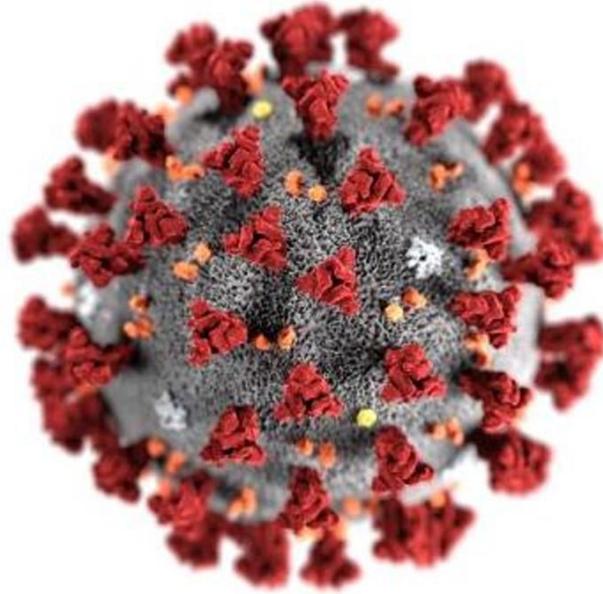


Mediating in the shadow of Covid-19



A presentation for Court Volunteer Mediators

by District Judge / Mediator David Lim

State Courts Centre for Dispute Resolution

5 June 2020, 9.30 am

Mediating in the shadow of Covid-19

Covid-19 pandemic

- Major disruptions in human activities.
- Implementation of safety measures.
- Curtailment of face-to-face interactions.
- Revamp of interactive work processes.
- Rise in use of video conferencing / virtual interactions.



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Covid-19 pandemic

- **Creation of “new normal”.**
- **Extension of safety measures.**
- **Predicted resurgence.**
- **Residual fear & paranoia.**



1. **What kinds of disputes will Covid19 bring about?**
2. **How would post Covid19 circumstances affect mediation?**
3. **How could mediators adapt their techniques to remain effective?**

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Covid-19 pandemic

- Likely increase in –
 - Contractual disputes;
 - Employment;
 - Tenancy.
 - Harassment complaints;
 - Neighbour disputes;
 - Domestic violence.
- Likely for cases to go for mediation because of –
 - Post CB financial strain;
 - Difficulties in preparing for trial;
 - Preference for virtual, expedient & inexpensive ADR modalities.



Mediating in the shadow of Covid-19

Online mediations



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Face to face mediation in post Covid19 era

- **Parties without computer facilities or know-how for online mediations.**
- **Wearing of masks & safe distancing.**
 - **Limited view of facial expression.**
 - **Harder to hear each other.**
- **Greater reliance on listening.**
- **Need for everyone to speak louder, slower and more clearly.**



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Benefits of online mediation

- **Convenient to schedule / set up.**
- **All involved can participate from their own locations.**
 - **No need to commute.**
 - **Familiarity, comfort & convenience.**
- **Indisposed / physically impaired parties can conveniently participate.**
- **No idle time during other party's private session.**



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“ZOOMediation”



Features most suitable for mediation:

- **Simple to set up & use;**
- **Customisable privacy settings;**
- **Breakout rooms for private sessions;**
- **Document sharing & annotation;**
- **Online whiteboard.**

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Online mediation issues

- **Application**
 - **Cyber security.**
 - **Loss of connection.**
 - **Poor image or sound.**
- **People**
 - **Comfort with virtual communication.**
 - **Self-consciousness.**
 - **Disclosure of intimate information**
- **Process**
 - **Communication dynamics.**
 - **Working with interpreters.**
 - **Confidentiality.**
 - **Settlement agreements.**



Mediating in the shadow of Covid-19

Application Issues:

Cyber security

- **Hacking / data theft / breach of privacy / spoofing.**
- **Can occur with any online videoconferencing application.**
- **Many risks already addressed by manufacturer.**
- **Access controls:**
 - **Passwords;**
 - **Personalised invites / links;**
 - **Waiting room;**
 - **Locked meetings;**
 - **Latest security patches.**
- **S.O.P. for CVMs**
 - **Instructions for response to cyber attacks**



