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Since the unprecedented national shutdown, the legal industry has had to pivot to Online Dispute Resolution (“ODR”). Online mediation is likely to remain an essential part of ODR given that more business disputes are expected to arise in the aftermath of this pandemic, the courts are more backlogged than ever, and jury trials are unlikely for the foreseeable future. But the uncertainty around how the process works can make many party representatives, and even some outside counsel, uncomfortable going down this road.

Part of setting yourself up for success is knowing what to expect and how to properly prepare. As with all mediations, you cannot go in and wing it. For online mediation this is even more critical. You and your clients need to not only prepare substantively, you also need to take steps to ensure that everyone

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participating is heard and seen effectively. You need to have a backup plan for technology issues and ways to communicate privately. You need to have a pre-determined process in place for sharing documents, calling an absent decision maker, and drafting and circulating a term sheet. And, you must ensure there is trust, confidentiality and commitment to the process. This guide will get you and your clients online-mediation-ready.

STEP 1: PREPARE

Lights, Camera, Action...

The first step is to ensure that each participant can actively and effectively participate in the mediation. Here's an example to illustrate the point. Imagine Jack Nicholson in "A Few Good Men" delivering his infamous line "*you can't handle the truth*" but he is sitting in a dark room, five feet away from his computer, wearing a t-shirt and boxer shorts, and he unknowingly is on mute when he delivers his line. After ten seconds of scrambling, he figures out how to unmute his microphone and repeats his proclamation, but his voice is garbled, and his face is in dark shadows. Instead of the intended powerful delivery, the seriousness of his statement isn't properly conveyed.

While this is obviously an extreme example, after months of Zoom calls, everyone has experienced some version of this. In an online mediation, it is imperative for all participants to be given an equal voice and opportunity to be properly heard and seen. To ensure you or your clients do not get frozen out of the conversation, make sure each participant has *at least* the following:

- access to a secure and steady internet connection (no public wi-fi);
- a webcam placed at eye level and positioned to display the individual from at least the shoulders up (if using computer's internal webcam, prop the computer up on books);
- a quiet and confidential space;
- proper lighting (if possible, face a window, or otherwise have lighting in front of the individual);
- access to, and working knowledge of, the videoconferencing application that the mediator plans to use;

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- headphones (may be necessary to block out disturbing background noise or to preserve confidentiality); and
- access to computer and other necessary chargers and electrical outlets so no one shuts down unexpectedly.

Although everyone will likely be in the comfort of their own home, it is also still important to dress for success. In other words, dress professionally from *at least* the waist up. And yes, you must wear pants (the last three months have proven this isn't as obvious as it seems).

Tip: Schedule at least one rehearsal/online pre-mediation strategy session. Set up a call with your client representative(s) using the same technology platform that the mediator plans to use for mediation (i.e., Zoom) at least one week in advance. Use the strategy session as an opportunity to test everyone's camera placement, microphone, and background noise. Are you comfortable with how your client sounds and appears? Make sure you can see their faces and physical cues. Let everyone test muting their phones, turning their video off/on, and switching from speaker view to gallery view. If your client's video and audio setup isn't adequate, offer to provide them new equipment. If they cannot properly use the technology, teach them. Consider whether your firm can designate someone from the technology department to be available on the day of mediation in case there are issues. Or speak to the mediator in advance to determine how they intend to handle technology issues.

Having everyone comfortable using the technology and with how they are being seen and heard is a necessary first step to a productive mediation day and to eliminating the uncertainty and anxiety that comes with it. Not to mention, you and your client want to make a strong first impression, especially to your adversary, and fumbling around with the technology does the opposite.

STEP 2: STAY ENGAGED AT ALL TIMES

Please Wait, Someone Will Be With You Shortly...

There may be a lot of time spent waiting during an online mediation—from being placed into a waiting room

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when you first connect, to waiting in breakout rooms while the mediator shuffles back and forth between the parties. This is true for in-person mediations as well, but virtually, this waiting may seem unbearable. And for many who are used to multitasking while working from home, it will be easy to get distracted and disinterested. Whereas in-person it is harder for a participant to get engrossed in another work project, virtually there is less accountability and more opportunities to disengage. While the mediator must do their part to ensure the parties remain involved, outside counsel also must ensure their client remains focused and engaged in the process.

Tip: Treat the online mediation the same as you would as in-person mediation. In most cases where the mediator uses caucuses, the mediator will place the parties and their counsel into breakout rooms (or in some cases, members of a party will drop from the call and dial back in at a later agreed upon time). Regardless of which method the mediator uses, remain in contact with your client. Don't give them an opportunity to disengage or become distracted by other work obligations. As you would if you were appearing in person, continue to talk to them. Discuss the strategy for when the mediator comes back, talk about the case or other aspects of your relationship. Bottomline, do as you would in person—encourage everyone to stay in the “room,” remain engaged and do not schedule other work commitments during the mediation.

