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DAILY REPORT

A SMART READ FOR SMART READERS

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Top 10 Dos and Don'ts of Virtual Mediation

By **REBEKAH RATLIFF, CCLS**

I am a JAMS mediator, arbitrator, and neutral evaluator. As a former commercial claims professional, I have a unique perspective on navigating civil tort negotiations and crafting resolutions. For over 25 years, I managed, evaluated, and negotiated complex casualty claims across subject matters with settlements. I handled cases all over the country. I used to pride myself on showing up in the room for the policyholder and resolving catastrophic claims so that everyone involved could move on with their lives. I do not believe people really want to be in dispute. I believed I needed to be in the room. Being in the room allowed me to read body language and make a “high touch” connection. Understanding the human condition is a skill learned by listening and discerning what is really being conveyed, often times not in words. The pandemic has caused us to shift our thinking and reimagine the alternative

dispute resolution (ADR) process. I still prefer in-person mediation, but virtual mediation, as an ADR option, has proven to be better than I expected it to be, and I think it is here to stay. COVID-19 and variants have forever changed how we think about what's possible.

Claims professionals are dealing with the reality of not being able to make human connections, and many are finding that “reading the room” in a virtual mediation is more challenging. Interestingly, not having an adjuster at an in-person mediation has been perceived as disrespectful to the process or the plaintiff. Now, no one is appearing in person, and it is acceptable at the negotiation table. The pivot to online hearings has been a great way to keep cases moving forward. During the COVID-19 pandemic, an insurance carrier/payer has to consider many



variables. New information can be shared at the mediation table that could change the value of the case. Introducing that information virtually can elicit responses that could “change the temperature in the room.” Not being in person can be both an advantage and a disadvantage.

The settlement success of virtual mediation has proven that we can still show empathy and humanity in a virtual environment; however, it may take a few extra teaspoons of patience to gain trust and build

rapport. As the day progresses, the neutral has to discern the timing of messages and when to employ “landing gear.” To clarify, it is important to help craft the messaging with the parties, which will influence the settlement posture in the other room. There are many ways to encourage settlement in virtual mediations, depending on the moving parts and the interests of the parties. While there are many videoconferencing platforms, Zoom has become a top choice for virtual hearings. The platform is constantly being updated to ensure safety and privacy when conveying information. The breakout room feature is very user-friendly and protects against participants accidentally ending up in another party’s room.

If you are ready to participate in an online mediation, here are some tips to keep in mind.

Dos

1. Schedule a pre-hearing call or videoconference with the mediator to get acquainted and to share basic case information.

2. Provide a confidential pre-mediation position statement to give the mediator your in-depth perspectives and arguments in the case.

3. Consider a mock trial or focus group so that you come to mediation ready to negotiate in a reasonable range.

4. Exchange cell phone numbers with clients and the mediator

in case tech issues arise or private communications are necessary.

5. Remember that the adjuster wants the case off his or her pending case list.

6. Execute the mediation and confidentiality agreements prior to the hearing.

7. Confirm that there are no time constraints on the day of mediation.

8. Be honest with yourself about the weaknesses in your case to aid in negotiation concessions.

9. Have an essential terms settlement memorandum Word document available for both attorneys to modify (be an optimist).

10. Consider adjournment versus impasse if the case does not settle (keep negotiating).

Don’ts

1. Panic if there’s a tech challenge. (Consider having a backup laptop.) Attentive and responsive moderators can help you out of a jam.

2. Be the first to suggest an impasse. (Consider the risks of trial.)

3. Box yourself and your client in and limit negotiation opportunities.

4. Be impatient and rush the process. (Patience is just as important as trust.)

5. Feel like you can’t take a minute to yourself to strategize.

6. Assume you understand a message from the other side. (Clarify what is intended.)

7. Ignore the decision-makers. (Make sure you know who they are.)

8. Forget that there are risks for both sides at trial.

9. Fail to use the mediator as a temperature gauge. (He or she spends time in both rooms.)

10. Leave a settled hearing without a signed settlement memorandum. (DocuSign is a great option.)

Dispute resolution professionals are seeing an increase in cases due to the backlog in courts. As we navigate the evolving new normal, remember that ADR is a strong option to consider for in-person hearings. Virtual ADR and hybrid ADR will continue to be an option for those who wish to resolve their disputes in a world in flux.

Rebekah Ratliff, CCLS, is a mediator, arbitrator and neutral case evaluator at JAMS. She handles disputes in insurance, business and commercial, products liability, personal injury and torts, government and public agency, securities and construction defect. She can be reached at rratliff@jamsadr.com.

