Optimizing the Use of Technology in Mediation

By Matthew Peaire and Aaron Jacobs

From cell phones, to the world wide web, to electronic mail, and beyond, over the past twenty years, we have experienced an unprecedented growth in technology, as well as a growing dependence in our day-to-day lives on these technologies. Accordingly, it is of little surprise that parties and mediators alike have implemented the advancements in information technology to the mediation process. Various forms of technology can be utilized to assist parties from the initial stages of selecting a mediator to the actual day of the mediation conference, and all points in between. This article details a number of ways that technology advancements have affected the way parties mediate.

Using Technology to Select the Proper Mediator:

When scheduling mediation, you will want to make sure that you select the best mediator for your client's case and allow for sufficient time for a good faith attempt at resolution. As anyone who has ever mediated can say, some mediators are better for some cases than others. Internet-based search engines, such as Google, can be a huge asset when selecting your mediator.[1] Oftentimes, search engines provide a quick and efficient access to a mediator's website, biography, fee schedules, mediation rules, contact information and on-line calendars for scheduling.

Technology Assists the Exchange and Collection of Information:

In most cases, prior to mediation, it is recommended that a party provide the mediator with a statement of the case, and other relevant materials, to assist the mediator in becoming familiar with the factual elements and the disputed legal aspects of the case. Additionally, the parties may wish to exchange certain documents and materials in advance of the mediation conference. With the increased use of laptop computers and tablets, oftentimes, parties and mediators prefer all submissions be provided in an electronic format.[2] Usually, this information can be exchanged via e-mail.

Additionally, on-line file hosting services, such as Dropbox, allows litigants and mediators to transmit and exchange documents using a cloud-based file storage system. These services allow these documents to be accessed through a website and mobile applications for cellular phones and tablets. In most cases, on-line file hosting services are significantly faster, more cost-effective and environmentally conscious than the exchange of paper documents.

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[1] James E. McGuire, Esq., Technology: Tools for the 21st Century Mediation, InsideCounsel.com, Oct. 5, 2012, http://www.jamsadr.com/files/Uploads/Documents/Articles/McGuire-IC%20Technology-2012-10-05.pdf.

[2] Donald E. Kelley, Technology & Mediation, Washington Arbitration & Mediation Service: Arbitration & Mediation News, June 1, 2012, http://www.usamwa.com/PDF%20files/WAMS%20Newsletter_8_2.pdf.

Technology can also assist the parties collection of relevant information in advance of mediation. Google and other search engines can be utilized to obtain pertinent information and other materials related to the dispute or the opposing party. The Internet provides a plethora of tools such as photographs, maps, and satellite images that may be useful to your case. Additionally, "social networking" sites such as Facebook, Twitter, or Instagram can be used to access publically displayed information posted by the parties to a lawsuit, as well as witnesses and experts.[3] These posting may contain information, admissions, photographs or other relevant materials that may assist your case and your preparation for mediation.

Online Dispute Resolution and Video-Based Mediation:

Perhaps the most obvious and direct union between technology and mediation is Online Dispute Resolution ("ODR"). ODR is a general term used to describe the use of Alternative Dispute Resolution methods utilizing the internet and cyberspace.[4] ODR first arose in the 1990's with the emergence of the Internet and continues to be a growing topic amongst dispute resolution professionals.[5] One form of ODR, "E-Mediation" or "online mediation" allow parties to mediate their case remotely, implementing the use of "virtual collaborative workspaces or e-rooms."[6] Virtual collaboration workspaces or e-rooms are forums that allow parties to collaborate and communicate exclusively through the use of technological channels, most commonly, via email, video and/or the internet.[7] Various vendors offer software that allows a mediator to conduct the online mediation process.[8]

ODR has often been used to assist with the resolution of "high-volume, long-distance conflicts," since ODR offers substantial cost and scheduling benefits.[9] The parties can participate in ODR without having to leave their office, so long as they have

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[3] Kelley, *supra* note 2.

[4] Julio Cesar Betancourt & Elina Zlatanska, Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?, 79 International Journal of Arbitration, Mediation and Dispute Management, Issue 3, 2013, Sept. 13, 2013, at 256, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325422.

[5] *Id*.

[6] Nadja Alexander, From ADR to ODR: Can Technology Shape the Future of Mediation Practice?, http://kluwermediationblog.com/2012/02/11/from-adr-to-odr-can-technology-shape-the-future-of-mediation-practice/, Feb. 11, 2012.

[7] Peters, Linda M., and Charles C. Manz. "Identifying antecedents of virtual team collaboration." Team Performance Management 13.3/4 (2007): 117-29.

