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Zoom tips for increased effectiveness of remote mediations

A PRACTICAL GUIDE FOR MAXIMIZING EFFECTIVENESS OF REMOTE ZOOM MEDIATIONS, FROM ADVANCE PREPARATION TO SHARING DOCUMENTS

The chiefly in-person nature of the legal profession quickly transformed because of the COVID-19 pandemic's shutdowns. Courts, lawyers, and litigants were required to "forthwith" utilize technology that enabled remotely-conducted court appearances, and ADR providers likewise needed to provide secure platforms for remote mediations.

Indeed, pre-pandemic, many neutrals required all decision-makers to appear in person at a mediation. In a relatively short time, Zoom and other remote platforms went from being novelties to the norm. Now, while social distancing and mask mandates are in the rear-view mirror, in-person jury trials have resumed, and bookings of in-person

mediations have steadily increased, it is also clear that conducting mediations remotely is not provisional but permanent.

After two years of remote mediations, we have clarity as to the benefits of using a remote platform for dispute resolution, as well as areas where there is room for improvement. One strength of remote mediations is that thoughtful use of Zoom's "screen share" feature can be an effective tool in negotiations. Some obstacles to fully utilizing Zoom's screen-share feature, or optimally taking advantage of the benefits of remote mediation, however, are technological in nature and will be discussed first.

Ensure that your computer's software, and your client's software, are up to date

Are you someone who leaves the computer on all of the time? Does that describe your client? The computers or other devices used for a remote mediation might not have all of the current operating system software updates or Zoom updates. According to Zoom's support site, Zoom regularly provides new versions of its desktop client and mobile app to release new features and also to fix bugs.

In addition, operating systems and Zoom updates are also made to enhance security features. Given the confidential nature of mediation, the importance of security features needs no explanation.

So, if your computer is “always on” and has not been restarted within the last week, or your client’s remote device has not been reset for some time, you or your client might not have all of the necessary updates to effectively (and securely) operate Zoom (or another remote platform).

The author experienced the need to update Zoom’s program firsthand earlier in 2022. During one remote mediation, there was a considerable amount of audio feedback and static whenever any of the participants spoke. As the feedback occurred when multiple counsel spoke, the issue was unrelated to a particular law office’s internet connection or other technical issues. Yet, there was *no* such issue in another remote mediation conducted earlier that same week.

Despite the quick response from our technical support, the issue could not be resolved. Later in the day, Zoom posted a notice on its own website acknowledging that some users had experienced an audio feedback problem, that the issue was on Zoom’s end, and that its own technical support had worked on and released a software update that day to fix the problem. Users needed to update their Zoom software to eliminate the issue. (Users can view Zoom Support’s “Upgrading Zoom to the latest version” article at <https://support.zoom.us/hc/en-us/articles/201362233-Upgrading-Zoom-to-the-latest-version>)

The Zoom software will allow you to check which version your device is currently running for video conferencing. Zoom also provides release notes for updates on the latest changes to Zoom. A review of the release notes will provide a list of new and enhanced features, as well as a list of resolved issues (which include fixes of audio and video issues, among others).

The electronic device you (and your client) use to participate in your remote mediation should be updated, including operating system updates and updates to the Zoom program. Indeed, your attempts to use Zoom’s screen-share feature for a PowerPoint, video, or other

use, may be hindered if your device is not utilizing current software.

Convenience comes at a cost

All of the many positive benefits of in-person mediation, of immediate certainty, confidentiality, control over the outcome, reaching creative solutions, avoiding expensive litigation costs, and finality, can be and have been achieved in remote mediations. Further, the tangible and non-tangible efficiencies of remote mediations have been recognized by lawyers and clients. Certainly, many participants are more comfortable being at home and appreciate the less formal, more flexible format. Some have health or other physical issues that limit their ability to be at a mediator’s office all day (and into the night).

On more than one occasion, a participant has experienced a rapid onset of what many describe as “Covid-like symptoms” shortly before an in-person mediation session. Instead of being canceled altogether, the mediation quickly and seamlessly transitioned into a remote or hybrid format.

Further, a remote format may be ideal in those circumstances where emotions can run high. With an in-person mediation, a chance encounter on the way to the restroom or kitchen can derail settlement discussions. Finally, of course, time is money. No doubt, the author is not the only mediator who has successfully resolved a matter at a remote mediation with litigants who were literally on the other side of the world.

