

The Zoomediation Session Process

Session Objective: The objective of the session is for the parties to ascertain if it is possible for them to reach a resolution of the issues in the case; and if so, to be sure that they get that accomplished during the session.

Mediation Process: The plan is to replicate – as closely as can be done – an in-person mediation session, while taking advantage of some of the efficiencies available in an online platform.

Here's what will happen when you log into the mediation session through the Zoom Meetings app, using the mediator-provided Zoom link, Session ID and Passcode:

1. You will arrive in a Waiting Room and the mediator will be notified of your arrival.
2. The mediator then will admit you into the Reception Room and then immediately move you into a pre-assigned, separate Breakout Room for your counsel & client group.
3. Once everyone has arrived and been sent to their respective Breakout Rooms, the mediator typically will “close” the Breakout Rooms and bring everyone together into the Joint Session Room.
4. The mediator will provide some admin info; participants will introduce themselves; counsel and client will be asked to confirm that they have come with sufficient authority, without any specific time constraints that would interfere with their participation in the mediation process that day.
5. Counsel then will have the opportunity, which they may waive, to offer any insights which might enlighten the other parties about their, and their clients', perspectives on the issues.
6. All participants will then be returned to their respective separate, private Breakout Rooms.
7. The mediator then will join one of the groups (most likely Plaintiff's/Complainant's/ Contestants) for an initial, separate caucus to address the issues and (typically) get a proposal.
8. When the mediator finishes there, he/she then will move to another party's Breakout Room to address issues; deliver the proposal; then carry a counter-proposal on to the next room; and continue to do so throughout the remainder of the session, just like in an in-person session.
9. At various times, the mediator may pull counsel, or some subset of participants, aside into a different Breakout Room for a separate caucus, if the mediator thinks it will be productive and those participants are OK with doing so.
10. The authorized exchange of information and proposals, mostly carried by the mediator, are intended to heighten the appreciation of risks involved in the case and help the parties adjust settlement expectations.

11. Once the settlement terms are identified, it is likely that a Mediation Settlement Agreement, containing all of the material terms of the parties' settlement, will be drafted at that time, with the participants signing it (physically or electronically). In some cases, the signed MSA may be supplanted with a more complete Comprehensive Settlement Agreement, to be drafted by counsel and executed by the parties, often within a few days after the session concludes.

Reminder to counsel and clients

Confidential/Privileged Process: The mediation session -- just like an in-person session -- is intended to be a private, CONFIDENTIAL and PRIVILEGED mediation process. Only the people on the list of registered participants, which will be shared with all counsel, are permitted to be admitted into the session, or in "hearing range" while the mediator is caucusing with counsel and client during our session. If a group later needs to add another person (e.g.; lawyer, paralegal or client rep), tell the mediator first so that she/he will know to admit them into our session.

No Recordings: No recordings or photos of any kind are permitted, either through Zoom (which will have been toggled "Off" by the mediator) or any other recording device. If the mediator suspects that any of the participants might have a non-registered person "listening in" at their location (either in person or via phone) at any point during the session, the mediator may ask that participant to rotate his/her camera around the room to confirm if anyone is there, and/or require that the unregistered person leave the area, and/or amend our roster of registered attendees to include such person.

Available throughout Session: It is imperative that each participant remain readily available and accessible to participate in private caucuses when the mediator returns to your Breakout Room. However, when the mediator is caucusing with other groups, you are welcome to leave your screen area to take a bathroom break, make calls, or "stretch your legs." Just leave your device connected to Zoom, but mute the Zoom microphone and video. Take your cell phone with you so that the mediator can text you when he/she is ready to return to your Breakout Room.

Breakout Rooms: Each group will have its own Breakout Room, in which the mediator and counsel & client will be free to discuss matters privately. No one else will be admitted to see or hear your conversations. When the mediator returns to your Breakout Room for a private, separate caucus session with your group, you will see the mediator immediately and he/she will verbally announce entry into your room.

Venue: Since this session likely would have been scheduled for an in-person session in the mediator's office, it is considered as being conducted in the county of that office, even though some participants may be located in other jurisdictions. Each person participating in our session shall be considered participating in the mediation process as if they were attending in person in that county.

Christopher Nolland
Attorney-Mediator
1717 Main Street, Suite 5550
Dallas, Texas 75201

Email: chris@nolland.com
OFFICE: (214) 653-4360
CELL: (214) 801-6110

Shipp  Mediation

ROSS W. STODDARD, III
ATTORNEY - MEDIATOR
Williams Square in Las Colinas
5215 N. O'Connor Blvd, Ste. 1820
Irving, Texas 75039
P: (972) 869-2300
StoddardRW@aol.com
www.nadn.org/Ross-Stoddard



Zoom Mediation Resource and Reference Guide/ Frequently Asked Questions

How do I get on Zoom?

Zoom is easy to learn – just click on the meeting ID provided in the mediator’s separate email and select “join by computer,” although you may go to www.zoom.us and open an account and download the desktop app at <https://zoom.us/client/latest/Zoom.pkg>. Importantly:

- For our purposes a free account is all you’ll need, although you don’t have to open an account to participate.
- While you can log in through your browser using the Meeting ID and the Password provided in advance of the mediation, the desktop app provides the strongest encryption available.

How can I learn more?

- You can find Zoom tutorials at <https://support.zoom.us/hc/en-us>.

Why Zoom?

- It’s encrypted.
- It has capabilities we need to make our mediation successful:
 - breakout rooms
 - screen sharing
 - whiteboards.

What kind of internet connection do I need to have?

- It must be fast, stable, and secure -- no coffee shop or public wifi.
- If you are experiencing problems with videos “catching,” try closing other apps on your computer or others sharing your internet connection.
- If your connection continues to be unstable, mute your audio and then call in by phone so some of the data for the meeting isn’t on your wifi network.

I can’t hear, or you can’t hear me. What do I do?

- If you’re having audio issues, make sure audio is not set to “off” or “mute” (a red slash across the microphone icon at the bottom left corner of your zoom window) – scroll to the popup bar at the bottom left corner of your zoom window – it looks like this:



- Make sure the correct microphone and speakers are selected by clicking on the “carrot” to the right of the microphone icon. You may need to try each of the available microphones and speakers until you find the ones that work.
- If you are using a separate mic, the source should be yours and not “the system”.

I can’t see you. What do I do?

- If you’re having video issues, make sure video is not set to “off” (a red slash across the camera icon at the bottom left corner of your zoom window) – it looks like this:



- Make sure the correct camera is selected by clicking on the “carrot” to the right of the camera icon. You may need to try each of the available cameras until you find the one that works.

How do I communicate with you privately?

- The Mediator will provide you with their cell number at the beginning of the mediation so you can contact him/her directly and privately.
- If you need to speak with the Mediator privately during the mediation, or if you need to suggest a restroom break or for some other reason, please text him/her.
- To quickly contact a mediator when you are in a breakout room, click the “Ask for Help” button at the bottom of your screen.



What are your tips for success?

- Appearance
 - Backlit participants are difficult to see – please face the light
 - Be sure confidential information can’t be seen in the background.
 - Turn off all notifications that reveal personal information.
 - You may choose to share your screen during the mediation, so you may want to clean up your computer’s desktop.
 - Find a quiet area and be sure family members, pets, and others are aware you shouldn’t be interrupted.
- Don’t talk over each other – Zoom only allows audio from one person at a time.
- Turn off all reminder buzzers, dings, etc. – but allow your phone to receive text messages so you can communicate with the Mediator and with others in your group.
- Stay near your computer even when the Mediator has gone in the other room so you will know when the Mediator returns to your breakout room.

