

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

BY LESLIE A. BERKOFF AND HON. LOUIS H. KORREICH



**Coordinating Editor
Leslie A. Berkoff**
Moritt Hock &
Hamroff LLP; New York



**Hon. Louis H.
Kornreich**
Bernstein, Shur,
Sawyer & Nelson PA
Portland, Maine

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP in New York and is co-chair of ABI's Mediation Committee. Hon. Louis Kornreich, a former bankruptcy judge, is Of Counsel at Bernstein, Shur, Sawyer & Nelson PA in Portland, Maine, and is co-chair of the Special Projects Subcommittee of ABI's Mediation Committee.

Taking Mediation Online: The Practicalities and the Pitfalls

Editor's Note: ABI recently launched its *Coronavirus Resources for Bankruptcy Professionals website* (abi.org/covid19), which aggregates information for bankruptcy professionals to assist clients and provide guidance due to the fallout from the COVID-19 pandemic.

Bankruptcy lawyers and mediators agree that mediation should take place in person with all decision-makers physically present. When faced with exceptional circumstances, however, many of us have participated in telephonic or video mediations. The universal social distancing precautions adopted in response to the COVID-19 pandemic present us with a new and extraordinary circumstance justifying remote mediations.¹

Learning to adapt and utilize remote mediation is necessary if bankruptcy lawyers and mediators are to serve those who have engaged them to resolve disputes. Doing so will enable lawyers and mediators to meet the explosion in bankruptcy cases that is likely to occur in the aftermath of the current health crisis when bankruptcy courts are likely to be overwhelmed. Traditional face-to-face mediations and in-court proceedings will resume at some point, but courts and lawyers will be looking for ways to move many new cases forward in an efficient, cost-effective manner.

Lawyers and mediators who have acquired remote mediation expertise will be well positioned to meet this new challenge. In addition, the normalization of remote mediation will expand the reach of skilled mediators to the entire country and beyond. It may also expand the mutual referral base of medi-

ators when conflicts of interest arise and additional or new assistance is required.

Much has already been written on the general subject of remote mediation. The purpose of this article is to convince the bankruptcy community that remote mediation is a particularly good tool to use in bankruptcy practice. Let's begin with the obvious: Remote mediation is not as good as face-to-face mediation, which enables participants to have eye contact, read body language and assess the positions of adversaries based on their deportment. It is hard to refute these well-known attributes of in-person mediation. The purpose of this article is to convince readers that when in-person mediation is impossible or impractical, remote mediation is an appropriate and effective way to resolve bankruptcy disputes and should not be dismissed out of hand.

While there are some articles that discount the usefulness of remote mediation,² other articles explain how remote mediation can be effective.³ Most of the criticism of remote mediation comes from outside of the bankruptcy context, where timing is not as critical. However, in bankruptcy, time is a luxury that many debtors and creditors do not have. Accordingly, remote mediation might be a more appealing option to resolve time-sensitive bankruptcy disputes.

Bankruptcy professionals are "can-do" types who know how to improvise. Bankruptcy lawyers rarely have an opportunity to sit back and wait until the time is right to participate in an in-person mediation. They know the pressures of the case, and the strictures of the Bankruptcy Code and Rules often prevent a delay of any kind. Their "must-do-now" mindset should be applied to mediation.

¹ The authors do not intend to offer technical advice or provide a "go-to" program for running mediations online. There are many resources available for training in Zoom and other remote modalities. Readers should turn to the many other resources available on this topic.

² See, e.g., Jeff Kichaven, "The Era of Video Mediation Is Here — Or Is It?," *Law360*, April 6, 2020.

³ See, e.g., Michael Willemin, "In Defense of Virtual Mediation," *Law360*, April 13, 2020.

A bankruptcy mediator can make remote mediation effective if lawyers and their clients are committed to the process and remove barriers to working in a new format. Bankruptcy courts have paved the way, as telephonic hearings have been in use for a number of years and video hearings are now occurring with regularity. Applying technology to mediation is a step in the same direction,⁴ and training mediators and the bar will be another key to its success.

Things to Consider

There are many important considerations that will improve the effectiveness of remote mediation. First, it is important for a mediator who is conducting a remote mediation to be both capable and comfortable with the technology they use. Just as mediators are trained in the art of conducting in-person sessions, they must be similarly trained to conduct mediations online.