[8] Alexander, *supra* note 6.

[9] Keith Lutz, Dispute Resolution Using Online Mediation, adapted from "Using E-Mediation to Resolve Disputes," first published in the March 2013 issue of the Negotiation newsletter, posted on April 3, 2013, available at http://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/.

access to the Internet.[10]   Accordingly, parties can immediately avoid the costs of travel and accommodations generally required for a remote mediation.[11]   Early studies have revealed that E-Mediations are an effective and useful medium to resolve disputes.[12]

Nonetheless, ODR certainly has its detractors as well.   Many commentators believe that the lack of personal, "face-to-face" interaction associated with ODR and E-Mediation undermines the foundations of effective negotiation.   Research has shown that electronic communications are prone to lead to increased levels of antagonism, a shortfall in the exchange of information, less cooperation amongst the parties, and feelings of distrust.[13]   There are also concerns regarding the security of these online platforms, the issue of confirming the identity of the participants in a remote setting, as well as preserving the confidential nature of mediation where a text-based record is generated during the ODR process.[14]

In recent years, Internet-based video technologies have vastly improved and have become more commonplace in business and commerce with applications such as Skype.   In fact, a majority of the smart phones and tablets that are sold today are capable of video conferencing.[15]   Accordingly, practitioners and mediators have started to more commonly rely on video-environments for online mediations, in order to alleviate some of the aforementioned concerns related to ODR.   Obviously, allowing the parties to physically see one another, even remotely, adds a layer of intimacy, which permits nonverbal communication, such as verbal tone, gestures, and facial expressions, which are not possible in strictly text-based environments.[16]   While some practitioners may still have apprehensions about utilizing these technologies, it seems that an increasing number of parties and mediators are becoming open to the idea of ODR and Video-Based Mediation.[17]

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[10] Burkley Wombwell, Online Dispute Resolution: An Amorphous Concept, Yet an Effective Tool, Dec. 16, 2013, available at http://www.disputingblog.com/wp-content/uploads/2014/04/Burkley-Wombwell-Hot-Topic-Paper.pdf.

[11] *Id*.

[12] Lutz, *supra* note 9.

[13] Betancourt & Zlatanska, *supra* note 4.

[14] Alexander, *supra* note 6.

[15] Kelley, *supra* note 2.

[16] Noam Ebner & Jeff Thompson, @Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation, International Journal of Online Dispute Resolution, Forthcoming, Feb. 14, 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857.

[17] Alexander, *supra* note 6.

Implementing Technology in the Mediation Presentation:

In mediation, it is imperative to garner the other party's attention, so that they truly appreciate the strengths of your case. In most cases, visual aids can be used to enhance the oral mediation presentation. The use of visual aids not only engages the opposing party and mediator, it also shows the other side that you have prepared the necessary tools to present your case to a jury.[18]

Technology can be an integral component of a vibrant and engaging presentation that will assist you in obtaining the best possible settlement outcome at mediation. If the events of your case are confusing, consider a visual timeline. If pictures assist in telling your story, consider a PowerPoint presentation. Photographs, maps, graphs, and other demonstrative aids can be truly effective tools to help the opposing party and mediator understand the facts of a case.[19] For example, satellite photographs obtained from Google Earth may be used to depict a "bird's eye" view of a certain traffic intersection, or "street view" images obtained from Google Maps can show the audience the physical condition of a particular building. These images can easily be incorporated into a PowerPoint presentation.[20]

If the damages are confusing, consider a spreadsheet, such as Excel, or diagram or chart that outlines each element of your damages claim. Sometimes, you will have powerful deposition testimony that supports your case. Consider enhancing the size of the text of the deposition testimony on a projector, or, if the deposition was video recorded, consider playing the video during your presentation. Regardless, of the specific mediums used, the goal of your mediation presentation is to tell your client's story, convey to the opposing party all of the powerful evidence that supports your case, and state it in a manner that is both convincing and easy to follow. Technology provides the visual aids to assist you in meeting these goals and obtaining the best possible recovery and outcome

Conclusion:

With the unprecedented growth in electronics, the Internet, and information technology, there has been an unbridled influx of technology into the mediation process. Using technology can make the mediation process more efficient, cost effective and, most importantly, more effective. Practitioners, mediators, and parties must familiarize themselves with these technologies or risk falling behind.

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[18] Morgan Smith, *How to Use Technology Effectively in Mediation*, Cogent Legal blog, Sept. 14, 2012, available at http://cogentlegal.com/blog/2012/09/technology-for-mediation/.

[19] *Id*.

[20] *Id*.