Can I use my smartphone or my tablet?

- There are options to use Zoom smartphone and tablet apps and you may wish to download those apps as a backup in case of technical difficulties.
- Participating on a desktop or laptop with a strong, secure internet connection will make your experience much better.

How do breakout rooms work?

- A quick video at <https://www.youtube.com/embed/jbPpdyn16sY?rel=0&autoplay=1> shows what breakout rooms look like.
- Soon after the beginning of mediation, the Mediator will usually put each client/counsel group into a breakout room separate and apart from the opposing parties and counsel. This breakout room is the equivalent of a private conference room – while you are in your breakout room no one outside the room can hear any communications between the parties and their counsel (including the Mediator unless he/she joins the meeting and you see them on your screen). This room is where you most likely will spend the majority of your mediation. The Mediator will shuttle between breakout rooms over the course of the day.
- Note that for security reasons the Mediator may have disabled the chat feature. If you need to communicate privately with anyone in your room, we suggest texting one another on your cell phone. You can also communicate with the Mediator when he/she is not in your room by sending him/her a text to their cell.

Can I share a document or a presentation?

- Yes – the host (the Mediator) and with Mediator’s permission during the mediation (for security reasons) any attendee can screen share by clicking the “Share Screen” icon. The Mediator can help you with this feature during the mediation.
- A video at <https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen> demonstrates how to use this feature.
- When enabled by the Mediator the screen share function allows participants to show documents, PowerPoints, or other content on their computers to all participants in the mediation or just their group in their breakout room.

Will you record our mediation?

- No. Under our Mediation Agreement no one may record the mediation.

Can you participate by phone?

- It’s better if everyone attends by video conference, but sometimes that isn’t possible.
 - You can join the meeting as an audio participant only by dialing one of the phone numbers listed on your invitation and then entering the Meeting ID and password.
 - Note that, if you participate by phone, it’s just like a conference call.
- Calling in can also serve as a “workaround” when internet connections become unstable – simply mute your computer and call in while remaining on video.

How do I control my video and audio?

- The “Magic Toolbar” is at the bottom of your Zoom window and looks like this:



- If you pull your cursor to the bottom of the screen the Magic Toolbar will pop up. You can lock the Magic Toolbar in place by clicking:
 - The carrot to the right of *Stop Video*
 - *Video Settings*
 - *Accessibility* (on the bottom)
 - *Always show meeting controls*
- You can mute your microphone by clicking on the microphone icon and can stop your video from streaming by clicking on the camera icon. When the microphone is muted or the video stopped you will see a red slash through the mic or camera icon. To unmute or to re-start video streaming just click on the appropriate icon.
- You can change your view – see the upper right-hand corner of your screen
 - Your Zoom screen features a choice to toggle between “speaker” and “gallery” view. “Speaker view” shows the speaker, and “gallery view” shows all meeting participants.

© 2020 John DeGroot, Chris Nolland, John Shipp, and Ross W. Stoddard, III. Permission granted to use, copy, and distribute with author attribution. Last updated October 4, 2020. More information on the authors can be found as follows: Christopher Nolland: <https://www.texasneutrals.org/chris-nolland>; John Shipp: <https://www.shippmediation.com>; John DeGroot: <https://degrootepartners.com/bio/>; and Ross Stoddard: <https://www.linkedin.com/in/ross-w-stoddard-iii>.

Important Phone Numbers and Notes:

RULES FOR MEDIATION (Revised for Stoddard's Mediations)
(Updated 1/1/2015)

1. Definition of Mediation. Mediation is a process by which an impartial person--the mediator--facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute, but may not impose his own judgment on the issues for that of the parties. **THE MEDIATION BEGINS UPON THE FIRST CONTACT WITH THE MEDIATOR BY ANY PERSON REGARDING THE DISPUTE.**

2. Conditions Precedent to Serving as Mediator. The mediator shall not serve as a mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the mediator shall disclose any circumstances likely to create a presumption of bias, or prevent a prompt meeting with the parties.

3. Authority of Mediator. The mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The mediator is authorized to conduct joint sessions and separate caucuses with the parties, and to offer suggestions to assist the parties achieve settlement. If necessary, the mediator also may obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.

4. Parties Responsible for Negotiating Their Own Settlement. The parties understand that the mediator will not and cannot impose a settlement in their case. The mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. **THE MEDIATOR DOES NOT WARRANT OR REPRESENT THAT SETTLEMENT WILL RESULT FROM THE MEDIATION PROCESS.**

5. Authority of Representatives. PARTY REPRESENTATIVES MUST HAVE AUTHORITY TO SETTLE, AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT. The names of such persons shall be communicated in writing to the mediator in advance of the mediation session.

6. Time and Place of Mediation. The mediator shall set the time of each mediation session. The mediation shall be held at the office of the mediator or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine.

7. Identification of Matters in Dispute. Prior to the first scheduled mediation session, each party shall provide the mediator with an Attorney Information Form and Consent to Mediation on the form provided by the mediator, setting forth its position with regard to the issues that need to be resolved. At or before the first session, the parties will produce all information reasonably required for the mediator to understand sufficiently the issues presented. The mediator may require any party to supplement such information. The parties may agree to share with each other any of such information in advance or during the mediation sessions.

8. Privacy. Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

9. Confidentiality. Confidential information disclosed to the mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports or other documents received by the mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any judicial, arbitral, administrative or any other proceeding. Any party that seeks to compel same shall pay all reasonable fees and expenses of the mediator and other parties, including reasonable attorneys' fees and the mediator's hourly fee, incurred in opposing the effort to compel testimony or records from the mediator. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any judicial, arbitral or other proceeding: (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; (b) admissions made by another party in the course of the mediation proceedings; (c) proposals made, or views expressed, by the mediator; or (d) the fact that another party had, or had not, indicated willingness to accept a proposal for settlement made by any party or the mediator.

10. No Stenographic Record. There shall be no stenographic record of the mediation process and no person shall record any portion of the mediation session.

11. No Service of Process At or Near The Site of The Mediation Session. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session, or while such person is entering, attending or leaving the session.

12. Conclusion of the Mediation Session. The mediation session shall be concluded by: (a) the execution of a settlement agreement by the parties; (b) the declaration of the mediator that further efforts during the mediation session are no longer likely to be productive; or (c) a written declaration of a party or parties to the effect that the mediation session is concluded, following completion of one full-day mediation session. Mediation communications may continue beyond the conclusion of the mediation session.

13. Interpretation and Application of Rules. The mediator shall interpret and apply these rules.

14. Mediation Fees and Expenses. The Mediation Fee consists of (a) a daily Case Administration Fee; (b) an hourly Mediator Services Fee; (c) plus Travel Costs for sessions conducted out of the mediator's office. Unless the parties agree otherwise, the Mediation Fee shall be borne equally by the parties (with all parties represented by a law firm counted as a single party). The Retainer Deposit shall be paid in advance of commencement of each mediation session, and any balance due shall be paid upon receipt of an invoice. The expenses of attorneys/witnesses/experts in attendance at the request of a party shall be paid by that party. All other expenses of the mediation, and any expert advice produced at the direct request of the mediator, shall be borne equally by the parties, unless they agree otherwise.

