



## Can virtual mediations really work?

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Before Covid-19, mediations usually took place physically. However, as the pandemic continues to tighten its hold, it is difficult to see a time in the near future when traditional face to face mediations will once again take place. Does this mean mediation has been resigned to the history books, if only on a temporary basis?

If the world's economy is to survive the pandemic, it must adapt as quickly as possible to enable business to "carry on as normal". Within some industries, the coronavirus has led to a rise in conflicts as supply chains have been disrupted; issues have arisen around the management of workforces and commercial entities everywhere are reviewing contracts for force majeure clauses that can be invoked. Unless a conflict can wait out the current crisis, which is highly unlikely if court proceedings have already commenced, then virtual mediation may be the most efficient alternative dispute resolution available to the parties at this present time.

So, can a mediation really be successful without the face to face connection between the mediator and the parties?

A successfully run virtual mediation can have many benefits over its traditional forbearer, including:

- Significant time and cost savings associated with attending typical face to face mediations e.g. travel and room hire costs;
- The removal of barriers to having additional participants attending who might otherwise have been precluded due to time, travel or cost considerations, e.g. insurers, interpreters, experts, junior assistants etc.;
- The flexibility and convenience of being at home means parties can remain refreshed with no one dashing off to catch a train or flight;

- A reduction in stress and anxiety with the parties remaining in a place in which they are comfortable, without the fear of seeing the opposition during a comfort break, something which may be particularly relevant if dealing with private and/or family clients.

Virtual mediation generally follows the same path as a traditional mediation, although it does present its own unique challenges, including:

- Fickle software platforms that may be dependent on the participants' personal internet connections and the inescapable technical malfunctions;
- Gaining familiarity with the virtual format, including the process of "entering" and "leaving" virtual breakout rooms to join plenary sessions, and vice versa, during the course of the mediation;
- Maintaining the preservation of confidentiality and the security of the mediation;
- The participants' difficulty in concentrating without distraction and their inability to read body language, gauge credibility and even empathise with each other – all things which are generally seen as key ingredients to a successful mediation;
- The ability of participants to leave a virtual mediation more easily resulting in a lack of commitment to the process;
- Taking fewer breaks from the sessions – as with working from home, virtual mediation presents a risk that participants may take insufficient breaks, and may not take the opportunity to step away from their computer in order to stretch and get some fresh air (and potentially, some perspective). Taking short and regular breaks is encouraged to ensure focus can be maintained during the course of the mediation.

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However, recognising the potential pitfalls of virtual mediation early on, allows the parties to maximise the advantages of mediation and optimise their potential for resolution.

The appointment of an experienced mediator who is familiar with the virtual mediation format and is relatively proficient in the use of the relevant technology is also invaluable in ensuring that the process runs smoothly. The appointed mediator will generally take on the responsibility of ensuring that the appropriate technology and virtual arrangements are in place, and that each respective side is sufficiently comfortable with use of the technology, prior to and during the course of the mediation.

A pre-mediation conference with the mediator and counsel will iron out many of the housekeeping matters that inevitably present themselves when hosting a mediation on an electronic platform from how the e-rooms will work, to ensuring everyone can see and hear each other, and how the parties will engage in both joint and private caucus sessions.

Following the pre-mediation conference, a dry-run or dress rehearsal of the mediation is recommended. Increasing your client's confidence both with the procedural idiosyncrasies and technological novelties which virtual mediation can present may ultimately put your client on a more secure tactical footing, particularly if your opponent has not taken the time to equally prepare his or her client.

With preparation, training and education, most of the difficulties associated with virtual mediations may be overcome and the benefits can far outweigh those challenges.



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