- Decide whether there should be more than one client representative because, for example:
    - the relevant facts involve several discrete areas of the business and there is no single individual who has knowledge of all the facts;
    - the person with decision-making authority does not know most of the relevant facts; or
    - a negotiated settlement may impact discrete business areas of the company, so different company leadership and executives should be involved with the negotiations.

Preparing for the Mediation Session

The preparation for any mediation depends on:

- The nature and stage of the dispute.
- The needs and objectives of the client.

Specific preparation points vary, but counsel should address certain baseline issues in any mediation preparation session.

Explaining the Mediation Process

Where the client representative is inexperienced in mediation, counsel should explain the process so the client representative:

- Knows what to expect in the mediation room.

- Is comfortable in the mediation setting and may focus on the issues.

Mediations usually occur in a conference room, but not always. Virtual mediations are increasingly popular, especially when in-person sessions are not possible due to restrictions on public gatherings. For information about virtual mediations, see Practice Note, Virtual Mediation: Key Issues and Considerations.

When the mediation is in-person, common locations for a mediation are:

- At the offices of a party or its lawyer.
- On neutral ground, such as:
    - the courthouse;
    - the mediator's office; or
    - the offices of an ADR forum, such as the **American Arbitration Association**.

Mediators usually have a fair understanding of the disputes before the mediation starts, having frequently asked counsel to submit briefs before the mediation occurs. After reviewing the parties' mediation briefs, mediators sometimes have a pre-mediation phone call with each party's counsel to discuss its client's position.

Mediation Stages

The mediation may begin with the mediator holding a joint session with all the parties together. In this joint session, the mediator:

- Usually explains the process.
- Addresses any logistical issues.
- May invite the parties or their representatives to state their respective positions.

The structure of the mediation may depend on the number of parties and nature of the dispute. Most mediations have the parties in separate rooms at some point and involve a series of caucuses, which are private sessions between each party, its counsel, and the mediator. The mediator typically walks back and forth between the parties' rooms to caucus with each side. During a caucus:

- The party explains to the mediator:
    - the issues it views as important;
    - its position on each issue;
    - the deal points it must have; and

    - the deal points it cannot give.

- The mediator asks questions to:
    - probe for factual or legal weaknesses in the party's position; and
    - explore ideas the party may not have considered.

One of the goals of private caucuses with the mediator is to formulate the party's next demand, offer, or counter for the mediator to convey to the opposing party.

For more information about the stages of a mediation, see Stages of a mediation Checklist. For more information on caucuses, see Practice Note, Complex US Mediation: Key Issues and Considerations: Private Caucuses.

Candor with the Mediator

Counsel should discuss with the client whether it is in the client's interest to be completely candid with the mediator about the client's bottom line. Candor with the mediator may assist the mediator's efforts for resolving the dispute. However, the client may want to hold back information if, for example, the client is reluctant to disclose its bottom line too early and wishes to remain flexible as the negotiation progresses.

Mediator Tools

Counsel should also explain to the client the kinds of tools the mediator may use to help the client consider alternatives and move its position. These tools include:

- Brackets. Where the parties appear far apart and unwilling to move, the mediator may suggest bracketing the parties' respective positions. For example, where one party demands $1 million and the other party refuses to pay more than $100,000, the mediator may try bracketing the difference by asking the first party if it would be willing to reduce its demand to $750,000 if the mediator can persuade the other party to increase its offer to $250,000. Bracketing permits the mediator to generate conciliatory movement by each party and determine whether there is any hope for reaching a negotiated resolution.

- Next-to-last offer. The mediator may use this tool when the mediation session lasts for an extended period and the mediator thinks the parties may be nearing an impasse. This situation usually arises where the parties make relatively insignificant concessions during the back and forth. Instead of continuing the mediation at a glacial pace or declaring an impasse, the mediator asks each party for its next-to-last offer, meaning that each party puts on the table an offer that is nearly final. This tactic allows the mediator to evaluate whether there is any chance the dispute will settle or whether, instead, the parties are too far apart for the mediator to bridge the gap.

- Consideration of:

- the client's best alternative to a negotiated settlement, known by the acronym BATNA, which helps the client weigh the benefits of settling on less desirable terms against the benefits of not settling at all; and
- the client's worst alternative to a negotiated settlement, or WATNA, which helps the client weigh the downside of settling on less desirable terms against the downside of not settling at all.

Effective mediators structure the mediation to include a series of conversations that ascend to a climax, sometimes referred to as an apex conversation, when a principal participant in the mediation, usually a client, begins to consider serious settlement options that the participant had not considered before (see Article, Using Mediation Better: Understanding the Apex Conversation).

Confidentiality

The confidentiality of mediation discussions can affect the client's willingness to engage fully in the mediation process. Counsel should discuss with the client the confidentiality parameters of the mediation.

Discussions with the Mediator

A mediator's effectiveness depends in part on the mediator's trustworthiness. An effective mediator inspires the parties to be as candid as possible during private caucuses with the mediator. Therefore, mediators routinely maintain the confidentiality of any information a party discloses to the mediator in private caucus. Counsel preparing its client for a mediation should:

- Inform the client of this practice.
- Instruct the client that, if there are any points the client wants the mediator to communicate to the other party, the client should direct the mediator to communicate it.

Discussions with Other Parties

In most jurisdictions and private mediations under institutional mediation rules, the parties' discussions with each other in a mediation are subject to a **mediation privilege**. Although the precise contours of the mediation privilege may vary by jurisdiction, the privilege generally prohibits discovery or admission at trial of the statements a party makes during a mediation (Federal Rules of Evidence (FRE) 408).

Parties to a mediation also often enter into a mediation confidentiality agreement that memorializes each party's obligation to:

- Maintain the confidentiality of any information a party discloses in the mediation.
- Refrain from:
  - disclosing any information the party learns in the mediation; and
  - using at trial any information the party learns in the mediation.

For more information on the mediation privilege, see Practice Note, Mediation: US Privilege and Work Product Issues.

Counsel should caution the client, however, that there may still be risks in conveying information to the other party during a mediation session, especially if the parties have not completed discovery. For example, the other party may be able to serve discovery requests to follow up on information that emerges during mediation, unless the parties agree to a mediation confidentiality agreement that specifically prohibits discovery requests based on information conveyed during the mediation.

Framework for Considering Substantive Issues

In preparing a client for mediation, counsel should discuss with the client a framework for considering the substantive issues in the case. If the dispute is at an early stage and no party has started a lawsuit, the discussion about framing the issues may be part of a general discussion between counsel and its client about what the client hopes to achieve. If the mediation occurs at a later stage in the dispute, after the parties have formed a litigation strategy and begun developing a record, the discussion between counsel and the client may focus more specifically on the best way to present legal and factual points in support of substantive issues.

