

THE MONTHLY



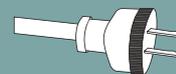
Who would have thought ...

... that we would still be here, on the cusp of more COVID restrictions and with the winter ski trips (for some) looking very unlikely. However, many of us are now comfortable with the "new normal", have adapted our practices and are reaping the benefits.

This edition of the R3 Monthly focuses on how COVID has increased the overall effectiveness of mediation.



online mediation faux pas ... still happening !



Plug in! - video conferencing uses ALOT of battery power - make sure your devices are connected to a power source.



Whatever platform you are using, satisfy yourself it is **secure**. Once on the platform, check that you don't have any confidential materials visible on camera on or your computer desktop (if screen sharing)

"Pivot" ... the buzz word of 2020

Many mediators have been forced to rapidly “pivot” and redesign their face to face mediation practices into an online offering. I know I have certainly spent many, many, hours learning how to navigate Zoom, Webex, Microsoft teams and Modron. I have also spent many hours collaborating with wonderfully generous mediator colleagues brainstorming how online mediating can be “done well”. I can confidently say that the mechanics of mediating online is no longer “the great unknown”.

But as restrictions are lifted – has all that learning been in vain? will parties discard online mediating and run gratefully back to face to face mediating? It seems not ... because what online mediating has taught us, is the importance of really honing in on the human element of dispute resolution,

I think it has enhanced, not hampered, my mediation skills. Certainly, what I am seeing is that the new frontier will be a mix of face to face and online mediating, so that those skills can continue to be developed and the soft skills exercised while “pivoting” can leading to an overall increase in the effectiveness of mediations.

A key skill of a mediator is the ability to facilitate discussions so that the parties are empowered to express their concerns, feel heard and, as a result, are more likely to consider the other parties’ perspective of the dispute. Mediating online, done well, can go along way to creating the right environment for that to occur. All the reasons why that is so would fill a book, rather than a newsletter, so I will only touch on two elements: its virtual nature, and how a mediator’s soft skills are being enhanced.

What difference does the “virtual” nature of online mediating make?

The obvious answer is the reduced travel time and reduced costs.

There is no need for parties in regional areas to allocate a few days travelling to and from a mediation, with the associated costs and lost productivity.

For some parties, the very fact of having to leave the familiarity of their home, or their local area, escalates the anxiety and apprehension they may already feel about the mediation itself.

more tips and tricks



Take up any offer to have a pre-mediation tech check. Not only can you use it to give the mediator a deeper understanding of the dispute and the parties; it goes a long way towards dissipating any anxiety about the technology which may be a distractor on the day.

If a party is able to remain in an environment where they feel safe and confident, there is one less distraction for the parties on the day, and they are more likely to feel empowered to consider different perspectives and compromise. It's very difficult to get a person who is already feeling out of their comfort zone physically, to abandon a positional stance they may have adopted for some time.

A less obvious benefit of the virtual nature of an online mediation, is the way it can potentially level the playing field between the participants, and strip back the impact of some aspects of a face to face mediation.

Subtle factors such as the energy that different participants bring into a mediation room can have a significant role to play.

We all know people, whether they be family, friends, colleagues or lawyers, that have a certain presence when they enter a room. Their height, size, dress, volume of their voice or mannerisms, all combine to create an certain persona or energy. I have certainly had some more diminutive participants (parties and legal representatives) remain very closed off and detached in an open session, and then express to me privately that they have no desire to engage in negotiations when they feel intimidated or looked down on by a “larger than life” opponent.

Put all parties online, with each getting the same size thumbnail image, and the mediator closely managing the interactions between the parties, and a lot of those imbalances fall away.



Another lovely feature of mediating during covid is the way it has, for many, emphasised that parties to a dispute are, at the core, human. During many mediations I have had the privilege of meeting family pets, seen holiday snapshots and had funny moments as children run unexpectedly into an office – and this has been with people in very high profile positions, people who would, face to face, slip very much in their “CEO/lawyer/plaintiff role” and act accordingly;

... by allowing a little of the human side to creep in, for some, the positional role is soften.

How can online mediation lead to a honing of mediator's soft skills ?

A good mediator should be able to establish a relationship of confidence and trust with the parties so as to facilitate discussions, help parties to evaluate the strengths and weaknesses of their position and consider ways to resolve the dispute. While working in the two dimensional world of online mediations, mediators have less material available to them to project their authority, empathy, understanding and trustworthiness, and less information available to read the other participants.

Face to face I could establish immediate authority by meeting participants at reception, shaking hands, leading them to the board room, and sitting at the head of the mediation table. Now, I have to establish authority by controlling the entry of participants into an online meeting, setting ground rules for when people speak in a joint session video conference and “pinning” myself (on some platforms) so as to ensure my image always remains on the screen.

Having exercised that muscle of “establishing authority” I have no doubt that some of those techniques will carry over the face to face mediations (except the pinning!).

Mediators have to work a lot harder to build rapport with participants online.

