

County of Santa Clara

Office of the County Executive

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DATE: April 28, 2020

TO: Honorable Members of the Board of Supervisors
Jeffrey V. Smith, M.D., J.D., County Executive

FROM: John P. Mills, Director, Employee Services Agency

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John P. Mills
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SUBJECT: Under advisement from March 24, 2020 (Agenda Item No. 16): Off-Agenda Report from the Office of Mediation and Ombuds Services (OMOS) related to feasibility of enabling Online Dispute Resolution (ODR) services between tenants and landlords

At the March 24, 2020 Board of Supervisors' meeting, the Board enacted a moratorium on "no-fault" evictions and evictions for non-payment of rent for tenants who have incurred substantial income loss and/or substantial out-of-pocket medical expenses as a result of the COVID-19 pandemic. At the request of President Chavez, the Board directed Administration to determine the feasibility of enabling online dispute resolution (ODR) services between landlords (LL) and tenants (T), and to consider partnering with the Court for possible mediation resolution if electronic dispute resolution services are not possible. This memorandum confirms the County's ability to provide ODR services through the Office of Mediation and Ombuds Services (OMOS) and outlines the nature of preparations to achieve that objective.

Background

The County has offered no-cost mediation services to residents and constituents in all manner of disputes by professional mediators since 1977. OMOS is the largest provider of neutral services, including mediation, in Santa Clara County. Therefore, when a shelter-in-place (SIP) order was issued by the County Public Health Officer on March 16, 2020, OMOS immediately implemented a comprehensive system for conducting mediation and ombuds services remotely, in order to provide necessary communication bridging during a time when communication efficacy, as a result of social distancing measures, had been strained.

Technology Testing and Selection

Non-Verbal Communication: While the concept of ODR is not new with respect to mediation, the practice of ODR is far from commonplace in the professional field of mediation, due

ultimately to the loss of communication nuance relative to face to face mediations. Because subtleties of non-verbal posturing, body position, and movement constitute upwards of 70% of communication efficacy, mediation is successful often because mediators are adept at reading and understanding these cues, and at helping the parties interpret and appreciate those communications properly.

Mediation Confidentiality: In addition to the requirement that ODR technology allow mediators the opportunity to interface with and interpret non-verbal communication dynamics, there are legal constraints impacting the mediation dynamic that must be addressed prior to engagement in ODR services. For example, parties participating in mediation must be afforded the opportunity to *caucus* with the mediator(s). A caucus is a privately conducted conversation between the mediator and some fraction of the total number of collective parties, for the purpose of discussing matters of strategy or sensitivity. During caucus, as with all other parts of the mediation process, California Evidence Code §§ 1115 – 1129 mandate the confidentiality of nearly all communications—both those conducted jointly, as well as those conducted pursuant to caucus. Therefore, in order to meet professional standards of practice, any ODR technology must be both visual in nature and afford the opportunity for joint and separate breakout (caucus) sessions during the multi-hours long process.

ZOOM Logistics: OMOS tested and/or reviewed a variety of mechanisms for ODR with the abovementioned considerations in mind. These included Skype, ZOOM, Blackboard Collaborate, WebEx, and Tyler Technologies (presently used by Santa Clara County Superior Court). ZOOM was the most capable of the platforms. In addition to already being licensed by the County of Santa Clara for employee use, it incorporates breakout rooms and waiting rooms that function well as separate virtual areas appropriate for caucus sessions. During caucus, parties can be taken out of the primary virtual (collective) meeting space into separate caucus rooms with allowances for the mediator to jump back and forth between each virtual room in order to provide parity and to maintain the legal confidentiality required of each separate conversation.

ZOOM Security: While ZOOM clearly offered the greatest functionality at baseline to meet the demands of ODR, there were those who sought to take advantage of the immediate increased widespread use of the relatively small ZOOM platform. A dynamic emerged known as “ZOOMbombing” Lorenz, T. (March 20, 2020). ‘Zoombombing’: When Video Conferences Go Wrong. The New York Times. <https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html>. In short, the ZOOM platform had critical security loopholes that allowed unintended parties to crash a ZOOM session, take control of the screens, the chat functions, the participant lists, and other critical meeting functions, and often post disturbing, disruptive, abusive, and demeaning content to exploit and disrupt the meeting. As a result, ZOOM

implemented heightened security measures. In addition, OMOS continues to actively work with TSS to implement ODR specific requests to increase functionality unique to the ODR process. Specifically, ZOOM security enhancements include processes for registering participants (prior to mediation dates), allowances that only registered participants may join ZOOM sessions, and password protections for ZOOM meetings.

Private Chat, DocuSign, Virtual Background, and Whiteboard: OMOS is actively pursuing, both with County Counsel and with TSS, the County's exploration and allowance for OMOS to utilize settings beyond the defaults established Countywide. These requests include the ability to integrate DocuSign into the ZOOM platform, thereby allowing parties to sign confidentiality and mediated agreement documents within and during the ZOOM session. OMOS has also developed a protocol for use of a virtual background by the mediator, such as that depicted below, which injects professionalism into the mediation session and avoids any unintended distractions that may be caused by allowing participants to see mediators' home environments.



Use of the whiteboard function during ZOOM sessions allows the parties and the mediator alike to engage in Phase III of the mediation process, commonly referred to as brainstorming, wherein ideas are generated by parties for the sake of aggregating creative ideas aimed at meeting underlying, universal human needs. Finally, the private chat function of ZOOM makes confidential sidebar possible during mediation, because parties and the mediator(s) alike are able to send messages (privately) to one another while still being collectively present in the group meeting, without the additional encumbrance and time involved in establishing caucus spaces when short, private words or replies are needed quickly.