EFFECTIVE ADVOCACY IN PROBATE (AND OTHER) MEDIATIONS

-- *Ross W. Stoddard, III*
Attorney-Mediator

I. How to Use Mediation Effectively to Achieve Optimal Settlement for Your Clients.

- A. **Learn** all you can about the mediation process, the dynamics of mediation, *negotiation techniques and strategies*, the psychology involved in negotiations, human dynamics. Attend seminars. Read books. Listen to tapes. *READ* the court's Order of Referral for Mediation and the Rules for Mediation, issued by the court or the mediator. Be sure to read Getting to Yes: Negotiating Agreement Without Giving In, by Roger Fisher & William Ury, Penguin Books (New York 1981).
- B. **You** tell your client about the *availability* of mediation, preferably in your *initial* client visit - do not wait until the **client** brings it up to **you**!
- C. **Use** mediation. Suggest it. Ask for it. Insist on it. Argue for it. Do so with your client, the other parties' counsel, as well as the judge.
- * Become an advocate for prompt resolution of the matter. Let your client, the other party's lawyer, and the judge know that you and your client are ready, willing and able to resolve the matter at the earliest feasible moment, and that mediation is a viable means to that end.
 - * Refuse to accept the belief that it necessarily will take a lot of time and money to resolve every dispute.
 - * Except in extremely rare instances, do not object to a case being referred to mediation - instead, after discussing the case with the court-appointed mediator and opposing counsel, seek agreement of the other parties' counsel to schedule mediation at an *optimal* point in the proceedings, which often is sooner rather than later.
 - * Develop a "short list" of mediators who you believe will work hard to help the parties achieve a resolution; but be open to suggestions by opposing counsel to use other mediators. Most urban areas have a number of qualified, well-trained, competent mediators, with various levels of experience and fees, from whom to choose.

- * Even though the court may have appointed a mediator, never hesitate to suggest or request a substitute mediator if you believe another mediator would be more appropriate for the case. Jointly request a substitution if all counsel agree. As court-appointed mediators, we may be a bit disappointed that we had, then lost, the opportunity to mediate that case. But still we are pleased for the parties that they reached their *first* agreement - the selection of a mediator.
- * **If you do not trust the mediator to maintain confidences; to remain neutral; to be proactive in helping the parties reach resolution, while maintaining the integrity of the mediation process; to draw on his/her instincts, intuition, gut feel, “higher power;” to be patient with the process; and to remain ready to continue working towards a resolution if the dispute doesn’t resolve during the initial session - THEN GET ANOTHER MEDIATOR.**
- * In court-annexed mediation, it is most advantageous to select/appoint a mediator immediately after a case is filed – although not necessarily to conduct a mediation at that point in time; rather, to *assist* the lawyers in distinguishing between the discovery which is necessary in order for all parties to **evaluate** the merits of the case, and the additional discovery necessary to **prepare** the case for trial. The mediation most likely should occur between the two stages of discovery, prior to the parties incurring the frequently substantial additional cost of the final phase of discovery and trial preparation.

D. Prepare for mediation.

- * Prepare **yourself** first.
 - ** Know your case:
 - Facts, undisputed and disputed.
 - Liability issues, undisputed and disputed.
 - Elements of your causes of action.
 - Amount of damages (The elements of damages should be written down, to be delivered to the other parties before, or at least at the commencement of, the mediation session).
 - Counterclaims.

- Extent and values of assets and liabilities of the Estate.
- Your client's interests, and what your client wants to achieve in the litigation/settlement.

** Think about your case:

- Strengths.
- Weaknesses.
- Probable and possible jury verdicts.
- Likelihood of appeal; possible appellate results
- Evaluation of the case by the other parties' counsel.
- What the other party likely will do, in terms of settling the case.
- What the other party thinks your client is likely to do, in terms of settling the case.

** Research your case:

- Read the applicable case law and statutes.
- Read the Trial Report Service for similar cases.
- Access statewide/national databases for similar cases (e.g.; TTLA).
- Talk to other lawyers about the settlement value of the case - **after** having disclosed to them the *weaknesses* and *problems* in your case - to get a more unbiased response.
- Read and understand the correspondence that you receive from the mediator.

* Then prepare your *client*:

** Provide your client with information about the mediation process and the role of the mediator.

- Court's Order of Referral for Mediation.
- Rules of Mediation (sample attached).
- Copy of mediator's correspondence to you.
- Copy of completed Attorney Information Form (sample attached) and/or Position Paper provided by you to the mediator.
- Articles on mediation.
- The proceedings are **privileged** and **confidential**, pursuant to Section 154 of the Texas Civil Practices and Remedies Code, the Court's Order of Referral for Mediation, and the Rules of Mediation.
- There will be no recordings of the proceedings.
- The mediator's role is to be an **advocate of settlement**; a neutral, objective facilitator of the negotiations, there to assist with the communications and evaluation of the case.
- The mediator is in control of the proceedings, but the **parties** are in control of the **results** of the mediation. The mediator will not be issuing any rulings or decisions on the merits of the case.
- The proceedings are informal; that is, witnesses will not be called to testify, and evidence will not be presented.

** Visit with your client about the mechanics of the mediation session:

- Initially, you most likely will (or should!) begin in a **Joint Session** with all of the parties and their counsel.
 - The mediator will introduce the process and the mediator's role; lay out some "ground rules;" and get commitments from each participant that they are attending in "*good faith*," have the requisite *authority* to resolve the matter, and will give the process enough *time* to have a fair chance for the parties to reach a settlement.

- Then each lawyer will have the opportunity to present a short statement of the case from the lawyer's client's perspective, including:
 - Facts;
 - Liability;
 - Damages;
 - Extent of estate assets and liabilities
 - Status of discovery; and
 - Status of previous settlement negotiations.
- You and your client will decide whether or not to have your client make any comments at the Joint Session.
- Remember, the purpose of the mediation session is to determine if the parties can find a resolution to the dispute, so **all** communications should be focused on accomplishing that objective.
- Then, the parties will be divided into **Confidential Private (Separate) Caucuses**, where the mediator will be meeting privately with each party and counsel, to **openly** discuss the merits of the case - including the strengths *and* weaknesses - and their respective evaluations of the case.
 - Here, it is *critical* that your client vocalize what is on the client's mind; vent whatever emotions need to be vented; and *actively participate* in the discussions and evaluations, so that the client is actively involved in making the final decision on whether, and how, to resolve the dispute.
- The mediator then likely will **shuttle** back and forth between the separate parties, conveying information and settlement proposals, until the material terms of an agreement between the parties is reached.

- Finally, a Family Settlement Agreement (“FSA”) or Mediation Settlement Agreement (“MSA”) will be drafted and signed at the conclusion of the mediation session; sometimes followed by a more complete and “formal” settlement agreement.