A quick internet search for “Zoom fatigue” yields so many mentions that it even has its own Wikipedia page. Many online articles dating back over a year describe feelings of mental fatigue and exhaustion attributed to video conferencing. Some believe this is due to the greater difficulty in “reading” people over a video screen than in person. Humans have, after all, evolved to interact in person with other people, and we communicate verbally and nonverbally. Indeed, the unstated

importance we place on seeing another person’s entire body is evident in jury trials whenever lawyers deliberately step away from behind a podium to address a jury.

Another factor that makes remote communications more fatiguing is the obliteration of the work/home boundaries. While countless “Zoom tips” articles have (correctly) stressed the importance of a quiet, private setting, free from the distraction of other people, pets, music, etc., by now we know that fully implementing these suggestions is not always realistic.

Preparing clients for a Zoom mediation

Thus, within a relatively short time span, practicing law remotely went from a novelty, to a staple, to something potentially causing fatigue and exhaustion. As such, even in 2022, the preparation of clients for a Zoom mediation remains crucial. That is, lawyers should not assume that just because their clients feel comfortable using Zoom technology from home by themselves, preparation for a remote mediation session is unimportant or unnecessary.

Some plaintiffs may have a visceral opposition to the concept of “settling,” that “settling” means “settling for less.” Achieving resolution through settlement, however, does not mean that one is “surrendering” or “giving up” without a fight, or that the defendant somehow “got away with it” by not being held accountable in a public jury trial.

Preparation for a remote mediation must include discussing the amount of money your client is willing to accept to settle the case. This involves having a frank discussion about the evidence likely to be admitted at trial, based upon the damages sought. Such preparation is especially important if you and your client are not physically in the same location during the Zoom mediation.

Counsel’s preparation for a Zoom mediation should also include a discussion of the logistics of participation.

Some questions to ask:

- Are you and your client going to be together in your office? If so, will the neutral be able to have a private conversation with counsel only? Sometimes the lawyers are set up in a conference room, and private conversations with the mediator are not possible (except through a direct phone call). What is your camera and microphone setup? It can be difficult to see, hear, and clearly understand multiple participants who are together in a large conference room, especially those who face each other at a table with a single camera at the other end of the room. If you and your client are going to be in the same room together, consider connecting to Zoom with two computers, one for you and one for your client. This may, in turn, require you to turn off one of the microphones to avoid audio feedback.
- If your client is going to be in a different location than you, where will your client be? At home? In a hotel? Driving in the car? How, exactly, will your client participate? Audio-only cell phone (i.e., without a camera)? What camera is your client going to use? Does your client have a stable internet connection or reliable cellular service? The author serves as a “co-host” during Zoom mediations (chiefly to move participants to different virtual breakout rooms). Far more often than one would expect, a party loses the connection and must be re-admitted to the session.
- Will there be any non-parties present? Counsel is, of course, mindful of these implications as they pertain to mediation confidentiality. Having someone else in the room with your client, off-camera, without the mediator’s knowledge, can pose obvious problems. Even with the mediator’s knowledge and consent, however, an interloper can sometimes derail negotiations. An off-site lawyer (and mediator) cannot gauge the nature and extent of any “advice” given or influence exerted by this interloper over the client.
- When a matter does settle at mediation, one should expect defense

counsel to insist that your client execute at least a short-form settlement agreement before concluding the mediation session. Therefore, logistically, how will your client be able to receive and review with you the settlement agreement? Is your client able to use DocuSign to execute a settlement agreement? If not, how do you plan to obtain your client’s signature? If you and your client are not at the same location, using Zoom’s screen-share feature can help the lawyer and client review the settlement agreement together.

Answers to these Zoom-related questions are helpful for your neutral to know and can be discussed in your pre-mediation phone call with the neutral.

“Zoom fatigue” and the virtual nature of a Zoom mediation should also be considered as negotiations continue throughout a mediation session. Many litigants and lawyers have described the back-and-forth nature of mediation negotiations as tiresome. Yet, countless attorneys and mediators can attest that when parties remain engaged and “buy into” the process of working together to try to reach a resolution, breakthroughs sometimes occur hours after the scheduled end time of a mediation.

Given “Zoom fatigue,” however, a litigant in a Zoom mediation may have less tolerance for the give and take of negotiations, implicitly expecting a speedier resolution, and want to “tap out” early. Often if a client and attorney are not physically together, the attorney might not be able to convince the client to stick with the process. This difficulty is compounded when, for example, a client’s off-camera family members return home for the evening and start to eat dinner. There is no doubt that it is far easier to hit Zoom’s red “Leave Meeting” button from the convenience of one’s home than it is to pack up and walk out of a mediator’s office.

