

# ONLINE DISPUTE RESOLUTION: LESSONS LEARNED IN PANDEMIC CAN LAY FOUNDATION FOR FUTURE SUCCESS



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There’s nothing like a cataclysm to push the profession into the world of tomorrow. Over the past year, most practitioners have had their litigation and settlement paradigms completely upended—with most discovering the brave new world of online mediation. Fortunately, although online mediation is novel to many practitioners, it has been slowly developing over the past few decades. As such, when the world turned upside-down in 2020, infrastructure, best practices, and protocols already existed to facilitate a fairly painless transition to online settlements of litigated cases. With the sudden influx of a critical mass of practitioners into the field of online dispute resolution, the systems have been refined, tested, expanded, and solidified over the past year—turning what was once a novelty or option of last resort into a mainstay of practice.

## YESTERDAY’S FUTURE BECOMES TODAY

Although not discovered by most until 2020, the concept of Online Dispute Resolution (ODR) was finding its footing two decades prior in 1999 when, in perhaps the most well-known example of its use, eBay launched its pilot program focused on resolving disputes between buyers and sellers using the e-commerce site.<sup>1</sup>

Naturally, as technology advanced and more neutrals were willing to embark into the unknown world of virtual mediations, more and more mediators became interested in taking their practices online for good—or at least offering online mediation as one weapon in their arsenal. Even as e-mediation grew in popularity it was still largely underutilized by litigators. However, in the face of a growing global pandemic many professionals, forced suddenly to work from home, found themselves connecting with clients and colleagues through various online platforms as a means to conduct their business. Attorneys and their clients would find the litigation of their matters stayed for an undetermined amount of time as many of our nation’s courts closed in the interest of public health. This caused a spike in demand for other forms of dispute resolution.

Many early adopters of e-mediation found that they were ready to meet the call. However, there are still many practitioners, and perhaps their clients, who remain reluctant to resolve their matters virtually through the use of e-mediation. The National Academy of Distinguished Neutrals conducted a survey in September of 2020, and asked litigators across the United States about their ODR experiences and preferences.<sup>2</sup> Of the 500 litigators who responded, only two percent of those who responded had participated in online mediation or arbitration prior to March 2020.

However, by September 2020, more than 95 percent of respondents were primarily participating in online mediations or arbitrations and stated that they would likely continue using online methods to resolve disputes even after restrictions are lifted.<sup>3</sup> The possibilities and promises of 1999 have become reality. Although online mediation is still seen by many as inferior to in-person negotiations and mediations, its acceptance has grown and it appears that the use of online mediation will continue to grow. As such, it seems necessary for practitioners—both neutrals and litigators—to learn the pros and cons of online mediation. Practitioners seeking to resolve disputes virtually should consider both the advantages and constraints presented through online dispute resolution when determining how best to move forward.

### **ADVANTAGE: ACCESS TO NEUTRALS OUTSIDE OF YOUR GEOGRAPHICAL AREA**

An often overlooked but powerful advantage is access to a wider range of neutrals. This becomes particularly important if you practice in an area that requires a significant amount of subject-matter expertise. Complex and fairly unique areas of the law in need of a neutral can now remove one barrier to resolution through the ability to hire leading neutrals based in any location without also incurring costs associated with travel.

### **CONSTRAINT: TECHNOLOGICAL DIFFICULTIES**

Selecting a virtual platform to conduct your mediation also means that there is a higher likelihood that parties, counsel, and the mediator may encounter technological difficulties. Losing connection or waiting for parties to join or re-join the “room” can lead to a loss of momentum during the negotiation process. As negotiations continue it can also lead parties to feel frustrated that they’re having to repeat themselves as connectivity lags. To minimize these disruptions, I recommend conducting a test run ahead of your mediation to ensure that everyone has the equipment and bandwidth needed to be successful. In doing this you can quickly identify areas needing improvement and fix them ahead of

your session. One relatively easy way to improve connectivity is to purchase a Wi-Fi booster. To ensure a crisp picture and sound, consider investing in newer model cameras and a USB lavalier microphone.<sup>4</sup>

### **ADVANTAGE: MANAGING POWER IMBALANCES**

Often in mediation there are power imbalances between the parties. As a neutral it is important to manage these situations and using virtual mediation can be helpful in doing that. Physical distance between the parties can reduce the intimidation factor and balance the playing field. Virtual mediation also lends itself to expanding client comfort. It is often said that the most nerve-wracking five minutes are on the elevator ride to the mediator’s office. Appearing at a mediation from the comfort of your own home or a “safe” office can remove some of those nerves, allowing the parties to focus better on resolving the actual dispute at hand.

### **CONSTRAINT: BUILDING RAPPORT WITH COUNSEL AND THEIR CLIENTS**

Mediators rely heavily on our ability to connect with attorneys and their clients. One of the ways that we are able to facilitate this is through seeing how people interact with each other and the spaces they are in. In getting to know and understand someone both parties typically gain valuable insight from being able to watch body language and mirror small movements signaling that you are listening. In a virtual mediation the ability to connect this way is hindered. One of the most effective ways to overcome not being physically present with parties is by extending and modifying pre-mediation work and enhancing the work that is required in the convening stage of the process. Additional pre-mediation session phone calls or Zoom meetings may be useful. Other tools to help with this are slowing your pace and engaging in thorough information gathering so that you can collect necessary information in spite of the fact that some methods may be less convenient or non-existent due to the use of virtual platforms.

