

VIRTUAL MEDIATION TIPS AND GUIDELINES

TECHNOLOGY AND SECURITY

1. Know your technology. Effective and secure technology platforms are a must for successful virtual mediations. Common platforms are Zoom Video Communications, WebEx, Google, Microsoft Teams. Good to have a back-up system in place in case of technology issues with the preferred communication platform.
2. All participants must have access to a computer with audio and video capabilities. Participants do not need to download the Zoom application.
3. The participants must have a secure and reliable Wi-Fi or Ethernet connection (password protected)– **no public Wi-Fi**. This is necessary to take all precautions to preserve the privacy of communications and materials or data shared with the mediator.
4. Access to mediations should be password protected and should have randomly created, unique meeting ID's and passwords. Passwords and meeting ID's should not be shared with anyone.
5. The mediator will be the host and in control of the Mediation. The mediator will use the "Waiting Room" feature to ensure that only invited participants are allowed into the mediation.
6. The parties should discuss in advance and come to agreement with each other and the mediator on the use and availability of the Screen Sharing Function. If the parties cannot agree, the Screen Sharing Function should be disabled.
7. On the attendance sheet, every participant should enter e-mail addresses and a cell phone numbers. These alternate forms of communication may be used if there are technology issues or connection is lost.
8. Mediation sessions should not be audio or video recorded, and this feature should be disabled

CONFIDENTIALITY

1. Virtual mediation will be conducted under the **same strict rules of confidentiality as any other in-person mediation**. All counsel and parties are expected to take the necessary precautions and actions to preserve confidentiality and the privacy of the mediation.
2. In virtual mediations involving parties physically located in different states, take care to research the laws of mediation confidentiality in those states. In this situation, do not

assume that all mediation communications will be confidential. You may need to designate the location where the mediation is taking place and document choice of law provisions.

3. Virtual mediation should be conducted with the **same level of attention and respect to the participants as if it were in-person**. This means that except when on a break, or related to the mediation, participants should not be doing other work, or be on their cell phones, iPad or other devices.
4. The participants all must be identified and should be in rooms where there are no others, except those participating in the Mediation. **No eavesdroppers**, spouses, children, or uninvited or unannounced participants.

JOINING THE MEETING

1. Prior to the Mediation, the Mediator will schedule a Mediation Management Meeting. At this meeting, the participants will agree on the date and time for the Mediation and will discuss the pre-mediation statements and other details of the Mediation. This meeting also will allow time for any technology issues to be addressed, and to demonstrate to the participants how the process will work. The Mediator will confirm that each participant understands how to mute/unmute, how to disable the video, how to send a message or “raise a hand” to speak and similar functions. In some cases, the pre-mediation technology review will be done 30 minutes before the start of the Mediation.
2. After the Mediation Management Meeting, the Mediator will send invitations to join the Mediation to each participant and counsel, which will allow them to be able to sign in.
3. When parties sign in, they will be placed in the “Waiting Room.” The parties will be muted and will not be able to talk with each other. The Mediator will grant access to all participants when all of the participants have assembled.

MEETING PROCESS

1. After an initial group session to talk about the case generally, the process and confidentiality, the Mediator will begin the caucus process. This will occur by assigning the parties to separate “breakout rooms.” These rooms will be private, allowing for attorney-client privileged conversations and for private conversations with the Mediator.
2. When the Mediator is in the other party’s breakout room, the other side will be able to talk among themselves. The Mediator will provide an estimate of the length of the caucus so that the party in the other breakout room might sign out of the Zoom meeting and rejoin at an appointed time. Before returning to a party’s breakout room, the Mediator will text the attorney or participant to make sure they are ready.

3. It will be possible to share documents with the Mediator and the other side during the Mediation, if agreed to prior to the Mediation. Counsel should identify and provide any documents they anticipate sharing in advance, if possible. This includes spreadsheets or other analyses.
4. As with in person Mediation, if an agreement is reached, the parties will agree on a term sheet.

Ariel Ludkowitz

Evan J. Spelfogel

From: Outten, Wayne <wno@outtengolden.com>
Sent: Sunday, May 03, 2020 1:36 PM
To: 'Gay, Darrell S.'; Ed Buckley; Gwynne A. Wilcox
Cc: Gesinsky, Loren; William Frumkin; MARK.PEARCE@georgetown.edu; dcashdan@cashdankane.com; espelfogel@phillipsnizer.com; edbuckley@buckleybeal.com; mbernstein@bsk.com; ECollins@ebglaw.com; LGesinsky@seyfarth.com; John.Hamlin@mmc.com; sswirsky@ebglaw.com; wno@outtengolden.com; gwilcox@levyratner.com; Joyce Savastano
Subject: Remote/virtual mediation

****External Email****

Hi all,

See the excellent memo below posted recently by Marty Scheinman, renowned mediator, to his Cornell group about a recent multi-party Zoom mediation.

