



## Give Peace a Chance – Virtual Mediation Works!

By Katy Miller

I am sure all of you have taken your clients to mediation in order to help get your cases settled, right? You present yourself with your client at the Mediator's office door to be led into one conference room while your opposition is led into another conference room. You pour yourselves a cup of coffee while you wait to begin. In most cases, your Mediator meets with you to get to know your client a bit. The Mediator then meets with the opposition to do the same thing. The Mediator often goes back and forth between conference rooms discussing the factual and legal issues, conveying offers and demands, and expressing opinions in varying detail.

Sometimes the parties or the Mediator want to conduct a joint introductory meeting or even a joint conference later in the day after certain agreements have been reached. Sometimes lawyers are called into a separate room with the Mediator to speak to each other without their clients, or sometimes the Mediator may want to facilitate a conversation only with the claimant and the decision-maker on the employer's side to talk about what went wrong. These are all scenarios that arise not infrequently in the traditional mediation model.

Ultimately, using all the tools available, the Mediator facilitates negotiation of all terms to a written agreement which is prepared and ultimately signed before anyone leaves.

But what happens now in the era of coronavirus and social distancing? How do you participate in peace-making (mediation) when many offices are closed, including the courts?

**Virtual mediation**, or mediation on-line, is actually easier than you may have realized and has wide-reaching benefits you might consider even after the days of stay-at-home orders.

### A. What are the Benefits of Virtual Mediation?

As I write, Governors across the United States have issued stay-at-home orders in an effort to combat the coronavirus pandemic. My office is largely closed, as I am sure is true for many of you. By the time you read this, the stay-at-home order may have been lifted, at least partially. But the situation causes one to think about the benefits of conducting mediation in a different way.

For example, there is clearly a benefit if parties and attorneys do not have to travel beyond their homes or offices. Parties attending a day of mediation normally have to take time off work which is even more difficult when they have to travel. Many parties are represented by attorneys, or have insurance adjusters, who live and work out of state. For these professionals to travel to a mediation is expensive, not only due to the cost, but the time spent for the mediation can increase significantly due to the travel. Long distances make it more difficult to bring the employer representatives, an attorney's support personnel, or an employee's spouse, especially when more than one day is required to attend the mediation. And while attorneys and litigants in Denver and surrounding areas have a wide choice from which to select experienced mediators, those in smaller rural or mountain communities do not have such a choice making travel the norm. Even if the mediator is the one who travels to where the parties are located, doing so clearly drives up the cost. Virtual mediation can greatly reduce the cost and inconvenience of traveling to mediation.

Another benefit is the separation virtual mediation creates between the parties. There are frequent situations where the parties really prefer not to, or even fear, running into each other during the course of the mediation. Employers may have strong feelings of anger or betrayal when a long-term employee brings a claim of discrimination; an alleged victim of abuse or harassment may fear coming into contact with the alleged perpetrator in the lobby of the Mediator's office or the restroom; an employee of a small company who babysat the owner's kids or often socialized with co-workers may feel very estranged from, and uncomfortable around, the company representatives. Or perhaps the attorneys have had a contentious relationship during discovery and prefer not to even shake hands with the opposition. The separation created by being in separate physical locations can actually make participants more comfortable with the mediation environment which will occur over several hours if not a full day.

And certainly, in this day of social distancing, conducting a mediation without the need to sit for hours in

the same physical location with others may have a clear health benefit. You can comply with the stay-at-home orders while fulfilling your client's needs to resolve the legal dispute in which he or she is embroiled. So how does virtual mediation work?

## B. How Does Virtual Mediation Work?

Virtual mediation is actually easier and less expensive than you might think. Anyone with an internet-accessible device and dependable broadband can attend.

In my office, we use the Zoom platform<sup>1</sup> but there are other similar applications available. There is no cost to you or your clients to access the link. All you have to do is download the app or whichever provider is being used, and away you go! I will describe the process using Zoom since that is what we use. Other apps may have a slightly different process.

First, a few days before the day of mediation, my office will send a link for you and your client to use to access the process. You and your client can be in separate offices. All that is needed is a strong internet connection, an electronic device with a camera and microphone, and privacy. We will discuss at your pre-mediation telephone conference, which I offer in every case, precisely what format of mediation you wish to have. In general, here is how it works.