** Most importantly, prepare your client's **attitude** for mediation:

- The day of the mediation is **the** day set aside to explore all alternatives for resolution of the dispute. Typically, at least initially, the **objective** of the mediation is to find a final, binding mutually agreeable solution to the dispute **that day**.
- Define your client's **objective** during the mediation. **However, do not let your client lock into a bottom line resolution prior to the mediation.**
 - Certainly, come to the mediation session with some parameters for settlement in mind.
 - But remember, the purpose of the mediation is to utilize the services of the mediator to develop new information and insight into the case, which will permit all participants to re-evaluate the settlement value of the case.
 - **It is very likely that the ultimate agreement reached during mediation will be beyond that which any of the parties thought that they would be willing to do to resolve the case prior to the mediation session.**
 - Mediation permits the parties in a probate case to craft a solution that may be beyond what the court can order, but one which has elements in it which are desired by the parties; or in a business case, the parties may be able to find a business solution to the dispute - something that a jury verdict may not be able to provide.
 - Mediation permits the parties in a substantial personal injury case to utilize a structured settlement - something that a jury verdict would not provide.

- Develop your client's trust in the mediator and the mediation process - both are neutral and objective.
- Be sure that your client understands that when the mediator is in caucus with the other party, the mediator is working hard for **your** client's position. So if the mediator is in the other caucus room for a longer period of time than with you and your client, that doesn't mean the mediator favors the other side; instead, it just means the mediator likely is having to work even harder in the other room on your behalf.
- If the case is not resolved during mediation, there are ramifications - be sure your client understands them:
 - Additional legal fees.
 - Additional court costs.
 - Additional out-of-pocket expenses.
 - Time to trial.
 - Emotional impact of further depositions and trial.
 - Appeal - likelihood, time, cost.
 - Retrial if remanded.
 - Collectibility of judgment, if your client prevails on a claim.
 - Post-judgment actions (abstraction of judgment, execution, depositions, attachment, garnishment, receivership), if your client is a defendant.

* Lastly, prepare your **mediator**.

** **Timely** respond to the mediator's request for information:

- Attorney Information Form (sample attached).
- Pleadings (last Amended Petition and Answer, Motion for Summary Judgment and Response).

- Position Paper (confidential vs. distributed to other counsel).
- Calendar of available dates for the mediation session.

** Let the mediator know if you believe that there are any particular problems or special considerations to be anticipated in dealing with any of the participants.

- Your client is "uncontrollable".
- Opposing counsel's client is "uncontrollable" by opposing counsel.
- There is a long-term relationship between a counsel and client - which may be perceived as more important to protect than reaching a settlement in this one case.
- Public policy/corporate policy will be a determinative factor in the resolution of the dispute.
- Counsels' working relationship has been somewhat acrimonious or, hopefully, the antithesis, during the litigation.
- One or more participants will have special medicinal or food intake requirements, or physical disabilities, which will need special accommodation.
- One of the parties has "definitively" stated what he/she will not ever do to resolve the dispute.
- Additional discovery will be necessary to fully evaluate the case for settlement.
- Defendants have not ever received a demand from Plaintiff's counsel.
- The extent of the assets and liabilities is not yet known, in a probate dispute.
- You are concerned that the other party will not come to the mediation session "in good faith", or with adequate authority.

- Persons other than the participants at the mediation session may play an important role in the decision-making process.
 - Spouse, or other family member.
 - Supervisor.
 - Board of Directors, or other committee.
 - FDIC/creditor.
 - Trust officer, financial advisor, CPA, estate planner, tax lawyer/accountant.
 - Expert on damages, business valuation,
 - Governmental entities.
- Your prior experiences in mediation likely will affect your beliefs about the chances of success in this one.

E. Attend the mediation session, appearing with a positive attitude and bringing with you the most optimal participants representing your client. Essential elements are:

- * **Persons Involved.** Bring the person(s) necessary for full resolution of the dispute.
 - ** **YOU!** You need to attend the mediation session. Do **not** send another attorney from your firm who either does not know the case as well as you do, or who does not have an equally strong relationship with your client.
 - ** Individual party.
 - ** Individual party's spouse.
 - Named as party.
 - Community interest in results.
 - Strong influencer.
 - ** Corporate officer.

- ** Insurance company claim's representative.
 - ** Guardian ad litem.
 - ** Attorney ad litem.
 - ** Executor, Trustee.
 - ** Guardian of the person.
 - ** Guardian of the estate.
- * **Authority.** Person attending must have authority to settle the case. This is best defined as a person who not only has the **authority** to fully settle the dispute, but also the **discretion** to decide the resolution which is acceptable to such party.
- ** Disclose limits on authority to mediator (e.g.; approval required by Probate/Bankruptcy Court, Texas Attorney General; FDIC; city council; etc.).
 - ** "Discretion to decide the resolution which is acceptable" is often may best be defined as meaning that the person in attendance has the authority to resolve the case for the last settlement proposal made by the other party (although such proposal likely will never be accepted by such person).
 - ** If person in attendance has limited authority, you need to have the person(s) with the requisite additional authority (and discretion) standing by their telephone, and the mediator needs to have available such person(s) office, cell and home telephone numbers. **Be sure to have access to such person after regular business hours.**
 - ** If all of your clients cannot attend in person, if possible, bring a written, properly executed, valid Durable Power of Attorney empowering an attending client to act on their behalf.
- * **Time.** All participants must commit to being available for the full amount of time necessary to allow the mediation process to have the optimal chance to result in full settlement, as determined by mediator.

- ** Participants should clear their calendars to be available from commencement of the mediation through the balance of the day and evening.
- ** Do not let your out-of-town client, or other participant representing your client, schedule a return flight in the afternoon; rather, make the flight as late as possible on the day of the mediation, or better yet, the following day.
- * **Good Faith.** Client and lawyer should come with the good faith intention to find a reasonable resolution of the dispute.
- * Be sure to advise the mediator ASAP, preferably before commencement of the mediation, if a conflict arises as to any participant's ability to attend with all of the above essential elements.

II. Checklist of What Works, and Doesn't Work, During Mediation.

A. Joint Session.

- * You and your client should arrive on time.
- * You and your client preferably should have fully reviewed the case and your negotiation plan shortly before the day of the mediation session.
- * Be courteous and professional with all participants.
- * Introduce yourself and your clients to all other participants, and identify their respective positions so that everyone knows who is in which role during the mediation.
- * Be cognizant of where the other participants are sitting and decide whether it is better for you/your clients to sit directly across from the other party.
- * Be attentive during the mediator's opening remarks.
- * Be especially attentive - and actively listen - during opposing counsels' opening remarks. You will have an opportunity to clarify any incomplete/erroneous information conveyed by opposing counsel - but will not know to do so unless you listened. You and your client should not snicker, laugh, roll your eyes, etc. while the other counsel are making their remarks.

- * Be prepared to make your opening remarks. During the mediator's and opposing counsel's opening remarks, do not be reviewing your file documents (for the first time in months) to learn about your case.
- * NEVER FAIL TO MAKE OPENING REMARKS! You likely will never have another opportunity to talk directly to the other party.
- * The purpose of the communications during the mediation process is very different than at trial.
 - ** Direct most of your remarks to the opposing participants - typically, primarily the other party, who ultimately will make the decision regarding settlement, rather than to the mediator (who will not be making *any* decisions as to the settlement). As a courtesy, occasionally look at the other party's counsel and the mediator while making your comments (it helps make you appear less "threatening" to the other party). When describing the other party's "bad" acts, direct your comment to the mediator. The other party will not feel as "attacked", but will hear the allegations as being told to a neutral person (such as will be the case with the jury or judge).
 - ** At trial, opposing counsel's "gladiator" role may be to thrust the spear deeply into the other party's position, so as to debilitate it. In mediation, settlement will occur if the parties shift their respective evaluations so as to have them meet somewhere in between their respective ideal results, albeit preferably closer to their own evaluation rather than the other party's evaluation.
 - Thank the other participants for attending the mediation and listening to your comments.
 - Acknowledge that you are aware that they may not agree with your views, but you at least want to give them the opportunity to understand them.
 - Remember, use language which will draw the other party towards your client's position, rather than language which will repel the other party.
 - The more the participants understand each other's positions and interests, the more likely a mutually agreeable resolution can be found. Enlighten them as to the risks of proceeding to trial.

