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Trueman & Valkenet: Online mediations must be safe & sound

By: Commentary: Jeff Trueman and Thomas Valkenet May 22, 2020

The COVID-19 pandemic has made videoconferencing an indispensable tool for litigation and alternate dispute resolution.

Before the pandemic caused courts to close, some lawyers and mediators used videoconferencing technology to take depositions and conduct mediations, as client budgets might allow. Once the pandemic hit, however, many more lawyers and mediators "zoomed" to Zoom. But soon after its security practices were called into question, many zoomed to other platforms.

Zoom's lax security practices should be of concern to lawyers and mediators. Ethics rules require lawyers and mediators to responsibly manage information security anytime, but especially when mediating disputes online.

Confidentiality and neutrality are bedrock principles in mediation. To achieve these ends, videoconferencing platforms have numerous settings that must be programmed to protect information from unwarranted disclosure. The platform must also be carefully managed during the mediation.

In our opinion, you should be wary of mediators who do not understand or will not manage these technologies.

Surrendering control

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 company, to control the platform's settings and manage the mediation.

In either situation, the participants and mediator, alone or in combination, have ceded control over confidentiality. They have not, however, shed themselves of the nondischargeable responsibility to maintain client confidences.

Both of these scenarios raise a number of security concerns and threats to mediation confidentiality and neutrality 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 advocates should ask themselves is, "Who should control the platform and its security settings?"

Where trust is nonexistent or in very short supply, as is the case in many litigated disputes, why would anyone give control of the platform to one's opponent, assuming the risks were fully explained? Alternatively, a deposition transcription service cannot assume the same obligations as mediators.

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 is unaware of 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 nonmediator. 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 assist the parties with drafting a term sheet.

Again, who should be able to perform these functions?

Maintaining neutrality

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 and the process.

The mediator should develop and circulate online mediation protocols that explain the issues to everyone involved. The participants can and 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 record anything on their smartphones and 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 waivers of privilege caused by unmuted audio equipment or the presence of nonclients. These assurances are easily obtained. If your mediator is not doing this, who is?

Public health concerns need not impede access to confidential and neutral mediation. Even if your tech savviness ends with telephone conference calls and email, you will adapt, just as you moved on from carbon paper and your law firm's telex.

New developments bring new challenges and responsibilities. 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 neutrality and confidentiality, regardless of where and how they practice.

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