A few minutes before the appointed time on the day of mediation, everyone clicks on the link provided by my office to gain access to the "waiting room." You will see a message indicating that you are in the "waiting room" and are waiting for the host. I am the host! Once everyone is in the waiting room, I will admit you to the mediation. We will all show up on the screen and this is the first time you will be able to see

and hear me and the other participants. At that time, we can have a joint session to introduce everyone, or just move directly into separate rooms.

Following admission into the waiting room, I will move all participants into private breakout "rooms," one for each side of the dispute. It is like bringing you into a separate conference room. You will see and be able to talk to everyone in your breakout room as if you were in a conference room together. No one else will see or hear you. The other side will be in their own breakout room. I am the only one who will come into your "room" unless you request me to bring someone else in. I cannot hear your discussion in your breakout room unless I am in there with you, in which case you will see me on your screen. During the day, we can add people or people can leave if necessary. New people arriving after the start time can click on the link indicating they are in my "waiting room," and I can admit them and send them to the appropriate room.

Only identified participants will be admitted, thus eliminating any fear of hacking the mediation. If additional rooms are needed for lawyers, insurance adjusters, or anyone else to have private conversations, that is easy to accommodate by simply adding another separate room.

We can also conduct arbitrations in the same way. Witnesses can wait in a "virtual waiting room" until they are called to the witness stand when I will move them into the "hearing room."

## C. Are there Pitfalls or Ethical Issues related to Virtual Mediation?

The short answer to this question is Yes. For mediators like me, building trust and rapport with the parties is a key ingredient to success. Not being in

the same physical space as the parties makes it more difficult to accomplish this. It is harder to look someone in the eye and ask difficult questions through a screen. Body language can more easily be lost when talking on a screen, and indeed eye contact is more difficult to achieve as people may be looking down or sideways.

Further, when parties and representatives commit to participating in a full-day mediation, their focus needs to be "in the room." It is harder to achieve this focus on-line. When parties have not physically committed the time and effort to come to mediation, it might be easier for one side to throw up their hands and "walk out." It is perhaps easier to refuse to budge in one's position if you do not have to look anyone in the eye to say it.

Technology may present an issue as well. In some communities, available bandwidth may be compromised or hard to sustain for a full day. Cameras or microphones can fail, and people may become frustrated with spotty connections. There can be a delay between somebody speaking and the person on the other end hearing what is being said. While attorneys are likely to have strong and secure technology, their clients simply may not. This problem can be at least partially corrected when the attorney and client are able to be together in the same room.

Finally, there are certain ethical issues of which to be aware conducting mediations virtually. The platform must be 100% secure. To a certain extent, Zoom and others have already experienced issues with hacking by outsiders, an issue largely eliminated with the requirement described above with admittance to the waiting room.

Confidentiality is another issue to consider. Under CRS §13-22-307,<sup>2</sup> all mediation communications, with excep-

tions rarely applicable, are confidential. Participants must be identified if they are present in the room, yet in the virtual setting, the mediator has no way to know if unidentified third parties are sitting behind the screen listening to everything being said. Furthermore, in some communities, the strongest internet connection may be at Starbucks or other public location. Yet any public location would be unacceptable since privacy and confidentiality cannot be assured.

#### D. Frequently Asked Questions

1. *Can we do the pre-mediation conferences by Zoom so my client can attend?* I have in the past normally done these calls by phone. Clients are always welcome to attend the conference call. But if the parties prefer, there is no reason we could not do the pre-mediation call by Zoom. I can easily send a link to those participating in the pre-mediation call, and we would be able to see and hear each other.
2. *What does it cost the parties to do the mediation using Zoom?* There is no cost to the parties to conduct the mediations using Zoom. I have the account which allows me to set up the session for an unlimited amount of time.
3. *What if we need to share documents during the course of the mediation?* The Zoom application has the ability to allow the participants to share documents on their screen with others in the mediation. The Zoom training videos are easy to follow if you are interested in learning how to do this.<sup>3</sup> For the most part, however, you will send me the documents we need to refer to in advance of mediation. In the alternative, during the mediation we can email documents to each other which can be reviewed on your separate device while we are discussing the matter.
4. *When the Mediator is with the other side in their "conference room," will I be able to see and talk to my client in our conference room?* Yes, when the Mediator leaves your room, you will still be able to see and speak to everyone else participating on your side. It will seem like you and your client are together in a conference room. You will see the Mediator reappear on the screen when she enters your room, after leaving the other side's room. During the time the Mediator is with the other side, you can mute your computer if you wish to take calls or do other work while you are waiting, or you can spend the time talking to your client. Whatever you would be doing if you were sitting in my conference room, you can do when we meet virtually!
5. *What about lunch and snacks, coffee, and water?* Unfortunately, here you are on your own. While I am happy to provide you with coffee and water, snacks, and lunch when you are physically with me, it is not possible to do that when we are in separate locations. You will have to provide your own sustenance. You can just leave the computer on and running while you take a break, or you can literally leave the conference and reenter by clicking on the link. I will see you back in my waiting room and admit you once again.
6. *What if we want to meet only with the Mediator or with the lawyers on the other side?* I can create as many separate breakout rooms as necessary and move people between them. If you want to speak only to the Mediator, for example, without your client, or if you want to speak only to the other lawyers, a separate room can be created with a click of the mouse and I will move you into the separate room. Then I can move you back to rejoin your client. It is easier than you might think.
7. *What happens if my technology does not work?* Unfortunately, this is a fact of our new life. Sometimes the internet connection is not strong