Counsel should consider framing this discussion based on the client's bottom line positions, such as what the client believes to be:

- The "must haves," which are the indispensable deal points for the client, without which the client cannot settle the dispute.
- The "cannot gives," which are the deal points the client cannot concede to the adversary under any circumstances.

Most deal points fall somewhere between must haves and cannot gives, representing points on which the client may have a preference but can afford to be somewhat flexible. By working with the client to identify the client's must haves and cannot gives, counsel may help the client:

- Understand its BATNA and WATNA.
- Be prepared to discuss the BATNA and WATNA with the mediator, as a tool for helping the client consider potential deal points from a different perspective.

(See Mediator Tools.)

Remote Participation in Virtual Conferences, Hearings, and Oral Arguments

by Practical Law Litigation

Maintained • USA (National/Federal)

A Practice Note explaining key issues and considerations for counsel participating remotely in virtual civil judicial conferences, hearings, and oral arguments. This Note offers guidance on participating remotely in telephone and videoconference status conferences, evidentiary and non-evidentiary hearings, and oral arguments, including virtually handling exhibits and examining witnesses.

Due to the ongoing 2019 novel coronavirus disease (COVID-19) outbreak, many courts suspended or modified their rules and procedures to accommodate remote hearings. For the latest developments in all US federal district and appellate courts and select state courts (including court closures, trial continuances, deadline extensions, changes in filing procedures, and remote procedures), see Federal Courts Update: Impact of COVID-19 and Select State Courts Update: Impact of COVID-19.

Remote participation in virtual civil judicial conferences and hearings (including telephone and video status conferences, non-evidentiary and evidentiary hearings, and oral arguments) is an alternative and sometimes preferred method to accessing the courts in person. Virtual proceedings, however, can present challenges to counsel's ability to advocate effectively for their clients

(for example, reducing nonverbal communications and frustrating orderly arguments and witness examinations). As a result, counsel must understand the skills necessary to participate remotely in virtual proceedings. This Note provides an overview of key considerations and best practices for remotely participating in a virtual conference, hearing, and oral argument.

Applicable Rules and Orders

Many courts and judges have standing rules, orders, and guidelines that govern virtual proceedings in the normal course. Others have issued temporary rules, orders, and guidelines in response to emergency limitations on public access to the courts. Many of these authorities alter typical or existing procedures and practices. For example, in response to the 2019 novel coronavirus disease (COVID-19) some courts have allowed:

- Remote appellate proceedings (US Court of Appeals for the Second Circuit, March 16, 2020 Announcement re Operations at the Second Circuit to Address COVID-19 Pandemic; Supreme Court of California Order Suspending In-Person Oral Argument and Setting All Argument Sessions at the Court's San Francisco Headquarters).
- The remote administration of oaths to witnesses (Florida Supreme Court, Administrative Order re COVID-19 Emergency Procedures for the Administering of Oaths via Remote Audio-Video Communication Equipment).
- Remote pretrial conferences and hearings (US District Court for the District of New Jersey Standing Order 20-2; Pennsylvania Supreme Court Order re General Statewide Judicial Emergency).

For a continuously updated collection of COVID-19-related orders in federal appellate and district courts and select state courts, see:

- Federal Courts Update: Impact of COVID-19.
- Select State Courts Update: Impact of COVID-19.

Before preparing for a virtual proceeding, counsel should check the relevant court's and judge's website for any orders and guidance applicable to the virtual proceeding. Counsel should also review any case-specific orders, stipulations, and agreements that apply to the virtual proceeding.

Logistics of Virtual Proceedings

Counsel must determine in advance whether the court is holding the virtual proceeding telephonically or by a web-based videoconference. Counsel then should determine:

- The dial-in number, for a teleconference.
- The technology platform, for a videoconference (for example, Skype for Business, Zoom, or Cisco WebEx).
- The meeting code or ID, any participant code, and, for videoconferences, the web address.

- Any security code.
- The backup contact information to use if a technological issue arises (for example, a telephone dial-in number to join a videoconference by audio).
- Whether any participants are appearing in person rather than remotely.
- Whether the court intends to record or transcribe the proceeding and, if so, how.
- That counsel and any other participant on their client's behalf have access to a strong network connection (with wired connections preferred) to access the proceeding.

Many courts issue guidance on the technical aspects of accessing the various technologies used for virtual proceedings. For example:

- The State of New York Unified Court System issued a Joining Skype for Business Meeting guide.
- The State of Texas Judicial Branch has a webpage entitled Electronic Hearings with Zoom.
- The Massachusetts Appeals Court issued a Guide on the Use of Zoom Conference for Oral Argument sessions.
- The US District Court for the Western District of Washington posted on its website a downloadable Connecting to WebEx Court Hearing guide.

General Considerations for Virtual Proceedings

Counsel participating in any type of virtual proceeding (including telephone and video status conferences, oral arguments, and evidentiary and non-evidentiary hearings) should:

- **Maintain formality and courtroom decorum.** Despite the remote (and possibly informal) location of the judge and participants, a virtual proceeding is still an official judicial proceeding. Counsel should maintain the same formalities and decorum as if they were physically present in court.
- **Increase preparation and focus.** Counsel should approach the virtual proceeding with a heightened level of preparation, organization, and focus. Proper preparation can make up for the unconventional hearing logistics and the absence of the benefits of in-person proceedings (for example, assistance of a colleague or co-counsel at counsel's table or the ability to read and use non-verbal communication).
- **Observe professional courtesies.** Virtual proceedings are not the norm in many courts and may be unfamiliar to the participants. Counsel should increase efforts to observe professional courtesies to build goodwill with the court and allow the proceeding to run smoothly. For example, participants should display patience and allow others the time to engage and take turns speaking without talking over one another.

- **Eliminate any potential background noise.** To avoid distractions in the virtual proceeding, counsel should mute all devices when not speaking and, where possible, participate in the proceeding in a location free from potential distraction and noise.

- **Direct participants when viewing materials.** When viewing materials during a virtual proceeding (for example, an exhibit or demonstrative), counsel should instruct participants on how to locate and view the materials and focus their attention on specific information within the materials (for example, directing participants to a document by its title, date, and page number and to a specific sentence or paragraph number). After instructing the participants, counsel should confirm that all participants are viewing the same material.

- **Consider submitting proposed orders, findings of fact, and conclusions of law.** When permitted, the submission of a proposed document setting out a party's requested relief frames the dispute for the court and may mitigate potential confusion and ambiguity caused by the nature of the virtual proceeding.

- **Connect and appear early.** Counsel and any other participant on their client's behalf should connect to the virtual proceeding before the proceeding's start (for example, ten to 15 minutes before) to confirm connectivity and address any other pre-hearing technical issues.