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Application Issues:

Loss of connection

- **Internet outage.**
- **Tripping of electrical circuit breaker.**
- **Poor wifi signals.**
- **Faulty setup or equipment.**
- **Computer hanging.**

- **Pre-mediation technical instructions for connecting, etc.**
- **Backup plan:**
 - **Upfront technical instructions in case of disconnection.**
 - **Helpline for parties to call.**
 - **Fall back communication plan.**
 - **Stand down or adjourn.**
- **S.O.P. for CVMs**



Mediating in the shadow of Covid-19

Application Issues:

Poor image or sound

- **Lighting and camera angle.**
 - **Background noises.**
 - **Quality of equipment & set up.**
-
- **Make adjustments for the best results.**
 - **Do the best to make the best:**
 - **Does the visual image matter?**
 - **Instruct party to speak slower, louder, clearer, etc.**
 - **Use chat, whiteboard, document sharing & annotation features for clarification.**



Mediating in the shadow of Covid-19

People Issues:

Familiarity & comfort with videoconferencing

- **Self Consciousness.**
- **Effect on communication.**
- **Mediator's awareness & self-awareness.**

- **Discomfort with sharing intimate information online.**



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Process Issues:

Communication dynamics

- **Mediation = facilitated negotiation to resolve a dispute.**
- **Face to face interaction:**
 - **Physical presence**
 - **Rapport, trust and cooperation;**
 - **Personal communication;**
 - **Better understanding;**
 - **Repairing relationship;**
 - **Conciliation & collaborative problem solving.**

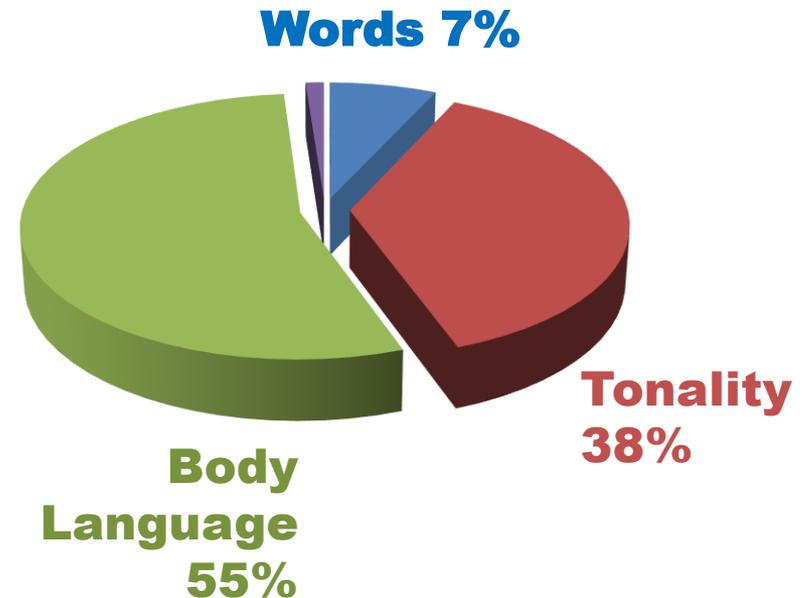


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Process Issues:

Communication dynamics

- **Non-verbal communication:**
 - **eye contact;**
 - **facial expressions;**
 - **tonality;**
 - **body language;**
 - **gestures;**
 - **demeanour;**
 - **emotional energy.**



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Process Issues:

Communication dynamics

- **Dynamics of virtual communication:**
 - **No physical presence.**
 - **Limited view of parties.**
 - **Hard to observe body language.**
 - **Compromised tonal & emotional nuances.**

