

Scheinman Arbitration and Mediation Services

From: Outten, Wayne <wno@outtengolden.com>

Sent: Sunday, May 3, 2020 1:36 PM

Subject: Remote/virtual mediation

****External Email****

Hi all,

See the excellent memo below posted recently by Marty Scheinman, renowned mediator, to his Cornell group about a recent multi-party Zoom mediation.

Wayne

~~~~~

Scheinman Arbitration and Mediation Services ("SAMS") conducted a multiparty mediation involving claims under federal, state and local law alleging sexual harassment, disparate and unequal pay practices and discrimination on the basis of a medical condition. The Plaintiff attended and was represented by two (2) attorneys, the Corporate Defendant was represented by two (2) in-house attorneys and two (2) attorneys from an outside law firm and an individual Defendant attended represented by separate Counsel. The nine (9) participants were each in their own homes, spanning geographically three (3) states and eight (8) different counties. Given the complexity of the matter, the SAMS team was led by me with my colleagues Barry Peek, Esq, and Tim Taylor, Esq. fully participating from their homes hundreds of miles apart

The way we do it as host, for those unfamiliar with the platform, is to have each participant respond to a link invitation from SAMS. The individual enters a virtual Waiting Room. A message welcomes them indicating they'd be admitted soon. While in the Waiting Room, there is no way to see or communicate with any individual and the people are unaware of anyone else being in the Waiting Room. This is wonderful as it avoids the awkwardness of having to share an actual Waiting Room with someone you do not want to see (particularly helpful in a claimed sexual harassment case).

Individually, the host brings a participant into the mediation, explaining he or she is being placed into their appropriate caucus room (breakout room) and will not be seeing the other side without agreement. One-by-one the Plaintiff and the Plaintiff attorneys were placed into their caucus room as was done with the Defendants' side. Additionally, separate caucus rooms were established for each set of attorneys, the mediators and for individual attorneys in case they wished to consult privately with a client. This placement process took about three (3) minutes.

I, or the three (3) mediators, moved between the caucus rooms, pulled out attorneys for side-bars and had different one-on-one meetings when needed. There is notice to the party the mediator(s) are entering so there is no concern about interrupting or overhearing what was going on in a caucus. Also, the individual has to consent to being moved to a different meeting which also assures confidentiality.

Through the miracle of DocuSign, at the conclusion, we had a Memorandum of Understanding signed by all principals - some of which were not present at the mediation

Here's my analysis using this case as the example

Disadvantages: 1) Although you can have tremendous eye contact, I did miss the ability to assess the full body language of certain people. You need to be more attuned to facial and body reactions to measure anxiety and emotion. 2) We had difficulty with connecting one (1) of the participants. That person had to change from iPhone to his iPad. We were delayed ten (10) minutes in order to have this resolved. 3) If someone lacked high quality internet service, this would not have worked as well. 4) Without the pressure to "get home", I sense some participants were a bit slower in getting to their end positions since they need not factor in travel time from the mediation site to their residences. I speculate this, and the fact people were attending to private matters at their homes; which meant we lost two (2) participants for about half an hour each, may have elongated the process for about an hour.

Advantages: 1) The privacy was better than in-person mediation. Even in our Mediation Center, built expressly for these type of cases, staff has to monitor to assure people that do not want to encounter each other not go into the Waiting Area together, or use the bathrooms area or kitchen at the same time. In certain cases, staff has to make sure the blinds are drawn so people cannot see each other. All of this is avoided when mediating on-line. The host can assure there is no "bumping" into someone or overhearing a conversation. 2) In an in-person mediation, when a side is ready for the mediator(s), someone has to find or ask for the mediator(s). Sometimes I hear "we were waiting for you, we thought you were going to just come back in". In this process, there is no delay. The side simply indicates they are ready for the mediator(s). A prompt comes onto the mediator(s) screen(s) and then immediately the mediator(s) enter the caucus room. 3) It is often the case a party needs to attain buy-in, authority or reassurance from someone not in attendance, e.g., an insurance adjuster, an officer of the organization or a spouse, significant other or partner. Inevitably, attendees are asked by those not in attendance for the viewpoint, comments or assessments of the mediator(s). Often those at the mediation indicate they wish the absent person could have heard directly from the mediator(s), rather than having to relay what had occurred to the non-attendee. When this happens during in-person mediation, the usual course is a telephone call wherein the mediator(s), if asked, talks to the non-present person. Its an off-line conversation. During this mediation, the need for an outsider happened twice. Once was someone that might shed light upon a reported conversation. The second was a principal being asked for more authority to settle. Both times, we sent a link and had that person join the relevant caucus. The mediators were able to hear the potential witness story and assess its import. As to the person necessary for additional authority, that individual was now "in" the mediation, able to ask questions of everyone there as well as the mediators. That principal commented, hearing directly from the mediators "changed" the Defendants' perception of the case. The principal's presence - which could never have been possible in real time in an in-person mediation - was crucial in getting to a deal. 4) As previously mentioned, after the usual give and take in drafting the Memorandum of Understanding, a fully executed document was signed incorporating people throughout the country. 5) This process was extremely cost effective. It saved travel costs and travel time for about ten (10) people, as well as billed mediator travel time.

Thus, I am persuaded the advantages FAR outweigh the disadvantages.

Future: 1) Certainly, in the near term, while we all dealing with Covid-19, we will be doing mediations, for willing parties, on-line. The comfort of our experiences to date, will, I suspect, persuade parties to

"give it a try". SAMS will pause a process that seems unsatisfactory and re-schedule to another date for an in-person session, if a party or a mediator feels its not going well because of the format. 2) As many of you know, due to scheduling difficulties, and my general aversion to flying (especially now), I usually decline requests to mediate outside the New York tri-state area. However, this experience of mediating on-line, which has been so successful for all concerned, has caused a reevaluation. From now on, if parties are unwilling or unable to travel to the New York area, I will gladly schedule a matter on-line with parties regardless of where they are located. We have just scheduled a matter where several people are located in Europe. The technology also opens up potential dates otherwise unavailable when I am away for a period of time.

My e-mail address has changed to:

[martin.scheinman@scheinmanneutrals.com](mailto:martin.scheinman@scheinmanneutrals.com)<<mailto:martin.scheinman@scheinmanneutrals.com>>

Please update your records, accordingly.

Wayne N. Outten | Chair

685 Third Ave 25th Floor | New York, NY 10017 T 212-245-1000 | F 646-509-2050

[WNO@outtengolden.com](mailto:WNO@outtengolden.com) | Bio<<http://www.outtengolden.com/lawyer-attorney/wayne-n-outten>>>

This message is sent by a law firm and may contain information that is privileged or confidential. If you received this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

Please consider the environment before printing this e-mail.