

**VIDEO MEDIATIONS OF EMPLOYMENT CLAIMS  
IN A POST-COVID WORLD**

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## **The Question**

- “Social distancing”
- “Wear your mask”
- “Stay at home”
- Don’t touch anyone”
- “Isolation is key”

Is there even a glimmer of hope with these COVID-19 rules in this brave new world that emotionally-charged matters like employment cases can be mediated successfully with no face-to-face, one-on-one, look-them-in-the-eye activity by the mediator? Many thought the answer was “no”, but as our social and professional isolation has lingered on, happily, the answer is “yes”. While in-person mediations are preferred (with some notable exceptions, discussed below), many very emotional employment law cases have been resolved through video mediation. [Telephone mediations, on the other hand, possess none of the qualities necessary for a successful settlement].

## **How Does it Work?**

In the more than 100 employment law mediations I have conducted after “stay at home” became the norm, I have used Zoom. I have a license through my firm for the paid program, which

allows extra security/privacy measures, unlimited participants and time for “meetings”, and most importantly, breakout rooms.

All participants’ email addresses are provided to the mediator, so that a Zoom invitation can be issued to all through Microsoft Outlook (or other similar calendar tool), with meeting ID and password for further security. Cell numbers are exchanged so that attorneys can contact the mediator easily by phone or text when they are ready for her or his return, or if needed for any other reason.

Attached is a sample mediation agreement (for state court-ordered mediations) which contemplates in person or video mediation.

As anyone who has mediated with me, or heard me talk about mediations, knows, in the more than 900 mediations I’ve done over the past 18 plus years, except for a handful (in which the participants (foolishly) insisted upon a joint session), none have involved a joint session. Therefore, from the start, separation of the parties is critical, and that is true of video mediations as well.

First, for security and privacy reasons, a waiting room is utilized. All participants remain in the waiting room (where, unlike in-person waiting rooms, they have no chance of seeing each

other) until the mediator (host) lets them into the main room. This can be done easily, so that the two (or more) sides are never together. Each side is then moved to their designated breakout room, where they can see and hear each other in a confidential room, just as if they were in a conference room. The mediator then easily moves from one virtual breakout room to the other (and, if necessary, can easily create additional rooms for separate discussions with counsel, different defendants, each plaintiff with his or her counsel in a multi-plaintiff case, and the like). When the parties want to talk alone, the mediator leaves the breakout room and goes back to the main room.

Participants universally have praised Zoom mediations as being efficient, almost as “personable” as in person, and serving a useful function in resolving employment claims. The few that have not settled would not have settled, even if conducted in person. Sadly perhaps, some participants have indicated that they prefer video, not necessarily because of COVID concerns or governmental requirements, but because they can do other things when not talking to the mediator, and participate from long distances without having to travel, or be on the phone. In cases involving particularly sensitive issues, such as sexual assault or cases with minor plaintiffs, some attorneys believe that video mediation is emotionally easier for the plaintiffs.

As time marches on, with no end in sight back to “normalcy,” and the possibility that “normal” will never be again, the need to be adaptable, creative and open-minded has become critical. Video mediations are an excellent way to resolve cases in this difficult climate, as both employees and employers, plaintiffs and defendants, conserve their energy and resources for more critical battles.<sup>1</sup>

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<sup>1</sup> Maureen S. Binetti is the Chair of the Employment Law Department of Wilentz, Goldman & Spitzer, P.A., a Certified Civil Trial Attorney, and a state-approved mediator who has mediated more than 900 employment law and related claims.

## **AGREEMENT FOR MEDIATION**

Mediation of the dispute in the matter of \_\_\_\_\_ shall be conducted generally in accordance with the following terms and conditions:

### **Mediator**

The mediator shall be Maureen S. Binetti, Esq.

This mediation will be conducted by the mediator through Wilentz, Goldman & Spitzer, P.A., at our offices located at 90 Woodbridge Center Drive, Woodbridge, New Jersey 07095, or by zoom video conferencing, if in person mediation is not permitted, or if the parties agree to utilize video conferencing. The mediation shall take place beginning at 10:00 a.m. on \_\_\_\_\_

### **Mediation Procedure**

The mediation constitutes a mutual and voluntary proceeding in the nature of settlement negotiations. The mediator shall act as an intermediary or facilitator to bring about an amicable resolution and settlement of the matters in dispute on a mutual and voluntary basis. In performing this function, the mediator shall not act or exercise any authority as a judge or arbitrator and shall not render any legal advice or legal counsel.