- A sincere apology, when made during the mediation process, can be a powerful, effective communication, which may stimulate significant movement towards resolution, and is a protected communication (i.e., privileged and confidential) under TCP&RC Sec. 154.
 - Carefully consider the potentially detrimental impact on negotiations, if you or your client are inclined to be acrimonious in your comments directed towards the other participants.
 - This is not the time for jury argument. Save the posturing and "chest beating" for another time.
 - “Showcase your clients”; by having him/her speak if you believe he/she will be effective in communicating to the other parties.
- * Unless absolutely necessary, do not "backtrack" from your last settlement proposal made prior to the mediation session. If you feel you must, be prepared to point out the factors which have changed in the interim, and which justify the shift in settlement position.
- ** The other party's **perception** of your good faith may be severely affected detrimentally by your backtracking.
 - ** Anticipate that the opposing party may be inclined to respond by also backtracking on its last settlement proposal, which inevitably will create considerable delay in the settlement process.
 - ** Recognize that your or opposing counsel's prior communications of "indications" of acceptable settlements likely will be "heard" as acceptable, and therefore considered a starting point by the listener.
- * Refrain from making any new settlement proposals until you have met in private caucus with the mediator.
- * Normally, discovery which is necessary to evaluate the case will be substantially completed by the time of the mediation session. If not, use the opportunity to share information and documents which will cause the opposing participants to better understand your client's position in the case.

B. Private Caucuses.

- * Let your client talk with the mediator, particularly about:
 - ** Facts of case.
 - ** Client's view of damages.
 - ** Client's view of settlement.
 - ** Client's view of the other parties, and opposing counsel.
 - ** Client's life considerations affecting decision-making process.
- * Let your client vent whatever emotions need to be vented, while the mediator is with you, as well as when the mediator is not with you.
- * Be prepared to discuss with the mediator:
 - ** Facts, undisputed and disputed.
 - ** Liability issues, undisputed and disputed.
 - ** Elements of your causes of action.
 - ** Amount of damages (The elements of damages should be written down, and delivered to the other parties before, or at least at the commencement of, the mediation).
 - ** Counterclaims.
 - ** Your professional view regarding the case:
 - Strengths.
 - Weaknesses.
 - Probable and possible jury verdicts.
 - Evaluation of the case by the other parties' counsel.
 - What the other party likely will do, in terms of settling the case.

- What the other party thinks your client is likely to do, in terms of settling the case.
 - Estimated time and cost to prepare for, and participate in, a trial of the case.
- * Focus on your client's "broader picture": the life considerations which affect, or are affected by, this dispute, or the resolution of the dispute. Do not just focus on what you think will happen at trial. Remember, you are licensed as an "Attorney *and Counselor* at Law".
 - * Be realistic, honest, and forthright with the mediator regarding:
 - ** Possibilities of various results at trial.
 - ** Anticipated effect of case law and court rulings on the probable outcome of this case.
 - ** Impact of expected testimony or depositions of fact and expert witnesses.
 - * Be creative and innovative in thinking of solutions which may resolve the case.
 - * If you feel compelled to posture for your client's benefit, let the mediator know in advance. However, do not later "torpedo" the mediator's efforts by refusing in front of your client to acknowledge any weaknesses in your client's position, or any risk in proceeding with litigation.
 - * Trust your mediator - strongly consider following the mediator's suggestions/guidance when offered. The mediator will be drawing on his/her experiences as a mediator, as well the experience of, and communications in, the present mediation.

C. If Settlement Cannot Occur During the Mediation Session.

- * Determine what is "in the way" of settlement, and then determine the course of action which is the most cost effective, expeditious route to remove the impediments to settlement.
 - ** Additional discovery. Work to reach an agreement as to the order and timing of the remaining depositions and written discovery, prior to continuing with the mediation.

- ** Court rulings on dispositive motions. If one counsel (or perhaps both) is extremely confident in his/her “prediction” of an upcoming ruling of the Court on dispositive motions (e.g., Motion for Summary Judgment, Motion to Strike Pleadings, etc.), then perhaps the Court should first rule, prior to continuing with the mediation.
- ** More time is needed. In some cases, the parties simply need more time to reflect on the realities of the settlement possibilities. In other cases, further discussions with, or evaluation by, non-participants will be necessary before substantial shifts in position can occur.
- * Regardless of the reason for the parties' inability to reach settlement during the mediation session, utilize the services of the mediator during the follow-up period in any manner which you believe will facilitate resolution of the case at the earliest juncture.

D. After the Settlement has been Reached.

- * Remember, “*it's not over 'til it's over.*” Until a Mediation Settlement Agreement ("MSA") is fully drafted and signed by all signatories, including parties and counsel:
 - ** **Do not** discuss with opposing counsel the merit, or more importantly, lack of merit, of your case.
 - ** **Do not** at that time acknowledge your recognition of your inability to prove your case.
 - ** **Do not** gloat or brag about how happy you and your client are about the terms of the settlement. Often, a settlement is probably "about right" if all parties are somewhat "unhappy" with the amount of the settlement (though a proactive mediator will work hard to help all of the parties feel as good as possible about the settlement terms..
 - ** You and your clients probably should refrain from joking and laughing during the drafting of the MSA or term sheet at the mediation session, particularly if the opposing participants are not pleased with the outcome.
 - ** Be reasonable regarding the provisions which you feel should be included in the MSA.

- ** All parties and counsel should sign the MSA. The mediator should *not* sign the parties MSA (doesn't make the MSA any "more binding" and opens the mediator up to becoming a "signatory witness" to the MSA in the event of a dispute over the terms. **DO NOT LEAVE THE MEDIATION SESSION WITHOUT A FULLY EXECUTED WRITTEN MEDIATION SETTLEMENT AGREEMENT. TO BE AN ENFORCEABLE AGREEMENT UNDER TCP&RC SEC. 154 AND RULE 11, THE AGREEMENT MUST BE IN WRITING. IT ALSO MUST INCLUDE ALL OF THE MATERIAL TERMS, BE SIGNED BY THE PARTIES/COUNSEL WHICH HAVE AUTHORITY /CAPACITY TO SIGN, AND SIGNED WITHOUT DURESS.**
- ** However, if the mediation has continued long into the night/early a.m.), consider **not** signing an MSA until the next day. You might proceed with "writing up" the MSA that night, then reviewing and signing it the next day. That certainly opens up the possibility of one or more parties balking at signing the MSA. However, that situation probably can be worked through. It is probably a better scenario than one in which a signatory party develops "buyer's remorse" the next day and successfully invalidates the agreement on the grounds of duress; or *unsuccessfully* attempts to invalidate it, and later *successfully* complains that their lawyer should not have let them sign it when they were too mentally/physically drained to be thinking clearly. Also let your client know that there always is a risk that the other party might not sign the MSA the following day; so that your client is fully informed of the possibilities.
- * If a more formal settlement agreement is to be executed, move quickly to get an acceptable draft circulated and signed by all parties.

