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# Humanizing Virtual Dispute Resolution

By Elayne E. Greenberg

## The Challenge:

*How might neutrals and advocates foster interpersonal dynamics when conducting arbitrations and mediations virtually, consistent with the ethical obligations of each profession and the ethical underpinnings of each process?*

Virtual dispute resolution for commercial dispute resolution has become the new normal.<sup>1</sup> Yet, the dispute resolution listserves are still peppered with posts from mediators and arbitrators who, although publicly extolling their own commitments to their impartiality<sup>2</sup> and neutrality,<sup>3</sup> are also simultaneously voicing their strong preferences for conducting their dispute resolution processes in person. According to these neutrals, they are unable to attain the same results when the process is conducted virtually because of the qualitatively different interaction. “In person, I can connect with the parties, person to person. And, those informal conversations at the water cooler facilitate settlement. I can’t replicate that on Zoom.”

This type of thinking, however, obscures our ability to overcome the challenges of and adapt to the benefits of virtual dispute resolution. What an exciting opportunity to rethink and recreate our practices when conducting dispute resolution virtually. This column re-focuses to this more constructive discussion about how neutrals and advocates can use this new communication channel to conduct dispute resolution processes. I will kick off this evolving inquiry by discussing how neutrals and advocates can foster the human connection virtually and then apply the concepts to two areas: communication and confidentiality.



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## The Human Connection Virtually—Is It Even Possible?

Dispute resolution scholar Noam Ebner dispels the concerns about the naysayers of virtual dispute resolution and educates us on methods neutrals and advocates can use to foster a human connection during virtual mediation.<sup>4</sup> Ebner conceptualizes that the human connection is comprised of trust, empathy, and social intuition.<sup>5</sup> Thoughtful and competent practitioners are mindful of the differences in conducting dispute resolution virtually and adapt strategies to create a dispute resolution process that still engenders a human connection. For example, trust in virtual mediation can be engendered by using a virtual communication channel that is reliable and confidential; scheduling a virtual opportunity for the participants to get to know each other; and participating in the virtual dispute resolution in a consistent and good faith manner.<sup>6</sup> In another example, virtual participants can demonstrate empathy by using active listening skills. However, active listening in a virtual environment requires looking up at the camera, not the speaker, when making eye contact and allowing time for the slower transmission of speech.<sup>7</sup> Another component of human connection is social intuition. Social intuition, connecting and understanding the other’s point of view, can be communicated by having the virtual listener lean forward with interest and having that visible in the allotted virtual box.<sup>8</sup> Therefore, trust, empathy, and social intuition work together to create human connection in virtual dispute resolution.

Neutrals and advocates, please be mindful that fostering a virtual dispute resolution environment that encourages human connection is not merely following a checklist. Rather, it is a holistic approach that considers how to synchronize the technological workings of virtual dispute resolution with the overarching goal of creating constructive interpersonal dynamics virtually. Robbennolt and Sternlight contribute to this conversation by identifying the nuanced considerations that apply when deciding which dispute resolution process to use and then deciding whether to conduct dispute resolution virtually for any specific matter.<sup>9</sup> Offering a somewhat different approach, Daniel Rainey invites neutrals and advocates to consider “making friends with the Fourth Party” by considering ways to effectively integrate technology in your dispute resolution practice.<sup>10</sup>

## **Virtual Communication—How Might Neutrals and Advocates Encourage Human Connection?**

Communication is the dispute resolution currency with which neutrals and participants assess and convey authenticity, integrity, credibility, connectivity, and persuasion in a way that honors the integrity of dispute resolution. Virtual communication—both verbal and non-verbal—is distinctly different than in-person communication.<sup>11</sup> After all, participants are viewed in vertical boxes only from the shoulders up. Even though these vertical boxes provide a limited viewing of participants, these vertical boxes provide an opportunity for neutrals and advocates to decide what they want to communicate about themselves and the matter at hand.<sup>12</sup> For example, when participants are relegated to a virtual box, such biases participants might have about size, weight, and disability are minimized.