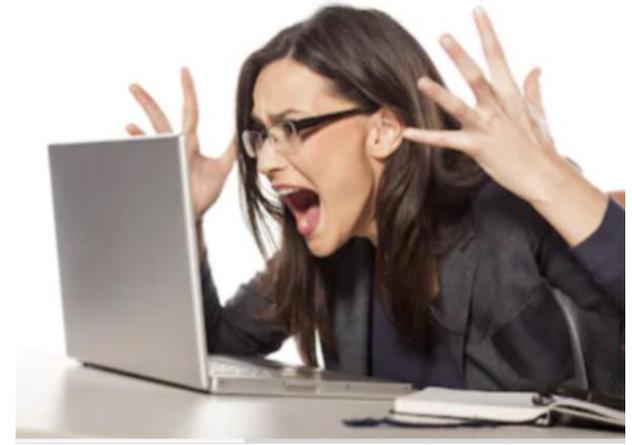


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Process Issues:

Communication dynamics

- **Observations:**
 1. **Virtual transmission of verbal & non-verbal messages.**
 2. **Connection from virtual face to face communication.**
 3. **Effect of virtual distance on venting of emotions.**

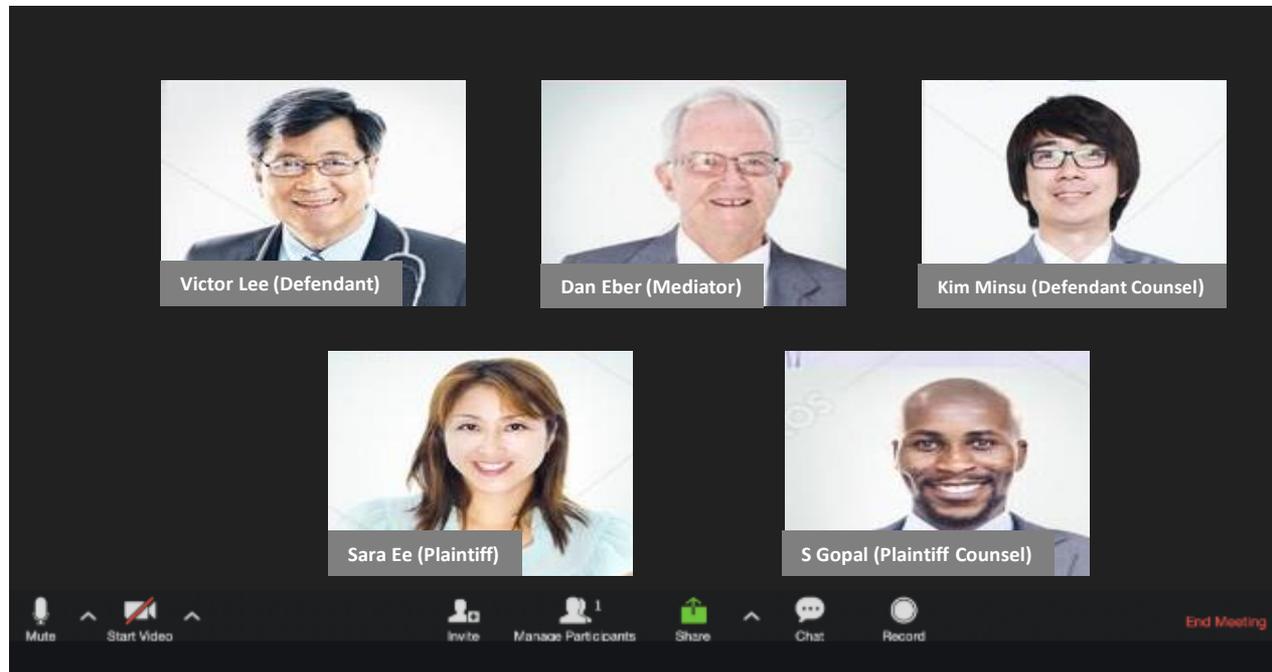


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Process Issues:

