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LAW BULLETIN MEDIA

## Moving to virtual mediation can be easy with the right preparation

Practicing law during a pandemic presents unique challenges for lawyers and mediators alike. But rest assured, the transition from in-person sessions to remote mediations is fairly easy. All it requires is adequate preparation, patience and, in many situations, a sense of humor.

During my mediations via Zoom, I have been virtually inside people's homes and met the children and pets of many lawyers. The process requires adjustments on behalf of all parties, but I'm pleased to say that the vast majority of these videoconference mediations have been very successful, and I look forward to many more.

As in any mediation, preparation enhances the likelihood of success. My first recommendation is that lawyers give considerable thought to their submissions. Instructing an associate or administrative assistant to send the neutral "everything" is one approach, but a well-crafted submission is much more effective. Attorneys should know exactly what is in the submissions that neutrals receive. Submissions that strongly detail a litigant's position can weaponize a mediator — in a good way — giving the mediator ammunition for negotiations.

Unlike judges, lawyers can speak to neutrals prior to a mediation. It is therefore imperative that lawyers prepare their clients for the session. Whether the client is a

plaintiff with no prior experience with the legal system or an adjuster that has been involved in countless mediations, the lawyer should have an honest conversation about the process and expectations. Additionally, if there is something unique about the client or important specifics of the case, the lawyer should call the mediator to discuss it prior to the formal video conference.

Once the mediation begins, the neutral stresses the strengths and weaknesses of the case to each side. Because a mediation is a negotiation, the neutral has to lead the parties toward an agreement at a specific number. The value of a case is determined by a jury verdict. If the same case is tried ten times before ten different juries, there will be ten different outcomes. Mediators help the parties come to an agreement of the settlement value of the case at that specific moment in time. If the mediation occurs after x number of witnesses, the value most likely will be different than it would be if y number and z number of witnesses have been deposed. Like a snapshot, the mediation captures the settlement value of a case at a fixed point in time.

A traditional mediation at ADR Systems is conducted with the parties in different rooms. The neutral walks between rooms and engages



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DISPUTE RESOLUTION**  
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each side directly. In a Zoom mediation, the concept is largely the same as it is during an in-person mediation; the only difference is that each side is in a virtual room. In videoconferences, the mediator enters a room and talks to the people in that virtual space. When the mediator leaves the virtual room, they cannot hear the people in that room and the occupants can't see or hear the neutral. When the neutral returns, their picture pops up on the computer screen. A mediator can only

communicate with a party when they are in the same room.

As in any mediation, it is important to remember that the opening demand or offer is only a starting point. Mediation is a process that requires an open mind on the part of both sides. The neutral is trying to get the parties to agree on an acceptable dollar amount and getting to a number that works for everyone is the victory. Each side has to evaluate the risk, expense and uncertainty of going forward, and therein lies the challenge of these uncertain times. If going forward points to a jury trial, it must be understood that such a scenario has also changed. When we are in fact on the safe side of this pandemic, it is unclear when jury trials will resume or what attitudes jurors might bring to the courtroom.

Regardless of how life unfolds post-COVID-19, remote working will be a significant part of lawyers' professional lives. Whereas in-person mediations have traditionally been the most effective, remote mediations are now a solidly viable option. Most likely, a blend of live and remote participation will become more common. As expected, lawyers have found a way to continue to advocate and fight for their clients, and mediators are ready to facilitate and expedite that process.

