

Tips for Successful Virtual Mediations

by Shira Forman

Online mediation is having a moment.

As the face-to-face negotiation sessions that once filled conference rooms are now relegated to screens, practitioners and mediators are becoming more and more comfortable with mediating online. And although the COVID-19 pandemic triggered this shift, there is good reason to expect that virtual mediation will maintain or even increase its popularity once it is safe to hold mediations in person.

In-house counsel can be instrumental in helping parties make the most of the online mediation experience. Here are some tips for ensuring smooth, productive online mediations:

Preparation Is Key

As with live mediations, much of the success of an online mediation depends on proper preparation ahead of time. This includes making sure that you choose the right party representative (i.e., one with decision-making authority who knows the case well). Importantly, it also includes discussing the facts and legal arguments in advance and formulating goals for the mediation. These goals should involve not only the settlement of the case but, where appropriate, strategic objectives should the mediation not result in a settlement.

Beyond the usual substantive preparation, online mediation requires that the participants are technologically prepared. As many organizations require their employees to use one virtual meeting platform and not others, it is important to make sure that the platform that has been proposed for the mediation is accessible to your team. If not, consider requesting permission to use the suggested platform; if that is not possible, the mediation may have to be moved to a platform that is usable by all parties.

By now most participants will have spent a good deal of time in virtual meetings. Nonetheless, it may be helpful to orient them to some of the features of an online mediation that they may not have experienced, such as breakout rooms and the probability that the media-



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tor will move from room to room and speak to different groups of participants (e.g., all parties, one party, or just attorneys). Consider holding a “dry run” mediation to acquaint everyone to the process and to ensure that microphones, audio, and video are all functioning before the mediation session.

Minimize Distractions

Enter a federal courthouse as a party to a mediation, and you can expect that, unless you have special permission, your cell phone will be held at the front desk for the day. In online mediations, of course, the same rule does not apply. Often, this means that mediation participants are busy responding to emails and calls and not completely focused on what is happening in the session.

Encourage your clients to devote their full attention to the mediation. This may be best accomplished by logging on to the mediation from a conference room or office, as opposed to from home. By resisting the temptation to multitask, participants will find that the mediation proceeds more quickly and efficiently.

Use Distance to Your Advantage

Sometimes, the contentious nature of a dispute can discourage parties from being in the same room during an in-person mediation. This may mean that the parties choose to forego a joint session and proceed straight to caucus. Although this method can be very successful, sometimes there is value in parties interacting. Some parties find that they are comfortable being in the same online “room” as an opposing party, even if they would not be comfortable doing so in person. Discuss the possibilities in advance with your client to determine what makes them most comfortable.

Make the Most of Downtime

In both live and online mediations that utilize caucusing, there is a lot of time spent waiting for the mediator to return to your room. In a live mediation, when a team is together, the team members are naturally inclined to talk to one another during these waiting periods. In online mediation, especially when parties are home, they can be

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inclined to spend the waiting period working, making phone calls, and generally attending to life outside the mediation. Encourage your team to take advantage of the wait time by discussing next steps, or even by thinking and making notes about possibilities for moving the mediation forward. In this way, the downtime can be used effectively to further your goals, even when it seems like nothing is happening.

The Mute Button Is Your Friend

By now we have all heard stories about Zoom gaffes and improprieties that range from the humorous to the career-ending. To avoid these memorable moments in

your mediation, instruct the members of your team to mute themselves when they are not speaking. When there is a formal break in the mediation, turn off videos and mute your microphones. If breakout rooms are in use, be aware that people may be entering and exiting your room at any time, sometimes without warning and sometimes in error. Because of this, it is important to double check who is in the room before beginning a private discussion. As with every aspect of dispute resolution—live and virtual—caution and common sense will be key to your success.



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you

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