Speech transmission in a virtual dispute resolution process is somewhat different from in-person speech transmission. For example, when communicating virtually, participants' speech transmission may be delayed, slowing down the speed of the conversation. There may be the inevitable connectivity glitches. Finally, communicating virtually may create Zoom fatigue.<sup>13</sup>

Following are some strategies to consider when communicating in virtual dispute resolution:

- Schedule a virtual pre-dispute resolution meeting to introduce each other, begin connecting, create a positive first impression, and review technology procedures.
- Give thought to creating a background that communicates who you are and reinforces positive messages about your credibility and integrity.
- Normalize human and technological glitches. Frozen screens and inconsistent connections may be a natural occurrence when conducting dispute resolution processes virtually. Prepare for a plan B option such as phone backup. If virtual dispute resolution is taking place in one of the participant's home, children and pets may unexpectedly appear. Humanizing the occurrence goes a long way in communicating a participant's authenticity.
- Agree on a virtual dispute resolution structure that provides for breaks for Zoom fatigue and time for attorney/client check ins.
- Adopt a speech pattern that is compatible with the virtual delayed speech transmission.

## **Confidentiality—How Might the Confidentiality Concerns About Participating in Virtual Dispute Resolution Be Addressed To Promote Trust in the Process?**

Confidentiality is a foundational ethical tenet in dispute resolution that provides participants with the assurance they need to engage in candid discourse.<sup>14</sup> Virtual dispute resolution processes provide additional challenges to maintaining coveted confidentiality protections.<sup>15</sup> In a virtual setting, what steps are being taken to assure the platform that is being used is confidential? What affirmative steps are being taken to assure that the dispute resolution processes are not being recorded or that an unauthorized party is listening to the proceedings? Does the confidentiality agreement that the neutral and parties are agreeing to include all the modifications needed to reflect participants' confidentiality expectations?

The CIARB "Notes on Remote Dispute Resolution Proceedings" alert the neutral and other participants about the need to have separate meeting rooms for caucuses or breaks that are confidential, block the body language of participants, and ensure private communications are not heard.<sup>16</sup> If one of the participants is participating from their homes or public offices, that site should be soundproofed if possible, and the presence of non-participating individuals should be barred.<sup>17</sup>

The CPR Task Force Guidelines caution about the use of virtual backgrounds to obfuscate such agreed-upon confidentiality protections as prohibiting the attendance of unauthorized persons or taping the proceedings.<sup>18</sup> Although the guidelines address arbitration, the message is applicable to virtual mediation as well.

Concerns about confidentiality protections keep evolving as security challenges become more sophisticated and challenge the status quo. Neutrals and advocates need to remain abreast of these changes to safeguard the trust dispute resolution participants have in virtual dispute resolution.

### **Going Forward**

Now that virtual dispute resolution remains part of dispute resolution practice, neutrals and advocates need to have the skills to satisfy their ethical competence requirement. For some, there has been pushback—after all, how can you create the human connection virtually that you are able to create in person?

In this column, we have been discussing strategies as part of a holistic approach to consider when using virtual dispute resolution that help overcome this resistance. The recommendations are consistent with neutrals' and advocates' core ethical values. This is an emerging topic. Some may still be sitting on the fence. I suspect other readers might add to these suggestions, and I look forward to hearing from you.<sup>19</sup>

Thank you to Professors Amy Schmitz and Sharon Press for generously coaching me in March 2020 about how to conduct virtual classes in a way that still connects with my students. And thank you to Noam Ebner and my other generous colleagues who engage in this discussion and extend the limits of what's possible.