Contact Information:

Ross W. Stoddard, III
Attorney-Mediator
Williams Square in Las Colinas
5215 N. O'Connor Blvd., Suite 1820
Irving, Texas 75039

O Phone: (214) 869-2300
Fax: (214) 869-4691
E-mail: StoddardRW@aol.com
www.nadn.org/Ross-Stoddard

SAEPC 4-20-21.out

Top Tips for Successful Zoomediations of Probate, Trust and Estate Disputes

Presented to the:

San Antonio Estate Planning Council

Via Zoom Webinar

April 20, 2021

Presented by:

Ross W. Stoddard, III
Attorney-Mediator
Williams Square in Las Colinas
5215 N. O'Connor Blvd., Suite 1820
Irving, Texas 75039
O Ph: (972) 869-2300
Fx: (972) 393-7253
www.nadn.org/Ross-Stoddard
E: StoddardRW@aol.com

John Shipp
Mediator - Arbitrator
Shipp Mediation
10th Fl, Campbell Center II - S. Tower
8150 N. Central Expressway
Dallas, Texas 75206
M Ph: (214) 543-4095
www.shippmediation.com
E: john@shippmediation.com

Top Tips for Successful Zoomediations of Probate, Trust and Estate Disputes

*Presented by Ross Stoddard and John Shipp
to the San Antonio Estate Planners Council – April 20, 2021*

Like most things learned in life, these tips come from our having encountered a lot of “what not to do” (and, fortunately, also “what to do”) by participants in online mediations. Our objective is to help you identify some ways to get optimal results from online mediations, and to avoid some of the pitfalls we’ve seen participants encounter while actively conducting online mediations. Together, informed counsel and mediators can help create a seamless and effective mediation process while using online platforms.

For shorthand, occasionally we’ll use “Zoom” throughout these tips, since it currently is the most often used online videoconferencing platform for mediations. Most, if not all, of the tips apply to the other online videoconferencing platforms as well, such as Cisco Webex, Microsoft Teams, etc. “Device” will mean a device used to access Zoom, such as a laptop, desktop computer, tablet or smart phone.

A. General Thoughts:

1. Online mediations are surprisingly and remarkably effective, and often can be more efficient, and cost-effective than in-person sessions (e.g.; no travel costs; less idle time).
2. Much of the “work” to make the process of online sessions productive falls on the mediator, who, as the “host” of the online session, has to “manage” and coordinate the technology to create that seamless process. If the mediator is familiar and knowledgeable about the workings of the platform being used, then s/he certainly can help guide participants when access issues arise.
3. Counsel also can help immensely by having a good idea of what makes an online session optimally productive.
4. As in all mediations, for the mediator to do the best possible job for the participants, it is critical that the mediator have the opportunity to “connect” with all of the participants.
 - a. This is more challenging, when the mediator is not in the same physical location as the participants.
 - b. It also is even more challenging when one or more participants are wearing masks, which currently is occurring due to concerns of virus transmission. This is true whether in an in-person session, or an online session during which several masked participants may be in the same conference room.

- c. Those needed “connections” are virtually non-existent when some of the participants are completely out-of-view to the mediator, such as when participating via audio only; or when the sole camera in a room is focused on lead counsel, with the other participants rarely/never in the camera’s view.
 - d. So it is, in essence, “triply challenging” when the mediation is being conducted online with participants in the same room wearing masks and/or being out of view of the camera.
 - e. The BEST scenario in which to have the most effective interactions with the mediator is to arrange to have a camera focused on each of the participants, with none wearing a mask during those interactions. Two known likely safe ways to do that: have each participant in a separate location (e.g.; solo in their own home or office); or solo in separate rooms in their counsel’s office with their device, at least for the times they will be interacting with the mediator or other parties.
5. Because of the now-proven viability of conducting mediations online, many, if not most of our mediator colleagues, and counsel with whom we’ve experienced online mediation sessions, believe that the post-pandemic “new normal” will include a considerable percentage of mediations being conducted online, either fully, or with at least one or more people participating via online (hybrid mediations).

B. Getting Prepared to Participate in Online Mediations – Starting Now!:

1. General:

Become very familiar with the Zoom Meetings platform (which is different than the Zoom Rooms platform) and other online video conferencing services, such as Cisco Webex, Microsoft Meetings, BlueJeans, etc. so that you are comfortable participating in a mediation being conducted on that platform. That likely will help your client feel more comfortable proceeding with an online mediation.

2. The Room Where It Happens:

- a. If at all possible, avoid using a conference room setup where the camera is on the wall 10-15 feet away from participants sitting alongside a long conference table. The mediator can barely see the faces or hear the voices of the participants (and even less so if they are wearing masks). There is little “connection” possible between the mediator and the participants.
- b. Instead, or at least in addition – if you are going to have your group in a single room: have a screen in front of each participant, logged into Zoom: whether a laptop, tablet or smart phone (typically turned horizontally) or desktop computer. This gives the mediator a chance to connect with the participants.

- i. AND, if you do that: be sure to have all but one person in the room shut off their devices' microphones in Zoom, and turn down/off the volume on their devices' speakers to avoid audio feedback.
 - ii. Ideally, have an omnidirectional speakerphone in the center of the table, and turn off volume and mics on ALL other devices.
3. Technology – Be Prepared.....like an Eagle Scout:
 - a. Devices: Invest in a couple of newer laptops with faster processing speed, cameras (e.g.; Logitech Brio Ultra HD, recommended by Zoom), and microphones for use by you and your client when you are together during the session.
 - b. Universal Power Supplies (UPS battery backup). Plug in your ISP modem, router, network switch, desktop, laptop. Should keep you running during a temporary outage.
 - c. Usually, there is more bandwidth and speed accessible, and likely less interference, when using a hard-wired (ethernet) connection into your devices, rather than wi-fi. Consider getting several ethernet to lightning/USB/USB-C adapters for your office. (\$15-\$25)
 - d. Download Zoom on your smart phone and tablet and know how to access Zoom and/or how to use them as personal cellular hotspots (or have a separate hotspot), in case you lose power or your internet connection fails you during the mediation.
 - e. Have a “spare” laptop available in case of a primary computer’s failure.
 - f. Upgrade your internet bandwidth/speed, especially if participating from home, with a lot of demands on that bandwidth from other active devices, such as school work; spouse/significant other working online at the same time; gamers actively playing on their computers; wi-fi security cameras; etc. Ditto at your office.
 - g. Have a backup game plan, in case a techno-hiccup occurs to your primary device: change your device to a backup smart phone or tablet; go to another location that has internet access, if yours has gone down (e.g.; leave home and rejoin from your office; call a colleague in another close-by firm and ask if you can borrow a conference room for the session; etc.) DON'T, however, use a public wi-fi to access Zoom.
 - h. Learn how to share screens and power points. These are easy and effective tools in getting your point across with the mediator and the other participants.