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enough. Sometimes one or more parties run out of battery. The list of what could happen is long indeed. The good news is that as we are learning and getting better at the technology, we encounter such issues in decreasing numbers. However, they do happen.

What I prefer to do is to have the cell phone number of at least one person on each side so that we can talk by phone to work through whatever issue arises. We may resort to using facetime which allows groups to join so long as everyone has access to that application, or we could do a conference call as a last resort. I am lucky to have a smart tech-savvy partner to help noodle out solutions when the problem arises on my end. As long as everyone stays with the process and does not get too frustrated, we can work through it successfully.

8. *Can people record the mediation session?* No! Remember, the Colorado Dispute Resolution Act requires absolute confidentiality of all mediation communications. I have the ability to prevent recording of the session using the application itself. Also, I require all participants to sign the Mediation Agreement which now includes a specific provision whereby you represent you will keep the mediation confidential, and will not, among other things, record it. While it is perhaps more difficult for me to monitor this across a screen, I expect the attorneys and the parties to understand and take responsibility to ensure that the process is not being recorded by use of a phone or in any other manner.

9. *What if one or more parties have other people or children in their homes during the day?* Particularly now, under the stay-at-home orders, this is inevitable. However, I ask that people mute their sound if children are in the room and identify for me and the other

participants when another adult enters the room. If another adult is participating in any part of the mediation, as opposed to just passing through the room, I ask that he or she be identified and sign the Mediation Agreement.

10. *What if we need to sign documents like the Mediation Agreement or the ultimate Settlement Agreement?*

Signing documents is not a problem although I do request that all participants sign the Mediation Agreement in advance of the morning of the session. When we reach a resolution, we can get signatures in a number of different ways. The agreement can be sent around by email, printed, signed, scanned, and sent back by email. We already do this when a party or counsel is participating from another location. Or there are apps one can download like DocuSign, used frequently in the insurance, banking, and other industries to get signatures electronically. Or one can sign the document, take a photo, and text it back to me. We can be flexible to make this work.

11. *What if we do not settle? Will you still be able to continue to assist with the negotiations?* Conducting mediation virtually will not change the persistence with which I pursue resolution. I can do what I do now, even when the parties leave my office without a settlement. I will continue to email or call counsel on the phone in hopes there is some way to get around whatever impasse we have encountered. Regardless of whether we meet in person or over a screen, sometimes it just takes a little longer to find the solution.

## E. Conclusions

Overall, virtual mediation has many advantages, especially in this time where the coronavirus creates such uncertainty. But even when the uncertainty passes, technology improvements have made

on-line mediations something to consider when logistics and cost make mediation otherwise difficult. As technology continues to improve, so too will your experience with virtual mediation. Give virtual peace a chance! ▲▲▲

**Katy Miller began her legal career with Holland & Hart in 1980 and joined the firm of Miller & Steiert in 1985. Her law practice was devoted to the area of employment law, representing both employers and employees. Since January 2006, Katy has devoted her time to serving as a neutral. Katy has lectured extensively to lawyers and human resource professionals. She is co-managing editor of The Practitioner's Guide to Colorado Employment Law. She has been included in The Best Lawyers in America for over twenty years, in the areas of both Labor and Employment Law and Alternative Dispute Resolution. Katy is a member of the College of Labor and Employment Lawyers. In 2010, Katy was selected to the National Academy of Distinguished Neutrals and was selected in 2014 as Barrister's Best Mediator by Law Week Colorado. Katy can be reached at Katy@LADRmedia-tion.com or 303-798-2533.**

## Endnotes:

<sup>1</sup> The Zoom application provides great training resources. See <https://support.zoom.us/hc/en-us/articles/206618765-Zoom-Video-Tutorials>.