Wayne

Scheinman Arbitration and Mediation Services ("SAMS") conducted a multiparty mediation involving claims under federal, state and local law alleging sexual harassment, disparate and unequal pay practices and discrimination on the basis of a medical condition. The Plaintiff attended and was represented by two (2) attorneys, the Corporate Defendant was represented by two (2) in-house attorneys and two (2) attorneys from an outside law firm and an individual Defendant attended represented by separate Counsel. The nine (9) participants were each in their own homes, spanning geographically three (3) states and eight (8) different counties. Given the complexity of the matter, the SAMS team was led by me with my colleagues Barry Peek, Esq, and Tim Taylor, Esq. fully participating from their homes hundreds of miles apart

The way we do it as host, for those unfamiliar with the platform, is to have each participant respond to a link invitation from SAMS. The individual enters a virtual Waiting Room. A message welcomes them indicating they'd be admitted soon. While in the Waiting Room, there is no way to see or communicate with any individual and the people are unaware of anyone else being in the Waiting Room. This is wonderful as it avoids the awkwardness of having to share an actual Waiting Room with someone you do not want to see (particularly helpful in a claimed sexual harassment case).

Individually, the host brings a participant into the mediation, explaining he or she is being placed into their appropriate caucus room (breakout room) and will not be seeing the other side without agreement. One-by-one the Plaintiff and the Plaintiff attorneys were placed into their caucus room as was done with the Defendants' side. Additionally, separate caucus rooms were established for each set of attorneys, the mediators and for individual attorneys in case they wished to consult privately with a client. This placement process took about three (3) minutes.

I, or the three (3) mediators, moved between the caucus rooms, pulled out attorneys for side-bars and had different one-on-one meetings when needed. There is notice to the party the mediator(s) are entering so there is no concern about interrupting or overhearing what was going on in a caucus. Also, the individual has to consent to being moved to a different meeting which also assures confidentiality. Through the miracle of DocuSign, at the conclusion, we had a Memorandum of Understanding signed by all principals - some of which were not present at the mediation

Here's my analysis using this case as the example

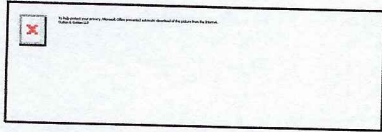
Disadvantages: 1) Although you can have tremendous eye contact, I did miss the ability to assess the full body language of certain people. You need to be more attuned to facial and body reactions to measure anxiety and emotion. 2) We had difficulty with connecting one (1) of the participants. That person had to change from iPhone to his iPad. We were delayed ten (10) minutes in order to have this resolved. 3) If someone lacked high quality internet service, this would not have worked as well. 4) Without the pressure to "get home", I sense some participants were a bit slower in getting to their end positions since they need not factor in travel time from the mediation site to their residences. I speculate this, and the fact people were attending to private matters at their homes; which meant we lost two (2) participants for about half an hour each, may have elongated the process for about an hour.

Advantages: 1) The privacy was better than in-person mediation. Even in our Mediation Center, built expressly for these type of cases, staff has to monitor to assure people that do not want to encounter each other not go into the Waiting Area together, or use the bathrooms area or kitchen at the same time. In certain cases, staff has to make sure the blinds are drawn so people cannot see each other. All of this is avoided when mediating on-line. The host can assure there is no "bumping" into someone or overhearing a conversation. 2) In an in-person mediation, when a side is ready for the mediator(s), someone has to find or ask for the mediator(s). Sometimes I hear "we were waiting for you, we thought you were going to just come back in". In this process, there is no delay. The side simply indicates they are ready for the mediator(s). A prompt comes onto the mediator(s) screen(s) and then immediately the mediator(s) enter the caucus room. 3) It is often the case a party needs to attain buy-in, authority or reassurance from someone not in attendance, e.g., an insurance adjuster, an officer of the organization or a spouse, significant other or partner. Inevitably, attendees are asked by those not in attendance for the viewpoint, comments or assessments of the mediator(s). Often those at the mediation indicate they wish the absent person could have heard directly from the mediator(s), rather than having to relay what had occurred to the non-attendee. When this happens during in-person mediation, the usual course is a telephone call wherein the mediator(s), if asked, talks to the non-present person. Its an off-line conversation. During this mediation, the need for an outsider happened twice. Once was someone that might shed light upon a reported conversation. The second was a principal being asked for more authority to settle. Both times, we sent a link and had that person join the relevant caucus. The mediators were able to hear the potential witness story and assess its import. As to the person necessary for additional authority, that individual was now "in" the mediation, able to ask questions of everyone there as well as the mediators. That principal commented, hearing directly from the mediators "changed" the Defendants' perception of the case. The principal's presence - which could never have been possible in real time in an in-person mediation - was crucial in getting to a deal. 4) As previously mentioned, after the usual give and take in drafting the Memorandum of Understanding, a fully executed document was signed incorporating people throughout the country. 5) This process was extremely cost effective. It saved travel costs and travel time for about ten (10) people, as well as billed mediator travel time.