Communication dynamics

1. Ensure everyone can see and hear each other clearly.
2. Build good virtual rapport.

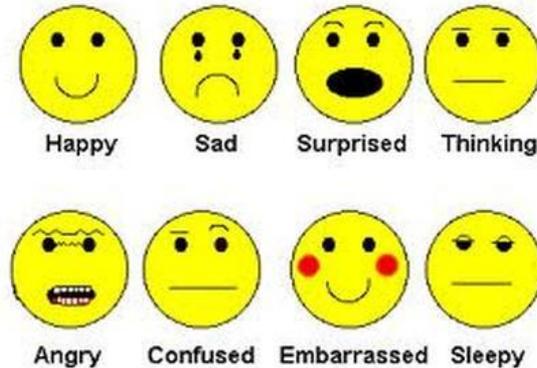
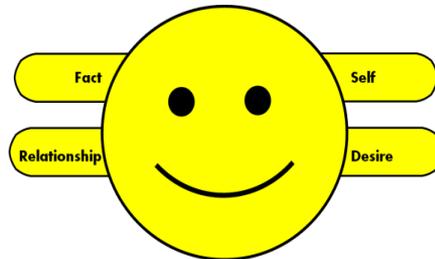


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Process Issues:

Communication dynamics

3. Be at ease & put everyone at ease.
4. Set and maintain ground rules for orderly communication.
5. Be extra focused & attentive to verbal & non non-verbal cues.

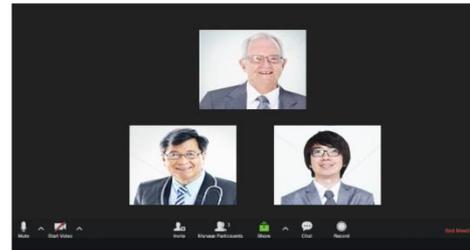


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Process Issues:

Communication dynamics

6. Use questions, summaries, paraphrases, and reflections to seek clarification.
7. Use shuttle mediation if it helps.



8. Focus on resolving the dispute.

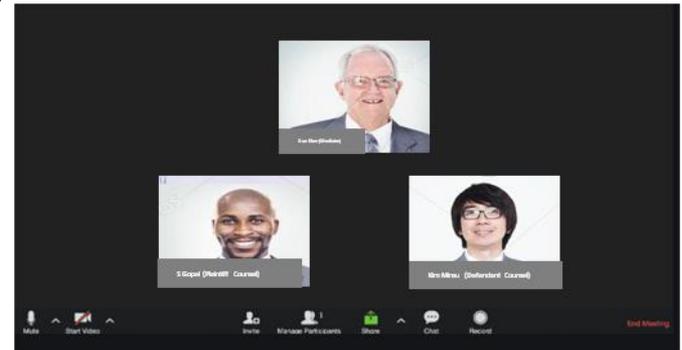
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Process Issues:

Communication dynamics

9. Pre-mediation conference with lawyers.

- information about the case;
- concerns and positions;
- relational and emotional dynamics;
- negotiation history;
- current gap;
- possible areas for constructive discussion;
- mediation strategies;
- settlement options;
- guidance for preparing clients.



Mediating in the shadow of Covid-19

Process Issues:

Working with interpreters

- **Inclusion of interpreter in the meeting.**
 - **Main & private meetings.**
- **Style of interpretation.**
 - **Simultaneous;**
 - **Consecutive;**
 - **Too many persons speaking at the same time.**
- **Mediating in non-English language / mixed languages.**
 - **Working fluency;**
 - **Comfort level;**
 - **Pragmatism / expediency;**
 - **Rapport & understanding;**
 - **Interpreter as standby assistant.**
- **Briefing the interpreter.**



Mediating in the shadow of Covid-19

Process Issues:

Confidentiality

- **2 aspects:**
 - **Proceedings are private and confidential (i.e. no audience or media present).**
 - **Mediation communication must be kept**
- **Legal basis:**
 - **§. 9 Mediation Act 2017 not applicable to court mediations.**
 - **Practice Direction 34(8).**
 - **Agreement between parties.**



Mediating in the shadow of Covid-19

Process Issues:

Confidentiality

3 Concerns in online mediation:

- **Unauthorised disclosure of mediation communication**
- **Recording by parties.**
 - (using application feature or separate device).
- **Presence of hidden non-party.**