They are now having to do so with a two dimensional image, usually of someone from the waist, or mid torso, up. As a result I have found that I now ***focus a lot more on facial expressions, voice modulation, speed of talking, pauses between sentences.***

And the result ... the underlying interests and concerns have been a lot easier to uncover, I am focussing more on the participants and asking a lot more questions that seem to reveal the real strengths and weaknesses of each parties position.

In some respects I am a chameleon, I have been forced to focus much more acutely on the social cues and behaviours of each individual participant to really pay attention to where they are at and what they need at that exact moment in time.

I am being very purposeful in my online interactions so as to rapidly develop that rapport that is a necessary prerequisite to being able to reality test the position that a participant is taking or proposing.

I am also finding that I am a lot more conscious of the impression I am projecting as the mediator.

In large multi-party mediations, where there may be many people on the screen, the tone of voice I use and the ground rules I set for the **joint session**, tend to be more formal and projected with more gravitas – I have found this has become necessary to avoid people speaking over the top of each other but also so as to set a very neutral image that moderates and neutralises the dynamics some parties may have brought into the mediation.

Whereas in the **private sessions**, I am watching very closely to read whether the parties are more relaxed, more likely to open up and discuss their real interests. If that is the case, then my tone and demeanour is similarly more relaxed and informal.

I have also found that I have had to concentrate even more so on facial expressions and tone of voice to learn about the dynamics between the parties and their lawyers, than I would have previously done in a face to face mediation.

One final matter worth mentioning is how emotion is dealt with online

In almost every form of human interaction, people have an innate desire to be heard.

When a party shows distress, sadness or anger it can be dealt with in two ways – naming and confronting it (eg “I can see how upsetting this has been for you”), or by glossing over it (eg “why don’t we just take a break”).

By the very nature of **face to face mediations**, it is much harder for a mediator to gloss over an emotion and most will confront it, however clumsily that is done – sadness or grief may be responded to by simply handing a box of tissues or getting a glass of water, and anger could be quelled by reframing the comment made.

Online, the temptation is to ignore the emotion and focus on the mechanics of the mediation – after all there is no way to send a virtual tissue box. However, ignoring the emotion of the dispute simply makes it harder to reach a resolution – the parties don’t feel heard, thereby making it hard for them to shift from a positional stance to a future focussed resolution mindset.

"To mediate successfully online, the emotions have to be addressed, they have to be named and acknowledged. It's just how that is done is different"

To mediate successfully online, the emotions have to be addressed, they have to be named and acknowledged. It's just how that is done is different.

I have found myself:

- deliberately slowing down my conversations when I sense people are getting agitated;
- lowering my voice when a party is getting angry;
- pausing for longer periods to ensure that parties have said everything they want to say; and
- deliberately using the language they use to convey a recognition of the emotion they are expressing.

Of course, all of these things were taking place in face to face mediations, however, by removing the information that is gathered face to face, it is like the other senses have been heightened and are working even harder.

So, while I have “pivoted” and “upskilled”, and confronted the prospect of business declining while people await a time that they can mediate face to face, I actually feel that this period of online mediation may see increasingly effective mediations.

As restrictions are lifted and parties have the option of face to face, or online, mediations, I am hoping that we continue to see a mix of both.

The virtual nature of an online mediation offers many benefits to the parties, and continues to force mediators to hone their skills mediating online, the overall effectiveness of mediations will undoubtedly increase.



WITH THANKS TO
YOU



I AM PLEASED TO SAY THAT R3 RESOLUTIONS
DONATED A TOTAL OF \$3,100 TO THE
SALVATION ARMY DISASTER APPEAL AND
PHOENIX AUSTRALIA, ARISING FROM
MEDIATIONS TAKING PLACE BETWEEN 1
JANUARY AND 30 JUNE 2020.

What's coming up?

Now ...

Since late March, I have conducted over 30 mediations online, via various platforms and in various combinations. Pleasingly the results are about the same. Many have said to me that they will continue to mediate some matters online, particularly those involving regional parties, as the costs are significantly lower. Over the past few weeks, as restrictions have eased (who knows for how long), it has been nice to be back to a few face to face mediations. However, the real benefit is that now parties have the choice, online or face to face. Some matters are more suited to one rather than the other, so call me if you would like to discuss suitability further.

The NSW Bar Association is maintaining a **consolidated guide to Court** during this period. You can access the guide by clicking on the NSW Bar Association logo to the right.



The next three months ...

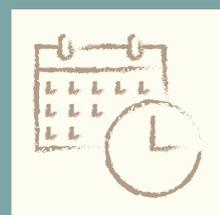
Now you have settled into "working from home" life and have your teams operating remotely, carefully review your matters to see whether there are any in which settlement discussions can be explored. Parties may be anxious to resolve claims and may be amenable to discussions, whether informal or via an online mediation. If you would like to discuss, or book, an **online mediation** contact us directly on 0421 048 456 or by email, jsomerville@r3resolutions.com.au

Finally

Stay safe and keep in touch with one another. While this is a period of uncertainty and a new way of doing business, our profession is agile and we can continue to keep delivering great service to our clients.

If you have any questions on how online mediating works, or need assistance in preparing, just give me a call.

Click the calendar to check availability and book and online mediation



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