# NO NEED TO PANIC

## ONLINE DISPUTE RESOLUTION WORKS

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Who knew six months ago "Zoom" would be a verb? The legal profession, as well as the dispute resolution community, have adapted to the coronavirus pandemic in creative ways, doing in a few weeks what otherwise might have taken years. Even though dispute resolution professionals are seeing cases settle online, not all lawyers and clients are interested; not yet, at least. Some believe online dispute resolution (ODR) is not as good as doing it in person. The three of us are using ODR successfully in our practices and we believe it will continue to be a viable option. This article dispels prevalent myths about ODR and suggests best practices for its effective use.

## MYTH #1: YOU CANNOT HAVE PRIVATE CONVERSATIONS.

*False.* Video-conferencing platforms (e.g., Zoom, Bluejeans) have virtual "breakout rooms" where conversations cannot be heard or seen by other participants. The host (i.e., the neutral) can move in and out of these breakout rooms for discussions as needed. The host can also move participants in and out of breakout rooms. Once in a breakout room, conversations are completely private as between each breakout room, as well as between the breakout rooms and the main session. Some neutrals use phones to go back and forth between the parties in private session, but breakout rooms in the platform provide a smoother, and therefore better, experience for participants.

**BEST PRACTICES:**

- The neutral should offer a video-conference platform that permits breakout rooms and enable them in advance of your session.
- For cases with multiple parties or complex issues, the neutral can create breakout rooms for each party and rename them by party to avoid confusion (e.g., "Plaintiff's and attorney's breakout room"). For less complicated matters, breakout rooms can be created and named after the parties join the session.
- The neutral can create and label extra breakout rooms. For example, it may be helpful to have just the attorneys meet with the neutral.

## MYTH #2: VIDEO-CONFERENCE PLATFORMS ARE NOT SECURE.

*False.* Despite bad press about security (you have likely heard about "Zoombombing" in which uninvited persons invade a session to post objectionable material), video-conferencing platforms are reasonably secure if configured properly. No platform is 100% secure. Most security breaches are due to user error. This is a big issue because attorneys working from home may not have configured their home computer as securely as their office network. It is, therefore, extremely important for attorneys to assure themselves that the neutral has a thorough understanding of the security settings for the platform and, in cases where a higher level of encryption may be appropriate, adjusted the settings properly and taken steps to manage the session to prevent compromises to information security or confidentiality.

**BEST PRACTICES:**

- Make sure you and your clients have the most current version of the platform's software.
- Do not share the meeting log-on information with unauthorized persons and advise your client likewise.
- You and your clients should not participate using public wi-fi because it can be hacked easily. If possible, hardwire your Internet connection with an ethernet cable. This also helps prevent bandwidth issues, such as children in the home using online streaming services.
- Ask the neutral if she has enabled a virtual waiting room. This enables the neutral to screen who has access to the meeting.
- Once the session starts, if appropriate, the neutral can "lock" the meeting so that no one else can enter.
- Civil cases may involve sensitive information needing special protection. If so, let the neutral know. Specifically, tell her if there is information you would not feel comfortable sending via email. Many email providers, as well as video-conference platforms, use a level of encryption that provides adequate protection for most information. If your case involves especially sensitive information, such as trade secrets or other intellectual property, perhaps the mediation, arbitration, or other dispute resolution session should occur on a platform that offers a higher level of encryption known as "end-to-end" encryption (e.g., GoToMeeting or WebExMeeting).

## MYTH #3: NON-VERBAL CLUES ARE INSUFFICIENT WITH VIDEO-CONFERENCING TECHNOLOGY.

*Only partially true*. Many lawyers prefer to see their opponents in person in order to read body language and other non-verbal cues of participants (although we note the irony that many civil attorneys want to bypass joint sessions and go right to separate caucus sessions). Yet, in this pandemic environment, facial expressions are limited when everyone wears a mask. With video-conferencing, multiple participants may be on screen at one time, meaning everyone's facial expressions are viewable simultaneously. This also eliminates participant cross-talk and interruptions, permitting greater clarity in what someone says and how they say it. Many parties participate from the comfort of home. We have found that ODR sessions are often less emotional and more solution-oriented because people have a higher comfort level and feel less need for posturing.

