

**The McCammon Group  
Remote Mediation  
Suggested Practices for Lawyers**

April 6, 2020

I. Introduction

- A. The Covid-19 Pandemic is altering the world at a rapid pace. Until such time as 1) the governments of VA, MD, and DC lift their Orders to “Stay Home” and 2) it is safe to convene mediations in person, it will be the policy of The McCammon Group to handle mediations only by remote methods.
- B. “Remote” in this memorandum refers to communications among the mediator, lawyers, parties, and other participants in the mediation process using electronic methods such as desktop computers, laptops, iPads, smart phones or other electronic devices in circumstances where the mediator is in a location separate from the other participants.
- C. Remote mediation provides disputing parties and their lawyers with the opportunity, throughout these troubled times, to resolve disputes without endangering the health of any participants with both time and cost savings.

II. Pre-Mediation Activities

A. Background

Most of the activities leading up to a mediation session have traditionally been handled remotely, most often by phone. Thus, there will be little change in the methods of communication during this phase of the mediation process. However, the substance of what takes place during this phase will be altered.

B. Joint Pre-Mediation Conference Call

- 1. The call will be handled by phone, as usual.
- 2. Creating a Technology Plan for the Mediation Session
  - a. There are numerous digital platforms, services, and devices that can be used separately or in combination to support a remote mediation. “Technology plan” refers to such configurations.
  - b. Among the items on the agenda of the Pre-Mediation Conference Call, the mediator will moderate a conversation among the lawyers to develop a technology plan to support the remote mediation session.

- c. Generally, lawyers want to retain control in deciding what technology plan will be developed and in hosting and implementing the plan.
  - d. It is the mediator's role to effectively participate in the chosen plan and, in so doing, to perform the traditional duties of a mediator.
  - e. If the lawyers need help in implementing the technology plan at the mediation session, they can rely on resources inside their respective firms. Alternatively, they can hire outside vendors. Many (court reporting and IT) companies offer these services to host meetings on digital platforms and to manage the implementation of the technology plan.
3. Additional details regarding the Technology Plan
- a. The mediator will work with the lawyers to determine whether there will be a plenary session (opening session including the mediator, all parties, their lawyers, and all other participants, as well as case presentations). If so, the mediator will assist the lawyers in shaping the technology plan to cover this activity and in determining which lawyer(s) will be responsible for the execution (hosting) of that portion of the technology plan.
  - b. The lawyers should know how the individuals on their respective teams will participate and what the technology needs of each team member are.
  - c. When documents will be utilized, the moving lawyers should either master the available techniques to display them through whatever remote technology is being utilized or email copies or mail hard copies to the mediator and all other lawyers in advance of the mediation session.
  - d. The lawyers should ensure in advance that any video conference site utilized does not have any time limitations. (Free subscriptions are often time-limited whereas, for a relatively small fee, these services are available with no time limitations.)
4. Development of Plan to Submit Written Materials
- a. The Mediator should coordinate the development of a plan for the submission of written materials to the mediator in advance of the mediation session.
  - b. An agreement should be reached as to what materials (the actual documents which constitute an integral part of the dispute) will be submitted by which lawyers.

- c. In addition, the lawyers may agree to submit mediation statements (their view of the case) to the mediator in advance of the mediation session, preferably with copies being provided to opposing lawyers.
  - d. A schedule should be established.
  - e. Agreement should be reached on the method by which the identified materials will be submitted to the mediator.
5. Individual Calls between the Mediator and the Lawyer(s) of each Party
- a. It is important that the mediator have private calls with the lawyer(s) for each party in advance of the mediation session.
  - b. Ideally, the scheduling of these calls can be accomplished during the Pre-Mediation Conference Call.
  - c. If these calls cannot be scheduled during the Pre-Mediation Conference Call, the case manager can subsequently schedule these calls.
6. Execution of the Agreement to Mediate
- a. **It is the responsibility of the lawyers to sign the Agreement to Mediate and to procure the signatures of their respective clients and all other team members who will be participating in the mediation session. It is extremely important for the lawyers to fulfill these requirements before the mediation session in order to save time and avoid confusion.**
  - b. There are several alternative ways to meet this requirement.
  - c. Before the Mediation Session (traditional method), each lawyer should:
    - 1. Sign a copy of the Agreement to Mediate which has been sent to them by The McCammon Group's case manager as an attachment to the Confirmation Memorandum. (Alternatively, the Agreement to Mediate can be downloaded from the website of The McCammon Group.)
    - 2. Arrange for their clients and all other participants on their team to, separately, do the same.
    - 3. Arrange for all these people to email to the lawyer their executed counterparts of the Agreement to Mediate; and then,
    - 4. Each lawyer should email these executed counterparts to the mediator.
  - d. Before the Mediation Session (electronic method) each lawyer can:

