



VIRTUAL MEDIATION ON THE ZOOM PLATFORM: A HOSTING MEDIATOR'S VIEW

By: Ross Hart

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Los Angeles, CA – Due to the unprecedented and extremely serious global coronavirus pandemic and mandated social distancing, the last “in person” mediation we conducted at AMCC was during the week of March 9, 2020.

Many courts across the USA are closed entirely or are only handling limited criminal and other priority matters. Once the “stay at home” orders are lifted and the courts' processes re-commence, it is an open question as to whether cases that had been set for trial and had those dates vacated during the “shut-down” period will be moved to the front of the trial line for Fall of 2020 with all trials currently scheduled for Fall of 2020 in turn being continued or instead those cases that had been set for trial during the “shut-down” period being moved to the back of the line. Similar questions surround the re-scheduling of key motions that had been set for hearing during the “shut-down”. Either way the virus has created a great mess and chaos for the litigation bar and judicial system. After a week or two of adjustment to the new reality in March of 2020, counsel for parties have started to re-engage in written discovery and depositions conducted via video conference as well as engaging in telephonic and video conferencing with judges and arbitrators regarding status, scheduling and the like. Counsel, their clients and carriers have also begun to utilize video conferencing to conduct mediations during the shut-down period.

Despite the delay and impact of the virus on the way people had been doing business up to March of 2020, one truth is that while the courts may be effectively shut down temporarily, existing civil disputes, cases and claims that needed resolution when the “stay at home” orders were implemented across the nation are not going away and will need to be resolved at some point in time. Existing disputes are stacking up. Despite the shut-down, life goes on and new claims and disputes of every nature arise daily. In addition to regular claims, we likely will have many additional claims related to the virus itself and the myriad legal disputes connected to the virus and its shut down effect on every facet of American and global life and business. Counsel, their clients and carriers have begun to utilize video conferencing to conduct mediations during the shut-down period to try to keep up and move cases along to minimize the future jam of claims resolution.

Over the last few weeks, this mediator has handled and hosted several video mediations via the Zoom Pro platform with good success. These have ranged from two party cases to complex, multi-party cases with as many as thirty participants in the Zoom mediation.

I was initially skeptical about handling mediations in this format having handled in-person mediation as a full time neutral for over 25 years. However, my experience with the Zoom platform has convinced me that not only is mediation via video conferencing a workable alternative during the coronavirus "stay at home" period, but is likely to be widely utilized by attorneys, parties and carriers for mediation in the future.

Some of the features that make mediation via Zoom workable and desirable are:

-The hosting mediator can initially greet all participants in a virtual waiting room outside the meeting. The hosting mediator can then screen and admit each participant to the meeting one by one identifying who each participant is, that he or she belongs in the meeting and track which party that participant belongs with. Once the mediator moves all the participants from the waiting room to the main meeting room, the mediator and all participants are in the main meeting room together. While in the main meeting room, the mediator and all participants can see and hear all other participants.

-Once the mediator has greeted all participants and conducted whatever activity might be warranted in a particular case, for example an expert presentation, the mediator can then move each party's team into its own secure "breakout room". In a recent mediation with 30 participants and multiple parties, the mediator had the seven participant teams each in their own breakout room. Once the team members for a particular party are in their assigned breakout room they can see and hear only one another and converse in complete and secure privacy.

-The mediator may announce himself and enter any of the private breakout rooms and conduct confidential discussions with the team members in the particular breakout room. As with an in-person mediation with physical conference rooms, the mediator may move among the breakout rooms having confidential conversations with each party as the mediation process progresses.

-The Zoom platform permits the mediator to move participants from room to room. For example, if the defense attorney and defense expert (with agreement of plaintiff's counsel of course) wanted to accompany the mediator to the Plaintiff's room and meet with the participants in the Plaintiff's room, the hosting mediator can move the participants to accomplish such separate

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meetings. A very important feature is that the hosting mediator controls the movement among rooms and participants cannot wander from room to room on their own without the mediator controlling that movement.

-If appropriate, the program permits the hosting mediator to return all participants to the main meeting room. This is helpful at the end of a mediation day to allow the mediator to brief all participants on what has occurred and next steps.

-The program has a "share screen" feature which allows participants to share photos, videos, documents, or a power point presentation with those in a breakout room or in the main meeting room.

-Participants have the choice of participating via video using the webcam on their laptop or desktop computers or calling in to the Zoom meeting and participating by phone only. Audio participation can be via the computer audio or by calling on a phone line. Whether one connects to the meeting through the computer or by phone there is the option to mute one's own audio so other participants cannot hear. There is also the option to shut off your own video so you are not visible to other participants but can still hear and be heard.

-Invitees do not have to have the Zoom app to participate. We do recommend that people planning to participate download the free Zoom app for a better experience. There is no charge to the participate in the Zoom meeting.

-This mediator has had many scores of participants in Zoom mediation sessions in recent weeks each with varying degrees of technical sophistication or total lack of technical sophistication. Each seems to have been easily able to participate meaningfully without technical problems in the Zoom proceedings. It is a very intuitive program.

I would add a few anecdotal observations as a hosting mediator:

-As compared with "in person" mediation we often seem to get more done because people who are participating from remote locations such as their homes or offices around the country or world are not stressed late in the day to leave to catch a train or plane or beat the traffic home.

-In some ways there is more confidentiality in a Zoom mediation as the mediator can text individual members of a team in a breakout room to move that one person out to speak with the mediator privately in the mediator's own breakout room without prying eyes of other parties

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noting when and with whom the mediator is conversing as often happens at “in-person” mediations when people pass one another in the halls or lobby of a physical mediation facility.

-Participation from remote locations often allows for greater and more effective participation than an “in-person” mediation. For example, at one recent Zoom mediation on a case where the mediation process has spanned over a year due to its complexity and issues, the mediator was able to meet with a party’s eight-person board of directors with all of the directors participating at the same time for the first time.

-Because people can participate effectively in a Zoom mediation from remote locations around the country and the world, the cost for the parties or carriers paying the participants is lower because there is no travel time, transportation and food cost or lodging expense that is involved in having lawyers, experts, party representatives and claims professionals attend a mediation.

So far, I have noted few downsides of Zoom mediation. Communicating with people via video will never be totally equivalent to meeting with them in person. To be able to shake hands, read reactions and body language and otherwise get a sense of people and their message or agenda in person is part of what makes us human. However, when one balances the current limitations of in person meetings that are likely to last into the indefinite future against the positive features and benefits of Zoom discussed above, this mediator predicts that mediation via Zoom will become a permanent part of the mediation landscape long after the Covid19 virus disappears.

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