

Advocate's View: It's (the) Zoom where it happens — what you need to know

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Hon. Thomas A. Stander

It's March 2020, and at first, I thought — we all thought — mediations will have to be put on hold until we can do them "in person."

However, it quickly became apparent that doing anything in person would involve risk and adhering to stringent protocols. The courts were on hold, and if the practice of law were to continue, the litigation world could not remain on hold too. We couldn't wait around for everything to get back to "normal" in the courts.

Still, there was a feeling that virtual mediations would be too difficult to set up, cumbersome, and ultimately not successful. The early consensus

was that virtual mediations are not the way we have always done things, so they probably won't work. But challenging that "muscle memory" — doing what we've always done — is how you create opportunity.

They say necessity is the mother of invention. Unfortunately, I didn't invent Zoom, but thanks to necessity, Zoom is where mediations are happening — and successfully so.

With that in mind, here are some thoughts on how to have a seamless and productive Zoom mediation:

Don't forget what you know. Everyone knows that in order to have a virtual conference or mediation, you need a computer, a camera on the computer, and WiFi. Equally important is that your client has that same equipment.

Surprisingly, we often forget about the client and wait until the last minute to determine whether they have the proper equipment.

Are you camera-ready? When we take a picture of a person with our camera, we make sure we do so without a window or light behind the subject. The camera on your computer works the same way. If you or your clients are backlit, nobody can see your face during the zoom mediation. Thus, it's important to observe yourself with your computer camera before the mediation. Even if you don't have a Zoom account, you can download a free account and set up a test conference with your client. Each of you can check your camera view to be sure you are being presented as you want.

Sorry, I was on mute. Since that's the quote of 2020, make sure mute is your only problem prior to a virtual mediation. As with the video, you want to check the audio you are using to be sure you can be clearly heard. I recently had a mediation where the client's computer audio didn't work. I had the client dial into the conference on his cellphone and use the cellphone audio with the computer video. For those worried about technical glitches, I have found few in the six months I have been doing Zoom mediations, and none that couldn't be resolved in a short period of time while the mediation continued.

Gathering in the conference room isn't what it used to be. Though it's true that in many ways, Zoom mediations are not a great deal different than the ones we did in person, I do not advise gathering in a conference room with your client for a Zoom mediation. First, some or all in the room are likely wearing masks, which in some ways defeats the purpose of having a mediation. Often the conference rooms use a wide-angle camera lens, making it more difficult for the parties in the room to be seen or heard clearly. If you do think that being in a conference room is absolutely necessary, I suggest using separate laptops in a large conference room with independent email addresses, so that counsel and the parties can each be on screen all the time and, when appropriate, without masks.

Ready, Set, Zoom. If you or your client have never had a Zoom mediation before, or it has been some period of time since you've been on a Zoom conference, ask me to do a test meeting a few days before the mediation. In doing so, you can check the picture, the sound, the WiFi access, and familiarize yourself with "breakout rooms."

What about privacy? By creating breakout rooms in Zoom, you allow the attorney and clients to have a private space to have uninterrupted discussions. I can create as many breakout rooms as necessary and move back and forth between rooms just as I would walking from conference room to conference room. Here's how it works: As a participant, you would get an email from me inviting you to the main Zoom conference. At the time of the mediation, you simply click on the link to virtually enter the room. All participants enter in the main room, but after

an introduction, I will electronically put the plaintiffs and counsel in a breakout room and the defendants and counsel in another breakout room.

Virtual success! After doing virtual Zoom mediations for six months or more, I can share that from my experience, there is no difference in the success rate of virtual vs. in-person mediations. Every mediation has its own path. Those that should settle do.

The world has changed dramatically since our first thoughts in March 2020, but the key to a successful mediation remains: preparation, preparation, preparation. You still have to prepare a solid pre-mediation statement and ready your clients for the discussions that are going to be had in mediation. To be fully prepared for the challenges our current environment presents, you now also need to educate yourself and your clients on the virtual options available — and embrace a new way to be sure you can be seen (and heard) in the best possible light.

Hon. Thomas A. Stander is a retired Supreme Court Justice. As Senior Counsel at Adams Leclair LLP, he specializes in the mediation of cases involving civil litigation, including matters of complex commercial litigation, personal injury, and medical malpractice. Justice Stander is on the Federal Mediation Panel and is a Court Approved Mediator for the NYS Courts. Contact Adams Leclair LLP at 585.327.4100 or Judge Stander at tstander@adamsleclair.law.

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