



## Make Online Mediation Work for You and Your Clients

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New York State's Presumptive, Early ADR Initiative and the Covid Pandemic have made it a necessity for attorneys to become conversant with alternative dispute resolution, particularly mediation. This article discusses best practices for attorneys and clients in online mediation.

### March 9. First session.

This is how it begins. I am in Court to mediate a child custody/visitation dispute. After introductions and screening, I meet the parents in a tight room. Like all unhappy couples their story is complicated. They met years ago. They dated in high school. After graduation, they had a child—still children themselves. He cheated. So did she. He left. She raised their son, went to school and got an office job. He owns a house painting business. The son is now eight years old. He knows and loves his father, but parenting time has been sporadic. The son lives with his mother, who makes all of the decisions. The father is back now, more stable, and he has a wife. He wants to be in his son's life. She wants none of it.

Their allegations are endless. They disagree on all substantive issues—parenting time, schooling, who gets to be there for the child's birthday and holidays. They each have attorneys (who are not present at the mediation). Their preparation, if any, has come from materials I sent them ahead of the session. Her eyes are cast downward. His arms are crossed. As they speak, I take a mental step back. The child is a battlefield. They fight each other over every inch of him. I listen. I reflect. I summarize. I get nowhere, while they trade profanities.

Me: We have a lot of work to do. This was a hard day. I will summarize it this way—you agree on nothing. Except.

Except?

Except that you both love this boy. Maybe that's enough to keep going. You'll tell me whether you want to schedule another session. Let's break for the day. Maybe next time we can spend less time on what you've done to each other in the past and more time on how you want the future to look. They glare at me. I wonder whether the first agreement of the day is that they hate me. Six days later the world stops.

### **Presumptive ADR at This Moment.**

In May, 2019, as a part of Chief Judge DiFiore's Excellence Initiative, Chief Administrative Judge Lawrence K. Marks announced the beginning of New York State's Presumptive, Early ADR (Alternative Dispute Resolution) Initiative.<sup>1</sup> The goal is to have litigants engage in ADR, particularly mediation and hopefully, to achieve resolutions earlier and more often than they might have through traditional litigation. Each of New York's Judicial Districts created plans to implement court-annexed ADR programs. In many ways, this announcement was a long-time coming. New York State has some of the busiest courthouses in the country. In 2019, there were 172,102 civil case filings in State Supreme, alone.<sup>2</sup> Statewide, there were 587,346 filings in Family and IDV Courts.<sup>3</sup> In 2019, NYC Surrogate's Courts had 14,237 filings.<sup>4</sup> Certainly, there will be more filings in the next two years.

The timing of this initiative is extraordinary. Judge Marks's ADR announcement came only months ahead of the Covid-19 pandemic. As of the writing of this article, New York State is in Phase Four of reopening. Many businesses have closed and will not reopen. Tens of thousands of New Yorkers have died.<sup>5</sup> Statewide, unemployment reached 15.6%.<sup>6</sup> How the pandemic will affect civil cases and current proceedings is not entirely knowable at this moment. Still, New York Courts will likely see an increase in commercial, real estate, bankruptcy and Surrogate's Court filings. They will add to the docket of civil cases that have been pending for several months, longer than they might have under normal operations. In this moment, the need to address and resolve civil disputes efficiently, through ADR, is critical.

Many attorneys participate in mediation at some point. Mediation is a confidential discussion with a neutral to explore ways to resolve a dispute. It may be held privately or through a Court-annexed program. The mediator encourages communication, problem solving, and option generating between the parties and helps them evaluate offers and counteroffers. The mediator works with parties, together (joint session) and separately (caucus). It's a conflict-intensive process. Parties and counsel get to speak freely in

ways they never could in a courtroom. This, of course, is one of mediation's main benefits. From candid discussion and evaluation of positions, offers and client goals, resolution becomes possible. A good mediator needs to have legal knowledge, interpersonal skills and a strong emotional IQ. Noticing behaviors like eye-rolling, sighs and crossed arms is crucial. So too, is noticing when people lean in to listen. Until March, 2020, having litigants and attorneys be in the same room together was widely considered a critical piece of the mediation process. What now?

