

# Alternative Dispute Resolution from a distance The new normal is... virtual

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# The new normal

- ▶ New ways to provide alternative dispute resolution services in response to the current situation surrounding COVID-19;
- ▶ Forms of intervention using conferencing technologies have proven to be successful;
- ▶ Using technology adds another dimension to the dynamics of mediation.

# Is virtual mediation appropriate for the conflict?

- ▶ All parties and practitioner must have a calm and private environment, free from distractions, to allow optimal participation in the mediation.
- ▶ The technology has to be accessible to the parties and they should have the chance to familiarize themselves with it, prior to the mediation.
- ▶ All parties must agree on the use of technology for the mediation.
- ▶ The capacity of the parties extends to using technology.

# Is virtual mediation appropriate for the conflict? (cont'd)

- ▶ The chosen technology will benefit the mediation process positively. If parties are very emotionally involved, technology can benefit the parties by creating a psychological space between them.
- ▶ Should access to others (such as a resource, accompanier or decision maker) be required, these people must also have access to and be comfortable with the technology selected.

# Is virtual mediation appropriate for the conflict? (cont'd)

- ▶ Ultimately, the choice of technology will be determined based on the person with the most limited access to or ability to use the technology.
- ▶ If the parties express conflicting preferences (e.g. one party prefers teleconferencing, while the other party prefers web conferencing via MS Teams or Zoom), the mediator should attempt to reach a fair consensus agreed upon by all parties.

# Managing confidentiality

Some things to keep in mind:

- ▶ Given the nature of technology, there is no foolproof method of maintaining confidentiality in a remote mediation process.
- ▶ In premediation, review the section of the *Agreement to Mediate* document on confidentiality with each party and:
  - Draw the parties' attention to the importance of being alone in a closed room or out of earshot. Before proceeding, always ask parties if anyone else is in the room is with them.

# Managing confidentiality (cont'd)

- Draw the parties' attention to the fact that recording or publishing all or part of the mediation is absolutely prohibited.
- You may emphasize that the confidentiality of information provided in mediation includes the non-disclosure of the content of emails or publications exchanged in mediation on social media.

# Develop trust with the parties

We must pay attention to some particularities, specific to online mediation, and know how to approach them:

- ▶ Demonstrate your mastery of the platform.
- ▶ Provide a technological tour of the platform during pre-mediation to make the parties more confident in using the technology.
- ▶ Allow extra time for pre-mediation;



# Develop trust with the parties (cont'd)

- ▶ Think about expressing your state of mind more frequently using verbal expression, to compensate for reduced nonverbal signs.
- ▶ Encourage the parties to share their state of mind; use summary, rephrasing and reflection techniques.
- ▶ Encourage the parties to ask questions rather than making assumptions based on limited information.
- ▶ Address the issue of confidentiality clearly.

# What if the technology fails...

How to prepare for technology issues:

- ▶ In advance, develop a series of back-up plans and share them with the parties, in case technology fails.
- ▶ This can include, for example, another phone number to call if the mediation is disconnected or the audio fails, what to do if video lag becomes extreme, specific e-mail addresses to which a new meeting link would be sent, if need be, and an alternate date should one be required.

# What if the technology fails... (cont'd)

- ▶ Inform the parties that technical problems may arise and that this is normal.
- ▶ All parties must have access to a “back-up” medium should technology not work as predicted (i.e. fully-charged phone).

# What if the technology fails... (cont'd)

What to do if you are facing technology issues:

- ▶ Stay calm. If you or any of the parties are disconnected, the mediation will be paused until all parties have rejoined.
- ▶ If your audio or video fails you may wish to disconnect and rejoin the session. Warn participants ahead that this may occur, because on some platforms the practitioner/host may have to end the session entirely to rejoin.

# The more the better

To sum up...

- ▶ Be prepared to spend time practicing and learning to become competent and comfortable using the technologies selected.
- ▶ As a practitioner who became a “technical lead”, you must be thoroughly familiar with your own equipment and any technologies being used so you can use them effortlessly, as well as support the parties in their technology use.
- ▶ Allow extra time for pre-mediation;

# The more the better (cont'd)

More communication, more questions:

- ▶ Think about expressing your state of mind more frequently using verbal expression, to compensate for reduced nonverbal signs.
- ▶ Encourage the parties to share their states of mind; use summary, rephrasing and reflection techniques.
- ▶ Encourage the parties to ask questions rather than making assumption based on limited information.

# The more the better (cont'd)

More caring:

Practitioners and participants may experience that mediation from a distance requires an increased level of attention which may be draining, more so than face to face mediation. As an integral component, ensure that you are aware of your needs and those of the participants to support well-being.

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