1. Utilize available sites (e.g., DocuSign) to obtain the electronic signatures of everyone on that lawyer's team who will be participating in the mediation session; and then,
  2. Arrange for these executed Agreements to Mediate (in counterpart) to be emailed to the mediator.
- e. During the Mediation Session, when participants who have not signed are **co-located** with their lawyer:
  1. The lawyer can, at the outset of the mediation session, download a copy of the Agreement to Mediate from The McCammon Group's website and procure signatures from all such team members, including the lawyer.
  2. The lawyer should then email the executed Agreement to Mediate to the mediator.
- f. During the Mediation Session when participants who have not signed are **not co-located** with their lawyer, the lawyer can:
  1. Download a copy of the Agreement to Mediate.
  2. Print on the Agreement to Mediate the name of each remote team member who has not signed it.
  3. Obtain authority, in the moment, to sign on behalf of all team members; and
  4. Sign on behalf of all such team member, "by, Sara Jones, Lawyer."
  5. (Alternatively, the lawyer can instruct the remote team member to download the Agreement to Mediate, sign it, and email it to the lawyer during the mediation session.)
  6. Subsequently, on behalf of the team, the lawyer should send to the mediator the executed Agreement to Mediate (in counterparts, if necessary).
7. Protocol for Caucuses
  - a. One approach is to deal with each caucus as a separate "silo" with no electronic connections with other caucuses.
    1. This approach assumes that the video conference convened in the opening plenary session has been terminated.

2. This approach allows each caucus to create its own method of communicating with its team members and with the mediator. For example, a caucus could create its own separate video conference using any platform of its choosing; or that caucus may choose to communicate with the mediator, more simply, even by smart phone. It all depends.
  3. The lawyer managing each caucus will invite the mediator to join the meeting. The mediator can then enter and leave a caucus, as would be appropriate.
  4. This approach would provide ultimate protection against any inadvertent electronic disclosure of confidential information because there would not be any electronic connections with other caucuses.
- b. In other situations (e.g., substantial number of parties, etc.) the lawyers may want the caucuses to be “hosted” as part of a single video-conference platform.
1. Generally, the mediator is not responsible for this hosting function.
  2. Third party vendors (some court reporters, IT vendors) offer services by which they would host the video-conference session convened for the plenary session and then host the caucus sessions by electronically setting up “breakout rooms” which would house each caucus.
  3. In this configuration, all the caucuses would have an electronic connection since they are all a part of the same video-conference session. However, if the management of these breakout rooms is performed properly, the risk of confidential information being electronically disclosed by mistake is low.

### C. Final Preparations

1. Experience demonstrates that it is extremely useful to arrange a trial run of the chosen technology plan sometime before the day of the mediation session. This will give the lawyers and the mediator a chance to tweak any glitches in the technology plan.
2. This trial run can also be used to ensure that all other substantive or procedural matters have been addressed.

### III. Mediation Session

#### A. Opening Presentations

1. Whether opening presentations (much recommended) will be made should have been addressed in the Joint Pre-Mediation Conference Call or perhaps in other conversations among the mediator and the lawyers leading up to the mediation session.
2. Likewise, and as discussed above, any technological arrangements needed to support the opening presentations should have been discussed and adopted in the Pre-Mediation Conference Call (or in other preparatory calls).
3. These technological arrangements are the responsibility of the lawyers.
4. It is the role of the mediator to fit into the chosen technology plan and to participate professionally and effectively.

#### B. Caucuses

1. The caucuses would proceed according to the plan adopted by the lawyers with the assistance of the mediator.
2. The mediator would enter and depart each caucus, as appropriate.
3. When working with one party in caucus, the other parties will be standing by, as they normally would.
4. As would be the case in traditional mediation sessions, the mediator will go back and forth among caucuses to complete the negotiations.

#### C. Memorializing a Settlement Agreement

1. As in traditional mediations, the lawyers will be responsible for memorializing the settlement agreement. (Ideally, the lawyers will have prepared, and perhaps even exchanged, templates of settlement agreements before the mediation session.)
2. Lawyers can draft the settlement agreement by videoconference, phone, and/or email. It is preferable for the lawyers to stay together virtually during the drafting process, if possible. If this is the case, a new video conference meeting could be convened by one of the lawyers, to which the mediator should be invited. Presumably, each lawyer will need to maintain access to the represented party to facilitate the drafting process.
3. Whether participating in these activities or not, the mediator will remain available, as needed, to iron out any problems in the drafting process.

#### IV. Follow-Up

- A. Traditionally, following up is a remote activity, executed by phone or email.
- B. Following up in the context of a remote mediation would be handled in the same manner as in an in-person mediation.
- V. Best Practices to Enhance Security in Hosting Video Conference Meetings
  - A. Make sure the video meeting is subject to a password.
  - B. Do not set a video meeting as a “public” meeting.
  - C. Share the meeting link only with invitees.
  - D. Setup a waiting room (lobby) for invitees.
  - E. Admit to the video meeting only invitees in the waiting room (lobby).
  - F. Set the screen share so that it is available to only the host.
  - G. Absent written permission from all participants, audio and/or visual recordings of the proceedings should be prohibited.
  - H. Absent written permission from all participants, private chats should be prohibited.