### **Best Practices for Attorneys and Clients in Online Mediation.**

New York's ADR Initiative combined with the continuing need for social distancing means there are going to be more online mediations in your practice. As an attorney, there are many tools you can use to turn an online mediation into a success.

**Before your online mediation.** Begin with the basics. Create a pre-mediation plan. Attorneys and clients are no longer going to be in the same room during the session. Communication will be more challenging, so it is important that before the mediation session, attorneys discuss key issues with clients, including a range of lowest and highest numbers that the client would be willing to agree to. This includes discussing best and worst case scenarios in the event no agreement is reached so that the client has a clear idea of what the alternatives will be if there is no settlement. Further, develop a bargaining timeline. Be prepared to make sensible incremental offers so the client has room for movement. Movement from one side tends to beget movement from the other. If the mediation is about more than numbers, develop a list of those issues with the client as well as thoughts on how to resolve them. Consider the mediation, if only for a few hours, as a problem-solving opportunity. Advanced preparation on these basics is key to a successful online mediation.

Also be prepared for technical issues and problems. It's tempting to imagine that because many clients now use online video in their work, they will already be prepared for the format of an online mediation session. Wrong. Being onscreen, regardless of purpose, is a self-conscious exercise. Consider how you and your client are going to engage with the format. For example, when watching several squares of people, where should the client look? How does the client sound through the computer microphone? Body language, audio and visual cues are more critical now than ever. Prepare your clients for the experience of discussing their conflict on a screen with their adversary. Conduct a video call with your client ahead of the mediation and pay attention to details like the client's background (which should be uncluttered so as not to distract) and details such as the angle of the computer camera. To the extent possible, problem-solve any technical

issues before the mediation. Finally, clean your desktop so that you may share your screen. Advise the client to do the same. It is incredibly helpful to share a screen for damages calculations, whiteboards and calendars. Spend a few minutes on this technical preparation in advance of the mediation and you will feel better, as will your client.

### **April 16. Second session.**

I'm getting used to the Zoom platform. It shows. There is a sound problem. I can't hear one of the parties. There is a visual problem. I can't see the other. Although this is a family mediation and we intend to stay in a joint session together, I've set up breakout rooms so that I may speak with the parties individually. Momentarily, I place the father in a breakout room and then, I cannot find him. This goes on for several minutes. When I do find him and bring him back into the joint session, he asks me whether or not I did it on purpose. I lie and say yes.

Still, before the second session I sent both parents instructions on how we would proceed on Zoom. Among other tips, I noted that technical issues might arise and that we would all need to be patient. I asked, citing concerns regarding screen fatigue, that we avoid long-winded diatribes. They are unhelpful in an online mediation (and often not so helpful in person). Additionally, because talking over and past each other means that none of us can hear anything on Zoom, I ask that we pay particular attention to the ground rules for any mediation. Listen, consider, reflect.

Remarkably, amid technical issues, amid a global pandemic with uncertainty attached to every decision, this session goes better than the first. When I fix the technical problems and everyone can hear and see each other, the parties really begin listening. The screen imposes a sense of distance that is not altogether bad. Pointing, yelling, shooting daggers with their eyes seems less effective now. I watch their postures and expressions, carefully. Their shoulders are down. No one has their arms crossed. Eye rolling is minimal. This is a vast improvement. They appear to be in their kitchens. Both have coffee and refill it. They are dressed informally. As we go over the agenda and some of the more critical points, both parties refer to computer calendars and address books as well as other materials. I make a mental note that they would not have had their computers in the courthouse. I keep my eyes on theirs throughout the session, avoiding the "self view" (bearing in mind that looking them in the eyes actually means looking straight at the camera to create the *effect* of looking into their eyes). They follow suit by figuring out how to look at me and each other in the eyes.

**During the online mediation.** Mediation is an emotionally taxing process. While there may be comfort in not being in the same room, being onscreen

is fatiguing in its own way, so be prepared to keep it moving to hold the client's attention, keeping in mind the following tips:

First, as an attorney, consider developing an agenda of topics for the day. Develop it with the other side and with the mediator. We do not reveal anything in an agenda that is not already known to all sides. The agenda has purpose - when people know where the day is going, it's easier to get there. Build in time for joint session, caucus and attorneys-only sessions. Also, build in time for breaks. Breaks are critical for online mediation. Fifteen minutes of walking around your home in circles is likely to do more for your decision-making powers than answering emails and texts. During very long sessions, clients and attorneys should be encouraged to move around. Sitting in a chair, in front of a screen, attending to the arguments, offers and counteroffers for hours is challenging.

