



Top ten tips for slaying it in Zoom mediation

While the same rules apply as with in-person mediation, there are nuances to be aware of

By Debra Bogaards

By now, you are very familiar with Zoom mediations. Even so, as a mediator, I still encounter head scratchers. Originally, my article was going to be entitled, "A Mediator's Pet Peeves." However, a more positive spin is "Top ten tips for slaying it in Zoom mediation!"

So, let's get started.

1. Pre-mediation preparation with plaintiff

While we have been using Zoom successfully for over 18 months, it's still useful to set up a practice Zoom meeting with your client/plaintiff. The meeting will allow you to practice Zoom technology and you can share some guidance in advance. You may explain the "breakout rooms," manage expectations and practice your client sharing with the mediator how they are doing now.

Checklist for you:

a. How is your client's space?

(*Sound, position of camera and background. Perhaps your client should move away from a bright window. How is the WiFi strength? Is the room too cluttered? Suggest a virtual background or provide one.*)

b. Is your client in a room with a door?

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PERSONAL-INJURY CHRONOLOGY

DATE	EVENT
xx.xx.xx	ACCIDENT
xx.xx.xx	Ambulance
	Sx: neck, back, and right knee
xx.xx.xx	Hospital name ER
	Sx: neck and right knee X-ray: right knee Dx: meniscus tear of right knee
xx.xx.xx to xx.xx.xx ; 30x	Chiropractor's name / Physical therapist's name
xx.xx.xx	Surgery

Caution your client about family members walking in and out. They may be distracting and sometimes interfere with you managing their settlement expectations.

c. Dress for success.

Your client is the star. Recommend your client dress up for such an important day. A polished look is preferrable over the sweatshirt with large headphones. As the mediator, I would suggest your client make a good first impression. Besides, the claims representative or decision-maker also may be meeting him/her/they for the first time.

As a mediator, I have encountered a surprising number of ill-prepared plaintiffs. One was wearing an old sweatshirt and driving in a car!

Another was elderly, and perhaps having difficulty hearing her husband, as both were talking so loudly that it sounded like yelling to me. To add to the scene, one was on her iPad and the other was on his laptop, in the same room, which didn't work.

In yet another mediation, the problematic daughter was talking her mother, the plaintiff, out of a good settlement; so, plaintiff's counsel lost control of his client. All of these scenarios could have been avoided with pre-mediation preparation.

2. Pre-mediation preparation with the mediator

When you have a client control problem and need assistance managing your client's expectations, a heads up in advance is very helpful. As the mediator, I can spend time explaining the weaknesses in your case, the application of a C.C.P. § 998 offer and verdict, and the value of settling now.

3. Good ol' chronologies

In a personal-injury case, when reading your mediation brief (you wrote one, right?) with attached medical records, I often have to prepare my own medical chronology. Preferably, you would include a chronology like the one to the left.

In an employment case, often I find myself preparing a chronology as well. Preferably, you would include an employment chronology like the one to the left. These chronologies are a quick glance that enables the mediator to do a deeper dive easily. My number one request would be to see more chronologies!

EMPLOYMENT-CASE CHRONOLOGY

DATE	EVENT
xx.xx.xx	Date of hire/job title
xx.xx.xx	Promotion/new job title
xx.xx.xx	Event
xx.xx.xx	Event
xx.xx.xx	Termination

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4. Take an iPhone video to show limitations on ADLs

The defense needs to understand your client's limitations with activities of daily living (ADL) at the present time. You may want to include a descriptive paragraph in the plaintiff's mediation brief about plaintiff's current or residual symptoms and any limitations on activities.

