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How Zoom Has Changed Mediation in a COVID-19 World

Q: THE COVID-19 PANDEMIC HAS FORCED MEDIATIONS TO MOVE ONLINE TO ZOOM AND OTHER VIRTUAL PLATFORMS. HOW SHOULD GENERAL COUNSEL ADAPT THEIR STRATEGIES BEFORE THE MEDIATION OCCURS?

A: In a live mediation, much thought is given in advance to who should physically attend. Sometimes the final decisionmaker is unable to attend in person, requiring "one last call" to the insurance adjuster or client decisionmaker as a buffer to final settlement numbers, offers, counter-offers, etc.

In a virtual mediation, there is an unspoken expectation of immediate availability of all persons and instant access to information and the client. Therefore, it is more important than ever to have an understanding of final settlement authority *before* the mediation, as there is not as much opportunity for private back-and-forth discussions with decisionmakers during the mediation itself.

Q: COULD YOU EXPLAIN THE IMPORTANCE OF A JOINT INTRODUCTORY SESSION?

A: In a live mediation, we often insist upon a brief "joint session" at the start of a mediation which serves as an opportunity for each party to outline its case, present its key evidence, etc. This helps the mediator better understand the case and allows each party to consider the best evidence and arguments presented by the opposing party. It also provides many plaintiffs their "day in court" to allow them to reach closure during a mediation, rather than seeing the day as just about trading dollar numbers.

In the virtual sessions, we have noticed mediators moving away from joint sessions. Perhaps this is due to technology limitations, or perhaps this is because the mediator believes the joint sessions are not as effective in a virtual setting. Regardless of the reason, consider asking the mediator to begin the mediation with a brief joint session so that the parties can introduce each other and lay the groundwork for a successful resolution of the case.

Q: THE VIRTUAL SETTING IS OBVIOUSLY VERY DIFFERENT FROM GATHERING IN A ROOM. HAVE THE DYNAMICS OF THE MEDIATION ITSELF CHANGED DUE TO THIS FORMAT?

A: The Zoom boxes are a great equalizer. In a live mediation, the attorneys in the room tend to be more prominent. Their clients sit next to them and speak when spoken to, but do not often interject or take the lead.

In a virtual mediation, however, all participants are in the same-sized box on a computer screen, with clients typically in their own home or office setting apart from their attorney. We have noticed that clients are taking a more active role in virtual mediations, perhaps due, at least in part, to the more equal way in which participants appear in the "room".

Q: CAN COUNSEL STILL CHAT WITH THEIR CLIENTS "OFF THE RECORD" WHEN A MEDIATOR ISN'T PRESENT VIRTUALLY?

A: In a live mediation, attorneys and their clients discuss all manner of things during "down time" when the mediator is not present. There is always fair warning when the mediator returns.

In a virtual mediation, currently Zoom breakout rooms do not have a "knock" feature. Therefore, you have no warning as to when the mediator is going to re-enter the room. We have seen some mediators collect cell phone numbers in advance of the mediation and text participants before re-entering the breakout room. This allows participants to stop all irrelevant or confidential conversations and better prepare for the next session with the mediator to begin.



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Q: DO VIRTUAL MEDIATIONS INCLUDE LUNCH BREAKS?

A: In a live mediation, there is typically no formal lunch break. The parties eat in their separate breakout rooms and the mediator continues to discuss the case. Oftentimes the mediator will join one side or the other to continue discussions over lunch.

In a virtual mediation, however, participants need to physically get up from their computer to get lunch and may not feel comfortable eating on a computer screen. Consider arranging a formal lunch break to allow the parties (and the mediator) to freely “log off” during lunch and eat privately before resuming the mediation. You might also ask the mediator to confirm other short “stretch breaks” when parties can log-off without fear of missing an important discussion.

Q: WHAT SHOULD PARTIES EXPECT AFTER A VIRTUAL MEDIATION?

A: In a live mediation, the parties often physically sign a short paper term sheet memorializing the outcome before departing. In a virtual mediation, if the parties reach a resolution, it is helpful if the mediator emails an agreement to all participants before everyone logs off. The parties and their attorneys can review, e-sign, and return the document to the mediator before ending the session. After the Zoom is ended, the parties can draft and sign final settlement papers in the following days as usual.

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