Second, work with the other attorneys and the mediator to take advantage of the endless possibilities for “meeting space” online. In a typical online mediation session—with only two sides - we set up no less than five breakout rooms. (1) Joint Session Room; (2) Plaintiff and Counsel; (3) Defendant and Counsel; (4) Counsel Only; and (5) Mediator, Co-Mediators, only. People can speak privately and candidly in any constellation that makes sense at the moment. In a recent mediation, the attorneys took lunch “together” in a breakout room. We discussed the pandemic, schools and television. There were no breakthroughs or sudden exchanges of numbers—there was a conversation. That conversation seemed to take the edge off the rest of the day's negotiations. The parties resolved the case that evening. Online, there is plenty of space for unexpected, helpful connections.

Third, take advantage of the fact that this moment is a complicated one for many reasons. The pandemic has created untold financial distress and suffering. Given current circumstances, review external pressures and costs in caucus with the mediator. How much will it cost to proceed with litigation? What are the chances of success at each step, e.g. a dispositive motion? How long will it take in a post-Covid world to get there? Has Covid impacted the timeline for your case to be heard by a judge? External pressures are always a piece of the puzzle. Never have they felt more present than at this very moment. Covid-19 is not a reason to settle. Still, its effects are being felt everywhere and should be discussed in any case and risk assessment. Offers and counteroffers are always a frustrating part of the mediation process for clients. Help clients, and yourself, by accounting for a changed reality and period of economic uncertainty.

Fourth, mediation is not litigation. Thoughtful consideration of positions, facts and pressures is a necessity because serve and volley arguments are very different in online mediation. Normally, we welcome fierce emo-

tion and argument because it's often a necessary step towards resolution. Attorneys state strong positions in every mediation. However, the force of your arguments and how they are received online may be different than in person. For example, banging the table and standing up may not come across the way you imagine on a screen. Similarly, long-winded explanations about the merits of your case and the meritless arguments of your adversary is simply less impactful when we are not in the same room together.

Fifth, for online mediation, consider that along with reminding the other side of your arguments, remind everyone listening that you have come in good faith to resolve the matter. Avoid long statements and instruct the client to avoid withering remarks. Anger is to be expected in mediation. But if every comment from the other side is an insult or accusation, it's as if you've dialed into the worst online video you've ever watched. Similarly, it is not uncommon for mediators to ask everyone to speak at joint session, if they wish. Take advantage of this moment but do not take it for granted. It is possible that clients will be more likely to speak in the online format than in person and it will be harder for attorneys to stop them. Before the mediation, review your client's prepared statements or remarks if they have any. For clients, regardless of how much we may remind them otherwise, the mediator still seems like someone who needs to be convinced of the rightness of their cause. Clients' prepared remarks often echo this theme. Be wary of it. Prepared scripts, inevitably, sound like a tirade to the other side. It's an unnecessary opening that may derail rather than convince. A prepared statement can and often should include points about weaknesses in the other side's case, but it is critical that the statement reinforce a willingness to negotiate, including by recognizing any valid position on the other side, or coupling the opening remarks with a concrete point of concession on a smaller issue if possible (that is not a sacrifice for your client to give on), in order to trigger negotiating momentum.

Sixth, consider how you will adjust for reactions during the mediation. Throughout the mediation, whether in joint throughout or in caucus, there will be offers and counter offers. Attorneys play a pivotal role in modulating responses. Both attorneys and clients may find parts of the process discouraging, but the attorney should help the client understand that even when sides are very far apart, when offers are on "another planet," it doesn't mean that the mediation is over. It's the beginning. One cannot control offers and demands of the other side. One *can* control his or her own responses. When the anger and "different planet," remarks subside, work with a client and the mediator on crafting counter proposals that have message and substance. Connect the numbers to reasons for those numbers. Everyone is in their home or office, so there's no need to rush. Idle time is different now because

people are not waiting in a conference room building anxiety while a caucus is going on with the other side. This is one of the significant advantages of online mediation. Clients can use their down time to relax in their own environment and chat offline, or in a breakout room with counsel, which lowers the stress of decision-making.