Considerations for Teleconferences

Courts frequently use teleconferences for status conferences, simple non-evidentiary hearings, and appellate oral arguments (see Status Conferences and Simple Non-Evidentiary Hearings and Appellate Oral Arguments). Counsel participating in a teleconference proceeding should consider:

- **Engaging in a roll call of all participants.** Courts often begin with court officials introducing themselves followed by counsel and the parties in the order set out in the case caption.

- **Identifying themselves each time they speak.** Identifying speakers assists the court reporter or other recording method to keep an accurate, usable record and helps participants identify the speaker. This also helps prevent participants from speaking over one another.

- **Keeping the presentation focused.** Counsel should:
    - state at the outset in clear and simple terms their desired outcome (for example, to depose a certain witness);
    - provide a roadmap to the presentation to keep the court's attention (for example, identifying the three main reasons supporting relief);
    - anchor the presentation by referencing back to the roadmap (for example, identifying which issue in the roadmap counsel intends to discuss); and
    - minimize references to written materials that may distract the judge from the presentation (for example, referencing an exhibit which the judge then must locate).

- **Speaking purposefully.** Without the benefit of visual cues and nonverbal communication, counsel should speak slowly and clearly and pause frequently. These measures:
    - make for a more effective telephonic presentation;
    - reduce the likelihood of participants talking at the same time; and
    - create opportunities for the judge to interject and ask questions.

- **Relying on documents and prepared remarks.** Counsel can use outlines and other materials to ensure that they focus their presentation and address all critical points without risking appearing distracted. However, just as with conventional appellate oral arguments, counsel should not read from written materials in a virtual appellate oral argument (see Appellate Oral Arguments).

Considerations for Videoconferences

Courts frequently use videoconferences for complex and evidentiary hearings (for example, a hearing on a dispositive or ***Daubert motion***) and appellate oral arguments (see Complex and Evidentiary Hearings and Appellate Oral Arguments).

Counsel participating in a videoconference proceeding should consider:

- **Wearing professional clothing.** Counsel should wear the same clothing they would wear in court.
- **Using a simple background.** Counsel should avoid:
    - complex patterned and cluttered backgrounds, which make focusing and concentrating on the speaker difficult; and
    - virtual backgrounds provided by many platforms, which can obscure a speaker's image when the speaker moves.

- **Identifying themselves in the videoconference platform.** Proper identification in the videoconference platform ensures that counsel's name and representative status or case information displays on the screen (for example, "D – Jane Doe," "Jane Doe, Counsel for Defendant," "Jane Doe, Counsel for ABC Corp," or "[DOCKET NUMBER]-Jane Doe").
- **Being mindful of lighting.** Counsel should position a light source in front of them to appear bright and focused on the screen. Backlighting forces cameras to adjust to the brightness behind the speaker, causing the speaker to appear in shadow.
- **Positioning the camera properly.** The camera should be at eye level and counsel's lower shoulders and head should fully appear in the screen if possible.

- **Presenting to the camera.** Eye contact establishes a connection with listeners and keeps them engaged. Counsel should mainly look into the camera when speaking and periodically at the computer screen to observe the judge or a witness during an examination.

- **Speaking clearly and slowly.** Counsel should speak in a measured manner to:
    - improve the clarity and comprehension of the presentation:
    - provide opportunities for the judge to interject and ask questions; and
    - allow for the time delay many computer microphones have in picking up the speaker's voice so that participants do not talk over one another.

- **Testing and practicing with the videoconference platform, equipment, and other technology.** Counsel should test and practice with their equipment and other technology to ensure that they work and counsel are familiar with their operation. When testing, counsel should learn how turn off all audio and visual computer notifications to avoid distractions during the proceeding.

Status Conferences and Simple Non-Evidentiary Hearings

Courts often hold virtual status conferences and simple non-evidentiary hearings by teleconference. This is because these proceedings typically are short, involve routine or a small number of disputed issues, and do not require the presentation of many documents or the examination of witnesses.

Counsel should observe the following best practices before participating in a virtual status conference or non-evidentiary hearing:

- Ensure any written materials submitted are simple, brief, and identify only the crucial issues and desired outcome. Teleconference hearings typically are short and courts prefer triaging issues and disputes in advance to make the most of the audio-only presentation.

- Confer with opposing counsel to narrow any disputes and resolve as many issues as possible. If counsel narrows any issues or reaches any agreements, counsel should notify the court so that it can adjust its time, preparation, and resources accordingly.

- Formally request a court reporter or other method of recording the proceeding, if appropriate.

Complex and Evidentiary Hearings

Courts often hold virtual complex non-evidentiary and evidentiary hearings by videoconference. This is because these hearings typically involve complex issues, numerous documents, or the examination of witnesses. Counsel's effectiveness at these hearings is often impaired by inadequate preparation, ad hoc practices and procedures, and leaving tactical decisions to the time of the hearing.

As a result, counsel must consider the following issues and when appropriate confer about them with opposing counsel and the court, before participating in a virtual complex or evidentiary hearing:

- Technology.
- Time limitations.
- Exhibits.
- Witnesses.
- Objections.
- Practice.

Counsel should document any agreement on conducting the virtual proceeding (for example, agreeing to virtually sequester witnesses) and, if appropriate, file the document with the court as a proposed order or stipulation before the proceeding.

Technology

In the rare instance when the court does not mandate or provide the videoconference platform for the virtual proceeding, counsel should agree on which platform to use. In all cases, counsel should address the following technology-related issues to the extent not addressed by the court:

- **Participant control.** Most videoconference platforms have participant control functions where a host or moderator controls access to the proceeding (for example, a waiting room for witnesses and muting function). Participants should understand whether a party or the court controls participation in the proceeding and when and how they exercise that control.
- **Non-participant access.** Participants should consider whether, how, and when to provide secure viewing-only access to clients, non-participating interested parties, and the public (for example, private or public stream on YouTube Live).
- **Party and witness communication.** Participants should consider the extent to which they may (if at all) use private communication methods (for example, private chats, breakout rooms, text, or email or other messaging services) to confer with clients, witnesses, or co-counsel during the proceeding. Counsel should also consider whether the host or moderator (typically the court) records the communications. Regarding evidentiary hearings, counsel should agree to not communicate with their witnesses during the duration of the witness's examination (see Witnesses).
- **Screen share functions.** Participants should understand whether and how they can share their screen or annotate materials shared on a screen. For example, participants often agree that no participant can share or annotate a document without the permission of the court or the party introducing the exhibit (see Exhibits).
- **Technology waivers.** Counsel should address whether technological malfunctions or user-errors waive or prejudice a party's privilege or right and, if so, to what extent (for example, if an attorney and client mistakenly communicate

privileged information because of improper use of a private chat room or if a network disruption interrupts a witness cross-examination).