Thus, I am persuaded the advantages FAR outweigh the disadvantages.

Future: 1) Certainly, in the near term, while we all dealing with Covid-19, we will be doing mediations, for willing parties, on-line. The comfort of our experiences to date, will, I suspect, persuade parties to "give it a try". SAMS will pause a process that seems unsatisfactory and re-schedule to another date for an in-person session, if a party or a mediator feels its not going well because of the format. 2) As many of you know, due to scheduling difficulties, and my general aversion to flying (especially now), I usually decline requests to mediate outside the New York tri-state area. However, this experience of mediating on-line, which has been so successful for all concerned, has caused a reevaluation. From now on, if parties are unwilling or unable to travel to the New York area, I will gladly schedule a matter on-line with parties regardless of where they are located. We have just scheduled a matter where several people are located in Europe. The technology also opens up potential dates otherwise unavailable when I am away for a period of time.

My e-mail address has changed to: martin.scheinman@scheinmanneutrals.com Please update your records, accordingly.

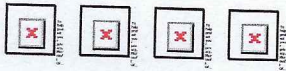


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FMCS Virtual Services Policy

April 2020

Virtual services are crucial to continuing FMCS's mission. However, virtual terms bring a new set of challenges. This Policy covers all FMCS virtual services. A directive is forthcoming.

This Guide has three parts:

1. FMCS Virtual Services Terms Policy
2. FMCS Policy for Conducting Secure Virtual Meetings
Using RingCentral Meetings or Approved Alternate Platform
3. Virtual Service Terms (Attached)
 - a. Mediator Agreement
 - b. Virtual CBM and Neutral Services Terms and Conditions
 - c. Virtual Training Terms and Conditions

1. FMCS Virtual Services Terms Policy

FMCS has developed terms to protect you and the agency while providing virtual services. The use of mediator and mediation includes all services provided by FMCS unless otherwise noted.

For any questions or concerns, please contact Office of General Counsel: (202) 606-5444 or ogc@fmcs.gov.

Overview: The virtual terms encompass four main principles:

- Attendees may not record or save any part of the mediation.
- All parties and the mediator must be informed of all attendees.
- Inadvertent access to confidential information must be identified and stopped immediately.
- Security breaches must be identified and stopped immediately.

Requirements: **Mediators must send the new FMCS virtual terms to all attendees of virtual services. These terms may not be modified in any way without consent of OGC.** Anyone—mediators or parties—with concerns or questions about the terms should be sent to OGC. If the service being provided is one in which the mediator is required to get an agreement signed (e.g., GM), that practice will continue but with an updated agreement that includes the virtual terms. This agreement will replace the current mediation agreements in use. For those services in which an agreement has not been required (e.g., CBM, RDT), the mediator must send terms and agreement to all attendees (signatures not required). Specifically, there are three agreements/terms that cover the majority of FMCS services:

- Virtual Mediation Agreement:
 - most confidential
 - use for all non-collective bargaining mediation (including all grievance and other employment mediations)
- Virtual Collective Bargaining Mediation And/Or Neutral Services Terms and Conditions
 - some confidentiality
 - use for collective bargaining mediation or neutral services, such as facilitations, where some confidentiality protection may be needed/wanted
- Virtual Training Terms and Conditions
 - no confidentiality
 - for use with all RDT unless there are confidentiality concerns (in which case use CBM/Neutral Services T&C)

How to Send to Parties: The Terms and Conditions should be attached to the Outlook meeting invite. Additionally, we suggest you cut and paste the following (or similar) language in the body of the meeting invite: The FMCS virtual terms and conditions are attached to this meeting invite. Please review the attached and reach out to the FMCS Office of General Counsel with any questions or concerns: ogc@fmcs.gov or (202) 606-5444.

