

Taking Mediation to the Next Level: Using Virtual Mediation Effectively for Your Client

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As COVID-19 numbers continue to decline and attorneys return to in-person practice, Zoom and other virtual conference software remain a viable and effective way to conduct mediations. Across the legal spectrum lawyers were forced to adapt to virtual meetings, and they eventually realized the advantages that can arise from this format. Since the use of virtual conferences has become part of a lawyer's skillset, the legal profession is likely to continue to use the software going forward. This paper will first present the pros and cons of using Zoom¹ to conduct mediations, and then describe the steps mediators should take to ensure the process is successful. While the use of Zoom is relatively new in the profession, mediators and attorneys need to know how to use these features as their use continues.

The first major benefit Zoom is the increased safety for all parties to a mediation. Zoom became necessary to conduct mediations due to the health and safety orders regarding the COVID-19 pandemic. Parties could no longer gather in person due to the potential safety issues, but Zoom offered an alternative that allowed mediations to continue without the health risks. While this benefit may be obvious and less important as the vaccine rollout continues, mediators should always keep safety concerns in mind.

¹ While there are numerous virtual meeting programs, for ease of reference, we will refer to "Zoom," which seems to possess the greatest market share.

Yet, parties can sometimes have problems finding access to Zoom-capable technology. Some parties may not be able to access video or have slow internet speeds that make connections difficult. The best way for mediators to promote safety while ensuring a smooth process is to ask the parties about their comfort level in gathering with other people. With the right comfort level, parties to mediation can meet with others before mediation to address any logistical concerns in using Zoom technology.. The mediator can also arrange technology accommodations for parties who are uncomfortable with being around others. These arrangements could include supplying the party with a secure device or providing a private room in a building with a stable internet connection. If mediators use these accommodations to establish stable usage, Zoom offers a viable alternative to in-person meetings when parties are unable to conduct mediations in person.

The second benefit is the time and financial savings involved in Zoom mediation. In-person mediations require all necessary parties to gather in one location with no real regard to travel time or costs. Mediations can become expensive and time consuming as parties travel to and from the location and pay for travel accommodations. Zoom mediations reduce this problem by allowing parties to participate from their homes or workplace. The added freedom may allow parties to be more comfortable during the mediation process. Another similar benefit is that the scheduling can be more flexible, allowing parties who were previously unable to participate the opportunity to attend. Parties can quickly join the meeting for their relative parts then leave without the burden of travel and scheduling. Overall, Zoom makes the mediation process much more accessible for everyone involved.

The final benefit is the increased access to information and files. As mentioned above, parties can participate in the mediation from their place of work or at home. This allows the parties to have quick access to their information that may have been inaccessible if the mediation

was in person and away from where they keep files. Lawyers can also use this to their advantage by working on other cases during the downtime in the mediation process. Further, Zoom has a “Share Screen” feature that allows all participants to see any specified window opened on a person’s screen. Parties can use this feature to share documents without making copies for everyone. Since Zoom is typically used on a computer, the parties will also be able to quickly share files through email if they prefer not to share their screen.

The problem with these features is that the parties must know how to use them. The features are relatively easy to operate, but problems can occur that can slow the process down. If a problem arises, the mediator may find it difficult to troubleshoot remotely. One option is to allow remote access to the parties’ computers so the mediator or an IT professional can solve the issue directly. A simpler option would be to revert to other technology, such as sending a copy through email if the file cannot be shared. While issues with technology are likely, the increased access to files and the methods to solve any potential problems can outweigh the negatives with using this technology.

A mediator should balance the pros with the cons to determine whether it is beneficial to conduct the mediation virtually. The first drawback to consider is the decreased personal connection among the participants. Although Zoom has become more commonplace due to the pandemic, virtual meetings still feel foreign and uncomfortable to many people. This reduces casual interactions and normal friendly behavior. Parties can no longer fully read body language or communicate physically, such as with a handshake. However, people can see themselves when they have video activated. This allows people to see their emotions on their own face in real time. People that may normally be hostile or uninterested are more likely to change their behavior since they can see themselves behaving inappropriately. For this reason, mediators

should encourage all participants to turn on their video, and they can also change the settings so everyone's video is showing at once instead of only including a few people on the screen. Although Zoom conferences can reduce the ability of the opposing parties to read a party's body language, the live video feed can result in parties acting more appropriately and working to resolve the problems.

A similar issue with Zoom mediations is the inability for parties to accurately read the room or put pressure on other participants. While people may be able to read their own emotions better with a live video feed, successful mediations sometimes require other people to see those emotions and act on them. A consequence of Zoom mediations is that the parties cannot behave the same way as they would if they were in person. The medium has changed, and the parties must behave in a different way to be effective in that medium. The relationships between parties may be calmer online since there are fewer obvious emotions. Because of this, a more formal approach may be the most effective. Parties should prepare in a different way and expect to rely more on their points and documents than emotions and pressure.