Time Limitations

Counsel should consider agreeing to time limits for argument and any witness examination. For example:

- Regarding oral argument, limiting each side to ten minutes, with the movant receiving a five-minute rebuttal period.
- Regarding witness examinations, allowing for a set amount of time for direct, cross-, and re-direct examination, if any.

Exhibits

When preparing and submitting exhibits in a virtual hearing, whether related to motion practice or witness examination, counsel should:

- Agree to use electronic exhibits or hard copy exhibits, or both. Regarding electronic exhibits, counsel also should agree on the file format (for example, **PDF**).
- Agree to a naming protocol for electronic exhibits that helps participants identify and manage the exhibits. For example, counsel often use descriptive file names that include:
    - a party identification;
    - the date of the hearing or title of the related motion or opposition; and
    - the proposed or agreed exhibit number.
- When possible, agree on the admissibility of any exhibits used during the proceeding and, for those exhibits not agreed on, the grounds for objecting to their admissibility. Counsel often use a different identification protocol for agreed on exhibits and contested exhibits. For example, counsel mark agreed on exhibits with a number and mark contested exhibits with a letter.

For more information about formatting exhibits and the admissibility and exclusion of evidence in federal civil litigation, see Practice Notes, General Formatting Rules in Federal District Court: Exhibits and Evidence in Federal Court: Overview and Standard Document, Evidentiary Stipulation and Proposed Order.

When handling exhibits during a virtual proceeding, counsel should agree on a single method to the extent not addressed by the court. Counsel typically use:

- **Screen sharing.** Most videoconference platforms allow participants to share their screen in which the exhibit is visible so that all participants can view a shared exhibit. Counsel typically organize their exhibits in an easily located folder on

their computer. The court and counsel ordinarily agree on who controls the presentation of exhibits. For example, some courts:

- order all parties to file or email their exhibits to the court or upload their exhibits to a secure cloud-based file sharing website so that the court can control the manner of the exhibits' offering, introduction, and admission; or

- permit parties to control their own introduction and handling of exhibits (for example, focusing the screen share on highlighted language in a document). Counsel should close any unnecessary windows, screens, and computer applications to avoid mistakenly sharing the wrong screen. Courts typically order the parties to file all exhibits used or offered.

- **Third-party software.** Numerous technologies and videoconference platforms can help counsel manage exhibits in virtual proceedings. These technologies and platforms typically control the storing, marking, handling, sharing, viewing, annotating, and organizing of exhibits. Counsel use this method most often with hearings involving numerous exhibits.

- **Hard copies or emailed copies.** Counsel occasionally use hard copies or emailed copies of exhibits distributed before the proceeding, particularly when there is a minimal number of exhibits and there is no concern that another party or witness may obtain advance knowledge of the scope of questioning by previewing the exhibits. Otherwise, counsel use these methods as a backup in case technology issues prevent the parties or court from sharing or accessing exhibits. To address concerns of advance knowledge, counsel can:

  - regarding hard copies, provide the exhibits in a sealed package for the participant to open on camera during the proceeding; or

  - regarding emailed copies, password protect the files and provide the password during the proceeding.

Participants should consider using multiple screens or a large format monitor when a proceeding involves numerous exhibits. Multiple screens and large format monitors allow a participant to view the other participants and an exhibit simultaneously.

Witnesses

In a virtual proceeding that involves witness testimony, counsel should:

- Ensure that their witness has appropriate technological capabilities to fully participate in the proceeding (for example, computer, monitor, webcam, and strong network).

- Place as much of their witness in view of the camera as possible. The witness's face and torso should appear in camera so the court can view any nonverbal communication and consider the witness's credibility (for example, body movement and eye contact).

- Instruct the witness on best practices for appearing in a virtual proceeding, including not using a virtual background (see Considerations for Videoconferences).

- Consider introducing their witness's direct examination by affidavit to reduce the potential for technical difficulties.

- Consider agreeing to virtually sequester all witnesses to maintain the integrity of testimony (for example, keeping a witness in a videoconference platform's waiting room or breakout room).

- Propose language for the judge to admonish witnesses against:
    - unauthorized communications during their testimony (for example, communications with any individual, including their own counsel, not approved by the court);
    - using a virtual background; and
    - reviewing any materials during their examination other than those shown by an examining party or the court.

- Question the witness on the record before each examination about:
    - who is physically in the room with them;
    - what materials and devices they have with them;
    - what currently is on their screen or screens; and
    - whether they viewed or listened to the proceeding.

For more information on examining witnesses, see Practice Notes, Preparing a Witness to Testify at Trial (Federal) and Cross-Examining a Witness at Trial (Federal).

Objections

Counsel should consider a protocol for handling evidentiary objections to minimize participants interrupting witnesses or speaking over one another, particularly when there is audio or video latency (see Considerations for Videoconferences). For example, counsel can agree to either:

- Waive any argument to the timeliness of objections and save all objections until the end of a witness's testimony or counsel's presentation.

- Proceed with real-time, nonspeaking objections that begin with a visual cue (for example, a raised hand) or a verbal introduction (for example, "[PARTY] would like to object]").

For more information about the admissibility and exclusion of evidence in federal civil litigation, see Practice Note, Evidence in Federal Court: Overview and Admissibility of Evidence in Federal Court Flowchart.

Practice

Counsel and participants should practice before the proceeding. This often involves conducting a mock argument or examination, rehearsing the handling of exhibits, and running through using a private communication method (see Witnesses, Exhibits, and Technology). A participant's poor network strength, insufficient hardware or software, and lack of experience with the technology and virtual process can cause unnecessary delay and potentially affect the outcome of the proceeding. Counsel can overcome these deficits with experience, advance knowledge, and planning.

Appellate Oral Arguments

Appellate courts hold virtual oral arguments by teleconference and videoconference. Although many of the considerations and best practices relevant to teleconferences and videoconferences are equally applicable to appellate oral arguments, counsel should pay particularly attention to issues relating to:

- Preparation.
- Time limits.
- Presentation.

For more information about appellate arguments, see Articles, Effective Appellate Advocacy and Expert Q&A on Best Practices and Potential Pitfalls in Oral Argument; Massachusetts Appeals: Appeals Court Oral Argument Checklist; and Standard Document, Appellate Oral Argument Outline.

Preparation

Counsel should prepare with at least the same focus as for an in-person oral argument. Counsel should also understand that, depending on the appellate judges' experience with virtual oral arguments, there may be limited questioning and that counsel may have little or no opportunity for nonverbal communication.