Mediating in the shadow of Covid-19

Confidentiality

- **Unauthorised disclosure:**
 - **Mediation Act does not apply to court mediations.**
 - **Mutual agreement**
 - **Confidentiality clause in settlement agreement.**
- **Recording by parties:**
 - **Practice Direction 34(8): contempt of court.**
 - **Mediator's Opening Statement.**
 - **Lawyers' assistance.**
 - **Activate Zoom function to prevent recording.**
- **Presence of hidden non-party:**
 - **Party to specify persons attending the mediation.**
 - **Lawyers' assistance.**
 - **Mediator to confirm whether any other person is present.**
 - **Include the person:**
 - **Consent of other party;**
 - **Private caucus;**
 - **Duty of confidentiality;**
 - **Ally / instigator.**



Mediating in the shadow of Covid-19

Process Issues:

Recording of settlement agreements online:

- **Written vs oral agreements.**
- **Represented parties:**
 - Lawyers may help in drafting, signing & tendering.
- **Unrepresented parties:**
 - Inappropriate for them to draft;
 - Inappropriate for represented party's lawyer to advise unrepresented party;
 - Mediator's role to draft / explain.
- **Signing of agreement:**
 - Limitations of Zoom features.



Mediating in the shadow of Covid-19

Settlement agreement saved as screenshot of annotated document on Zoom

The screenshot displays a Zoom meeting window with a Microsoft Word document open. The document content is as follows:

MC26352/2020

In full and final settlement of the Plaintiff's claim and the Defendant's counterclaim, the Plaintiff Sara Ee and the Defendant Victor Lee hereby agree as follows:

1. The Defendant shall pay the Plaintiff the sum of \$15,000 within 7 days from today.
2. The Plaintiff shall return to the Defendant within 7 days from today all the Defendant's documents as are listed in paragraph 7 of the Defendant's Defence and Counterclaim.
3. Each party shall bear its own costs.
4. The parties shall file their respective Notices of Discontinuance within 14 days from today.

Signed this 29th day of May 2020

[Handwritten signature]
Sara Ee (Plaintiff)

[Handwritten signature]
Victor Lee (Defendant)

The Zoom interface on the right shows three participants: Dan Eber (Mediator), Sara Ee (Plaintiff), and Victor Lee (Defendant). The Zoom control bar at the bottom includes Mute, Stop Video, Invite, Participants, Share Screen, Chat, Record, Reactions, and Leave Meeting.

Mediating in the shadow of Covid-19

Settlement agreement saved as screenshot of document with agreement in chat box

The screenshot displays a Zoom meeting interface. On the left, a video gallery shows three participants: Dan Eber (Mediator), Sara Ee (Plaintiff), and Victor Lee (Defendant). The main window shows a Microsoft Word document titled 'Document1 - Word' with the following text:

MC26352/2020

In full and final settlement of the Plaintiff's claim and the Defendant's counterclaim, the Plaintiff Sara Ee and the Defendant Victor Lee hereby agree as follows:

1. The Defendant shall pay the Plaintiff the sum of \$15,000 within 7 days from today.
2. The Plaintiff shall return to the Defendant within 7 days from today all the Defendant's documents as are listed in paragraph 7 of the Defendant's Defence and Counterclaim.
3. Each party shall bear its own costs.
4. The parties shall file their respective Notices of Discontinuance within 14 days from today.

On the right, a Zoom Group Chat window is open, showing a conversation:

From Me to Everyone
MC 23652 of 2020 (Mediation-150520)
Dear Sara, Victor
If you agree with the terms of settlement as shown on the screen, please signify your agreement by replying with "I confirm that I understand the terms and that I agree to them".
As I have explained to you, once you signify your agreement, it means you are willing to be, and will be, bound to comply with the terms.

From Sara Ee to Everyone
I confirm that I understand the terms and that I agree to them.

From Victor Lee to Everyone
I confirm that I understand the terms and that I agree to them.

