

The Ethics of 'Who Controls the Online Mediation'

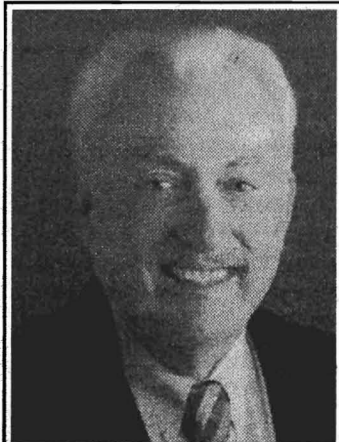
by Patrick Coughlan, Esq., Devon Coughlan, Esq., and Jeff Trueman, Esq.

Since March of this year, the authors have conducted more than 40 online mediations involving as many as 30 participants at once. Settlement rates remain high. Critical to the process are pre-mediation conferences that familiarize participants with the platform without the pressure of performing in an actual mediation. Early conversations about protocols concerning information security and confidentiality, as well as the details of the case, set the stage for a meaningful mediation that increases the chances of resolving the dispute.

A number of important ethical concerns are raised when parties mediate disputes online with Zoom, or other video conferencing platforms. Confidentiality and mediator neutrality, for instance, are bedrock principles in mediation. Videoconferencing platforms have numerous settings that must be programmed to protect information from unwarranted disclosure.

The platform must be carefully managed during the mediation for the same reason (to avoid disclosing confidential information). Mediators also have an ethical obligation to competently operate all technologies that facilitate settlement discussions. In addition, mediation is intended to serve the interests of the parties and, toward that end, the mediator is responsible for helping the parties make informed choices about which technologies to use. For these reasons, in our opinion, you should be wary of mediators who do not understand or will not manage these technologies.

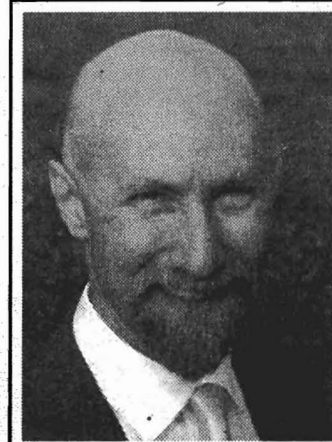
Rather than take the time to understand videoconferencing technology, some mediators allow one of the participating law firms to manage the platform and "host" the session, which gives that firm complete control over the platform. Alternatively, some mediators will hire (at the parties' expense) a fourth party, such as a deposition transcription com-



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assist the parties with drafting a term sheet. Again, who should be able to perform these functions?

Party participants should not regard the online mediation forum as anything other than neutral. They also have roles and responsibilities in managing the security of the platform. The mediator should develop and circulate protocols that explain the importance of information security and confidentiality and set forth standards of acceptable online behavior. The participants should take an active role in revising the protocols to best suit their mediation.

Most importantly, the mediator must have all participants agree in advance not to share the meeting number or password with anyone else; not to record anything on their smartphones; and to acknowledge that no one else is physically present with them or can overhear their conversations during the mediation.

The mediator's concern for confidentiality fully joins counsel's concern for inadvertent

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alone or in combination, sow the seeds for problems; they lose control over confidentiality, they create a forum that is not neutral or may not appear neutral to the parties, and they prohibit the party's ability to decide for themselves what technologies will be used in the mediation.

The lawyers in these circumstances have not, however, shed themselves of the nondischargeable responsibility to maintain client confidences. Both of these scenarios raise a number of security and ethical concerns that warrant consideration before scheduling and engaging in an on-line mediation session.

Exposing confidential information, intentionally or by accident, is a cardinal sin of a mediator. At the outset, from our view, the question that advocates should ask themselves is, "Who *should* control the platform and its security settings?" Where trust between litigating parties is non-existent or in very short supply, why would anyone give control of the platform to one's opponent; assuming the risks were fully explained?

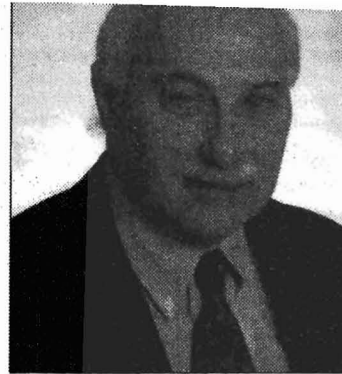
On the surface, hosting an online mediation may appear to be the same as hosting an in-person mediation. But there are critical differences. Most videoconferencing platforms permit recording, chat messaging, screen sharing, and other forms of communication that need to be disabled or managed by the mediator; not someone else who cannot assume the mediator's obligations to maintain confidentiality and neutrality.

Under "normal" circumstances, you would not want your mediator to assign those obligations to your opponent or anyone else; especially a non-mediator who is unaware of ethical issues in mediation. From a practical perspective, you would not expect to hire a fourth party at an in-person mediation to manage the "waiting room" or the breakout rooms, re-assign people to different caucus discussions, or

presence of non-clients. These assurances are easily obtained. If your mediator is not doing this, who is?

Public health concerns need not impede access to ethical mediation. New developments bring new challenges and responsibilities.

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Mediation is more critical now than ever before with the court closures. As a litigator practicing for 19 years, I understand the benefits of reaching agreements and compromise rather than engaging in protracted, expensive and bitter litigation. My experience in the courtroom, serving as a mediator and advocating for clients in settlement negotiations provide me with the insight, knowledge and tools to help both the represented and self-represented individual navigate their case to final resolution at mediation. With the use of virtual breakout rooms, video conferencing is proving a successful, private, and often less stressful experience for participants.

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Most law practices already understand the need to maintain robust internal information security protocols as part of their firm's office management practices.

The mediation process that is ancillary to trial practice is no different; the same expectations should apply to mediation practice. Mediators, like law firms, should be expected to keep up with the changing times, maintaining competency, confidentiality, neutrality, and party self-determination, regardless of where and how they practice.

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