To ensure an effective presentation during a virtual oral argument, counsel should:

- Listen or view previous virtual oral arguments (in addition to in-person oral arguments) before their appellate court that, if possible, include their assigned appellate judges. Many appellate courts routinely make audio and video recordings of their oral arguments available on their websites. From these recordings, counsel can learn:
    - any particularized protocols of the appellate court. For example, some appellate courts ask counsel to pause at specific times in the argument to allow for questions by the appellate judges in order of the judges' seniority;
    - each assigned appellate judge's approach to virtual oral arguments; and
    - the appellate judges' voices. In telephonic oral arguments in which the appellate judges do not identify themselves when speaking, counsel must learn each appellate judge's voice to understand which judge is asking the question.
- Include in their oral argument outline:

    - a roadmap for each major point or issue; and
    - verbal cues and signals to stress important points in their roadmap and to solicit questions (see Considerations for Teleconferences).

- Consider a method of communicating in writing (for example, by text or an online, private chat) with co-counsel or colleagues during the oral argument (particularly if they can view or listen in real-time). Counsel should silence any notification or alerts for any communications. However, counsel should reconsider outside communications when presenting in a videoconference so that they do not appear distracted on screen.
- Ensure that they can argue and listen in a quiet place without distractions. Without the ability to read body language and confirm an appellate judge's understanding or attention, counsel must ensure that their verbal communication is clear and unimpeded. For the same reasons, counsel must carefully listen to an appellate judge's question, as tone, pace, and timing may inform how counsel answers.

Time Limits

Appellate courts continue to enforce time limitations in virtual oral arguments to varying degrees. Without the advantage of an appellate courtroom's light or timing system, counsel must have within their view a silent timing device that is easy to read (for example, the stopwatch feature on a mobile phone) to manage their allotted time. This is the case even if the appellate court provides time prompts verbally or visually (for example, by a clerk holding up to the camera a sign or timing device, or both, indicating the time remaining in an argument).

Presentation

Virtual appellate oral arguments can pose challenges to the ability of appellate judges to ask timely questions. As a result, it is crucial that counsel speak clearly and slowly and frequently pause between points to provide an opportunity for an appellate judge to interject and ask questions. During these pauses, counsel often ask the appellate judges if they have any questions.

JULY 28, 2020

Surviving a virtual arbitration: it's all about the preparation (and the wallpaper)

- by **David Pliener**
- Barristerat Hardwicke

It began with the wallpaper, or, rather, trying to find a camera angle that didn't feature our feature wall. When that failed (the only other spot providing a clear view of our staircase where my non-A level studying son was likely to emerge at any point post 1.00 pm wearing very little), I then realised that I had to "curate the bookcase". Should I try to balance up the politics books? What does a section on magic realism suggest about the merits of our case? Where do I put all the Leeds United books? These were not questions I ever anticipated having to address as part of my professional life. Yes, I know I could use a virtual background, but I find them distracting, especially when, like me, you wear glasses, and the real world seems to peak out through the corners.

Welcome, then, to the preparations for my recent six-day *virtual arbitration*. As I'll explain, there was still the legal stuff to deal with, on top of some IT challenges, but, once the wallpaper and bookcase were taken care of, it was all largely manageable.

There's been a lot written and discussed online about the challenges and differences between live and virtual hearings. I want to explore some of them, but my overarching message is that with good preparation, a reliable broadband connection, and an understanding tribunal, the experience is overwhelmingly familiar. Indeed, in some regards I found it easier and more effective.

But first, the challenges. It is mainly a question of preparation.

I had run a courtroom trial with an electronic bundle before, so I was familiar with working my way through a virtual pack of documents. One aspect I had not anticipated was the impact of updated bundles in the run-up to the hearing. With a hard copy bundle, you can just slot in late documents. However, the claimants kept updating the bundle by issuing a new virtual bundle on each occasion. That works fine, but is not much help if, like me, you had been dutifully marking up the previous virtual bundle. It is important to agree a process in advance which would avoid this problem.

Next, the IT. We are most of us now the masters of our own home-based mini-IT complex, replete with 17 screens, auto-focus webcam, headphones and high spec mic. You might not need all of that kit for the hearing, but I can't see how the advocate could cope without at least one screen for the hearing and one screen for the electronic bundle.

The next most important IT element is to set up the communications link with your team. This requires some thought and, for those among us with a "Reply all" tendency, a little care. In order to try and avoid the wrong messages going to the wrong people, we had a Teams link between my leader and me, and a WhatsApp link for the wider legal team. We had a separate WhatsApp group for the legal team plus *experts*. I know of other cases where they also set up a link between opposing counsel, but we made do with old school email for that. I can, however, see a benefit in some circumstances for having an easier conduit between the legal teams. In a live hearing, there is always the opportunity for counsel or solicitors to narrow issues or even settle claims simply by virtue of their proximity at the hearing. You will want to think about whether you can recreate an element of that proximity in a virtual capacity.

Most of what I have suggested so far is common sense, or at least what we now know to be common sense in the virtual online world. However, one aspect I had not considered was the appointment of a hearing manager. We used ADR/ODR, who were excellent. Their person controlled who was allowed in to the Zoom meeting as host, but also administered the virtual bundle so that relevant pages would be shared on the screen when needed. Alongside a live transcription service, this really meant that we could focus on the trial.

You also need to agree who will have their cameras on and who will be on mute. In advance of the hearing, the *arbitrator* said that he wanted to see all the legal team at all times, but that everyone should be on mute save where they were speaking. In fact, by default and then, I think, by preference, we ended up running the hearing with everyone off camera and mute except for the arbitrator, the lead advocates (depending on whether the juniors were running a part of the case) and the *witness* where relevant. I would definitely recommend that approach. I cannot see any benefit to forcing all members of the legal team to be in the spotlight all day and it is needlessly distracting.

It's also worth remembering that on a platform like Zoom, it has a function which allows you to change your name and to have a photograph showing when your camera is off. I had prepared for the former (remembering to change my name from Lord Royal Flush following my weekend virtual poker session), but didn't realise I had at some point used a photo of myself in t-shirt and shades from the summer. I spent the first day frantically trying to get rid of it, but was saved by the fact that the opposing QC had a shot of her riding up a mountainside.

With the right preparations in place, my experience was that once the hearing started, the similarities to a live hearing far outweighed the differences. For example, contrary to what I have heard from many others, I did not find that oral submissions needed to be shorter or punchier. Certainly, when I was cross-examining, I don't think it was long before I was in the zone and was barely aware that this was a virtual hearing.

Indeed, I think that there are then a number of advantages of a virtual hearing over a live hearing, mainly deriving from the close-up view you have of the arbitrator and the witnesses. It is possible in hearings, especially in more informal *arbitrations* rather than in court, to see the facial expressions of the arbitrator, but never in as much detail as on a virtual hearing. The same goes for the witnesses. I found all of this genuinely useful in assessing where to push and what to discard. I also found it helpful to have the ability for all to be looking at the same document on the screen, especially in relation to technical aspects.

