

Digital Mediation when Digital isn't Available

By Cortney M. Stuart, Esq.

In the digital age that we have all come to know and embrace, the natural response to in-person mediations being canceled during a pandemic was to jump online, where most of us spend most of our time anyway. However, how do we do a virtual mediation with a participant who does not have access to the internet or Wi-Fi?

How do we conduct a virtual mediation with a participant who cannot afford a computer, laptop, tablet, or cell phone? In rural north Georgia, where I practice, poverty and limited access to the internet is common. There are those people that cannot access the internet because of where they live. Either they cannot afford it or there is no provider who delivers internet in those areas. On top of mountains, there is not always Wi-Fi. In the backwoods, there is not Wi-Fi and often no internet options.

Moreover, if a participant has transportation, public Wi-Fi is not always an option. If a participant does have internet options, that does not mean the participant can afford it or afford a device capable of doing a virtual mediation. Finally, in rural north Georgia, the aging population is not always so tech savvy. So, in the digital age with a pandemic, how do we conduct mediation?

I believe the first step is for the mediator to inquire about internet and device options available to the participants. Is the party represented by an attorney? If the party has an attorney, will the attorney be arranging the internet and device for the party? Do not assume that an attorney is tech savvy or has a device capable of attending a virtual mediation just because they are an attorney.

For instance, until a couple of years ago when the Georgia State Bar began to require attorneys to have an email address, many attorneys in rural, north Georgia did not have email addresses. If the party does have internet and a device capable of attending a virtual mediation, make sure to walk them through the process prior to the mediation to avoid any delays on the date of mediation.

Because Wi-Fi is not reliable in the area I practice, I try to do a test session with participants prior to a virtual mediation to introduce myself and test their virtual capabilities. A lot of times, I learn that the participant's Wi-Fi is not stable, and the mediation will be unproductive if conducted virtually with the person in the location they are planning on being in.

Participants will frequently realize this themselves during the test session and suggest alternative places they can attend the mediation from. Additionally, participants with unreliable or weak internet can consider a Wi-Fi booster, using a smart phone's hotspot, and hardwiring the internet connection instead of Wi-Fi. Even if the party has reliable internet, the test session is good to make sure the person's microphone, video, and speaker work.

If the party does not have internet or a device capable of accessing the internet, the first question I ask myself is, "Do I feel comfortable with this person coming to my office?" If so, then I can have the party sit in a separate room from me while I conduct the mediation with the opposite party virtually and at a location of their choice. If this happens though, I always disclose to the party not at my office that the other party is at my office and make sure there are no issues with that. If I do not feel comfortable with the party coming to my office or the opposing party does not feel comfortable with that, I believe the mediator should research public internet options available. In the town I primarily practice in, there are limited public internet options available. The go-to public internet option prior to the pandemic was the public library.

However, the public library in the city I primarily practice in has been closed since March with the pandemic. Some cities have parks with public Wi-Fi, which might be a good option. If the internet in the park is strong enough, the party can sit in their vehicle and attend the virtual mediation. Additionally, some counties have law libraries at the courthouse with internet access. The mediation should consider whether the public Wi-Fi is free.

Some cafes and restaurants will allow a customer to use their Wi-Fi after a purchase. However, participants might not have the funds to spend on a purchase to use the Wi-Fi. Be mindful of the financial circumstances of the parties and any potential financial abuse by one party in a domestic situation. If the party can participate in the mediation by using a public Wi-Fi option, be sure to think of the confidentiality aspect of it. I suggest to the participant who is in a public Wi-Fi setting to use headphones and a computer away from others if they cannot be in a separate, secluded place.

Also, be mindful of the participant's attention span. If the participant is in public, there could be a lot in the public setting that is distracting to the party. For all these reasons, I do not generally suggest mediation in a public setting unless the surroundings can be managed appropriately.

An additional option is a telephonic mediation. While I completely believe that there is a valuable component of mediation to be able to see someone when they talk, see their body language, and the parties see the mediator, a telephonic mediation is a viable option. Almost everyone has a cell phone or landline phone, and telephone service is generally more accessible than Wi-Fi or internet. Telephonic mediations are not a good option for every case. Where will the party be attending the telephonic mediation from? Are they going to be a Disney World waiting in line for their favorite ride (while wearing a mask of course) and attending the mediation? If so, telephonic mediation is not the best.

Does the party have a telephone? Does the telephone have minutes on it, if it is a cell phone. Does the party live in a place with notoriously spotty cell service? If yes to any of those questions, telephonic mediation is not a good option. Additions, does the party have an attorney?

Will the attorney and party be in the same location? If not, can the mediator conference the parties together and allow them to caucus? The confidentiality and attention-span concerns are still prevalent in a telephone mediation and should be considered and monitored.

Finally, in-person mediations are still an option; however, make sure that you and the participants are safe. Some participants and attorneys prefer in-person mediations, even with the current pandemic environment. If you find yourself conducting an in-person mediation, I suggest finding a big, open room where social distancing can be easily maintained, have hand sanitizer, and require all participants to wear a mask. If you need to caucus, you are going to want two big, open rooms.

You do not want to be stuck in a closet trying to caucus with a party during a pandemic. You could inquire of the courthouse about reserving an entire courtroom or two for the mediation. Also, remember to consider doing one party in person and another virtually if all agree. There is no one-size fits all mediation. The mediator should explore new options for conducting mediation during the pandemic; however, the mediation should not just know the options but know the pitfalls and advantages of each. The mediator must also investigate the parties' circumstances and what types of mediation are best for the parties and the circumstances of the case.



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