

# 6 Steps to Effective Zoom Mediation

By Judge Morton Denlow (Ret.)

Since the beginning of the Covid-19 pandemic, I have been conducting all of my mediations on Zoom and find it to be an effective mediation platform. I successfully mediate a wide variety of cases including complex business disputes, employment matters, insurance coverage issues, intellectual property suits, and numerous class actions.

Zoom virtual mediation has both advantages and disadvantages over an in-person mediation. Overall, however, when properly prepared, counsel and their clients have found Zoom mediations to be a cost-effective means to settle disputes.

This article outlines steps to facilitate Zoom mediation for mediators, counsel, and their clients. I predict that mediating on Zoom, or a similar virtual platform, will continue to be employed after the pandemic is abated. Therefore, mediators and counsel should familiarize themselves with steps to enhance their abilities to utilize the virtual mediation process.

## Step 1: Preparing for the Initial Conference Call

Upon receiving a new dispute for mediation, my case manager sets a date for an initial conference call between all counsel and me. She emails the parties an agenda for the initial call with dial-in instructions. In addition, she sends them a copy of my Mediation Procedures and a document entitled Initial Preparation for a JAMS Zoom Mediation, which is reviewed during the initial conference call. For attorneys who have not previously mediated on Zoom, this is a useful checklist they can share with their clients (see sidebar).

## Step 2: Conducting the Initial Conference Call

During my initial conference call with counsel, counsel familiarize me with the dispute and I explain my expectations and procedures for the mediation. I encourage the attorneys to share the Zoom preparation document with their clients to be sure that everyone feels comfortable in

accessing and participating in a Zoom mediation.

For those who have not previously mediated on Zoom, I emphasize the security of the process, the availability of breakout rooms for confidential discussions, and the possible use of the screen share feature to enable parties to both view and edit documents during the mediation.

Prior to the mediation, parties are asked to execute and return Confidentiality Agreements similar to those required at an in-person mediation and to submit attendee lists. They are also sent the log-in and password to join the mediation.

The initial conference call also gives the mediator the opportunity to answer all Zoom-related questions and to direct participants to additional information sources or offer a pre-mediation demonstration, if requested.

## Step 3: Preparing Materials for Potential Screen Sharing

After I read the parties' mediation submissions, I decide whether to prepare or share any documents during the mediation. Zoom's screen share feature allows parties to display documents, exhibits, or a white board on the screen for viewing and possible editing by the parties.

In many cases, I prepare an outline of the issues to be resolved, or a comparison of the litigation alternative versus the settlement alternative for the parties to consider. In class action cases, I use the defendant's response to my form of class action checklist for discussion in the joint session between the parties. I put these documents on my computer to be opened in the screen share feature at an appropriate point in the mediation. I also request parties to prepare draft settlement agreements or term sheets for possible use at the conclusion of a successful mediation. These documents can be jointly discussed and edited by means of the screen share feature.



## Step 4: Starting the Zoom Mediation

JAMS assigns a moderator to each mediation. Parties cannot enter the mediation until the moderator opens the Zoom session and parties log-in with their passwords. We ask the parties to log in 5-10 minutes before the scheduled start of the mediation.

As parties log in, they enter the joint session where everyone can see each other. While they are in the joint session, each person is assigned to a breakout room for their party, which can be accessed later in the mediation for confidential meetings and discussions. It is not uncommon to have four or more breakout rooms created depending on the number of parties involved. The joint session room and the breakout rooms are used in a similar fashion to rooms in an in-person mediation.

Once everyone is logged in, I ask the parties to introduce themselves. I then introduce and explain the role of the moderator, who is there to describe the breakout room process and to deal with any technical issues that may arise. Mediators can perform the moderator function if properly trained.

I then explain (1) the confidentiality of the process; and (2) the means by which I will request to join or be invited into a breakout room: I ask for a cell phone number from one person for each party and I share my cell phone number with them; text messages are used to communicate.

I also establish two rules: (1) no recording of the mediation, and (2) no "lurkers" are allowed (i.e., only parties on the screen can see or hear the mediation).

At that point, we conduct a test of the breakout rooms. The moderator opens the breakout rooms and explains how to navi-

gate back and forth between the breakout room and the main session. This enables us to be sure the parties are all in the correct breakout room and have an opportunity to confirm their conversations there are confidential.

