

Special Issue 2022

TRIAL REPORTER

Journal of the Maryland Association for Justice

Stories From The New Normal



Recording of this hearing or live stream is prohibited.
Violation may constitute contempt of court and result in a fine of up to \$500 and a jail term of up to 180 days.



MARYLAND
ASSOCIATION
FOR JUSTICE

IN THIS ISSUE

- [How We've Adjusted to the Pandemic](#)
- [Remote Proceedings Pros and Cons](#)
- [Zoom Mediations: Here to Stay](#)

To Mediate on Zoom or In Person?

By Jeff Trueman

After many months of pandemic-related lockdown, we now know that Zoom works for mediation. Simply stated, it's efficient. When participants don't have to travel to a physical location in order to mediate a satisfactory outcome to a litigated dispute, they save even more time and money than they did before the pandemic. Travel restrictions and preferences will likely wax and wane because of emerging COVID-19 variants. If and when participants cannot mediate in person, lawyers and mediators can rely on Zoom to get the deal done.

But are in-person mediations really gone for good? I hope not. When environmental conditions permit, I encourage counsel to think strategically about whether to mediate in person or not. First of all, do you want an opportunity to build a meaningful relationship with your client? Zoom's breakout rooms are quick and easy to administer but keep you at a distance physically and emotionally. Your client may need your presence and guidance when considering his or her options.

Second, does your client want or need to experience something more tangible by interacting with the mediator or the other parties? People communicate on multiple levels, consciously and unconsciously. The physicality of a live, in person mediation can intensify everyone's attention to the process and the content of the discussions. When it comes to Zoom, parties (and sometimes counsel and the mediator) often have disparate access to technology. Lagging video and audio can make it impossible to understand what is being conveyed. Even when the technology works as intended, Zoom cannot accommodate conversational cross-talk. On the other hand, Zoom allows people to participate from a safe space such as their home and that may foster greater engagement - or distraction.

Some lawyers believe that the fear of trial can be leveraged more effectively in person. But the parties almost never meet face-to-face (by request of their lawyers). In private caucus rooms, with clients looking on, lawyers push back when pushed. It is easier for parties to move off of their bargaining positions without threats and posturing from the other side. Then they negotiate strategically, manage risk responsibly, and make good decisions. This is true whether or not the process unfolds on Zoom or in person.

Third, do you want to show the other parties that you and your client are genuinely committed to the process and that you respect the other participants (assuming you do)? Everyone knows how easy it is to default to Zoom. When you offer to show up in person, you make the statement that you're serious about engaging in a meaningful process. On the other hand, Zoom makes it easier for decision-makers to participate, even though some claim professionals do themselves no favors when they cannot or will not engage their video feed during the mediation.

There is one additional aspect of mediation that I don't think should be overlooked: the benefits of a joint discussion. Note that I did not say "joint session." I'm not looking for reasons to inflame anyone's emotions and make matters worse between the parties. And there is no reason to assume or expect that joint

sessions will occur at any time in the process – especially at the beginning. But in my experience, strategic and well-managed joint discussions between select participants (counsel or the parties without counsel) often produce good results.

Yes, Zoom can facilitate effective joint discussions. But joint discussions that happen between participants who are physically in the same room are a bit more effective in my opinion. At the far end of the spectrum, the supreme master of all joint discussions, “breaking bread,” can work miracles. It turned the tide in a highly sensitive case that occurred during lockdown. With counsel’s permission, I ordered lunch for the parties and myself - no lawyers. The case settled then and there (although getting counsel to stop blaming each other about other things was another matter). If we used Zoom in that case, I suppose I could have arranged for lunch to be delivered to the parties via DoorDash but the power of archetypally “breaking bread” comes from the personal connection it creates. That cannot be facilitated in a virtual breakout room. Contentious and “impossible” cases require creativity and flexibility, with or without Zoom.

Essentially, mediation is about negotiating and making decisions with the aid of someone outside of the dispute. Zoom is just a tool that serves the mediation process, like other technological tools we use every day such as smartphones, email, PayPal, DocuSign, etc. Consider how you use technology, along with elements of the mediation process, in order to generate quality information that will help you and your client get the best look at the best set of terms possible.

Biography

Jeff Trueman is an experienced, full-time mediator and arbitrator. He helps parties resolve a wide variety of litigated and pre-suit disputes and interpersonal problems concerning catastrophic injuries, wrongful death, professional malpractice, employment, business dissolution, real property, and domestic relations. Jeff is a past director of Dispute Resolution for the Circuit Court for Baltimore City where he oversaw over 70 retired judges and senior attorneys conducting over 1,500 mediations, settlement conferences and neutral evaluations per year. He is a Distinguished Fellow of the International Academy of Mediators, an invitation-only membership organization consisting of some of the most successful commercial mediators in the world.