Similarly, while caucusing with the mediator, everyone should give the session their full attention. Discuss ahead of time with your client that no one should have their email or other work open on their computer while they are with the mediator. *If you wouldn't do something with the mediator in the room with you, don't do it virtually.* It is surprising how many mediators I have spoken with that have observed counsel, not just client representatives, reading and typing emails, or getting up and doing chores in their homes, forgetting that the mediator can see them. This behavior gives the impression that you are not taking the mediations seriously or that you are not fully committed to negotiating a deal.

STEP 3: PRESERVE CONFIDENTIALITY

Anything You Say Cannot Be Used Against You...Or Can It?

Confidentiality is critical to the mediation process. Generally, what is said during mediation cannot be used in the litigation and this remains true in online mediations. There are, however, a few differences from in-

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person mediation that must be taken into consideration. Unlike in-person mediations where you can see who is present, virtually you cannot see who may be listening off camera or stop others from entering the “room.” To avoid breaking confidentiality:

- the mediator needs to ensure that only invited participants can log into the meeting (any online-trained mediator will ensure the security of the meeting);
- each participant needs to confirm in advance and/or at the outset of the mediation that they will be in a private location where the discussions cannot be overheard by anyone else;
- the parties must all agree that no one will record the session; and
- you must ensure that any communication with your client remains private.

Tip: Determine in advance how you and your client will communicate privately during the mediation.

In the case of Zoom, which is the platform preferred by many online mediators, there is the ability to chat with other participants. It is important to know that the chat discussions—even those sent privately between two participants—can be downloaded by the mediator. Therefore, to avoid breaking attorney-client privilege, keep all communications with your clients outside Zoom. Set up a text message, WhatsApp or some other easy communication channel in the event you need to virtually kick your client under the table or share something important.

I'd Like to Speak to My Attorney Please

An obvious downside to online mediation is that it is difficult to read the room. It can be hard to pick up on subtle physical or vocal cues through videoconference. This means you may not be able to read the mediator, but it also means you or your client may not be able to pick up on each other's cues or signals the same way you could in-person. This often makes participants uneasy with the process and creates concern that someone may give away the farm.

Tip: Discuss the strategy and parameters of what should (and should not) be disclosed to the mediator with your client in advance and don't be afraid to ask the mediator to leave the “room.”

While this is true for in-person mediations, for online mediation it is more critical to have pre-mediation strategy sessions and explicitly discuss what you are comfortable sharing with the mediator. In addition, you can always ask the mediator to leave the "room" to speak with your client privately, and if you need to do this more often virtually than you would in-person, do not be shy. The parties and counsel are in charge

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of the process, so don't be hesitant to speak up and ask for privacy.

STEP 4: CLOSING THE DEAL

Don't Agree to Disagree Later

You have spent the day negotiating and you're close to a mutually agreeable resolution, but the parties need additional authority from an absent representative. Or, you've reached an agreement and all that is left is for counsel to draft a binding settlement agreement. To avoid late day complications, it can be helpful to take a few additional steps in advance of the mediation.

Tip: Have a process in place to seek additional authority from absent decision makers. As with in-person mediations, make sure you have access to all key decision makers who may not be participating in the mediation. Consider circulating a designated dial-in conference number or Zoom meeting ID and password in advance of mediation day in the event participants need to speak with other party representatives on short notice. (Granted, there are circumstances where this cannot be done at the mediation (i.e., board of directors' approval), in which case, the parties should just include the condition of approval in the term sheet)).

Similarly, if an agreement is reached, it would be a mistake to end the mediation without capturing the main terms of the agreement in writing.

Tip: Determine how you will draft and circulate a term sheet. The mediator may have counsel do this offline, or counsel for the parties can do this together online by sharing their screen or using the whiteboard feature on Zoom. Either way, have a plan in place so that a negotiated agreement doesn't fall apart at the eleventh hour.

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Online Mediation May Be Here to Stay

Mediation remains a valuable alternative to expensive and protracted litigation. Online mediation may require more logistical and substantive preparation, but if the parties are really committed to negotiating a resolution, they can do it virtually just as they could in-person. And with social distancing rules in place—at least in some form—for the near future, online mediation is likely here to stay.

If I can assist you or your clients in connection with preparing for future online mediation, please do not hesitate to reach out. I am available to train law firm personnel or consult in connection with negotiations.

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