In this respect, Covid-19 has created something unique in our national consciousness - a pause. For many, this may have offered a moment to be savored in this disaster. This could mean more time with children, more time binge-watching awful television, or more forced time out-doors, at a distance. People are working harder than ever while living very differently. For many, the lines between one's work and personal life have blurred. If that is so, then maybe so too have the lines blurred between what we know is the right answer and what the other side avers is the right answer. Holding conflicting thoughts about right and wrong is critical in mediation. Resolution requires living with that conflict. Clients discuss their experience of the pandemic a great deal. Listen. Their experience of this moment may offer insight into how a conflict could be resolved, particularly at a time where escalation of conflict is the last thing a client needs. In this way, the crisis creates an important opportunity for attorneys and parties in mediation. It gives one pause.

### **Concluding Online Mediation Session**

Pay close attention to the state of the mediation if you get to a point where you don't yet have resolution, but everyone is ready to call it a day. Many mediations do not end in one day. Stay connected to the process and participate until the matter is done – either because you have achieved a settlement, or you have determined that all good faith efforts at settlement have been exhausted. As attorneys, it is our instinct when a mediation has not yet completed after the first day to return our attention to other matters or back to litigating the case. That can mean wasting an opportunity to build on progress from the mediation. Prior to the pandemic, repeated face-to-face sessions posed challenges which in turn served to stifle negotiating momentum. Now, such sessions are much easier to schedule and should be utilized for continuing the discussion.

If we look at the history of a dispute, including the events that led up to it as well as the litigation, past settlement attempts and more, we would likely agree that most civil cases did not come into being in one day. To imagine that they can be resolved in one day is to hope that, by some magic, the mediation process will force the other side (or one's own client) to see the light of truth in a very condensed time frame.

The more likely scenario is that the parties will need some time to process what happens in an online mediation and that it will take more than one day

to get to resolution. However, it is a far more accelerated process than what the clients experience in a traditional court setting. Engage with this process thoughtfully and you might find that issues get checked off and numbers get closer, if not on the evening of the mediation, then a few weeks later as everyone cools down. Counsel and parties may see that some momentum—any momentum—builds on itself and agreements become easier.

### **June 10. Third session.**

We begin the Zoom session 15 minutes early. After some initial discussion regarding some easier points, we move to more complicated issues. We negotiate the meat and potatoes of the parenting time schedule and how the parties will divide summer vacation as well as holidays and religious events. These were flash points when they came up initially in the process.

This time, I ask the parties to share their screens. They have calendars and each has blocked off various pieces. When we look at them we see overlap, but also places where the other might have parenting time with the child, without interfering with some special occasion celebrated by the other parent.

They listen. They reflect. They summarize for each other.

July. The father's family has a big party on the Fourth. If he can be with his father for that, maybe, we can alternate years.

Christmas Eve. That's a special night to her. She can have him then.

New Year's. We'll both see him for the New Year. We can alternate day and evening.

Me: I'll write this up.

And then what?

Then you begin.

### **Endnotes**

- 1 See, Press Release, *Court System to Implement Presumptive Early Alternative, Dispute Resolution in Civil Cases*, New York State Unified Court System, Hon. Lawrence K. Marks, Administrative Judge, May, 14, 2019, [https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19\\_09\\_0.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf).
- 2 See, New York State Office of Court Administration, *Annual Report of the Chief Administrator, 2019* at page 36. [https://www.nycourts.gov/legacypdfs/19\\_UCS-Annual\\_Report.pdf](https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf).
- 3 *Id.* at page, 40.
- 4 *Id.* at page, 44.
- 5 *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, August 3rd, 2020; As of the time of the writing of this article, New York has had 32,413 deaths. The national total is 155,935. <https://www.nytimes.com/interactive/2020/>

us/coronavirus-us-cases.html?action=click&pgtype=Article&state=default&module=stylIn-coronavirus&region=TOP\_BANNER&context=storylines\_menu

- 6 See, New York State Department of Labor, *Employed, Unemployed, and Rate of Unemployment By Place of Residence For New York State and Major Labor Areas*, June 2020, <https://www.labor.ny.gov/stats/pressreleases/prtbur.pdf>

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