The conduct of the mediation shall be pursuant to standard mediation procedures and practices in accordance with guidelines or rules as may be determined by the mediator with the full consent of the parties. The rules of court and procedures applicable to courts, administrative agencies, and similar tribunals may provide guidance but shall not be formally invoked or followed in the mediation proceeding.

The mediator may conduct both joint and separate or caucus meetings with the parties with or without counsel present. Information obtained by the mediator through a caucus meeting shall not be

disclosed to the other party or parties unless the participant-party agrees that it may be disclosed in order to facilitate the mediation process.

If the mediation is conducted through zoom video conferencing, in advance of the mediation, the parties and counsel shall download and install the zoom software on their computer (which will need to have a camera and microphone) or the zoom app on their cellphone. Only the free plan/account is needed for counsel and the parties to participate. Counsel shall provide email addresses for all participants on their side for the mediation, and all will receive a zoom invitation through Outlook for the mediation. The invitation will have a link to the zoom meeting, a meeting ID number, and a password. The mediation will be passworded, and other mechanisms will be utilized, to maximize the privacy of the mediation process, although no process is foolproof.

In this regard, it is important to use a secure WiFi or Ethernet connection, not a public one. Only counsel and the specific clients who have received the online zoom invitation may be present in the rooms created on zoom. All participants should ensure that they are alone and cannot be overheard. Participants should be in an uninterrupted mode during the mediation and turn off or silence other devices.

To aid in privacy, the mediator will enter the zoom meeting first, and all participants will be held in a waiting room until the mediator admits them. Each side will be admitted separately, and moved into their virtual breakout room, where they can see and hear each other, but will not be seen or heard by anyone else. The mediator will go in and out of the breakout rooms, just as would be the case if the mediation were held in person at the mediator's offices. When the mediator is in a breakout room with one party, the other party will not hear or see them, and they will not be heard or seen. If at any time, any participant can hear what is intended to be a private communication (including attorney/client communications), or if any person enters the mediation who is not an authorized participant, the zoom session must be immediately terminated and the mediator contacted at the cell number to be provided at

the mediation. Cell phone numbers of counsel shall be provided to the mediator to facilitate communications during the mediation.

### **Confidentiality of Mediation Information and Proceedings**

No formal record of the mediation proceedings shall be made or maintained. There is an absolute prohibition against recording any aspect of the mediation process.

Formal rules of evidence shall not be applicable to the mediation proceeding. Any information offered and disclosed in the course of mediation, including oral statements and written documentation, shall be deemed to be confidential and inadmissible in any judicial, administrative or similar proceeding, unless previously disclosed to or known by a party, or otherwise discoverable. The mediator shall not be required to respond to any subpoena or to testify or produce records, notes or work product arising from the mediation in any other proceedings. **The parties agree that nothing that occurs during the course of the mediation process shall be asserted in any way as a basis for a claim, including, but not limited to, any claim of retaliation.**

### **Compensation, Fees and Expenses**

This mediation shall be governed by the New Jersey court-ordered mediation rules, including the two free hours (1 hour of pre-mediation services, 1 hour of mediation) to be given to the parties under those rules. Thereafter, all compensation for the mediation shall, in accordance with the court-ordered mediation rules, be paid 1/2 by plaintiff and 1/2 by defendant. It shall be payable on termination of the mediation and shall be the responsibility of the parties and their attorneys.

Fees for mediation services shall be charged at the rate of \$\_\_\_\_\_ per hour.

### **Termination of Mediation**

The mediation shall be terminated: (1) on the amicable settlement between the parties of the matters in dispute covered by the mediation; (2) by the final decision of the mediator that continued



mediation is futile; or (3) by the declaration of any party that it no longer wants to continue mediation and is satisfied that the mediation be terminated.

We agree to the terms and conditions of mediation.

By: \_\_\_\_\_

Attorney for Plaintiff

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Attorneys for Defendant

Dated: \_\_\_\_\_