<sup>2</sup> See Colorado Dispute Resolution Act, C.R.S. §13-22-301 et seq.

<sup>3</sup> Check them out at <https://support.zoom.us/hc/en-us/articles/206618765-Zoom-Video-Tutorials>.

From the President: Nimmo ...Continued from page 5

Not to be deterred, we began holding weekly legislative meetings again to discuss strategies and plans for doing what we could during the shortened session while at the same time preparing for the likely scenario that most, if not all, of our legislative work would be delayed until 2021. But due to the hard work and persistence of our lobbyists and several members within our organization, CTLA was able to move two very positive pieces of legislation and pass them with bipartisan support in a matter of weeks. One bill limits and restricts the immunity of UC Health facilities, and the other bill sets specific guidelines and notification requirements before an insurance company can use an affirmative defense of a failure to cooperate. We believe these two pieces of legislation will have a very positive impact for our clients and our members. It is a testament to our lobbyists and this organization that we were able to pass these two bills in such a unique and difficult legislative session.

June also brought us having to make a final decision on whether to take our Annual Convention virtual. The decision

to forego our convention in Vail was very difficult and was not taken lightly. It involved numerous meetings, reviews of contracts, reviews of executive orders, and the reality of whether we could safely gather with over 250 members, families, and sponsors. However, once the decision was made, our Executive Director, Julie Whitacre, the convention planning chairs, Kari Jones and Molly Greenblatt, and all of the staff at the CTLA office have done a tremendous amount of work to plan and prepare for the convention. I know it will be first class as it always has.

I will likely be the only president in CTLA history not to hold an in-person Annual Convention or Spring Dinner, but when people have asked how do you like being president, my answer has always been the same “I love it.” While it was unquestionably a unique and challenging year, I enjoyed the opportunity this organization provided me to lead. We owe the officers a huge debt of gratitude for all that they have done this year. Due to the unique challenges we faced, the officers committed significantly more

time than normal. Their opinions and support were invaluable.

I also want to personally thank Julie Whitacre. She has been amazing this year, and her dedication, hard work, and passion for her job was inspiring. Thank you to the Executive Committee, the Board of Directors, the Legislative Committee, the Women’s Trial Lawyer Network, the Case Assistance Committee, the Diversity Committee, and all the other committees and CTLA staff that dedicated their time to making this organization great. Finally, I would like to personally thank my partners for their support. They have been there for me all year.

Our organization is strong, and we are facing challenging times, but we are in good hands. CTLA is well-equipped to face these challenges because we have great people and skillful leadership. While 2020 has been tough, the future is bright. To quote my favorite band, the Grateful Dead, “the only thing there is to say, every silver lining’s got a touch of grey, I will get by, I will get by, I will get by, I will survive.” ▲▲▲

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From the Executive Director: Whitacre ...Continued from page 7

brotherhood is difficult. We must renew our strength, increase our faith, and gird our courage.”

Throughout history, Juneteenth has marked times of joy and pain. Recent events remind us that freedom is not shared equally. Joining the celebration feels like a critical piece of the puzzle to overcoming systematic racism.

There was a dark time in our country’s history that we enslaved others as a path towards a prosperous future. As we mourn the deaths of Ahmaud Arbery, Rayshard Brooks, George Floyd, Breonna

Taylor and countless others, more of us understand that we must openly acknowledge that systemic racism continues to be a deep-seated problem rooted in the enslavement of Black people. That acknowledgment is essential if we are going to overcome it. Let’s join our fellow Americans on the road to justice, by renewing our strength and girding our courage. ▲▲▲

**Endnotes:**

<sup>1</sup> The Proclamation itself freed very few slaves, but it was the death knell for slavery in the United States. Eventually,

the Emancipation Proclamation led to the proposal and ratification of the Thirteenth Amendment to the Constitution, which formally abolished slavery throughout the land. <https://www.us.history.org/us/34a.asp>.

<sup>2</sup> <https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/about-this-collection/>

<sup>3</sup> Elizabeth H. Turner, Juneteenth: Emancipation and Memory (2007).

<sup>4</sup> <https://en.wikipedia.org/wiki/Juneteenth>.