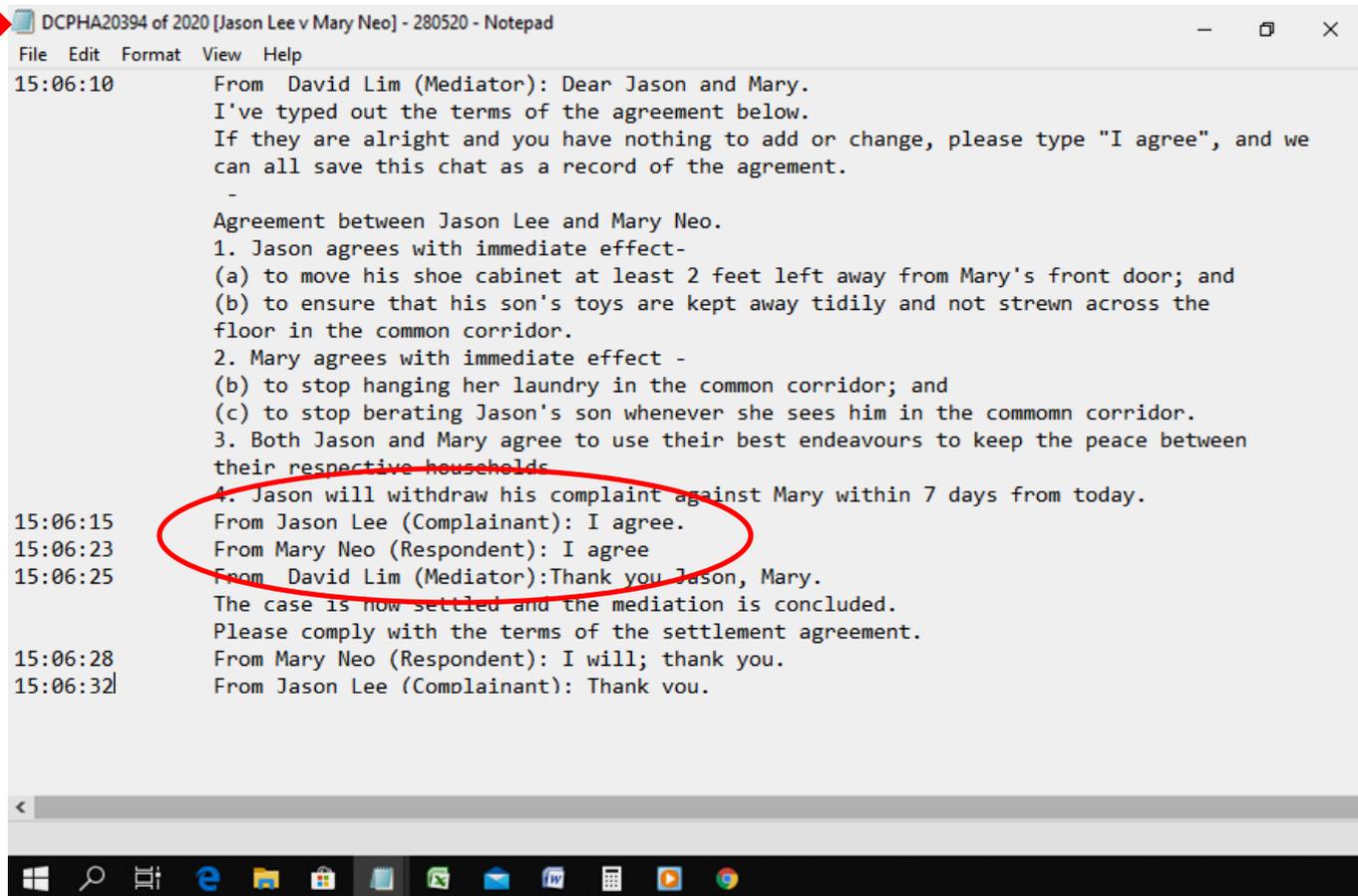
From Me to Everyone
Thank you, sara, Victor.
The matter is settled.
You may wish to take a screen shot as a record of the settlement.

The chat messages from Sara Ee and Victor Lee are circled in red. The Zoom meeting controls at the bottom include Mute, Stop Video, Invite, Participants (3), Share Screen, Chat, Record, Reactions, and Leave Meeting.

