

8 Keys to a Successful Virtual Mediation

By Maggie Levy, Esq.

Because of the COVID-19 pandemic, most mediations throughout the country are now being conducted virtually rather than in person. Many believe this trend will continue long after the pandemic is over because of the many benefits of virtual mediations. Although there are the obvious disadvantages of not having the opportunity to meet your adversary and opposing counsel face to face, engage in small talk over lunch or in the hallway, or shake hands to seal the deal when a settlement is reached, there are many advantages.

Virtual mediations are more efficient and cost-effective because travel time and expense are eliminated. Out-of-state parties and counsel can avoid the time, expense and delays of air travel and the cost of hotels, meals, and ground transportation. No one needs to be away from their office, home or family for an extended period of time. This makes scheduling a virtual mediation much easier, even when there are numerous parties and counsel. Participants in the mediation do not have to fight traffic, look for parking or pay exorbitant parking fees. As a result, virtual mediations usually start on time. Often there is less tension and stress because the parties and their counsel are in familiar and comfortable surroundings. All of these factors can help make the parties and counsel more amenable to settlement than if they were mediating in person.

What can you do to maximize the potential for a successful virtual mediation? Here are some tips that will help:

- 1. Make sure you, your client, and any other participants who will be in your breakout room are familiar with and comfortable using the mediation platform that will be used, such as Zoom.** Have a practice session a few days before the mediation so that you and your client are comfortable logging in, muting and unmuting your microphone, and turning on your video. Test the lighting to make sure it is adequate and make sure the camera is positioned at eye level so that each participant can be seen and can make eye contact with the mediator and other participants. Familiarize yourself and your client with the concept of separate breakout rooms in which you and your client can talk confidentially. Zoom offers several online tutorials, and most mediation services offer to conduct a practice session at no charge to make sure that all will go smoothly the day of the mediation. This will put you and your client more at ease and make you less anxious about the process. It will also avoid having to download the application the morning of the mediation or the last-minute discovery that a camera doesn't work or a laptop does not have a camera. The device that will be used for the mediation should be used for the practice session. It can be a desktop, laptop, iPad, tablet or smartphone. All devices should be kept fully charged throughout the mediation.
- 2. Each participant should use a separate device when participating in the mediation.** This enables the participants to observe facial expressions and engage more fully in the mediation process. Participants should be in separate locations or socially distanced so that they do not need to wear a mask during the mediation. Sharing devices or wearing masks makes it extremely difficult if not impossible to fully participate and to be heard and understood in a virtual mediation.
- 3. Advise the mediator in advance who should be in your breakout room, and provide the mediator with email addresses and cell phone numbers for each person in your breakout room in case there are technical difficulties.** Be sure to have the mediator's contact information so that you can email documents or copies of cases to the mediator or text the mediator when you are ready for her to come back into your breakout room. Use your phone or a separate device for texting or sending emails during the mediation.

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4. **To maintain confidentiality, each participant should be in a private enclosed space where outside parties cannot hear you.** Only a strong secure internet connection should be used, not a public wi-fi network. No third parties should be present during the mediation, and all parties who plan to be present should sign a confidentiality agreement in advance of the mediation. The mediator should provide that to counsel in advance of the mediation, and it can be signed in counterparts and returned to the mediator. All participants should be advised that recording the virtual mediation is strictly prohibited.
5. **Make every effort to minimize background noises and distractions.** Since many people are working from home, there may be children playing, dogs barking, gardeners mowing and blowing, construction, trash collection, and other distractions. Not all of these can be avoided or anticipated, but plan in advance to the extent possible so that you can move to a quieter more private location if necessary. Mute your microphone whenever you are not speaking and advise your client to do the same.
6. **Take advantage of the benefits of virtual mediations.** When the mediator is in another breakout room, stand up, stretch, take a short walk, or eat your lunch. Remain available, but this does not mean you have to be glued to your chair for 8 hours. Avoid “Zoom Fatigue” by taking breaks. If you want to speak to a codefendant’s counsel or opposing counsel, ask the mediator to move you to a separate breakout room to do that. If you want to speak to your client privately without worrying about the mediator coming back into your breakout room too soon, tell the mediator you will text her when you are ready for her to return.
7. **Prepare a draft settlement agreement in advance of the mediation.** Include all the terms that your client would like, but leave the settlement amount blank. This will save a lot of time once the parties reach a settlement, and it

will also avoid disagreements over the terms of the settlement after the mediation. Ideally the parties can finalize and sign the complete settlement agreement during the mediation.

8. **If a settlement is reached and the parties are unable to finalize a complete settlement agreement, the parties must sign a document setting forth the basic terms of the settlement before leaving the mediation so that the settlement will be enforceable.** This document can be prepared by counsel with input from the mediator, and it can then be signed by the parties and scanned and emailed to the mediator. If a party is unable to scan the document, they can sign it and take a picture of the signature page with their phone and email that to the mediator. The mediator should provide copies to all counsel. This document can specify that a particular party will prepare a more detailed release or settlement agreement, but if one or both parties have prepared a draft settlement agreement in advance of the mediation, that may not be necessary, as all of the terms can be finalized before concluding the mediation.

If you use these tips, you will see that virtual mediations can be a very effective means of resolving cases.



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