C. In the Days Before Today's Mediation Session:

1. Work with Your Client:
 - a. For online mediations to work for you and your client optimally, you both have to approach the coming session as if it was your client's day of trial.
 - b. Prepare for it. Prepare your client for it. (And prepare your mediator for it!)
 - c. Forward to your client all of the Mediation Packet, and particularly highlight any Zoom information, as some clients are less experienced than others with online videoconferencing.
 - d. Be sure your client is (or becomes) familiar with how to use Zoom.
 - i. Have a practice Zoom session with your client, to make sure the client will be adept at accessing Zoom and that his/her internet equipment will be sufficient to run Zoom without buffering or other technological issues.
 - ii. Let the client know that it is expected that *everyone* (and particularly counsel and decision-maker clients) will be attending via *video*, no differently than counsel and decision-maker clients would be attending in person during an in-person mediation session, and as nearly always required by the courts, for a court-ordered mediation.
 - e. Be sure your client (and you and anyone else who will be required to sign the MSA) have a scanner/printer/paper accessible to facilitate printing, signing, scanning and delivering the signed MSA, or at least its sig pages. If no scanner device is available at the client's location, consider having them use/get a scanner app on their smart phone (also good for you to have as a backup if your scanner device fails to work properly, or if you don't have one at home -- though you should consider getting one, or ideally an MFC—multi-function center that prints, scans, copies and faxes).
 - f. Forward via email to your client the mediator-provided Zoom invitation link (ID and Passcode) several days in advance of the scheduled session; and again on the afternoon immediately before the session, to make it easier for the client to find the Zoom link at the top of the client's email inbox when they need it.
2. Work with the Mediator:
 - a. Provide the mediator with you and your client's cell phone numbers (and get the mediator's cell phone and give it to your client). Then "offline" texting/calling will be readily available for the mediator to assist getting people logged into the session, if needed.

- b. Take advantage of the efficiency that comes from conducting your initial private, separate “client & counsel” caucus with the mediator a few days in advance of the scheduled jointly-attended session.
 - i. This saves a lot of “idling” time on the day of the jointly-attended session; particularly if there are several parties in the case, since the mediator will be having a separate first caucus session with each one in succession (often the longest caucuses of the session, when facts and issues are being discussed, and venting takes place).
 - ii. Also gives you a chance to confirm that your and your client’s technology setups are operational for Zoom sessions, and lets the mediator demonstrate how you and your client will have your own breakout room.
 - iii. It also “sets up” the near-term thinking of the clients to be about settlement, instead of litigation.
 - iv. Importantly, it gives the mediator and your client an opportunity to get to know one another, and for the mediator to build a bit of rapport and trust with the client.
- c. Let the mediator know if you want to show a PowerPoint/video/doc during a joint session, so that proper Zoom permissions can be set up in advance by the mediator. Be sure that you know how to do so, in advance of the session.
- d. Let the mediator know if any people in your group likely will be in different time zones than the mediator, so that it can be noted in the Zoom Invitation and mediation packet materials. Might affect the start/end time of the session.
- e. Provide the mediator a full listing of the names of all people who will be participating in your group; their “roles”/titles; and their cell phone numbers.
- f. Identify that you, or another lawyer in your group, will be the “point person” during the session for direct communications with the mediator.

D. In the Hour or Two before “Today’s” Mediation Session Begins:

1. Jointly re-test your and your client’s access devices and accessibility to Zoom.
2. Be sure that you have at least two ways to reach your client that day, particularly if the client will be participating from another location than you – cell phone (for voice and texts), landline, spouse’s cell phone, email (though not everyone monitors emails consistently).
3. Have a tech-savvy staffer on standby to assist you with technical issues.

4. Mediators often call for “attorneys-only caucuses” at various points of mediation sessions. If you have assembled your group in a conference room for the session, then plan to have a place for counsel to go, *or* all of the others in your group to go, in the office suite so that counsel (and perhaps other trial counsel in your group) can meet in such an attorneys-only session without any clients present, and with the doors closed.
5. Send a group text to everyone in your group who will be participating in the session, so that you can easily alert them when it is time to return to their screens (such as when the mediator returns to the breakout room). Some mediators like to have that text group sent to them at the beginning of the session, to expedite sending the return-to-screens alert.
6. All participants should update their Zoom screen names to the first and last name they prefer to be called. Don’t forget, the mediator may have 15 names to keep straight. You want you and your client to be moved into *your* breakout room, not another party’s room, which is much easier for the mediator to do if the screen name is (a) the person’s name, not a spouse’s name or phone number; and (b) matches up with the names you’ve provided in advance of the session.

E. During “Today’s” Mediation Session:

1. Be cognizant of how you “show up” for the session:
 - a. You should dress like it is an important event, *since to your client it is....* particularly if “the other side” likely will be seeing you during a joint session. (Or dress that way at least from the waist up, if you are participating solo from home!) You likely are earning a fee for your services that day (and hopefully getting paid for them). Look like you deserve to be paid that much!
 - i. Project a professional image; basically, business casual or better. Men, consider wearing a collared shirt, perhaps with a suit jacket or blazer, either with or without a tie.
 - ii. The other *parties* may not know you, or your reputation as a very competent lawyer (even though their lawyers may), so those decision-makers will be forming an opinion of you during that initial visit. They may not be too concerned (though perhaps mistakenly, *a la* Columbo!) about a disheveled, beach bum-looking fellow in a t-shirt leading the charge at trial on behalf of their counter-party.
 - iii. And in pre-suit or early mediations, when the other parties’ counsel may have had little interaction with you other than on the phone, they, too, will be sizing you up as an adversary. Look the part of someone that exudes competence.

- b. If settlement is your client's objective at mediation, how you "show up" can have an impact on the ultimate settlement value achieved for your client (which also will hit your bottom line directly if you are on a contingent fee arrangement!).
2. It's *really important* that everyone (including you *and your client*) appear on **video** as well as audio, so that you can be seen as well as heard. Remember, we are trying to replicate as closely as possible a pre-pandemic, in-person mediation session.
- a. Imagine if everyone appears with a blank screen and via audio only (or as a cat, as was recently experienced by one of our Texas attorney colleagues!). It would seriously undermine the viability of the online mediation process. (Remind your client of "Do Unto Others" if your client thinks its ok for just him/her to participate that way.)
 - b. That is almost as detrimental to the process as having the decision-maker off-premises and uninvolved directly during *in-person* mediation sessions, which probably causes more mediations to result in no settlement during mediation sessions than any other single factor.
 - c. Use audio-only if there simply is no other way to keep a participant actively engaged in the process.
 - d. If bandwidth demands are causing buffering of the video, or interfering with sound quality, the mediator can switch you over to Phone Audio, so that your video is still visible, but your audio is coming in from your phone call.
3. **Every** participant should have their **own screen** so that they can be seen by the mediator, even if more than one participant will be in a room.
- a. If possible, DON'T place a single camera at the far end of a room that is intended to capture all of that room's participants. See above.
 - b. And DON'T have a single camera on a single device focused on just you, while you are in a room full of other participants. Remember, it is *critical* that the mediator have an opportunity to connect with, and get as much as possible of a "read" of all of the participants during the session, in order to do the best job that can be done.
 - c. And since getting that "read" is already a bit more challenging via video vs. in-person, having masks on during the pandemic makes it even more challenging. So consider the possibility when the mediator returns to your "room" to separate you or your client into separate offices with each of you on your own device, at least for *some*, if not all, of the private caucuses, so that full faces can be seen by the mediator. (Perhaps more likely possible if only a few people, rather than many, are in your group.)