In a recent mediation, there may have been confusion due to translation. The elderly Cantonese plaintiff testified in deposition that she could reach her right arm overhead, holding a dumbbell, although her attorney claimed she had permanent limitation with her range of motion. In our breakout room, I had plaintiff get her dumbbell, which turned out to be a two-pound pink weight. Then, Plaintiff lifted it overhead using her left arm and then using her right arm. Her left arm when lifted was outstretched straight. When she lifted her injured right arm, the arm was bent, with limited range of motion. With counsel's permission, I videotaped this using my iPhone. When defense counsel and the claims representative watched the video in our breakout room, I was able to get a significantly higher offer and settle the case.

5. Settlement history

A detailed settlement history is essential for every mediator. Again, charts make our life easy. Below is an example. One time, neither side could provide an accurate settlement history because both the plaintiff's and defense counsel were taking the case over from other counsel in their firms. The claims representative was able to look back through her claims log notes to provide the numbers.

Another time, the defense didn't know how much had been offered in the past. Their opening offer was less than the previous offer, which plaintiff's counsel had made notes of during a call directly with claims.

6. Photos

In a case involving a scar or hypopigmentation on your client's face, provide a photo of your plaintiff before the accident looking absolutely gorgeous. Then, provide a gory "at the scene" or in the ER photograph of your plaintiff's shayna punim. Finally provide a present-day photo for comparison purposes.

7. Do the numbers add up?

Once you obtain the defense mediation brief, take a look at the numbers – medical specials, wage loss. Are they different totals? Why? Did you use actual medical specials instead of *Howell/Hanif/Corenbaum* medical specials? Often, plaintiff has continued to treat, so your medical specials might be higher. In that case, perhaps you can call defense counsel to discuss the difference, provide the updated medical records and bills by email, and see whether defense counsel needs more time to get higher settlement authority. It may be in your client's best interest to move the mediation date to give defense counsel time to summarize the new material and increase their evaluation for settlement purposes.

SETTLEMENT HISTORY

Plaintiff Demands		Defense Offers	
DATE	AMOUNT	DATE	AMOUNT
2.01.20	$1,000,000	4.05.20	$30,000
5.12.20	$950,000	6.01.20	$30,001
10.29.20 (C.C.P. 998)	$1,200,000	11.16.20	$35,000
6.30.21 (1st Mediation)	$750,000	6.30.21	$200,000

8. Take those breaks

Even on Zoom, your plaintiff may get tired. A ten-minute break to use the facilities, walk outside or eat lunch is imperative. During a pre-mediation preparation session, suggest to your client to have snacks and lunch available. I find that people think better when they are not "hangry."

9. Talk privately to your mediator

Mediation is a dynamic process. Sometimes, counsel and the mediator talk by cell phone or in another breakout room when there is a (1) client control problem, or (2) family member intrusion. Keep your mediator up to date and ask for their help.

10. Say "yes" to the mediator's proposal

The mediator may employ various methods to help the parties achieve closure. Sometimes, the defense has exhausted their settlement authority. By building credibility with the claims representative during the mediation, oftentimes the mediator can persuade the claims representative to ask for additional authority by presenting a mediator's proposal.

In almost every case, both sides have accepted my mediator's proposal. Once, where the parties were polarized and many millions apart, my mediator's

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proposal – while it didn't ultimately settle the case – did help the defense to get more money from their corporate defendants.

Mediation is fluid and dynamic. During this pandemic, Zoom mediations have shown us that we can achieve phenomenal settlements while in our own homes. However, the rules that apply to an in-person mediation still apply and naturally there are some nuances. Here's to your next successful Zoom mediation!

Debra F. Bogaards has a new solo practice, Bogaards Law, *in the Union Square district of San Francisco. She is both a mediator and a plaintiff's attorney. In 2019, she stopped doing insurance defense work for State Farm and Mercury as well as private clients after 37 years. Her mediation practice is well suited for her, given her strong background in both insurance defense and plaintiff's personal injury, employment, elder abuse and tenants' rights cases. An accomplished trial attorney, she has successfully completed 37 jury trials and one bench trial. She also is Vice President of the U.C. Hastings Board of Trustees. In her free time, Debra enjoys cycling in West Marin.*


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