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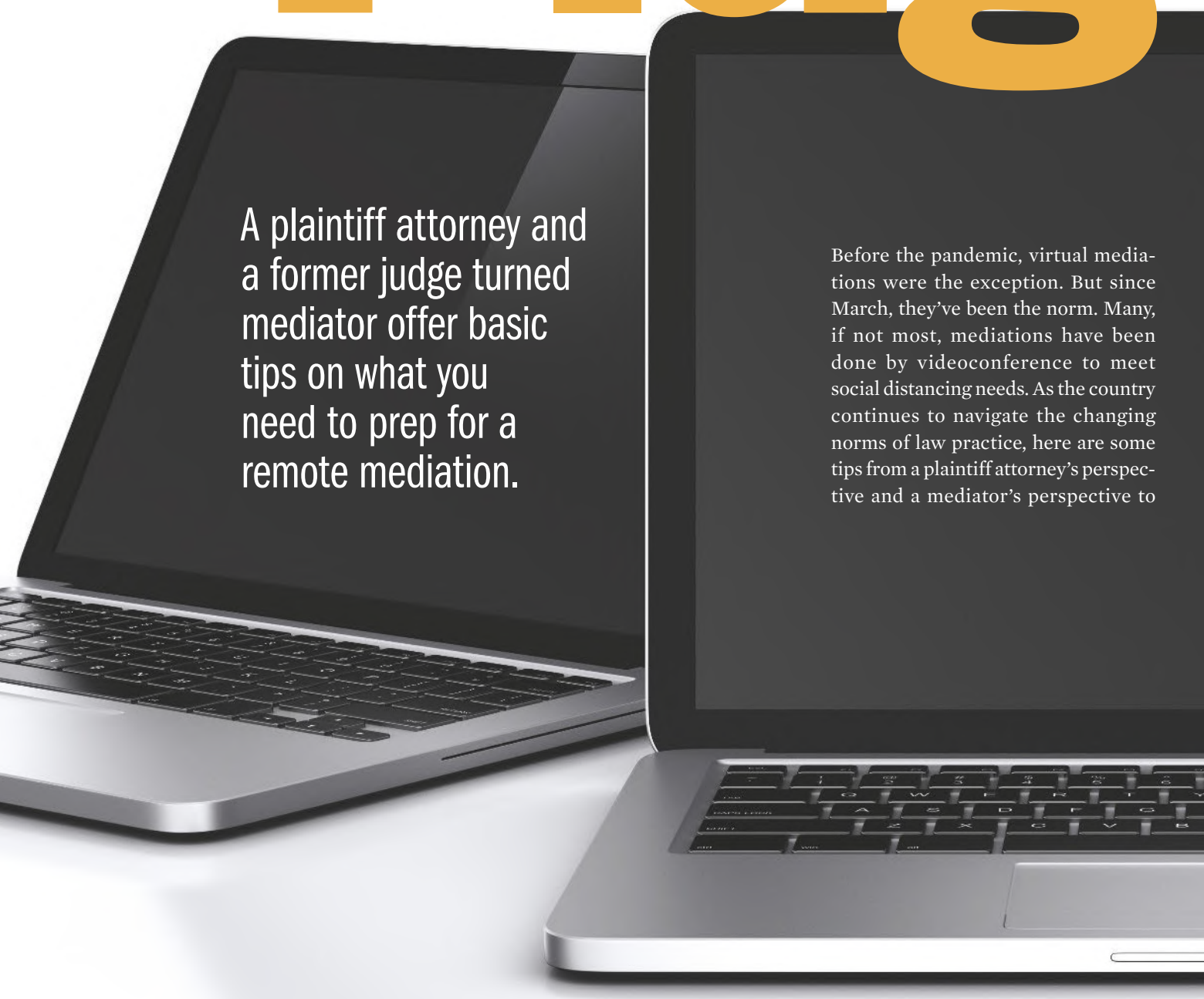

A plaintiff attorney and a former judge turned mediator offer basic tips on what you need to prep for a remote mediation.

