

Tips for Successful Mediations Using Zoom Videoconferencing

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This article discusses suggestions for holding effective Zoom mediations.

By Suzanne H. Segal

During these difficult COVID-19 times, our first priority is the health and well-being of our community. However, if our economy and infrastructure are to survive, mechanisms for conflict resolution must also be available. Where there is turmoil and uncertainty, conflict is likely to follow. Companies and individuals must resolve conflicts to allow people to carry on their work, pay their employees, protect property as well as individual rights and run their businesses.

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Preparation for a Zoom Mediation

Like everything else we do in litigation, there is a significant correlation between preparation

and success. The more a lawyer prepares her client for the mediation, the greater the likelihood of a positive result for the client. There are, however, unique considerations when preparing for a Zoom mediation.

- **Pre-mediation Call Between Lawyer and Client**

The pre-mediation call between lawyer and client is essential to the success of the any mediation. The lawyer must explain the process to the client—even a sophisticated client—to remind the client of the distinctions between mediation and litigation. Introducing the client to the phases of mediation, setting the ground rules for the process and addressing the client's expectations for the outcome are critical parts of this call.

- **Discussing the Zoom Mediation Process**

Explain that the mediation may include a pre-mediation session with the mediator. One of the



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disadvantages of Zoom mediations is the challenge for the mediator to establish trust and rapport with the client. If this concern is heightened in a particular case, consider including the client in a virtual pre-mediation conference with the mediator. Encourage your client to ask questions and get to know the mediator.

Inform the client that there will be plenty of opportunities for private communication during the

virtual mediation. Discuss with your client and the mediator the expectations regarding confidentiality and how that will manifest in a virtual mediation. Consider whether the Zoom mediation should be password protected. Ask about security measures, such as utilizing the most current version of Zoom and controlling access to the participants' locations. If privileged information is also highly confidential information, you may wish to consider multifactor authentication as a requirement for the mediation.

Address who needs to be present at the mediation for your client and for your opponents, i.e., who has authority on the other side to make decisions—is it a CEO? A CFO? An insurance adjuster? Confirm their availability for a Zoom mediation.

- **Procedures Unique to Zoom Mediations**

Prior to the mediation, counsel must discuss the Zoom technology for conducting the mediation with the mediator and with clients. Counsel should ensure that everyone is comfortable with the technology. A dress rehearsal or “mock” mediation might increase confidence in unfamiliar procedures. Remind your client that his or her attire should be appropriate for the occasion and discuss the background that will appear behind the camera. Confirm that your client will be in a room with no background noise or other audio distractions, and that your client has adequate WiFi. Create a back-up plan in the event that the technology fails. Consider time

zone differences and try to set the mediation at a date and time that works for everyone involved. Obtain back-up phone numbers in the event technology goes awry.

The parties must set aside a specific amount of time to devote to the mediation, without interruptions. This can be a more difficult commitment when parties participate from their own offices where phones and computers can easily distract. Get a commitment from everyone involved to decline unrelated calls during the mediation and to avoid multitasking, at least when the mediator is working with that party. Perhaps remind parties of these “ground rules” shortly before the mediation.

Have a plan for confidential communications with your client during the mediation. Is a second private virtual meeting a reasonable option? Or would your client feel more comfortable simply texting, IM-ing or emailing you during the meeting? If cellphone calls are necessary, plan for a way to hold the call so that it does not interfere with the virtual meeting. In addition, cell numbers of counsel and the mediator should be exchanged to allow texting during the conference.

Documents should be shared in advance of the mediation to give the mediator and your opponent an opportunity to understand the documents. If there are confidential documents to be shared only with the mediator, set up a separate procedure for sharing such documents. Using Dropbox, Google Drive or similar tools can

be very efficient for sharing documents. If it is necessary to review a particular document during the mediation, however, it is a good idea to have an old-fashioned paper copy available, just in case technology unexpectedly fails.

Any potential written settlement agreement should be circulated in advance of the mediation. This will give everyone a chance to consider the proposed terms and focus on the most controversial ones during the mediation. The parties should anticipate that edits to the settlement agreement can be made and shared during the mediation. Parties should take care to ensure that the most recent version of the edited agreement is shared and avoid confusion by clearly identifying versions (perhaps with date and time labels) as they are circulated.

- **Collect and Share Information in Advance of the Zoom Mediation**

Parties should review all the relevant documents and, as noted, should consider sharing documents in advance of the virtual mediation. Confirm that the information is available in an electronic format that is easily shared through email or a portal, such as Dropbox or Google Drive. Focus on documents or databases that address damages. Counsel should evaluate whether the damages information will be easily understood by others or whether expertise is required. After liability issues are discussed, damages evidence often steers the mediation to a more objective evaluation of the case. By sharing

information in advance, issues involving the format or interpretation of the information can be resolved prior to the mediation. Zoom also allows you to share documents during the mediation, by utilizing the “share screen” function.

• **Mediation Briefs**

Typically, mediators encourage parties to share their mediation briefs with their opponents, although this practice is often optional. If briefs are shared, counsel should set aside the litigation tone and find a more diplomatic approach. Counsel can be a staunch advocate for a client’s position but remain diplomatic in a discussion of the facts and law. The diplomatic tone of a mediation brief may be even more critical to the success of a Zoom mediation, as parties lack the same opportunities for trust building that are available at an in-person mediation.

The Zoom Mediation

Once the date of the mediation arrives, the Zoom mediation should seem easy and comfortable. Your client knows the mediator and knows what to expect from the process. With the mediator leading the proceeding, you can virtually communicate about all the issues necessary to reach a fair resolution of the dispute.

In most mediations, parties prefer separate caucuses. Virtual teleconference technologies like Zoom permit the mediator to

create separate “breakout rooms” to house parties and lawyers. The mediator should create this arrangement first, then circle through the breakout rooms, confirming that everyone is in the correct breakout room and that the parties agree that confidentiality has been maintained. In a Zoom mediation, it is relatively easy for the mediator to move between separate breakout rooms to hold private conversations with parties and counsel.

In the event a joint caucus becomes necessary, the breakout rooms can be closed and everyone can become part of a joint meeting. If one party needs to consult privately with a party in another breakout room, the technology allows the mediator to join a new party to a breakout room. Again, before conversation begins, everyone should confirm who is actually in the room to assure the parties that confidentiality is maintained.

Conclusion

If the parties resolve all the material terms in dispute, the best procedure is to complete the written agreement, and have it signed by the parties who are present. This can be accomplished through “DocuSign,” a program that allows parties to e-sign a document through a shared portal. If it is not possible to complete a written settlement agreement, the parties should agree that all material terms are resolved and

memorialize that final agreement in a term sheet.

If only a few terms are agreed to by the end of the mediation, but material terms remain in dispute, a term sheet can be created and signed by the parties to reflect that they reached agreement on some items. The mediator should advise the parties that because material terms remain unresolved, however, the agreement is unenforceable. As such, the term sheet may only represent tentative agreements. Before the end of the mediation, the parties should set a second mediation date, before the momentum towards resolution is lost.

It is true that most mediators would agree that an in-person mediation—with all decision-makers in the same physical location—is the ideal way to proceed with mediation. In-person mediation enables the parties to focus on the challenging task of resolving their conflict without their office’s distractions. An in-person mediation allows for the personal connections that build trust and resolution more easily. But we are living in far from ideal times. For the moment, and to allow the important work of conflict resolution to continue, Zoom mediations may offer a reasonable alternative to resolving your client’s disputes.

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