Further, in the present environment, the mediator must take the lead in preparing participants — both the lawyers and the parties — in the workings of a remote session. Everyone must be comfortable with the concept and technology for remote mediation. The mediator should provide participants with training provided by the system vendor, then set up a practice session to ensure that everyone is comfortable with the technology.

Just as a mediator would ensure that every participant is comfortable and knows where the amenities are located in real conference rooms for an in-person mediation, every participant should be made aware of how to use the mute button or request, set up and participate in a private caucus for a remote mediation. Preparing participants in this way is part of a mediator's trust-building role. It is also the best way to avoid frustrating and devastating mistakes.

Second, the mediator needs to ensure that all participants are comfortable with the confidentiality of the online process. It is easier to assess confidentiality when the participants are sitting in a private conference space where it is obvious that what is said is heard only by those who are in the room. This is more difficult to do online. Moreover, most remote platforms have recording features, which must be disabled. The mediator and lawyers must carefully review the confidentiality expectations of all the participants and stress the importance of maintaining the confidentiality of the process. Adding passwords that are exchanged solely with the participants will build confidence in the process. Further, in advance of the mediation, the mediator and lawyers must stress that each participant should be in a private space where they cannot be overheard. The parties should not be on public Wi-Fi and should be in an area with good connectivity to avoid disruptions.

Third, security precautions should be taken with a remote vendor, and every participant should be made aware of these precautions. By adding dual passwords, locking the session once all participants have joined and implementing some of the other recommended precautions, remote mediation will be as secure as the technology allows.

Fourth, the parties should agree upon a contingency plan in case the technology fails to work, such as having technicians on standby.

Fifth, the mediation agreement should be re-crafted to incorporate all the above concerns and any special concerns of the participants. It should be read and signed by the mediator and every participant.

Benefits and Concerns

There are several benefits to remote mediation. One of the primary benefits is cost savings. Without the need to travel, expenses will be reduced, and participants will have more flexibility in scheduling. Setting up remote mediations might also be less intrusive for participants and easier to calendar around work and family obligations. Of course, all of this comes with an inclination toward informality. Thus, it will be necessary to remind participants to treat remote mediation with the same seriousness as in-person mediation. Those participating must avoid falling prey to the distractions of other activities and multi-tasking. A remote mediation must occur as if it were being conducted in a live setting.

There are other benefits, such as utilizing technology to share documents electronically. Most online programs such as WebEx provide for document-sharing, which is easier than printing and making copies of documents. Indeed, utilizing technology, parties can literally be focused on the same place on a page of a document. There are some risks to sharing documents online, however, such as losing some level of control as to where the documents are sent and who may have access to them. However, most mediation agreements and orders contain provisions requiring the parties to agree to strict confidentiality. It should be made clear that anyone attempting to record the mediation, send an improper email or misuse a confidential document will be subject to sanctions, and that the loss of credibility from such abuses would not be worth whatever benefit might be gained.

Perhaps the greatest drawback to keep in mind is that not everyone is comfortable with or trusts technology. While today's world is becoming more technologically driven and recent events have perhaps accelerated that trend, not everyone has access to the same technology or even the ability to participate from an area with a stable broadband connection. Of course, this goes back to the initial step of ensuring that every participant is familiar and comfortable with the process ahead of time. Asking participants to certify that they are comfortable with the process as a condition of going forward should be part of a pre-mediation checklist, and advocates should ensure that their clients are comfortable even before the practice sessions with the mediator.

Mediation always depends on the parties having trust in the mediator and the process. Therefore, it is up to the mediator to properly set the stage by establishing trust in the mediator, the technology and the process of remote mediation.

Conclusion

While we all hope that things will return to normal soon so that professionals may resume face-to-face

⁴ The authors do not know whether Winston Churchill, a master of in-person disputation, would have accepted remote mediation as a means of dispute resolution. However, he astonishingly predicted the use of video conferencing in a 1931 article that appeared in *Maclean's Magazine* entitled, "Fifty Years Hence." Andrew Roberts, *Churchill: Walking with Destiny* 357 (2018).

mediation, one byproduct of this pandemic will be the normalization of remote mediation for use in appropriate circumstances. Lawyers and mediators who become skilled in the art of remote mediation will better understand when it will work best, even after the world rights itself. **abi**

Reprinted with permission from the ABI Journal, Vol. XXXIX, No. 6, June 2020.

The American Bankruptcy Institute is a multi-disciplinary, non-partisan organization devoted to bankruptcy issues. ABI has more than 12,000 members, representing all facets of the insolvency field. For more information, visit abi.org.