

Cases Are Resolving Online. So Why Are Lawyers Reluctant To Try It?

Jeff Trueman



Although social media feeds are full of reports that mediators are settling cases online, many lawyers are not interested — not yet, at least. Few have experienced online mediation, although many are willing to keep the option open. There seems to be a consensus that online mediation is not as good as mediating in person. Before I conducted online mediations, I was inclined to agree. Nonetheless, I was willing to learn about the technology. I spent time studying different platforms, practicing on them, talking to others who use them, etc. But many lawyers (including myself) maintain the opinion that people need to see each other in order for the process to be effective — although there is a strong irony to this since most civil lawyers want to bypass joint sessions, with some who intensely dislike their opponents. Still, as a mediator, I told myself that I need to “read the room” in order to be effective. But having conducted a number of successful online mediations where cases resolved, and hearing similar results from colleagues all over the country, I think more attorneys and institutions will want to mediate online.

For sure, there are some shortcomings. Although computers, tablets and smartphones are ubiquitous, not everyone has access to a strong and secure Internet connection. Not everyone is proficient with technology. Some people are not ready to change the way in which they do business. Moreover, there are security concerns. “Zoom,” one of the most popular online video conferencing platforms for mediation, recently suffered a barrage of criticism, along with a number of investigations and lawsuits over their security and privacy practices. Zoom responded immediately and has improved the security of its platform with more developments to come. Stay tuned.

It is important to point out that no platform is 100% secure. Most security breaches are due to user error. I believe that Zoom — while not perfect — is safe enough to use in most civil mediations. It all depends on how “the host” — the mediator — adjusts the

platform settings and manages the mediation. Participants should use the latest version of the software and keep their meeting invitations and passwords private and secure. Public internet networks must be avoided. The mediator should screen who gets into the mediation and lock the session so that no one else can be admitted. The engagement agreement must include issues relevant to online mediation so that participants understand and can follow online protocols. Critically, the mediator must have a comfortable command over the technology so that he or she is able to focus on the mediating the dispute.

Many video conferencing platforms are very easy to use. Once engaged in the process of mediating a case online, participants experience the same things they did at in-person mediations. They can see and hear each other. They can share and edit documents. They can caucus at any time with as many or as few people as they want. Virtually anything can happen with online mediation as it does in person, except shake hands (and get sick).

In some ways, online mediation may be better than in-person mediation. People can’t talk over each other. No one has to leave early to catch a plane or beat traffic. With the assistance of other communication media, deals get done more efficiently. Drafting and editing settlement documents is easy by virtually sharing screens or through email. Quick ideas can be shared via text. Confusion or frustration can be ironed out the old fashioned way — by cell phone. At mid-day, everyone makes their own lunch so dietary issues are better managed as well. Overall, settlement rates mediation remain high with online mediation.

Despite the economic and practical efficiencies of online mediation, when trial dates are delayed, the pressure to settle diminishes. But this may change. To make room for new legal challenges that the pandemic will prompt, current matters will have to get resolved. The personal and business needs of clients will likely induce them and counsel to come to the virtual table.

From a broader perspective, I believe technological advancements in dispute resolution will become more prevalent in the future, even after we defeat the virus. Of

**Upcoming events
will be announced at
MDdefensecounsel.org.**

course, online mediation will not be appropriate in every case. Indeed, mediators should not offer “cookie-cutter” approaches to their management of the process. Whenever travel and social restriction ease, some disputes will justify in-person meetings and negotiations. There is a lot to be said in favor of taking the time and expense to “show up” in person and investing the time and energy into mediation.

But don’t discount the power of technology to change institutions and the ways in which we conduct the business of law and mediation. No one thought the Internet would impact brick and mortar retailers, or journalism, or the music industry, or taxis, etc., until it did. Increasingly, people don’t have to reorder their lives around the directives and time frames chosen by courts, incur travel expenses and frustrations with airports, traffic and parking, take time off of work or other important matters, wait years for resolution, etc. The tools that help people solve their legal problems outside of courts will only get better.

Someday, we may look back on these times and notice the similarities between our reactions to online mediation and how people responded to new technologies in the past. For example, the chief engineer of the British Post Office affirmed that his country didn’t need the telephone since they had “plenty of messenger boys” and the president of Western Telegraph in America predicted the telephone “has too many shortcomings to be seriously considered as a means of communication.”

The author is a private commercial mediator in Baltimore and the past director of Civil ADR for the Circuit Court for Baltimore City. He can be reached at jtr@jefftrueman.com.