Before the pandemic, virtual mediations were the exception. But since March, they've been the norm. Many, if not most, mediations have been done by videoconference to meet social distancing needs. As the country continues to navigate the changing norms of law practice, here are some tips from a plaintiff attorney's perspective and a mediator's perspective to

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In Virtual Mediations

help you prepare for a successful virtual mediation.

While the traditional, in-person mediation remains the gold standard, remote convening can and does work. Virtual mediation, however, must be approached with attention to certain key details. Creating an environment for substantive discussion between the parties is the most important first step.

By || **J. Kent Emison and Nancy Saitta**

A Plaintiff Attorney's Perspective

Prepare mediation materials far in advance: You must provide the defendant or insurance company with good reasons to support your client's claim. This is not unique to virtual mediations but is especially true for them—there may be fewer opportunities to elaborate or discuss your case in a virtual setting, so it's even more important for defense counsel and any insurance adjusters or in-house counsel to have your mediation materials far enough in advance.

Settlement brochure. Send a thorough settlement brochure and demand at least 30 to 60 days before the mediation. Share the settlement brochure and any other information that may be helpful to resolving the case with the mediator, and make a point to speak with the mediator before the mediation to confirm he or she has adequate information.

Client preparation. Virtual mediations require more client preparation than in-person ones. Carefully explain the mediation process to clients well in advance of the mediation, and help them set up the necessary tech.[1] They should use a laptop if possible, not an iPhone or iPad. And before the mediation, they (and you) should check the internet speed using an online speed test. Also advise them about best practices during the mediation, such as muting their line when they're not speaking.

One of the disadvantages of virtual mediations is that it is difficult for the client and the mediator to develop meaningful rapport. To help offset this disadvantage, consider scheduling a premediation videoconference meeting with the client and mediator. The client should be prepared to "personalize" themselves with the mediator. For example, in wrongful death cases, prepare your clients to describe their relationship with the decedent and their loss. In personal injury cases, clients should be prepared to tell the mediator about how their injuries have affected their life. Make sure the mediator has a chance to talk to your client and get a good idea of the client's case and loss or damages.

Appearance and background. Your client's appearance—and yours—matters in a virtual mediation, as does the video background. Try to eliminate or minimize distractions or objects that might appear or be heard on screen. Make sure that the lighting is good so your face appears well lit and that the camera is at eye level or slightly above. (Do not have the camera looking up your nose!) Do a practice run with your clients to check these items for them.

Tell your client to set aside enough uninterrupted time to devote to the mediation, without taking unrelated calls, multitasking, or allowing other interruptions.

Private communications. Arrange for additional ways to communicate privately with your client, cocounsel, and mediator. Generally, this can be done by setting up a separate videoconference link or exchanging phone numbers with the mediator in advance. Have all the contact information for your client, and test those communication methods several days in advance.

Presentation. Far in advance, confirm whether there will be time for opening statements or any kind of presentation. If so, find out whether defense counsel intends to do one.

If you do a presentation, be efficient. Know how much time you will need, and notify the mediator ahead of time. Also practice how to screen share in the platform you will be using, and organize

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your PowerPoint or any documents ahead of time in a dedicated, easily accessible folder.

A Mediator's View

Under no circumstances should anyone other than the mediator host, schedule, or control the virtual mediation. If the defendant proposes to act as the convener, politely decline, and ask the mediator to handle this situation. Now more than ever, the mediator's role requires positioning the parties in appropriate virtual "rooms." For example, if you have multiple plaintiffs or defendants, separate rooms are likely needed. Controlling the setup and technical aspects of the gathering is part of the mediator's job.

Test the technology. Do a test run of the technology long before the date set for the virtual mediation. If you and your clients are not familiar or comfortable with the remote platform, the mediation will be affected and potentially stalled. To manage that situation, the mediator will spend more time and effort on tasks that have nothing to do with resolving the case.