## **ADVANTAGE: SUITABLE FOR ALL CASE SIZES AND LEVELS OF COMPLEXITY**

Cases of all sizes and levels of complexity are equally well suited to be resolved virtually. Successful resolution of cases virtually hinges on the amount of work the parties and the neutral put in ahead of the actual mediation session and their ability to adequately judge fatigue of the parties. While there has been some concern as to the likelihood of success of larger more complex cases, I can say that I personally have not seen a change in my resolution rate since transitioning to virtual mediation. That said, matters with additional parties do require additional resources, which may include the mediator using multiple computers or devices so that each party or “side” can have a dedicated channel with no risk of accidentally broadcasting one side’s caucusing to the opposing party. While this may seem daunting at first, it is really no different than the common-place idea that in multi-party mediations you need additional breakout or caucus rooms.

## **CONSTRAINT: INCREASED FATIGUE**

There are many theories as to why this happens including one that suggests that the reason we experience increased fatigue when using online platforms is because we tire of looking at our own faces. It is important to be mindful that everyone involved in resolving a dispute online will tire faster than if conducting the session in person. This should be considered when you are scheduling the time you think you’ll need to resolve the case. Opting for more time never hurts and everyone is grateful if it gets done faster than anticipated. Adding to our fatigue is the fact that we are being asked to use a different set of communication skills than before—as we stretch our limits and learn new communication styles it can exhaust us.

## **ADVANTAGE: COST SAVINGS**

Being able to attend mediation from your own home or office not only adds convenience but also plays a role in significant costs savings. Removing travel time and costs is a benefit to all. These savings are multiplied because in addition to saving hard costs,

the lack of travel (even that 30-minute commute to your litigation services office) results in time savings that can be put to productive use.<sup>5</sup>

## **CONSTRAINT: DISTRACTED PARTICIPANTS**

Of course, being able to attend mediation from your own home or office adds convenience and is a cost saver but it also means that there are more opportunities for participants to lose focus. There are a variety of things at home that can be a distraction. To avoid this and ensure that you can give resolution your full focus consider setting up your computer in a quiet place,<sup>6</sup> make arrangements for child care if needed, and if necessary (and you are able), considering joining the session from your office.

## **ADVANTAGE: RESOLUTION**

Mediation in any venue is almost always an advantage. Known for its unique ability to resolve conflict efficiently, mediation continues to grow in popularity as lawyers and their clients seek to end litigation. It is important to note that mediators anecdotally report that they often tend to be more directive in their approach to dispute resolution when conducting mediations online, likely a result of having communication options limited as they transition their practices online.

## **CONCLUSION**

Online mediation is certainly the mode of today. And given the successes reported throughout the pandemic, it will likely remain a potent tool in a mediator or litigator’s bag of tricks even when things return to normal. Through practice and focus, the lessons learned in this pandemic can ensure that in the future (even when face-to-face mediations are safe to resume) parties and litigators will have broad access to a convenient format that enhances comfort, flexibility, and mediator availability—all of which tend to speed matters along towards that ultimate goal: the resolution of the dispute. 🌱

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## Notes

- 1 Noam Ebner, E-Mediation, in *Online Dispute Resolution: Theory and Practice*, p. 357, (M.S. Abdel Wahab, E. Katsh & D. Rainey, eds., The Hague: Eleven International Publishing, 2012), available at SSRN: <https://ssrn.com/abstract=2161451>
- 2 National Academy of Distinguished Neutrals. *The Customer is Always Right(?)*, NADN Survey of Litigators, September 2020. Cited with permission.
- 3 *Id.*
- 4 With so many people serving as their own IT departments, it can be daunting to appropriately gear up for an online mediation. Practitioners are now faced with learning about lighting, audio quality, and camera framing—becoming their own AV department as well. However, it is important to remember that although the aesthetic considerations do matter in online mediations, they are not insurmountable obstacles. During this time of COVID the expectations continue to remain low, as most practitioners, parties, and neutrals are extending significant amounts of grace and empathy as everyone struggles through the learning curve together. A practitioner conducting their first online mediation is well advised to watch a few YouTube videos on framing, lighting, and the like.
- 5 Or saved for more enjoyable use—having an extra 30 minutes to read the news or a few extra minutes with your family beats sitting in traffic.
- 6 In an extreme, but relatable, example of this: Neal Katyal who was preparing to argue a case in front of the United States Supreme Court from his home office gave his son \$100 to go downstairs and pay anyone making noise to be quiet so he could argue without distraction. Matt Grossman. 2021. “Supreme Court Case During the Pandemic? Landline Essential, Business Suit Optional,” *Wall Street Journal*, January 3, 2021. Available at <https://www.wsj.com/articles/supreme-court-case-during-the-pandemic-landline-essential-business-suit-optional-11609688842>