

Is There a Zoom Mediation in Your Future?

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During the state of emergency, courts have been working at less than full capacity. While no two courts are the same, none have conducted business as usual since mid-March, and there will likely be backlogs as a result. Some cases are backlogged because of hearings being adjourned and new matters not being set. Still more cases will come into the trial courts as legal and public health conditions continue to relax.

<https://courts.michigan.gov/Administration/SCAO/Resources/Documents/COVID-19/CircuitProcessForTriage.pdf>

Courts are barely operating. The pandemic is here. Stay-at-home orders are in place. The State Court Administrative Office is posting Toolkits to help judges “triage” their dockets anticipating when things start returning to normal. <https://courts.michigan.gov/News-Events/Pages/RTFC.aspx>

Many labor and employment lawyers are working from home, their offices closed with limited access. Normal routines are at a standstill. While most court matters are postponed, lawyers must decide whether to adjourn or pursue discovery and alternative dispute resolution (ADR) processes. I write to suggest that the factors favoring ADR outweigh the factors favoring adjournment.

Issue 1 – Security: You may have read that Zoom is *not* secure. Whatever problems there were appear resolved. I believe Zoom is both secure and confidential. First, no one gains access to a Zoom meeting without a passcode and meeting number. Second, individuals must be admitted to the mediation through a “waiting room” feature controlled by the mediator. No one unrecognized can gain access. Third, once the mediation begins, the mediator host can “lock” the meeting and prevent anyone else from joining. Fourth, no one in a break out room can hear, access or see what is happening in another. Fifth, the mediator host can disable the ability of a party or lawyer to record the session using Zoom itself.

Issue 2 – Mediator Selection: The same principals apply here as in the days before COVID-19 turned our world upside down: Is the mediator trustworthy, competent, prepared, committed? Will he or she be acceptable to the other side? Does the mediator prepare? Is the mediator a “closer” who sticks with it and doesn’t give up too soon? Is the mediator creative? Does he or she have subject matter expertise?¹ Today, you should also ask whether the mediator is trained

¹ See, for example, https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013_Article_Making_the_Most_of_Mediation.pdf

to mediate using a video platform. Mediations are difficult enough without technical glitches interrupting, hi-jacking, or distracting the participants. Trained mediators ensure that each mediation is secure and confidential, won't be recorded, and provides a smooth professional process through all the stages with which litigators are familiar: joint sessions, private caucuses, shuttle diplomacy, lawyer only conferences, etc.

Issue 3 – Preparation: Despite the popularity and growth of Zoom, some advocates and clients are unfamiliar with the technology and experience anxiety even thinking about it. If you find yourself in that category, you can easily discover whether your favorite mediators offer to help prepare you and your clients to use the process and make the most of it.² See, for example: <https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/GUIDE-TO-ONLINE-DISPUTE-RESOLUTION.pdf>

To assist parties and lawyers in getting comfortable with the program, I offer a complementary practice session. Practice sessions extend from 15 to 45 minutes. Practice sessions insure participant audio and video features are working, the parties are able to navigate from one room to another, and all understand Zoom features such as “Chat” (to send one another messages), “Share Screen” (to view documents and images), and “Security” (to lock out intruders).

Issue 4 – Does It Work: My experience with Zoom has been uniformly good. There have been few technical difficulties, mostly related to unreliable internet connectivity. The solution to virtually all glitches is simple: the person who drops out of the mediation is directed to log out and rejoin. That resolves almost all problems. If all else fails, I have a conference call line to complete the process via telephone.

Here's the process in a nutshell: In preparation for the date set for mediation, everyone receives a link with a password and meeting number. The parties and lawyers log in and wait for admission in the “waiting room.” At the scheduled time for mediation, the mediator admits everyone into “the main room.” Once sound and video are checked, the mediator collects cell phone numbers to text or call in the event of technical difficulties. I also provide my cell to everyone in case someone has a problem and wants to reach out to me. Participants are then moved to their break out rooms. For a two party mediation, I typically create four: a caucus room for the plaintiff team, a caucus room for the defense team, a joint session room for the mediator's opening remarks, and a lawyers only room in the event the lawyers want to confer with each other or meet privately with me. If agreement is reached, the lawyer only room is typically where we hammer out language issues. For signatures, most people – including parties – own a printer/scanner. They sign the last page of the agreement, initial the others, scan them into their computers and email to their attorneys who, in turn, exchange the documents. Where someone does not own a scanner, they take a cell phone picture of the signature page and text it to their lawyers. Technology has not been a barrier to signing documents.

In my judgment, the advantages of mediating with Zoom outweigh the disadvantages:

² The National Academy of Distinguished Neutrals (NADN), for example, denotes which mediators are familiar with which video platforms. <https://www.nadn.org>. See also, the website of PREM, Professional Resolution Experts of Michigan. <https://premiadr.com>

Advantages:

- No risk of face-to-face contact.
- If resolution is important to your clients, they need not wait until the pandemic subsides.
- Zoom is secure, private and confidential.
- Meetings are not recorded.
- No embarrassing chance encounters with the other side.
- Cases settle. Each of the matters I've mediated using Zoom so far has resolved during the process.
- No need to bring your client to your office to participate.
- Mediate from home, your office or anywhere you have wi-fi service.
- No travel time.
- No mediator travel fees

Disadvantages:

- You're staring at a screen the entire day.
- Video interaction is not as satisfying as face-to-face.
- An unauthorized person could be listening in on the other side without you knowing.
- A party could be recording with a cell phone.³
- Sometimes there are technical difficulties that interfere with an orderly process.
- Uncertainty regarding whether your client will survive the economic downturn.
- Limited ability to observe body language.
- Reduced persuasion and influence by the mediator when not face-to-face with decision makers.
- Video mediations can take longer.
- Document exchange and signing can be clunky.

Conclusion: The Zoom platform is free. The process works much like the face-to-face mediation process to which you are accustomed. Zoom offers you options. They are worth exploring.

³ As mediator, I address these questions at the start of the process.