Premediation call and meetings. The premediation call is more important in the world of remote meetings. As always, attorneys should discuss with appropriate candor information or subtle observations that might not be provided in or obvious from mediation materials. Remember, the mediator will not have the benefit of meeting your client in person and won't be able to discern idiosyncrasies that might be recognized at in-person mediations. Preparing your mediator in advance will avoid unintended consequences.

Your mediator should be willing and available to set up a virtual meeting with your client and you before the mediation. Meeting eliminates technology phobia and can help establish the different rapport that virtual mediations require. As we know, the goal of the convening process is to gain the willing and meaningful participation of all stakeholders, and more attention must be given to this concept in the virtual world.

I like to have the parties consider holding a joint session that can be done days before the actual mediation. This allows the parties to see one another through the same platform that will be used during the negotiation process. It also provides an opportunity for introductions and questions. Of course, if visual presentations will be a part of the mediation, this is a perfect time to work out details so negotiation time is maximized.

Review goals and objectives. You must carefully consider—and potentially alter—well-recognized mediation goals and objectives to fit virtual platforms and to reflect how you and your clients are feeling due to the public health crisis.

For example, the goal of the opening session is to create a safe environment and hope that the case at hand can be resolved. While most parties want to move to virtual private breakout rooms immediately, consider whether it would be better for stakeholders to begin together in an opening room to acknowledge that they believe this form of alternative dispute resolution works—and the pandemic has not changed that.

Protect confidentiality. Most virtual platforms are secure, but be mindful of confidentiality concerns, and discuss and review how the platform maintains mediation privilege. As a practical consideration, your mediator should remind the parties not to share the invitation to the mediation. If the platform has a chat application, you may want to disable this function to protect against a conversation being inadvertently shared in one of the other rooms.

If the chat is disabled, have a line of communication open when the mediator leaves the room, such as text message or email. This allows parties to call the mediator back into the room, keeping the conversation open and productive to serve the ultimate goal: settling the case.

Map the Tech

When using a virtual platform to conduct mediations, the "one-meeting" approach is a preferred method. Typically, a neutral party will send meeting credentials to the participants. The neutral then starts the session, sets up breakout "rooms" for participants, and navigates from room to room to speak with them separately.

BlueJeans (bluejeans.com), for example, has case managers who send each side a different meeting link with a randomized nine-digit ID and passcode—meaning that plaintiff and defense counsel have completely separate IDs and passcodes for different meetings.

When the neutral party enters the room, the navigation screen lists all the different meetings for the day, and this screen is visible only to the neutral. The neutral can securely navigate from room to room because each session is locked to only those participants with a specific ID and passcode. The neutral has to "hang up" to move from room to room, eliminating the chance for human error and ensuring that all mediations conducted over videoconferencing are secure and confidential.

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Professional demeanor. During the actual negotiation process, there is a time lag when using virtual technology that everyone should be aware of. There can be a dramatic loss of personal connection every time the mediator leaves the room, but it's extremely important to maintain a professional demeanor. In remote engagements, participants often have a tendency to be less formal, which can negatively affect a virtual process far more than in-person ones.

When remote participants are left unattended in breakout rooms, they tend to wander away from their screens and be distracted. Attorneys may want to ask mediators to assign tasks or leave specific questions to be answered for when they return to keep everyone focused on certain facts or issues.

Documenting the settlement. The usual roadblocks to settlement, such as unacceptably low offers, exist in the virtual world and will similarly chill the settlement process. Although the vehicle driving the virtual mediation process has changed, the same rules apply and should be strictly enforced.

Put in place a procedure to record or document the terms and conditions of the settlement to ensure a binding agreement that clearly sets forth the complete understanding of the parties. In advance, the mediator should establish how the settlement will be documented—everything from the exchange of documents, to electronic signatures, to time lines to prepare these important documents.

Make sure to implement the same full and complete preparation as you would in person to communicate effectively in this new virtual environment.

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NOTE

1. For more on technology, see Brian D. Cook, *Get Started With Remote Depos*, Trial 16 (May 2020); Michael Patrick Doyle, *Best Practices for Remote Depos*, Trial 30 (June 2020).

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