A useful tip is also to make sure that your witness explains at the start what they are looking at and where the electronic bundle is. That way, the arbitrator understands that when the witness is always looking over up and to the right, they are reading the document and not looking for answers from an off-screen stooge. You also need to try and make sure that other devices are not pinging out emails. Having messages pinging to witnesses during cross-examination is not a good look.

The main challenge we faced was one of inconsistent broadband cover for both of the QCs. There is only so much you can do about that, but you can put in place back-up measures, both in terms of the IT (having a mobile hotspot ready) and in terms of the personnel (the junior advocate really does need the notes ready to take over at the drop of a hat).

My takeaway conclusion was that virtual hearings have a real role to play going forwards, especially in arbitrations. I do not think that there is any reason for them to be limited to shorter or one-day hearings. There are real benefits, especially in international arbitration, in not needing the legal teams, witnesses and experts, to all decamp to far flung corners of the globe. I recognise that some disputes will be sufficiently sensitive that the parties would only feel comfortable seeing the witnesses give live *evidence* in front of them, but I suspect that such situations are relatively rare. I anticipate that the courts will retain the use of some virtual hearings, but not for trials, and so this remains an area where arbitrations could gain a further competitive advantage.

Oh, and in case you were wondering how the wallpaper went down, my opponent ended her examination in chief with, “Thank you Mr X, you will now be asked some questions by Mr Pliener, who you can see with the very smart wallpaper behind him on the camera”. At least she didn’t mention the “100 Years of Leeds United” just over my right shoulder.

http://arbitrationblog.practicallaw.com/surviving-a-virtual-arbitration-its-all-about-the-preparation-and-the-wallpaper/

Virtual Mediation: Key Issues and Considerations

by Theo Cheng, ADR Office of Theo Cheng LLC, with Practical Law Litigation

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A Practice Note explaining the principal issues, benefits, and concerns in holding a mediation using a video teleconferencing platform (VTC), including various practical, technical, and strategic considerations.

This document may be particularly relevant in light of the extreme limits on in-person meetings during the 2019 novel coronavirus disease (COVID-19) crisis but may be adapted for other situations in which some or all mediation participants appear remotely.

Participation by remote means in a legal proceeding is not new, but practitioners, mediators, arbitrators, and judges rarely employed them. Virtual ADR processes (also known as online dispute resolution (ODR)) are not wholly new tools for resolving disputes. During the COVID-19 crisis, remote or virtual participation in mediation sessions, arbitration hearings, and even bench trials, whether by using an audio or video teleconferencing (VTC) platform, are becoming increasingly common.

When circumstances do not permit one or more participants to a mediation session to gather together in-person, mediations have traditionally accommodated their remote participation in the process by using the telephone or some VTC platform. During COVID-19, everyone is generally participating remotely using either a single platform or a combination of audio and video

technologies. Because of this, mediations can be conducted entirely in a virtual format and are not specific to any particular platform, audio or video, which are, today, driven by underlying **software** programs.

As with all software-driven platforms, each VTC has its own special features and limitations. The key for the participants is to understand the salient features and limitations of the chosen platform and to become familiar and comfortable enough with the technology to focus on the core of the mediation process, namely, achieving a mutually acceptable resolution of the participants' own making.

The virtual mediation process generally follows the same path as any other mediation (see Stages of a Mediation Checklist). For a collection of resources to assist counsel with the mediation process, see Mediation Toolkit. For more information about alternative dispute resolution in general, see Practice Note, ADR Mechanisms in the US: Overview.

Basic Prerequisites for a Virtual Mediation

Mediation is particularly conducive to being converted from an in-person format to an online format. For a virtual mediation to be successful, all participants must prepare.

Platform Considerations

The platform merely provides the virtual space in which everyone gathers for the mediation. A platform should permit participants to:

- Access the platform from an electronic device (such as a desktop computer, laptop, tablet, or smartphone).
- See and hear all other participants.
- Interact with all other participants in real-time.
- Engage in both joint and private caucus sessions, so that various groupings of participants can meet in a secure environment.

The version of the software application suitable for each device is likely to differ. Therefore, because each participant's experience on and control over the platform may be slightly different depending on the device in question, participants must understand how their devices access the platform.

There are many VTC platforms in the marketplace. Principally due to its feature-rich options, recent and ongoing adoption of security and privacy updates and widespread familiarity and usage, Zoom has become a perennial favorite among many mediators and counsel. However, there are many other VTC platforms, each with their own distinct features, limitations, and security and privacy issues, such as (in alphabetical order):

- Apple FaceTime.
- BlueJeans.

- Cisco WebEx
- Google Meet (formerly Hangouts Meet).
- GoToMeeting.
- Highfive.
- Immediation.
- Legaler.
- Microsoft Teams.
- Modron.
- Skype for Business (being replaced by Microsoft Teams on July 31, 2021).
- Sonexis.

When selecting a platform, participants should consider their anticipated needs, available technical and financial resources, and experience with various platforms.

Platform security and privacy enhancements vary tremendously and are constantly changing and being updated. For further guidance, see the ICCA-NYC Bar-CPR's Protocol on Cybersecurity in International Arbitrations, the AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy, and the New York State Bar Association 's Cybersecurity Alert: Tips for Working Securely While Working Remotely. Some law firms and organizations also subscribe to enterprise versions of VTC platforms that they selected for security or privacy reasons. These preexisting arrangements may dictate the choice of platform for a mediation session.

Internet Connection

Participants should participate in the mediation from a location with secure, reliable, high-speed internet. They should test their respective internet speeds by searching "internet speed test" in the web browser. The minimum Mbps download and upload speeds needed for the platform depends on several factors, including the expected number of participants and the number of locations from where they are connecting to the platform.

If a participant's internet connection is unstable, weak, or prone to outages, the participant may remedy the situation by:

- Using a Wi-Fi booster.
- Using a smartphone's hotspot.

- Hardwiring the internet connection by installing a direct ethernet (T-1) connection.

Microphone, Speaker, and Camera

Participants should have a functional microphone and speaker to transmit and receive audio. If using the built-in microphone and speaker in their devices creates feedback issues or otherwise produces less than desirable audio quality, a participant may use a separate headset or headphones that contains a microphone. This alternative also often reduces or completely blocks ambient noise, which allows the participant to hear and transmit audio more clearly. Sound clarity is especially important for participants working from home with other people or pets present or when appliances (such as air conditioners) may generate significant ambient noise.

If participants are using a VTC platform, each participant should also either:

- Confirm that the device the participant is using to connect to the platform has a built-in camera that sufficiently transmits and receives video images.
- Obtain a separate webcam that the participant can connect to the participant's device and use to transmit and receive video images.

Document Sharing

When evaluating VTCs, consider whether participants anticipate needing to simultaneously view a document in real time, such as:

- Photographs.
- Video clips.
- E-mail communications.
- PowerPoint presentations.

Some VTC platforms permit users to share their screens, so that all participants can view any document or file that a participant opens on the participant's own device.