4. All participants should have their cell phone available, in case computer audio doesn't work.
 - a. Ditto if someone drops off of, or gets knocked off of, Zoom during the session.
 - b. Texting also is an easy way to communicate with the mediator if you want to call for an "offline" discussion/call with the mediator, or vice-versa.
 - c. After any initial joint session, whether it includes opening remarks by counsel, or just the mediator setting out some "ground rules" for the session and a chance for everyone to see who is engaged in the mediation process, you likely can step away from your computer while the mediator is in another breakout room. This can help preclude "Zoom fatigue," and give counsel and client a chance to take a break in their own communications, which helps reduce the need to continue with idle chit-chat, when you and your client have already done enough of that.
 - d. If the mediator finds your or your client's screen blank 20 or 30 seconds after announcing her/his arrival back into your breakout room, the mediator can text you to alert you to return to the screen, and you, in turn, can group-text everyone else in your group.
 - e. Often after visiting with the mediator, counsel and client need to visit privately to discuss how to respond to an offer. You'll ask the mediator to step out while those discussions take place.
 - i. When you are ready for the mediator to return to your room, just press the "Ask for Help" button on your screen. The mediator will have an alert box pop up on the mediator's screen.
 - ii. If the mediator doesn't return to your room in 20 or 30 seconds, send a text to the mediator to let them know that you are ready for them. Two reasons why the mediator may not respond asap:
 - (A) Could be in another breakout room and it's inopportune to leave at that moment, in which case the mediator can quickly text you a number, indicating about how many minutes it might be before a return to your room can occur; or
 - (B) The mediator may have stepped away from the screen (bathroom or kitchen visit) and hasn't seen the alert on the screen. The mediator likely will take her/his cell phone whenever she/he steps away from the computer screen.

5. To help facilitate communications:
 - a. Though Zoom is duplex, there sometimes are lags in the spoken word, so pause for a second before you talk so that you are not “over-talking” another speaker.
 - b. While engaging in communications during a joint session or separate caucus, if someone turns off his/her video, checks emails/texts, has a side conversation with someone in the background, etc., it can undermine other participants’ (including the mediator’s!) confidence that the person is invested in the process. If it happens to be in front of an opposing party, such as during a joint session, it can lead to a strong negative reaction in that party; one that often is not forgotten throughout the remainder of the session.
 - c. Personalize the space around you within view of your camera. Might help others “see you as a person” and potentially respond more positively to you. If you see something interesting in other people’s camera views, comment (in a nice way) about their: dog, furnishings, background, artwork, photo, breakfast, etc. It can reflect a recognition that, in the end, we all are just people, some of whom happen to have a dispute to get resolved today.
 - d. Check your lighting. Deities are backlit; mere mortals are frontlit or sidelit! Backlighting will make you look like you are being interviewed on 60 Minutes!
 - e. Keep your face, upper torso and your hand motions in view of the camera, not just your forehead, one side of your face, the left side of your face and the right side of your client’s face, or an “upshot” of your nostrils!
 - f. Look into your camera directly, if possible, such as on your laptop. Use an external monitor to queue up important docs, bullet points, MSA/CSA provisions, etc.
 - g. Keep your cellphone with you at all times, since that is the alternative means of contact throughout the session.
 - h. Folks can get “hangry” when they need to eat; so make sure your client knows that typically the mediation session won’t stop for a lunch break; rather the mediator may be in, and then out of, rooms throughout the lunch hour. It’s fine to bring some food and have lunch by your screen, and to continue eating “in front of the mediator” if the mediator returns while you are finishing lunch.
 - i. If you or your client need to be on a conference call sometime during the day, just let the mediator know at the beginning of the day, and the mediator can coordinate room visits to avoid your room when you need to be on that call.

- j. Use the Share Screen feature to focus on exhibits, and Whiteboard to illustrate important points, diagrams, settlement progress, etc.
 - k. Remember, most people are simply more tired and irritable than they were pre-pandemic, so be a bit more patient with folks, and “signal your turns.” Anticipate allowing a little more acceptance time for the decision-making process to occur.
 - l. Zoom fatigue can impact you and your client, so take time to get up and walk around frequently when the mediator is in another room.
 - m. Be careful with using the “Chat” feature. If accessible, you want to be certain it only goes to the people in your breakout room, not to all participants. Many mediators have disabled the chat feature, to preclude an inadvertent communication to the other participants. Safer course is to simply use your group text on your smartphone.
6. Preparing & Signing the Mediation Settlement Agreement (“MSA”).
- a. Many, but not all, attorney-mediators will provide a “running start” MSA template to facilitate consummating the settlement terms of the parties at the end of the session. In those circumstances, the attorney-mediator will email the draft to counsel for their and their clients’ review and revisions.
 - b. It can be sent as a revisable doc, or as a pdf with an opportunity to interlineate any requested revisions.
 - c. When mutually-agreeable provisions are determined, the mediator can email a ready-to-be-executed final draft to counsel, who will forward it on to their offsite clients. Typically, that’s when the MSA will be downloaded, printed, signed, scanned and emailed back through counsel to the mediator. This is when the settlement consummation process can take a bit longer than in in-person sessions, since sometimes one of the signatories might not have access to necessary equipment. In those cases, the parties might have to rely on an email initiated by that party noting his/her agreement to the attached MSA, and his/her commitment to sign and circulate it the following day when a printer/scanner can be accessed.
 - d. If instead of an MSA, the parties prefer to proceed directly to a full CSA, then typically counsel (most often defendant’s counsel), should bring a draft of a proposed CSA to the session, and circulate the template (*sans* final number) earlier during the session, so that opposing counsel isn’t seeing a 15-page CSA at 7:30 p.m.
 - e. Sometimes counsel would prefer to use Share Screen and collaboratively work on the MSA or CSA that way.

- f. In cases where everyone has access to Docusign, that also can be used for signing the settlement agreement.
- g. Another “workaround” if a signatory has a printer, but not a scanner, is to sign and take a photo with their phone and email/text the image, or to use the scanner feature of their smartphone. Might also have a signature stored on their phone.

F. Post-Session Mediation Work:

If your case does not settle during the initial, jointly-attended session, consider using Zoom caucuses (instead of phone calls) with the mediator as a platform for ongoing discussions, either with just you, or you and your client. Remember, the settlement is in the control of the clients, so the more they are involved in the settlement discussions, the more they will take responsibility for the decision to settle.

Christopher Nolland
Attorney-Mediator
1717 Main Street, Suite 5550
Dallas, Texas 75201

Email: chris@nolland.com
OFFICE: (214) 653-4360
CELL: (214) 801-6110

Shipp  **Mediation**

ROSS W. STODDARD, III
ATTORNEY – MEDIATOR
Williams Square in Las Colinas
5215 N. O'Connor Blvd, Suite 1820
Irving, Texas 75039
P: (972) 869-2300
E: StoddardRW@aol.com
www.nadn.org/Ross-Stoddard

DEGROOTE
PARTNERS

Mediation | Arbitration | Complex Situations

For more information about the mediation practices of Ross & John, or of Chris Nolland & John DeGroot, who also contributed to the content of this paper, please see their bios in the Texas member listings of the National Academy of Distinguished Neutrals at www.nadn.org