Providing exhibits/sharing documents as a tool to increase effectiveness

Mediation briefs remain as helpful a tool in 2022 as they did in 2019. In

addition to a brief, however, consider also providing exhibits, whether documents (e.g., a contract, a lease), photographs (accident scene, allegedly defective machine part), videos, or even mediation-specific PowerPoint presentations (which include a summary of damages, such as medical bills or unpaid wages). All of these can be provided in advance or, if there is a reluctance to do so, shared with the mediator using Zoom’s “share screen” feature. [Note: See *Rojas v. Superior Court (Julie Coffin, et al.)* (2004) 33 Cal.4th 407, 415-417, holding specially prepared documents produced for mediation may be confidential communications and not useable at trial.]

Although mediators are not fact finders, sharing a “day in the life” video of your client, a wrongful death case video that includes impact statements by the decedent’s family and friends (particularly those who are not actually present at the mediation), or an accident reconstruction video at mediation, shows the mediator that you are prepared. If the other side did terribly in a videotaped deposition, play the mediator a sample excerpt.

If you have a document from your client’s employer that is helpful to your client’s employment case, provide it to the mediator. Documentary evidence can bolster support for your opening demand, which frequently is viewed by the defense as extraordinarily high (and frequently met in kind by what seems like an unrealistic, low offer). These all can be shown to the mediator using Zoom’s screen-share feature.

Indeed, well before mediations shifted to a remote format, defense attorneys complained about a plaintiff’s counsel “ambushing” them at mediation with a high settlement demand. Some plaintiffs’ counsel never make a demand before mediation. Others make an opening demand that far exceeds their previous demand. These issues, unfortunately, continue to occur with remote mediations.

Likewise, defense insurance adjusters, government attorneys, risk

managers, general counsel, and corporate representatives have always needed time to decide on how much settlement authority to bring with them to a mediation. Presently, with so many employees still working remotely, and defense representatives frequently appearing remotely from the East Coast, defense counsel may need even more advance notice to discuss and seek settlement authority. Therefore, providing defense counsel with evidence well in advance of the mediation can help them understand the scope of exposure and time to ask the decision-makers for appropriate settlement authority.

If you are mediating a matter early in a case, or even before litigation is initiated, deposition transcripts and other documents might not be available to show the mediator. Experienced litigators often prepare a packet of exhibits, or even a brief PowerPoint presentation, of relevant documents and photographs.

Adept and liberal use of Zoom's "share screen" feature to show these documents to the mediator can be an effective tool. Documentary support for your monetary demands shows the mediator that there is an objective basis for your demand, that you know your case well, that you are not afraid to try your case, and that you are there to mediate in good faith.

Show and tell

The author believes that preparing a PowerPoint presentation or other evidentiary presentation for mediation, shown to the opposition, can be a powerful tool towards reaching a favorable settlement.

Some lawyers want to hide information from the other side. Indeed, lawyers sometimes claim to have the proverbial "smoking gun" that will destroy the other side's case at trial and refuse to share it. Actually, producing the document or other evidence for mediation can help the opposition properly evaluate their case.

Granted, it may take quite a bit to convince lawyers who do not want to

share their mediation brief with the opposition that sharing exhibits with the other side is helpful. But, if the goal of going to mediation is to negotiate a settlement, exchanging briefs and exhibits in advance can assist with those efforts.

Utilizing Zoom's screen-share feature to present evidence at a mediation, whether photographs, documents, or a PowerPoint presentation, shows the mediator and opposing counsel that you are competent and trustworthy. This is so because your evidence will support your arguments and opening demand demonstrating that you base your case on factual, objective information and not "pie in the sky."

The reverse is also true. Making arguments in a mediation unsupported by objective facts creates the risk your client's position will not be taken seriously. Plaintiffs' counsel hope that the mediator will convey that their case is strong and their settlement demands are realistic.

As suggested above, preparing a concise (e.g., approximately five slides) but powerful PowerPoint presentation for the mediator is an effective tool. Your PowerPoint slides should include a convincing analysis of damages, whether your damages are for medical treatment or lost wages. This is not the time to prepare a 60-slide presentation with embedded movie video clips. As discussed above, attention spans are more limited, and your audience has a greater risk of distraction in the remote format.

