

PREPARING FOR A VIRTUAL MEDIATION SESSION: A MEDIATOR'S PERSPECTIVE

To Zoom or Not to Zoom, that is no longer a question!

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Los Angeles, CA – Once you have decided to take the leap into virtual mediation, preparing for it is a bit different than most of us are used to doing with in-person sessions. Although online dispute resolution has been around for many years, its use has been highlighted and more vigorously “road tested” with the current COVID-19 health crisis. Online mediation brings its own challenges and unique limitations that have us using technology in a way that is foreign and new to many now finding themselves involved in virtual mediation for the first time. However, one thing is true for both virtual and in-person mediation: proper preparation is key in having a successful mediation and reaching resolution.

After now having handled multiple mediations via Zoom as mediator, the following are some steps in preparing that I have found to be extremely helpful:

- (1) **Embrace the technology!** Since we are all familiar with having the first meeting with the mediator being an in-person session, many parties and counsel are uneasy and unfamiliar with the technology offered by Zoom and other online platforms and are hesitant about how the mediation will work. Will it be secure, how am I able to talk confidentially with the mediator, etc. This can be a daunting concept and event for many, so it is helpful to request the mediator to schedule an initial pre-mediation conference prior to the actual mediation session with all counsel and possibly parties to discuss the use of Zoom (I use Zoom to refer to all the various online platforms since it is the one I use most often and the one with which I am most familiar). This preliminary conference will allow parties and counsel to use and familiarize themselves with the technology ahead of the mediation session itself, discuss how confidentiality and privacy is achieved and maintained (the use of breakout rooms, share screen, etc.) , discuss scheduling and logistics using the Zoom platform with this possibly being the first time counsel and the parties actually get to meet each other, particularly in the virtual world, and encourages cooperation and collaboration among the participants. The mediator (usually being the most knowledgeable having already used Zoom for several mediations and conferences) can help put counsel and the parties at ease as to how the session will be held and lay the ground work for the eventual resolution of the case. Having this pre-mediation status conference is a great tool to allow the participants to use and get familiar with the online mediation format, have the schedule set for the mediation, answer questions about the

virtual concept and allay any apprehensions of the participants regarding communication and privacy.

(2) **Document exchange is key!** As mediators, we are very appreciative of briefs presented in advance of the mediation, as well as having the parties provide documents and information they deem important to a full understanding of their positions. In Zoom mediation, these pre-mediation briefs and documents are of increased importance since it is more difficult for many to virtually provide briefs and documents online during the mediation. Non-confidential briefs are most useful since the mediator will know that all the parties and counsel have the same information, and that he or she can discuss the information contained therein without divulging any confidential information. Of course, the parties can still provide the mediator with a confidential brief with details not to be shared with the opposing parties.

(3) **Organization!** Another useful tool is to consider providing your brief online in a PDF as a virtual binder with bookmarks so that the mediator has it on hand during the mediation and can easily access and use it during the session. This is an extremely helpful way to provide your brief and documentation to the mediator (as always, a few days prior to the mediation is preferred) without having to mail a binder and numerous documents. This is also an easy way for the mediator to share this information with the opposing side, if allowed by the generating party and counsel.

Zoom does have a feature called “share screen” in which parties can present and share their screen with any participants during the online session. This feature can be used to share information with just the mediator or with as many other participants as one wants. This is a useful feature, but it typically takes a little practice to get the hang of.

(4) **Are you ready to mediate?** Once you have had the “all-hands” pre-mediation Zoom status conference and hopefully sent briefs and information to the mediator, it is helpful to have a brief separate Zoom video conferences with the counsel, party and others that are going to participate in the mediation (claims adjusters and experts come to mind) to have confidential dialogue about their case and positions, and allowing the mediator to ask pertinent questions in order to get a more detailed understanding of the claims, arguments and dynamics of that party’s case. This is also another opportunity for the participants to use and get familiar with the technology and answer further questions as to how the virtual mediation is going to be run, security and confidentiality issues and any other questions (including anticipated follow up if the case does not resolve during the virtual session, issues about how a settlement agreement will be finalized, etc.).

This also is an opportunity for the mediator to really get to know the participants before

the mediation, understand and flesh out agendas, etc. In turn, this is an opportunity for the counsel and party to confidentially discuss their case, arguments, claims and concerns with the mediator ahead of the mediation so that time is used to its best advantage once the mediation commences- an opportunity to tell their story ahead of time. I find these separate pre-conferences to be time well spent in terms of maximizing the chances of settlement during the joint virtual mediation.

- (5) **Embrace the benefits!** Lastly, in having these pre-mediation Zoom meetings and conferences, the participants have now had the opportunity to see what savings they can enjoy with the virtual mediation, as compared to the traditional in-person meeting. They will have experienced the technology firsthand to see how easy it is to use once one has played with it a little. Also, the participants have already experienced other advantages of a virtual session over an in-person mediation: no travel, no parking costs, no lodging or meal costs, the ability to work from your office and on other matters when the mediator is in the other party's breakout room, and no stress about having to head out early because of traffic or a flight. I have found that in the Zoom mediation, we actually get the full attention of all the participants as much, if not more, than when we have everybody in person. This is a tremendous advantage and allows the mediator to focus on the issues with the decision makers without the stress of having that person needing to leave early or being mentally pulled out of the session by the press of other issues.

In closing, although the increased use of technology has been forced on many of us due to COVID-19, including the need to consider virtual mediation and other conferences, it is already clear that this technology is here to stay and will be used regularly because of the ease in using it and the immense savings in time, travel and costs. Embrace it, properly prepare and you will reap the great benefits of virtual mediation in the post COVID world of litigation.