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Mediation while keeping your (social) distance

By T. Warren Jackson

Greetings from my home in West Los Angeles, as one of the Signature Resolution neutrals; the office has been closed for over a week, following stay at home orders from both our mayor and governor. The result is considerable quality time with family members and pets and time to review law firm client alerts and bulletin board forums discussing legal questions and impacts associated with the coronavirus, COVID-19. An initial observation is that law firms, perhaps smarting from not generally being designated essential businesses or services, are routinely providing guidance from their off-site locations. There are a significant number of coronavirus employment law issues: the Families First Coronavirus Response Act, effective April 2, providing paid family and sick leave for many affected employees; new federal stimulus legislation; various state laws and executive orders extending job, layoff and pay protections; and numerous employer obligations as organizations go remote, such as expense reimbursement under California Labor Code 2802, wage and hour compliance, WARN and other layoff requirements, privacy, and cybersecurity. Notwithstanding the best efforts to give and get guidance, many of these are first impression issues, and inexorably subject employers to second guessing and future employment law litigation.

What's going to happen to the current and anticipated litigation during this stay home period? That

leads to my second observation — that ADR must continue to be a necessary tool for navigating this unprecedented disruption. Note, California Chief Justice Tani G. Cantil-Sakauye, on March 24, issued a statewide order suspending all jury trials in California superior courts for 60 days and allowing courts to immediately adopt rules to address the impact of the pandemic. Courts are doing just that. Spoiler alert — video conferencing is a practical and must do option for conducting mediations or arbitrations during this pandemic crisis, and perhaps after normalcy returns.

The concept of mediation has become an indispensable and win-win aspect of civil litigation. Generally, it's a voluntary process but mediation orders or mandatory mediation have become a routine tool in both a trial judge's toolbox and in employers' ADR procedures. The fact that nobody loses, in part due to the trope that what happens in mediation stays in mediation, has virtually eliminated historical resistance to parties suggesting and agreeing to mediation. The nuts and bolts and do's and don'ts of mediation are an integral part of legal seminars and trial symposiums. Imagine returning to a world where wage and hour class actions and employment litigation in general is resolved without mediation, or mandatory arbitration without the possibility of a hearing because of office closures. Absent creating a new normal, that dystopian existence is what we're facing with the temporary and indefinite closure of law firms and ADR platforms.

The technological tools are out there to conduct business as we've known it. The parties simply need to agree and get to a comfort zone, which even the most technologically challenged can accomplish. Frankly, I was one of the challenged; until now, I only knew Zoom as the 1977 R&B hit by the Commodores with Lionel Richie! Since closing its doors, Signature neutrals have been training for and conducting mediations through video conferencing. We've virtually captured the office experience, e.g., filing of briefs, caucus and side rooms, document sharing and finalizing agreements. The only missing elements are the meal service and live contact. Set forth below are some practical tips on making your video conference mediation as seamless as possible:

- Practice with the technology perhaps using your family members as parties in order to raise your comfort level. Focus on how to assign parties to their respective rooms, to join parties, individually and collectively, and how to travel back and forth between rooms or engage in joint sessions.

- Make sure your platform's or any technical expert is available and on speed dial to guide you through technical glitches, e.g., internet goes down, or the inevitable, at least in the early stages, operator error or panic.

- Identify the available home space that can be commandeered for a lengthy mediation session. While many of us have been video bombed during video chats, we may need to protect the uninitiated from the decibel levels and

NSFW language that can accompany mediations.

- Prior to the session or at outset, prepare your parties for the turbulence which may occur. Although the technology includes chat features for private discussions, I recommend exchanging mobile phone numbers to facilitate private communication such as we're ready to see you now.

- Identify any documents that you or the parties may want to share so they're ready to be shown.

- Make best efforts to maintain composure, calm and patience when the unexpected or frustration happens.

Even after we get the "all-clear," going forward video conferencing can expand neutrals' footprints by eliminating the time and cost of remote travel by parties or the mediator. While, hopefully, our new normal will not include swiping right (or is it left or both?) through virtual platforms to select mediators, shuttered and clogged courthouses, the prospect of new and interesting claims and pent-up demand for settlement require action. We can do this! As Lionel wrote, "zoom, zoom...don't you wanna go." ■

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