ZOOM Implementation Timeline and Next Steps: On March 17, 2020, one day after moving the entire Office to a telework environment, OMOS staff had already established a ZOOM workgroup, which was testing functionality, security, logistics, and add-ons. By March 19th, OMOS conducted its first ZOOM meeting on an intra-County basis. By March 27th, OMOS had conducted its first pilot ZOOM mediation session. OMOS is currently developing a simplified

protocol and training primer for clients and constituents who may be unfamiliar with ZOOM. Topics covered include login, registration, passwords, chat, caucus space, audio, and video expectations (and protocols), and other basic readiness indicators geared for non-ZOOM users.

Eviction Moratorium Outreach and Notice

Critical to the successful and comprehensive launch of the ODR services is the publication of those services. To that end, OMOS partnered with the Office of Public Affairs (OPA) in order to widely broadcast and advertise the ODR services available through OMOS, and to tie into the collective messaging the County was implementing with respect to the COVID response. On the County's webpage entitled **Updates Regarding County Services During Novel Coronavirus (COVID-19)** (<https://www.sccgov.org/sites/opa/opa/covid19/Pages/home.aspx>), OMOS introduced the concept of ODR and is listed as the County's ODR service provider. Similar links are located on the Office of Supportive Housing (OSH) website and the OMOS website. The OSH website URL listing the OMOS resource can be found at:

<https://www.sccgov.org/sites/osh/EvictionMoratorium/Pages/Resources.aspx>

Naturally, many clients don't immediately consider mediation in a shelter-in-place dynamic, because of the strong association between mediation and face-to-face communications. The OMOS website, <https://www.sccgov.org/sites/omos/Pages/default.aspx>, seeks to make parties aware of OMOS's ODR offerings in this time of social distancing, which include mediation, conflict coaching, organizational ombudsmanship (involving the juvenile dependency and adult custodial systems respectively), group facilitations, and online communication and conflict resolution trainings. OMOS is presently assessing the need and demand to provide ODR training to other organizations through a series of ZOOM modules.

In addition to the education, testing, networking, and publicizing in which OMOS has engaged related to ODR, the most important principle of any mediation offering has always been the quality (and sufficiency) of the service delivery itself. OMOS has a staff of 9.5 full time equivalent (FTE) Senior Mediators, 7 of whom are attorneys (as well as advanced mediation and ombuds practitioners), and three of whom (2.5 FTE) possess Master's Degrees in fields such as Conflict Resolution and Communication Studies. In anticipation of a significant increase in caseload and volume of requests for ODR pertaining to the eviction moratorium, along with associated landlord/tenant matters, OMOS hired an additional extra help Senior Mediator, a licensed clinical psychologist, to support the additional caseload. Staff have spent several weeks gaining nuanced experience with ZOOM and with pursuing many recently offered webinars on ODR practice, *Conflict in the Age of COVID-19*, and *Communicating through Social Distance*.

City of San Jose: Many local municipalities, and even the Governor of California through Executive Order, have adopted similar ordinances to the County's regarding evictions.

Beginning with the City of San Jose on April 13th, OMOS has engaged in targeted educational outreach and partnership to ensure that the mediation safety net, by way of service provision among overlapping and distinct mediation providers and jurisdictions, is coordinated to the extent possible. The City of San Jose's eviction moratorium, though similar in scope to the County's, does not include adequate service provision for conflict, ODR, or mediation. Since the shelter-in-place order was implemented, the City of San Jose has taken more than 600 calls from community members on the City's Eviction Moratorium and Rent Stabilization hotlines.

Additionally, because the City of San Jose ties its conflict resolution offerings to jurisdictional limits established by the City's Apartment Rent Ordinance (ARO), for which the city coordinates its mediation efforts among six contracted hearing officers¹ who only hear multi-family dwelling matters, single family home and condominium tenant-landlord cases have no source of City-sponsored mediation or conflict resolution assistance, much less ODR, in light of the respective ordinances. Therefore, even if the City of San Jose had an operational-ready mediation program, which they do not, their services would not cover a broad swath of anticipated eviction moratorium cases—namely, those involving houses and condominiums. OMOS has offered, therefore, to coordinate with the City in order to take on conflict cases resulting from *either* Ordinance, so that ultimately, all tenants and landlords in Santa Clara County have service options available to them to help resolve conflict during the COVID-19 pandemic.

Outcomes

For the period of April 13th through April 23rd, OMOS has initiated seven mediations concerning landlord-tenant matters and the eviction moratorium, with an additional three conversations between mediators and parties who are engaged in the legal process of *mediation consultation* (California Evidence Code section 1115(c)) pending. This brings the total number of cases processed for neutral ODR services during the 10-day period to 10, averaging one case per day at the present rate. It is anticipated that this number will continue to increase as outreach efforts continue in partnership with other local jurisdictions.

cc: Miguel Marquez, Chief Operating Officer
James R. Williams, County Counsel
Megan Doyle, Clerk of the Board of Supervisors

¹ The City of San Jose makes use of a mediation/arbitration hybrid model of conflict resolution, where parties are coached in communication, until such point as they cannot reach agreement (of their own accord), at which time the hearing officer renders an arbitration-like decision.