While some cases benefit from this difference, many cases need to have that pressure. A change in the pace of mediation could create this pressure in an online setting. Mediators could speed up or slow down the process depending on how parties react to those changes. While an online mediation will change the behavior of everyone involved, the mediator can try to create an environment or process that will achieve similar results to being in person. Mediators should examine the best approach when deciding whether an online or in-person mediation is best for the situation.

Another potential downside to using Zoom is how the parties treat the process. While in-person mediations are typically formal, mediations over Zoom are often not treated with the

same respect. Parties might dress casually, people may try to multitask during important moments, and overall, they may not view the process in the same way as an in-person mediation. However, mediators can combat this by encouraging each lawyer to discuss the importance of the mediation with their clients. The mediator can communicate beforehand that each group should dress professionally and have time allotted for the full session. Mediators can also take advantage of using “breakout rooms” on Zoom.

Breakout rooms are small groups where the Zoom host can move people so only people in that room can talk to that person. Breakout rooms are important because they give mediators more control over the session. The mediator can place parties into different rooms then quickly move his or herself through the different rooms. By doing this, the mediator can ensure that each party is focused on the issues and is not multitasking or leaving the room. Of course, mediators need to learn how to use breakout rooms and other essential aspects of virtual technology. Mediators, like all attorneys, must be constantly learning and adapting. Therefore, any mediator using Zoom needs to be comfortable with the technology before leading a virtual mediation. With the proper preparation, communication and supervision, online mediations can be treated as seriously as in-person mediations.

The final problem with online mediations is the confidentiality of the discussions. While in-person mediators can ensure that each person signs a confidentiality agreement and is not disclosing any sensitive information to outside people, online mediators must rely more on the parties themselves to sign the agreement and not disclose. This situation creates some distrust between the parties, which may cause some parties to resist online mediation. However, mediators can reduce these concerns by requiring each person to e-sign a confidentiality agreement. E-signatures can be done over Zoom and can be screen-shared so other parties can

see. Further, the mediator may require parties to show their surroundings to prove that there are no other people that can hear any sensitive information. Zoom has a feature that lets people create “backgrounds” that do not show the person’s actual surroundings. A mediator can require that any artificial backgrounds are turned off to show the person’s true surroundings.

While some people have concerns about Zoom confidentiality, Zoom has made many updates to their software to reduce these concerns. The host of the meeting is the only one with the ability to record the meeting. They can activate a “waiting room” where they will have to approve each incoming participant before they join. They can turn off any chat features. Finally, they can place people in breakout rooms to prevent them from hearing sensitive information. Overall, the functionality of Zoom has been improved to reduce any confidentiality problems, and mediators can show these functions to parties to remove any concerns they have about online mediation.

After the mediator has weighed the pros and cons of Zoom mediation, he or she should follow certain steps to make online mediation as successful as possible. The first step is to communicate with the parties to ensure that each person will have access to Zoom-capable technology. Necessary accommodations should be made before the mediation, so the mediator must first know what accommodations must be made. This communication should also mention the seriousness of the mediation despite the different medium, as discussed above. The mediator will be able to test the meeting with the parties to ensure that everything is working properly. The mediator can offer a pre-mediation demonstration of Zoom for people that are unfamiliar or uncomfortable with the platform. The parties can also submit requests to the mediator, such as requiring each person to show their surroundings.

The second step is to select the correct settings in the Zoom meeting. The host should create a waiting room, breakout rooms, grant access to screen sharing, and choose the layout of the video cameras on each person's screen. The host can also attempt to setup remote control for a person's computer if the host suspects that there will be problems they will need to troubleshoot during the meeting.

The third step is to arrive early for the mediation. The host must start the meeting before others can join. The host should start the meeting early and be available for any potential problems. Ideally, the mediator will provide each party with his or her phone number so parties can call if there are any technical issues. The fourth step is to conduct the mediation according to normal procedures and the requests of each party. The mediator should treat the process as they normally would in order to provide the same legitimacy as an in-person mediation.

The final step is to use the online functionality of Zoom to prepare a term sheet or other settlement agreement. As mentioned above, e-sign and screen share can be used to authenticate these documents with the same effect they would have if they were physical. The mediator can then bring all parties back to the main meeting room for final remarks or exit the meeting from their breakout rooms.

Overall, Zoom offers the necessary functionality to perform online mediations. Mediators should examine the pros and cons of Zoom to determine whether to have an online or in-person mediation. The mediator should then take several steps to prepare for online mediation. This paper has provided a list of pros and cons along with solutions. A list of steps a mediator should take before conducting an online mediation is also listed. Zoom will continue to be utilized in the legal profession, and mediators should use the steps above to maintain the legitimacy that comes from in-person mediation.