

EFFECTIVE MEDIATION DURING COVID-19

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The COVID-19 pandemic and associated social distancing have had a massive impact on all areas of society, including aspects of litigation that traditionally involve meeting with other parties, such as trial, hearings and mediation. Faced with this unprecedented disruption, attorneys must prepare themselves and their clients for inevitable changes in mediation practices. This includes consideration of a number of factors, such as: (1) logistics of conducting remote mediation; (2) coordinating with neutrals and opposing counsel to reschedule mediation; (3) modifying existing mediation deadlines with the court; (4) surveying the new landscape for tactical advantages; and (5) planning for uncertainty.

In response to this health crisis, many states passed severe restrictions on travel and gatherings that make traditional, in-person mediation impossible. In Dallas County, shelter in place procedures prohibit such gatherings, at least through April 3. Bexar, Harris, Tarrant and Hunt Counties and other states have issued similar orders, with more potentially to come. International travel is de facto prohibited. Even if a shelter-in-place order is not in effect, most workplaces have travel restrictions on their employees, especially in cases involving air travel. Individuals, including both attorneys and clients, may also simply not be willing to travel or gather to attend mediation, even if there is no explicit prohibition on such meetings. JAMS, for example, moved their neutrals and staff to a remote-work structure on March 17. Because of this, the most likely accommodation is conducting remote mediation, where the parties are not required to attend in person.

Technological advances make remote mediation cheaper and easier than ever. Anyone with a smartphone or webcam and internet access can videoconference on applications such as Zoom, FaceTime, Skype and many more. While in-person discussions have the greatest chance of leading to a successful mediation, videoconferences offer a solid alternative. These applications allow the parties to

communicate non-verbal cues through facial expressions and body language that are not available through phone calls. Attorneys should communicate with proposed mediators and the parties to evaluate their familiarity with the various videoconferencing or teleconferencing options, as this is not a common practice in mediation under ordinary circumstances. Video applications may be challenging initially for those who are unfamiliar with the technology, and are subject to glitches, like lagging voices or distorted image quality. But in a time of crisis when traveling and gathering for face-to-face mediation is impossible, video conferencing may be the most viable alternative to postponing mediation entirely. Some mediators also offer telephonic mediation or alternatives where the mediator has shorter individual conferences over multiple days via email or telephone instead of a single session.

Whether parties decide to mediate remotely or postpone in-person mediation until after the crisis subsides, they will need to coordinate with each other and the mediators to alter existing plans. Because this is a new issue, reaching agreement on remote mediation may take some convincing for certain attorneys or parties used to traditional, in-person mediation. It is best to reach out as early as possible to discuss alternatives and explain potential advantages of remote mediation. Remote mediation may open up new dates that were previously unavailable due to scheduling conflicts or may reduce costs associated with travel and in-person attendance. When the parties can meet from the comfort of their own living room, rather than having to fly to a different city, get a hotel room and meet in person, their schedules can be much more flexible. Those who prefer a later date for an in-person mediation should also recognize that they are operating in a dynamic, unpredictable environment. There is no guarantee travel and gathering restrictions will be lifted by the date these parties reschedule their live mediations. Thus, parties should be realistic and conservative with setting new dates for mediations to avoid the need for multiple reschedulings.

Parties also need to be proactive in addressing mediation deadlines with their courts. The parties must evaluate whether they will be able to meet their current deadlines and, if not, coordinate to move the court to extend the deadlines and amend scheduling orders. The Texas Supreme Court has the authority to issue orders extending deadlines in disaster situations, under Texas Government Code, Section 22.0035. To date, the court has issued three emergency orders related to the COVID-19 pandemic. The First Emergency Order states all courts in Texas may: (a) modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule or order, for a stated period ending no later than 30 days after the governor's state of disaster has been lifted; and (b) allow or require anyone involved in any hearing, deposition or other proceeding of any kind to participate remotely, such as by teleconferencing, videoconferencing or other means. First Emergency Order Regarding the COVID-19 State of Disaster, No. 20-007, 2020 WL 1239711 (Tex. March 13, 2020). The First Emergency Order expires May 8, unless extended. In evaluating this, attorneys should search for rulings, orders or guidance issued by the specific court, county or state that place mediations on hold, would affect deadlines, or prevent them from attending mediation. Parties should request extensions as soon as practicable. In such cases, a court would be quite likely to grant reasonable requests for extensions and modifications of scheduling orders.

Once a remote or live mediation is set, attorneys should reevaluate their clients' strategic positions with fresh eyes, given the potentially dramatic change in incentives and leverage positions caused by the



COVID-19 lockdown. For instance, with numerous courts canceling all trials and hearings for 30 days or longer, there is sure to be massive docket congestion in the coming months. This may, in turn, cause the looming possibility of litigation to be less of a threat and change the leverage positions accordingly. Further, a client may have a greater need for immediate money, and therefore be more open to accepting a different amount if it means expeditious resolution of the dispute. And, the economic impacts of COVID-19 may mean a defendant will be insolvent or less able to satisfy a judgment months from now at the conclusion of litigation, so mediated resolution offers certainty and some amount of recovery. These sorts of strategic decisions will be intensely fact-specific and will require attorneys to consider the macro effects of the COVID-19 lockdown to advise their clients appropriately.

Finally, while it is important for attorneys to control the factors they can control, like rescheduling, it is equally important to plan for yet unknown contingencies. Travel restrictions may become more severe. Shelter-in-place orders may become more widespread. Nobody knows how long this crisis will last. With predictions that a vaccine may not be available for a year or longer, attorneys and parties may be reluctant to participate in face-to-face meetings for the foreseeable future. Attorneys can continue to serve their clients' interests effectively by implementing proactive, flexible protocols and maintaining open, transparent communication with the court, mediators, opposing counsel and, ultimately, their clients. It is best to have needed conversations early in the process and work towards consensus on alternative mediation plans. After all, agreeing on a protocol for mediation is the first step in reaching agreement to resolve the case and if the parties cannot agree on that, then it is unlikely they will reach resolution at mediation.

If you have questions or would like to discuss further, please contact [Perrin Fourmy](#) or Dominic Cruciani.

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