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**BEST PRACTICES:**

- Position your camera at a flattering angle, preferably showing your head and shoulders. This may mean putting your computer or phone on a stack of books to raise it up.
- Arrange your background so it is not distracting to other participants.
- Speak clearly and slowly so that participants understand what you are saying.
- The neutral may need to ask a participant to mute himself to block excessive background noise that makes it hard for others to hear.

## MYTH #4: YOU NEED TO BE TECH SAVVY.

*False*. Most video-conferencing platforms are fairly simple to use. We often hear from attorneys that their clients cannot participate in an ODR session because they do not have a computer or access to the Internet. However, most people have a smartphone that can be used on the platform. This an issue for discussion between all parties and the neutral if a concern about access is raised.

**BEST PRACTICES:**

- Familiarize yourself and your clients with the platform recommended by the neutral. There are many instructional videos available online.
- Practice, practice, practice! The technology should improve efficiency, not frustrate it.

Do not discount the power of technology to change institutions and the ways in which we conduct the business of law and dispute resolution.

## MYTH #5: SOMEONE OTHER THAN THE NEUTRAL CAN HOST THE SESSION.

*Bad idea.* Mediators are ethically obligated to ensure confidential communications, mediator competency, and party self-determination. Permitting a party to host a video-conference mediation makes it difficult, if not impossible, for the mediator to ensure compliance with her ethical obligations. For example, the mediator cannot ensure confidentiality of all mediation communications when one of the parties is in control of the platform. Mediators who cannot explain how the platform works impede the parties from exercising their self-determination to make an informed choice about which platform to use. Third parties who host online mediations are not bound by the same ethical rules as the mediator. It is our opinion that the mediator, not someone else, should be accountable to participants for an ethical process.

**BEST PRACTICES:**

- Expect the neutral to host the ODR session.
- Ask the neutral to explain the advantages and disadvantages of using the platform, including how it preserves confidentiality.
- Expect the neutral to get everyone to sign so-called online protocols or "ground rules" for using the platform. These might be in a stand-alone document or incorporated into the Agreement to Mediate. Ground rules should include the following agreements:
  - The participants will be in a private location for the duration of the session with no one else off-camera or within earshot;
  - The session may not be recorded;
  - Participants will be free from distractions; and
  - A specified backup plan will be used in case of technical glitches.

### OVERALL ASSESSMENT OF ODR

In some ways, ODR may be better than in-person sessions. No one has to leave early to catch a plane or beat traffic. With the assistance of other communication media, confirmation of terms and deals get done more efficiently. Pre-session documents may be signed virtually and payments may be made online. Drafting and editing settlement documents is easy by sharing screens virtually or through email. Quick ideas can be shared via text. Confusion or frustration can be ironed out the old fashioned way: by phone. At mid-day, everyone makes their own lunch so dietary issues are better managed. ODR settlement rates remain high.

Of course, ODR will not be appropriate in every case. Whenever travel and social restrictions ease, some disputes will justify in-person meetings. There is a lot to be said in favor of taking the time and expense to "show up" in person and investing energy into addressing the dispute with others across a table.

### CONCLUSION

Do not discount the power of technology to change institutions and the ways in which we conduct the business of law and dispute resolution. Few thought the Internet would affect brick and mortar retailers, grocery deliveries, journalism, the music industry, or taxicabs in the ways it did. Similarly, the technological tools that help people solve legal problems outside of court will only get better. Someday, we may look back and notice that our reaction to ODR is similar to the way we reacted to new technologies in the past. Recall the chief engineer of the British Post Office affirmed that his country did not need the telephone because they had "plenty of messenger boys." The president of Western Telegraph in America predicted the telephone "has too many shortcomings to be seriously considered as a means of communication." Do not get left holding yesterday's phone.

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