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PERSPECTIVE

## Mediation by Zoom: some considerations for counsel

By Bob Blum

Counsel and mediators have adapted well to mediation by Zoom, and for some it is now the preferred way to mediate. There even is a cottage industry advising counsel about how to show your best on camera. Much of this advice, however, does not deal with the mediation process by Zoom. Here are some things to consider as you prepare.

### Zoom gives mediators a new view of counsel and client.

Mediators put high value on understanding counsel's and client's body language, watching reactions to discussion of risk, the value of settlement now, iterative proposals, etc. Many people have "tells" (as in poker) that can be read by a mediator. You might think that this would be lost in mediation by Zoom. Wrong. Zoom can give the mediator a better view of counsel and client.

Think of the usual in-person setting, often in a caucus room with a number of people around a table. The mediator usually will focus on the person talking, and it's not easy to watch everyone else in the room while doing this. With Zoom, it's easy to watch everyone while one person is talking — just put up "gallery view." This way, the mediator can get a picture of everyone's reaction at the same time and a better understanding of what is really going on in the room than often is possible with in-person mediation.

Here's a simple example — in a recent mediation counsel and the carrier's representative were tel-

ing the mediator that there was no more money available, period. At the same time, the mediator saw — sitting at the other end of the room — the client sit up. The client had been disengaged all day. Not now. He had heard that with some more effort — cash — settlement was in reach. With that on-screen movement, the discussion changed significantly and the case settled. Maybe that movement would have been apparent with in-person mediation, maybe not. With Zoom it was absolutely clear.

Because the mediator can see lots with Zoom, don't let anyone hide from the camera. Hiding is easy. Use bad lighting. Say that there is a bad video connection. Move away from camera. With tactics like these, essentially there is no full participation. Before mediation, counsel and the mediator should make clear that everyone must be fully on camera, unless there is strong reason not to do this and all agree in advance.

### Zoom can disclose vulnerabilities: Don't give away insights to the other side.

Zoom consultants give great advice on how to set up a room for best camera effect. They're not thinking of the effects in mediation. The other side can magnify what is on screen and learn about your client — and counsel as well - picking up possible vulnerabilities. Background can give information that affects settlement and information can be gleaned from items like personal photos and mementoes. When preparing for a Zoom

mediation, look carefully at your client's background. Encourage a neutral background — I have even seen a white sheet hung to block out personal information.

When clients understand that their backgrounds can disclose vulnerabilities, this helps them also understand that mediation is not just another Zoom meeting. They need to prepare by eliminating distractions (someone else takes care of the dog). This will also help create the time and space needed for successful mediation.

### Zoom can overload a mediation: Don't bring too many to the party.

In an important case, particularly one where counsel has relied on technical expertise of colleagues, you may be tempted to bring more lawyers to the room. It's easy with Zoom. They can be there and not bill all their time. And it's more comfortable to have them for immediate consultation.

Watch out. More lawyers at mediation can damage your case. The dynamics of the discussion can change. The technocrats like to insert their clear view of the law. This can send the mediation down the wrong path. Settlement is a practical solution, not a legal solution. And if legal fees are at issue, the more lawyers at the mediation the greater the chance of a charge of over lawyering.

Of course, the same problem can occur with the client — especially with a family business. As you know, strong voices with small stakes in the outcome can block a deal. Carefully vet who your client brings to the mediation.

### Zoom offers new flexibility: Be open to change in the way that mediation takes place.

We expect the on-line world to move quickly and we need to find ways to accomplish this without losing key parts of the mediation process. For example, you don't have to have everyone join the mediation at the same time, which often is needed with in-person mediation. Instead, the mediator can take the initial trust building time with your clients separately before the negotiations, using extended pre-mediation Zoom meetings. The actual negotiations can start faster, and this also can give the mediator and parties the opportunity to plant early settlement seeds.

Zoom mediation is here to stay. We have just started to explore how best to work with it. Use imagination and be open to experiment to develop it further. ■

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