The parties are then invited back to the main session by a message from the moderator and the mediation begins. The mediator can choose to start the mediation in the main session, or can ask the parties to return to their respective breakout room and join them separately there.

As the mediator, I also have my own breakout room. The moderator remains in the main session to deal with any technical issues that may arise, such as parties accidentally logging out of the Zoom session and later returning, or losing their internet connection and dialing in by phone. In the absence of a moderator, the mediator must be capable of handling these duties.

### Step 5: Shuttling Between the Parties

All mediators have their own style of mediation, and those styles can be used in a Zoom mediation. For example, the mediator's preference for the use of the joint session, separate caucuses, bringing certain parties together without the entire group, can all be done through Zoom. The mediator's movement between breakout rooms is accomplished by means of a cell phone text request to join the breakout room. The movement of parties to and from the main session and the breakout rooms is done via the breakout room feature, which allows parties to move between the main session and their breakout room. Therefore, the Zoom mediation can proceed in the same manner as an in-person mediation.

### Step 6: Concluding the Mediation

Once an agreement is reached, a term sheet or other settlement document can be prepared and edited separately or jointly by the parties using the screen share feature or by the exchange of red-line emails. In my mediations, the parties have used the screen share feature to finalize a 30 page consent decree, class action term sheets, and other settlement documents.

At the conclusion of the mediation, you can once again invite all parties to return to the main session for final remarks before signing off or the parties can exit their screens from their separate breakout rooms.

### Advantages of Zoom Mediation

The Zoom mediation process is effective, and I experience success rates similar to the prior rate for in-person mediations. Some of the advantages of a Zoom mediation include:

1. Safety during the Covid-19 pandemic.
2. Cost savings: No out of pocket travel or hotel expenses.
3. Time savings: No commuting time for in-towners and no travel time for out-of-towners.
4. Ease and flexibility of scheduling: Participants' travel schedules are no longer a factor, and parties can participate longer if necessary; follow up sessions can be scheduled quickly if needed.
5. Inclusion of more people who otherwise would not be able to take the time to participate in person: Expert witnesses, key employees, or additional counsel can participate, who otherwise might not attend in person.
6. Ability to have people join for only part of the mediation.
7. Ability of parties or counsel to multi-task during the mediation.

8. Use of the screen share feature.
9. Ability to minimize negative interpersonal interactions.

### Disadvantages of Zoom Mediation

1. Lack of direct interpersonal and casual interactions with the parties.
2. Distraction of participants if they are multi-tasking.
3. Decreased ability to study "the room," such as body language or the dynamics between counsel and their clients.
4. Possible distractions to parties, counsel, or the mediator who participate from home.
5. Potential technical problems, such as the loss of internet service.

### Recommendation

Zoom or other virtual mediations became a necessity during the Covid-19 pandemic. I predict that they will still have a place after in-person mediations once again become feasible. Based on my experience, the advantages outweigh the disadvantages. Zoom mediations work! ■



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## INITIAL PREPARATION for a JAMS ZOOM MEDIATION\*

### ITEMS TO BE DISCUSSED DURING THE INITIAL CONFERENCE CALL W/COUNSEL

1. Experience w/Zoom: have Counsel/parties participated in a previous Zoom Mediation?
2. Does every party have the necessary technology to participate through Zoom?
3. Zoom information is available on line @ Zoom or through JAMS.
4. The ability to conduct joint sessions and separate caucuses.
5. A Confidentiality Agreement for execution, Log in information and a Password will be provided prior to the Mediation
6. The Mediation shall not be taped, and parties shall disclose all participants in each breakout room.
7. A JAMS Moderator will be assigned to handle all technical issues.
8. The possible use of a "Screen Share" feature and need to upload all potential shared documents in advance.
9. "Dress Code" is "business casual."
10. The Waiting room concept: Lawyers and their clients need to log in 5-10 minutes early
11. Counsel will be contacted by JAMS Staff prior to the Mediation to provide an attendee list, the number of breakout rooms required and each participant's cell phone # for texting with the Mediator to request entry into a breakout room and other potential communications.
12. Food, Breaks and the importance of staying engaged.
13. The possibility of a demonstration if needed.

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