## Endnotes

1. May 8, 2023 posting by Prof. Golann alerting readers to the April, 2023 National Academy of Distinguished Neutrals Member survey of 1500 of its members, published in the New Normal for Dispute Resolution, <https://www.nadn.org/marketing/uploads/NADN-2023-MemberSurveyReport.pdf>.
2. The Code of Ethics for Arbitrators in Commercial Dispute (effective March 1, 2004), [https://www.adr.org/sites/default/files/document\\_repository/Commercial\\_Code\\_of\\_Ethics\\_for\\_Arbitrators\\_2010\\_10\\_14.pdf](https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf) (*In relevant part* Cannon I: An arbitrator should uphold the integrity and fairness of the arbitration process.  
B. One should accept appointment as an arbitrator only if fully satisfied:  
(1) that he or she can serve impartially;  
(3) that he or she is competent to serve; and  
(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.  
G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue.
3. ABA Model Standards of Conduct for Mediators [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf) provides in relevant part:  
Standard II. IMPARTIALITY  
A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.  
A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.  
A mediator should not act with partiality or prejudice based on a participant's personal characteristics, background, values and beliefs, or performance at a mediation, or for any other reason.
4. Noam Ebner, *The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation* (2021) in D. Rainey, E. Katsh, and M. Abdel Wahab, M., *Online Dispute Resolution: Theory and Practice* (2nd ed.). Eleven Intl. Publishing, pp. 73-136, 2021, SSRN: <https://ssrn.com/abstract=3760782> or <http://dx.doi.org/10.2139/ssrn.3760782>
5. *Id.* at 2.4. (Ebner defines the terms as follows: “**Trust**: One person’s assumption that another is benevolent towards them and will not do them harm even if they have the opportunity to do so. **Empathy**: One person’s ability to be aware of sensitive to, and caring about what another person is feeling or experiencing, from their point of view—and to express this to the other. **Social**
- Intuition**: One person’s capacity to harness their self-awareness and other-awareness in order to bridge between themselves and another.”
6. *Id.*
7. *Id.*
8. *Id.* at 5.1.
9. Jean R. Sternlight and Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes* (2022). DePaul Law Review, vol. 71, p. 701, 2022, SSRN: <https://ssrn.com/abstract=3896021>.
10. Daniel Rainey, *Integrating Technology Into Your Dispute Resolution Practice*, 21-26 (Eleven, 2022).
11. Daniel Rainey, *Integrating Technology Into Your Dispute Resolution Practice*, 21-26 (Eleven, 2022); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DePaul L. Rev. 537 (2022).
12. See e.g. Feyzan Karabulut & Paul R. Messinger, *The Best Background for Video Calls? Most People Get It Wrong*, (WSJ, May 30, 2023) at R4 (“pick backgrounds that showcase your best self, as opposed to thinking that no self is the best one.”); Elayne E. Greenberg, *Blinding Justice & Video Conferencing?*, 275 Stetson L. Rev. 2023 (discussing how to be aware of the implicit and explicit biases that might be triggered when viewing a participant virtually).
13. Noam Ebner and Elayne E. Greenberg, *Designing Binge-Worthy Courses: Pandemic Pleasures and Covid-19 Consequences*, Negot. J., 2020 Fall, 535-560, (discussing Zoom fatigue as a consequence of prolonged focus on Zoom).
14. See, e.g., The Code of Ethics for Arbitrators in Commercial Disputes, CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office at [https://www.adr.org/sites/default/files/document\\_repository/Commercial\\_Code\\_of\\_Ethics\\_for\\_Arbitrators\\_2010\\_10\\_14.pdf](https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf); Model Standards of Conduct for Mediators, Standard V. Confidentiality, A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law at [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf).
15. See, e.g. Elayne E. Greenberg, *Meeting the Parties Separately*, chapter in Omer Shapira (ed) *Mediation Ethics: A Practitioner’s Guide* (ABA Publishing 2022).
16. See, e.g., CIARB Notes on Remote Dispute Resolution Proceedings at <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>.
17. *Id.* at 6.3,
18. CPR’s Annotated Model Procedural Order for Remote Video Arbitration Proceedings: <https://static.cpradr.org/docs/4.21%20FINAL%20Annotated%20Model%20Procedural%20Order%20for%20Remote%20Video%20Arbitration%20Proceedings.pdf>.
19. Please reach out to Professor Greenberg with your comments at [greenbee@stjohns.edu](mailto:greenbee@stjohns.edu).

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