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PERSPECTIVE

Mediation at ground zero: The case for virtual dispute resolution

By Jan Frankel Schau

A Chinese proverb says, “Be not afraid of growing slowly, be afraid only of standing still.” With the abrupt shut down of all of California, lawyers and their clients may find themselves scrambling to figure out how justice in the time of the coronavirus epidemic may be served. Many mediators and mediation agencies have experimented with online dispute resolution with varying success in the past. Now, using platforms like Zoom to conduct mediation has become imperative. Embracing the new technology is another matter.

One of the first tasks in every mediation is what we call “convening.” In every case, the parties choose a mediator, choose the location of the mediation, choose a target date and discuss how the fees are paid. In this case, there is an additional query of “how.” Mediators are all still working (albeit remotely), but can suggest their favorite platform, but a Zoom specialist will take the extra step of either setting up a practice session with you or talking you through the advantages and disadvantages of a Zoom mediation before it is scheduled.

After spending many hours on Zoom, in teaching, training and mediation, it appears that the Zoom platform has some real advantages. You have, for example, a “safe space” where all parties can appear in a “main room” but can be muted by the host (the mediator), so that they can’t scream or berate one another. Of course, it also offers a safe space from actual germs — allowing young and old, ill or healthy people to participate fully. In trainings, the professor at the front of the classroom often finds herself staring into a sea of laptop computers. With Zoom, you capture the faces and can make direct eye contact with each participant. In fact, it is remarkably easy to make genuine eye contact with the individual you are addressing as though (and maybe better) than a face to face interaction.

Once you decide to participate in a Zoom mediation, you will be subject to some new and perhaps restrictive ground rules that will differ from the ground rules in an ordinary mediation conference session. For example, participants will be reminded that a recording

of the negotiations is strictly prohibited. All participants must have access to a secure network. All participants will be admonished not to allow third-party eavesdroppers, for confidentiality purposes. A lot of the rules that have become second nature due to the importance of confidentiality and privacy in our conference centers takes on new and heightened importance when participants are working

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within the comfort of their own home. There are additional benefits to clients in allowing them to participate from a comfortable physical space without requiring them to travel to an office building which may be unfamiliar and create an intimidating environment.

The preparation for a mediation is also different than in a conventional setting. That is, you will want to have all of the important evidentiary documents uploaded onto your desktop or in an easily accessible Dropbox file. You will also want to upload a means for signing documents virtually — such as DocuSign. Finally, you will want to have a template for a settlement agreement readily accessible. There are no handshakes in an on-line mediation!

The mediator will set up the conference space in advance. When you arrive on the platform, you will likely be left in a Waiting Room, which will inform you and your clients that the mediation has not yet commenced. Thereafter, you will likely be invited into a main session, where the faces of all participants will be visible, but where the voices will be muted, so only the mediator can be heard. After the initial ground rules are delivered and introductions are made, any participant can ask to be heard via chat or a virtual raising of their hand. The mediator can then unmute, one at a time, if that is what is desired. Depending upon the case and the preference of the parties and mediator, you will then be invited either to make an opening statement in the main session, or to join a “break out room.” Of course, each of these steps can be discussed and planned out in advance

of the mediation, just as they have been in face to face mediations.

Once in the breakout room, you will have an opportunity to discuss your case more frankly and completely confidentially with your mediator. When your mediator leaves to join another breakout room, you and your client will have complete privacy in your own breakout room. Some mediators will offer a back-

up plan of communicating with them by text, while others will prefer use of the chat function.

Lawyers have expressed their concern that the human touch, the nuance, the empathy, the compassion, the tone and the urgency may be lost in the hollow confines of a flat screen. There are ways around this, too. In this time of isolation, having someone outside of your family household listen to you or your client with full attention (no other devices or distractions permitted) can be very satisfying. By a simple gesture and demeanor, real emotions can be conveyed, and real listening and understanding can occur. Looking intently at someone as they are speaking and then reflecting back what you have heard is a technique mediators have long engaged called “re-framing.” When the mediation takes place remotely, it is all the more important to make sure that everything that is said has been correctly heard and understood. The system, not unlike the in-person mediation, remains imperfect. The key is open-mindedness and flexibility.

Although some of the mediation agencies, such as ADR Services, are deliberate in decorating their conference spaces to look like home more than a corporate office, the on-line dispute resolution system will now be taking place from the homes of the lawyers, the clients and the mediator. In a paradoxical way, there is an intimacy to that feature that allows people to know something of one another that they might not otherwise appreciate in a “neutral” conference space. Some home offices are

cluttered with memorabilia, some have family photos, others have modern art. Each says something of the inhabitant which is usually not revealed in the confines of a mediation conference space.

There are other advantages to mediating via Zoom for busy lawyers and mediators. There is no travel time. The camera, I am told, provides a nice sheen so that you need not worry too much about appearances. Each little square with the picture of the participant also bears their name in the corner, so you can always recognize the participants by their correct name. There is no need to refer to anyone as a “plaintiff” or “defendant” or “counsel” — terms that were often substitutes for the more personal reference by names.

On the technical side, you can upload and share documents, get agreements signed more quickly, use a white board or other means to take notes and many other technical functions. You can also communicate with your mediator via chat even when she is in a different breakout room or request her to come into your room at certain intervals.

Obviously, this pandemic is a once-in-a-lifetime scourge that will have many negative consequences worldwide. Your litigation practice does not have to be sacrificed while the courts and your offices are closed. As Nelson Mandela once said, “We must use time wisely and forever realize that the time is always ripe to do right.” By avoiding direct interaction while still advancing your clients’ case through online dispute resolution, you will continue to serve your clients at a time they may need it most. ■

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