Collaboration

Some VTC platforms permit users to collaborate by editing a document within the platform. For example, when mediation results in a resolution, participants may view and edit a draft term sheet, **memorandum of understanding** (MOU), or settlement agreement (see Memorializing the Settlement Agreement).

Pre-Mediation Conference

At a pre-mediation conference, the mediator and counsel discuss logistics and housekeeping matters in preparation for the mediation session. Clients and client representatives also may attend the pre-mediation conference. This conference may occur via telephone or on a VTC platform.

Whether in-person or remote, the participants in a pre-mediation conference should:

- Discuss the dispute's procedural posture, including whether:
    - the parties are currently in a litigation or arbitration proceeding;
    - the judge or arbitrator ordered mediation;
    - the parties have engaged in discovery.
- Discuss whether a limited, informal exchange of documents and information may lead to a more productive mediation and, if so, establish a framework for that exchange;
- Identify the attendees to the mediation session and clarify the participants' respective roles, including:
    - which participants have the authority to resolve the dispute; and
    - whether anyone with possible influence over the decision maker should also attend.
- Determine the contents, scheduling, and parameters for exchange of any pre-mediation submissions requested by the mediator.
- Set the date and start time of the mediation session.
- Identify the locations from which each participant is attending the mediation.
- Review the VTC platform features and protocols to which the participants must adhere during the virtual mediation session (see Platform Considerations).

Other Pre-Mediation Session Considerations

Joining the Mediation Session

Some platforms offer a separate room into which participants first enter (sometimes called a "waiting room" or "lobby") and the mediator then transfers them into the main room. This process:

- Allows the mediator to ascertain that everyone scheduled to attend the session is present before allowing them all to appear in the main meeting room simultaneously, rather than having them appear one at a time.

- Preserves some sense of neutrality by not creating the impression that impartiality may have been compromised because the mediator, for example, was spending time with one or more participants before the other participants logged into the platform.

A time limit can also be agreed-on in advance before everyone is admitted into the main session room to manage the participants' expectations. However, if participants desire an experience more akin to an in-person session, a mediator may forego this feature.

After all participants are in the main room, the mediator may close or lock the main room to prevent anyone else from entering the session. However, if the mediator uses this feature, a participant disconnecting from the platform (voluntarily or involuntarily) cannot rejoin the session unless the mediator takes steps to unlock the main room and transfer the participant in to the room (see Disconnected Participants).

The mediator may remind participants to agree that no one else is to be present with a participant unless previously disclosed to all the other participants. Doing so prevents any unwanted or unintended eavesdropping and assists in preserving mediation confidentiality, as well as the confidentiality of any attorney-client privileged communications.

Once all participants are present in the main room and the mediator issues any final reminders or instructions, a virtual mediation session proceeds in similar fashion to an in-person session in a single conference room. Specifically, the mediator convenes the session by beginning with greetings and introductions, followed by welcoming remarks and the setting of ground rules. The other participants may take advantage of having all participants gathered in a single (virtual) room to provide their own opening remarks, share their particular perspectives, and otherwise engage in a typical joint session. As the discussion progresses as facilitated by the mediator, the discourse is not likely to be that much different than if all the participants were in the same physical room. With virtual conference calls so ubiquitous, most participants are likely to find this setting quite familiar.

Recording the Session

With the possible exception of memorializing any resolution that is achieved at the session (see Memorializing the Settlement Agreement), because mediation is intended to be a confidential process, most participants likely presume that no one intends to record the mediation session. However, given the technological interface being used and the inability to have any visibility beyond the small view provided by the camera, the mediator should take steps to ensure that there is to be no recording of any kind, such as:

- A video streaming capture software program pre-loaded on a participant's device.

- An otherwise hidden, disguised, or off-screen audio or video recorder (including the voice memo feature on some smartphones).

- The recording feature available on some VTC platforms. (Mediators hosting the session should disable that feature.)

Should the participants choose to record some or all of the session using the VTC platform's built-in recording feature, various issues regarding that recording should be discussed, including:

- Which participants should have recording privileges.
- Whether the recording should be stored:
  - locally; or
  - in the cloud.
- Which parties should be given access to the recording.
- Who maintains the recording.
- Whether the recording is to be stored or deleted after the mediation ends.

Inadvertent Access to Confidential Communications

Like any software, a VTC platform is susceptible to technical bugs or glitches. Although rare, participants on a VTC platform may inadvertently overhear or see something that they were not intended to see. The mediator and participants should discuss how to respond should this occur. For example, the participants may agree that the participant receiving the inadvertent communication must immediately:

- Stop and refrain from further listening or viewing and inform the affected participants (that is, essentially creating a default procedure akin to the inadvertent receipt of privileged documents in another party's production).
- Inform the mediator so that the mediator may take further steps.

Private Caucuses

As in any mediation, there may be a need for the participants to confer privately in various configurations of participants, with or without the mediator, in a room that is separate from the main mediation session room (see Practice Note, Complex US Mediation: Key Issues and Considerations: Private Caucuses). Different platforms refer to separate caucus rooms by different names, such as breakout rooms (Zoom) or breakout sessions (WebEx). In platforms that offer caucusing, the mediator can virtually place or assign participants so that they can communicate privately and in confidence with each other. In essence, it is no different than had the mediator assigned individuals to physical rooms across or down the hall in the in-person context.

The participants can also establish some kind of protocol to permit the mediator's entry into the caucus rooms to help discussion within and among the various participant groupings, preserve attorney-client privileged communications, and ensure confidentiality.

However, most VTC platforms do not have a virtual knock or chime feature to announce when someone is about to enter a caucus room. Having the mediator suddenly appear in a caucus room can not only be jarring and rude, but also potentially breach a confidential communication (perhaps even one protected under the **attorney-client privilege**) occurring in the room.

To minimize the risk of an unexpected intrusion, the mediator and participants should agree on how the mediator is to announce that the mediator is ready to enter a caucus room. For example, mediators may:

- Announce their intention to enter a caucus room using a broadcast chat feature (like that available on Zoom) which, once participants are separated into their own rooms, allows mediators to send a message to all participants.
- Call, text, or e-mail in advance one or more of the participants in a caucus room (typically counsel) to indicate the participant's intention to enter the room.

If the selected platform does not offer the ability to place participants in separate rooms, while a little cumbersome, participants can simply disconnect and reconnect to the platform in various configurations to accommodate the need for private caucusing. Traditional telephone mediations have operated in this manner for decades and, in fact, at least one VTC platform (Sonexis) has a pure audio conferencing version that provides for the creation of caucus rooms. With a little advance planning, participants can develop protocols for mirroring caucus rooms in the virtual world.