Opening Statements: Mediators should include reference to these virtual terms in their opening statement or at the beginning of training. *Sample:* This virtual service is subject to the FMCS terms for virtual services that have been provided to you. By continuing with this service, you agree to the terms. These terms are also available on our website, www.fmcs.gov. If you have any questions or concerns, let me know and I will direct you to OGC.

Note: Most FMCS services should fall under one of these agreements. If you need an agreement modified, let OGC know and we will work with you to modify an agreement.

FAQ's:

- Do I have to send to all attendees for every case or session?
 - You should send for every case or training. You do not need to send for a second session unless there are new attendees, and then you need to send only to the new attendees.

- What if the parties have questions or want to change terms?
 - Direct them to contact OGC. You may not tell or allow them to change terms.

- What if we are in a jurisdiction that requires open meetings?
 - We do not have a one size fits all agreement for this as open meeting requirements vary by jurisdiction. Please contact OGC and we can modify an agreement for you.

- What if a party has their own terms that the party wants to use?
 - Please contact OGC to determine a course of action. As a reminder, mediators may not sign agreements without approval from OGC.

FMCS Policy for Conducting Secure Virtual Meetings using RingCentral Meetings or Approved Alternate Platform

Have Questions? Need help?

If at any time you would like virtual meeting assistance, please reach out to us for help!

Office of Strategy & Development (OSD) at osd@fmcs.gov
or contact Information Technology (IT) at AllITStaff@fmcs.gov

Virtual Meetings on FMCS Platform

By default, all virtual meetings will be conducted by FMCS staff on our primary platform. Virtual meetings may include both telephonic and video services.

FMCS's Virtual Terms and Conditions will apply to all meetings and a written copy will be furnished in advance to each party either in the form of a mediation agreement or terms and conditions.

FMCS has licensed access to the following platforms and they are approved for our use.

- RingCentral Meetings (Primary)
- Skype for Business
- Microsoft Teams
- Facilitate Pro
- FMCS ERooms

Alternative Platforms

Customers may ask for the meeting to be held on a platform other than ours. While it is not preferred, you may use (or download) any of the pre-approved platforms listed below. If customers ask to use a platform that is NOT listed, you must reach out to IT and may only utilize an alternate platform if IT approves it. If you would like help accessing any of these platforms or have a question about one not listed, please reach out to IT directly at AllITStaff@fmcs.gov

- Adobe Connect
- Zoom
- GoToMeeting
- WebEx
- Google Hangout
- Other – Will be considered on a case by case basis: Contact IT at AllITStaff@fmcs.gov You must obtain written approval from IT before using an alternate platform not listed above.

Checklist for Using Alternate Client Platform

If the alternate platform is used, as mediator/facilitator or host of meeting, you must be able to manage the functionality of the platform and ensure meeting security. OSD may be able to assist you with this if you are not familiar with the alternate platform. Please reach out to them directly for help at osd@fmcs.gov

The following are things you should be able to control and manage as meeting facilitator.

1. Are you able to run the meeting as 'Host'?
2. As host, are you able to view and control the 'participant list'?
3. Are you able to create 'breakout rooms'?
4. Manage 'breakout rooms' -
 - a. Are you able to access all the rooms?
 - b. Are you able to assign participants to a specific room and ensure their room is secure from others?

5. *Are you able to mute participants?*
6. *Are you able to remove participants from the meeting?*
7. *Are you able to verify that the 'recording' function is completely disabled?*
8. *Can you control screen sharing?*
9. *Are you able to access all rooms you created?*
10. *Are you able to merge parties back together?*

Suspected or Actual Security Breach

- In the event of a suspected or actual security breach, end the meeting. E-mail both your EM and AllITStaff@fmcs.gov immediately with a description of the suspected or actual security breach, and await further instructions.
- If a meeting participant is inadvertently exposed to confidential information, end the meeting immediately and report the incident to your EM.
- With the use of the Waiting Room and Lock Meeting features, it is highly unlikely you will have unknown participants at the meeting. If, however, you become aware of an unknown participant with access to the meeting, pause the meeting to ascertain the identity of the unknown participant. Once the identity of the participant is known, if that person is welcome in the meeting, the meeting can continue. If you cannot ascertain the identity of the unknown participant, remove that participant from the meeting. If you believe the unknown participant has had access to confidential information, stop the meeting and contact your EM.

Green Screens: Mediators may use green screens if desired. If parties are using green screens, please be aware of potential security risks (e.g., someone hiding behind the screen) or other risks (e.g., someone displaying an inappropriate background) to the process. For tips on how to minimize these risks, please contact OSD.

Have Questions? Need Further Guidance?

Please contact OSD if you would like further assistance in working through these questions or setting up one of the alternate platforms – use osd@fmcs.gov.