You can certainly ask the mediator to have a joint session with opposing counsel, where you can use Zoom's "share screen" feature for your PowerPoint or other documents. If you do not believe a joint session would be fruitful, consider authorizing the mediator to screen-share your PowerPoint with defense counsel. Walking defense counsel through your analysis (both liability and damages), again, shows that you have considered the actual evidence.

You want the mediator and opposing counsel to think that you are reasonable and that there is a basis for your opening demand. Especially when an opening

demand is very high, perhaps far in excess of what the defense adjuster or client representative had been expecting, the defense may conclude that the plaintiff is being unreasonable. In those circumstances, plaintiff's counsel should not be surprised by the defense responding with a low opening offer. If you believe that the case warrants a large number, sharing exhibits during a mediation will demonstrate there is a reasoned basis for the demand. Telling the mediator to start with a large number demand not tied to any particular measure of damages, however, will appear arbitrary and not well thought out.

Likewise, if the other side's offer seems low, ask the mediator if the defense will share its evidence and exhibits with you. It is important to understand the defense analysis of liability and exposure. They may be assigning a different weight to the same evidence you see but evaluating it differently, or they may be relying on entirely different evidence.

If you demonstrate your commitment to a meaningful attempt at resolution by preparing a "meaty" PowerPoint for the mediator and willingly share evidence, you create a stark contrast to a defendant who refuses to share any evidence with the mediator. Indeed, it may generate skepticism about whether the defense offer is realistic.

Your screen may show more than you intended

As a practical matter, if you want to create a PowerPoint presentation for a mediation or intend to share other documents, it is suggested that you create and save documents in a .pdf format. Also, ensure that the Zoom coordinator or host (who may or may not be the mediator) has enabled you to use the screen-share feature because a host can disable participants' ability to share their screen.

Before the mediation, practice sharing your screen, and be aware of what other documents may pop up on your computer. That is, Zoom often gives the user a full view of everything in an open

window on your computer. Therefore, you do not want to inadvertently share something meant for private consumption. Having two monitor screens set up, one for the Zoom camera and one containing only documents for screen sharing, is a good way to eliminate that problem.

Likewise, practice zooming in and focusing on a particular paragraph in a contract or employment agreement. Remember, you want to persuade while you are presenting the evidence. Therefore, think about the sequence of evidence you intend to offer. Consider whether your evidence is presented in an understandable format. ADR Services, for example, is one of many mediation providers that will create a mock Zoom session for its clients to do these tests in advance.

Tip: Zoom's Support section on its website (support.zoom.us) contains a wealth of information on its "Screen Sharing" features. Under "Sharing your screen or desktop on Zoom," Zoom Support states that Zoom video conferences allow users to share content, including:

- A second monitor
- Entire desktop or phone screen
- One or more specific applications

- A portion of your screen
 - Content from a second camera
 - Whiteboard
 - A locally stored video
 - Audio played from device
 - iPhone/iPad screen
- (<https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen-or-desktop-on-Zoom>)

Importantly, Zoom's support page indicates that there are certain operating systems required to enable certain screen-share settings. As noted above, ensuring that the operating systems are up to date on your computers and devices is essential. You do not want out-of-date software to preclude you from fully utilizing Zoom's screen-share feature.

Finally, understanding "Zoom fatigue" may help avoid the pitfall of underestimating the importance of maintaining eye contact in a remote mediation. So, when you use Zoom's screen-share feature, utilize the format that allows you to keep your face visible while displaying a document on the screen (and also see the faces of the other participants).

Conclusion

Because remote mediations are no

longer a novelty, but a staple in today's law practice, the technology's ubiquity can lead to skimping on preparation for a remote mediation. This, in turn, creates a missed opportunity for maximizing the dispute resolution process. More than two years after the widespread adoption of Zoom to conduct mediations, it is evident that counsel's effective utilization of Zoom's "screen share" feature demonstrates preparation, deep knowledge of the dispute, and a commitment to negotiating in good faith. Likewise, ensuring that the software on your computer, and your client's remote device, are up to date will help minimize technical difficulties.

Judge Elizabeth Feffer served on the Los Angeles Superior Court for 13 years, presiding over more than 75 civil jury trials, more than 500 civil bench trials, hundreds of evidentiary hearings, and numerous settlement conferences. Now a mediator, arbitrator, and private judge with ADR Services, Inc. Judge Feffer is trusted with a diverse range of complex cases with novel legal issues for resolution and finality. judgefeffer@adrservices.com.