Disconnected Participants

Platform issues, internet instability, and human error can all cause participants to become disconnected from the platform during the session. The participants should develop clear guidelines for how to respond if this occurs. For example, the participants may agree that the disconnected participant should:

- Try to reconnect to the platform (this often resolves the problem if the mediator did not lock the session).
- Contact the mediator (and possibly others) via e-mail or text message to alert the mediator of the connection issue.
- Use provided dial-in instructions to connect by telephone.

In a serious case where the participant cannot reconnect, suspension of the mediation may be necessary, and the mediator should shepherd that process. (The parties should have already exchanged email addresses and phone numbers to help off-platform communications.)

On Zoom, if a participant becomes disconnected from a breakout room, reconnecting to the session places that participant back in the main session room, not the breakout room. (The analogy in the in-person context is as if the participant had left the building entirely when the participant left the caucus room.) In that case, once reconnected, the mediator must return to the main session room and reassign that participant to the appropriate breakout room.

Memorializing the Settlement Agreement

At some point during the mediation session, the participants may need to memorialize any or all portions of the discussion (see, for example, *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 262-63 (2013) (holding that all settlement agreements reached resulting from mediation in New Jersey state courts must be reduced to a signed writing or ascribed to in an audio or video recording)).

Participants may circulate drafts of documents via e-mail or use some kind of external collaboration tool, such as Google Docs or a shared Dropbox file. However, if the parties anticipate wanting to memorialize any agreement they reach and select a VTC platform with this capability, they should take advantage of this feature to draft and edit a term sheet or settlement agreement at the conclusion of the virtual mediation (see Collaboration).

Some VTC platforms offer related features that participants may use to:

- Affix a signature or other mark on a shared document, which the participants may then screenshot or download.
- "Whiteboard" freehand drawings or writings.

Other platforms allow users to incorporate third-party software applications to meet these needs, such as DocuSign or RightSignature.

If a platform does not offer the above features but does afford recording capability, the mediator may memorialize the resolution on video by:

- Orally reading the terms and conditions of any term sheet, MOU, or agreement in the presence of all the participants.
- Obtaining individual assent to the document from the participants.

Connecting to the Mediation Session

Well in advance of the mediation, each participant should:

- Download the platform software application, even if the platform permits access simply by using an internet browser, because the participant's experience on the platform and the features and options that may be available to the participant may differ if the full software application is not available on the device.
- Choose a location that offers an adequate internet connection, quiet, and privacy. If a private space is not available, select a location that minimizes foot traffic. Turn off any unnecessary appliances that may provide audio or visual distraction.
- If desired, arrange to have two screens available so that they can view other participants and documents at the same time.
- Participate in any available platform orientation sessions.
- Spend as much time as they need to become familiar and comfortable with the chosen VTC platform, how it operates, and the available features.
- Conduct a dry run of the platform and their individual set-ups during which they test and receive feedback on a variety of different aspects, including:

- microphones;
- speakers;
- headsets;
- sound (including feedback and background noise);
- lighting (avoiding backlighting and facing cameras away from windows);
- dresswear; and
- camera angles and eye contact (positioning cameras at eye level or above (a laptop can be placed on a stack of books to achieve this)).

The mediator should also schedule the mediation within the platform. When setting up the session, the mediator should:

- Name the session using only the case number or some other innocuous name so as not to reveal the parties ' names.
- Password-protect the session and creating a two-factor authentication requirement by:
  - not embedding the password in the link; and
  - conveying the link and the password by using separate mediums (for example, emailing the link and sending the password by text message).
- Caution participants not to share the conference link in any kind of public forum to increase the likelihood of unwanted attendees accessing the session, a phenomenon that has now come to be called "Zoombombing." (Zoombombing principally arose from compromised meeting links resulting from user error in releasing the link information publicly or having the Personal Meeting ID otherwise compromised, or both. Although there were many articles written on this subject during the early weeks of the pandemic, best practices for using Zoom, including enabling waiting rooms, password-protecting meetings, and exercising the host's removal powers, have largely eliminated this problem.)

When ready to join the mediation session, each participant should close unnecessary tabs and applications on the device to prevent battery drain and internet bandwidth usage. Turning off e-mail, calendar reminder, and other notifications, as well as silencing phones, also prevents unnecessary disruptions and distractions.

The participants can also discuss the various options for viewing other participants and the propriety and use of virtual backgrounds available in many VTC platforms. Participants should generally avoid virtual backgrounds because they mask the presence of others in the room and require additional bandwidth.

Concerns with Virtual Mediations

Virtual mediation brings unique challenges, including:

- Participants' inability to fully gauge credibility and read body language.
- The lack of control that some participants feel by being assigned and shuttled into different rooms by the mediator.
- Difficulties preserving the confidentiality and security of the proceeding.
- Inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet.

While most of these concerns can be overcome by using training, education, and continued practice and use of the chosen VTC platform, there are other concerns that relate to the psychological and neurological effects of communicating using VTC platforms. For example:

- The distortions and delays inherent in video communications:
    - confound the receipt of information and muddle well accepted subtle social cues to which participants are accustomed; and
    - create gaps in the participants perception of reality.
- Participants fill in any reality gaps in a way that leaves them feeling disturbed, uneasy, tired, isolated, anxious, and disconnected.
- Participants may struggle to concentrate or have difficulty developing empathy, rapport, credibility, and trust, all of which are generally critical to a successful session.

(See *Why Zoom is Terrible*, New York Times April 29, 2020 and Liz Foss Lien and Mollie West Duffy, *How to Combat Zoom Fatigue*, Harvard Business Review, Apr. 29 2020.)

If participants experience platform fatigue, they may benefit from:

- Refraining from multi-tasking while engaged in the session.
- Reducing on-screen stimuli from other sources (such as e-mail notifications, calendar reminders, and so on).
- Building-in regular breaks from the screen.
- Stopping a mediation session earlier than anticipated to prevent poor decision making by the participants due to platform fatigue and possible coercion by one participant on another, including the mediator.
- Switching to a different medium, such as using the telephone.

A mediator may explain the general principles of platform fatigue during the pre-mediation conference and schedule multiple session days in advance with the participants to account for this possibility.

Benefits of Virtual Mediations

Virtual mediations offer many benefits, including:

- Enormous savings in travel time and expenses.
- Avoidance of logistical issues related to:
    - coordinating participants' schedules;
    - accounting for unexpected travel delays; and
    - securing a mediation space or participants' lodging.
- Removal of barriers to having additional participants attend who may otherwise have been precluded due to time or cost considerations (such as the ultimate decision maker at the company, the junior associate on the matter, the insurance carrier's adjuster, or an interpreter).

In fact, participants in a virtual mediation must only agree on an available date and time for the session to proceed. Relatedly, because mediation sessions can be scheduled more easily, they may be preferable for disputes that are time-sensitive or otherwise need a faster path to resolution.