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Settlement agreement saved as Zoom chat:

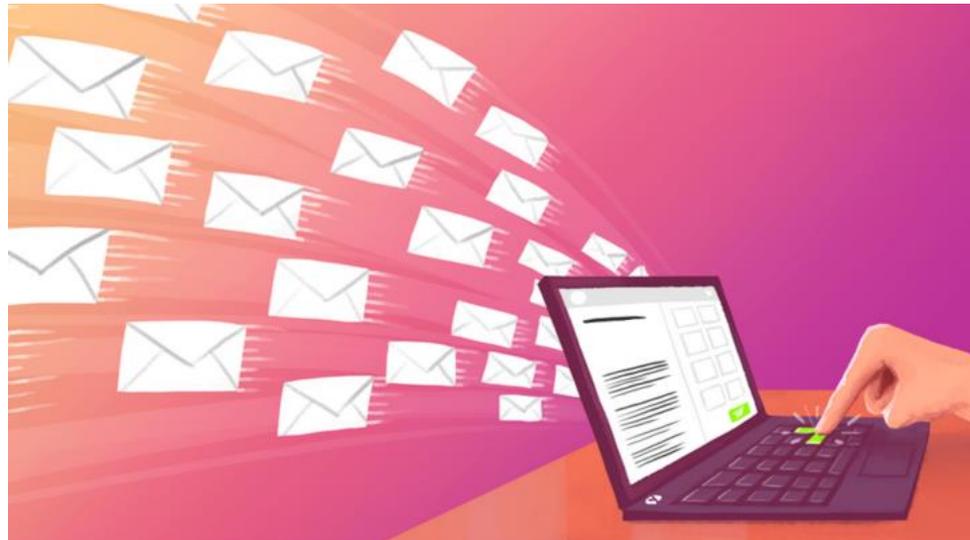
Note:
Saved chat
file can be
renamed
for
proper
record.



Mediating in the shadow of Covid-19

Recording settlement by email:

- Mediator emails finalised draft agreement to parties.
- **Parties reply within stipulated time with their agreement.**
- Email chain forms record of settlement.
- **Requires use of separate email platform.**
- Works best for sufficiently tech-savvy parties.
- **Requires commitment from parties.**



Mediating in the shadow of Covid-19

Professionalism

- **Attire & appearance.**
- **Environment.**
- **Interruptions & distractions**
- **Appropriate background**
 - **Judiciary's virtual backdrop**
 - **Plain backdrop.**



Mediating in the shadow of Covid-19

Self care



“Taking good care of YOU means the people in your life will receive the best of you, rather than what’s left of you...”

(Carl Bryan, tennis coach)

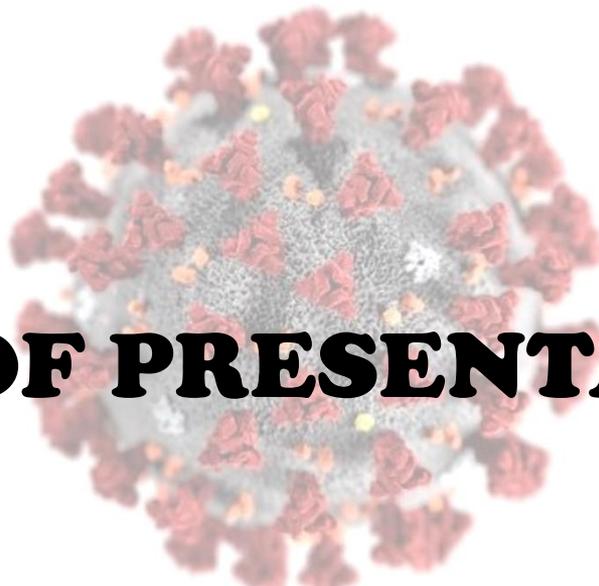
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Conclusion

- 1. Learn to use the application well.**
- 2. Learn to be comfortable with virtual communication.**
- 3. Know the changes & limitations in communication dynamics and how to mitigate them.**
- 4. Be mindful of the practical issues & limitations and how to address them.**



Mediating in the shadow of Covid-19



END OF PRESENTATION

Questions?
Comments?

