MEDIATION
Pandemic Style

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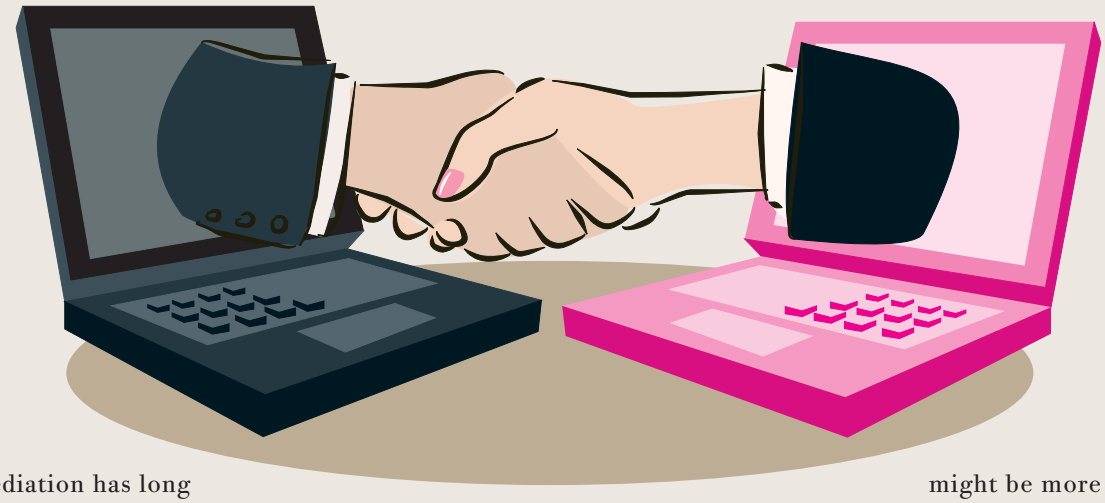
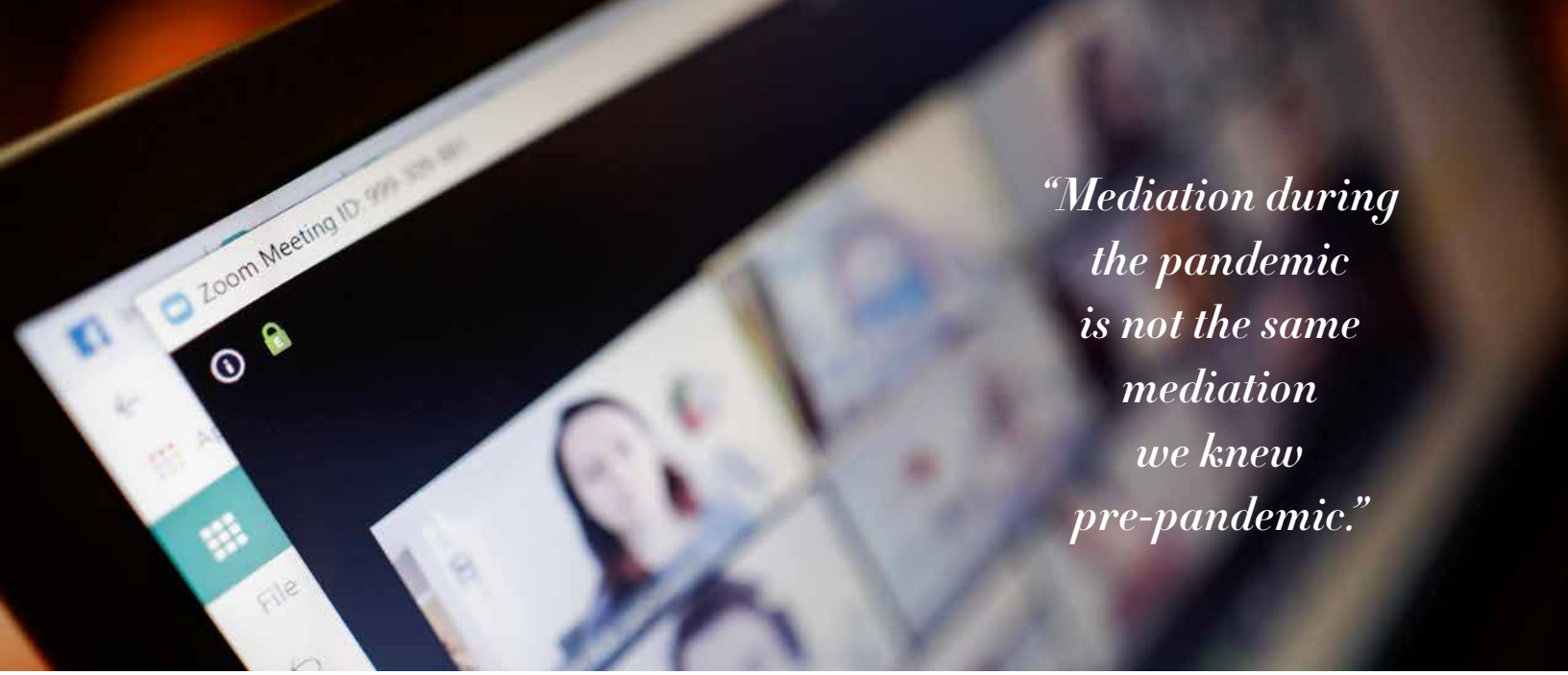


Mediation has long been an essential feature of civil litigation for one simple reason: it works. When the process is well executed it has the potential to accomplish much. Specifically, mediation brings finality to long standing disputes; it stops the meter and contains costs; it compels litigants and lawyers to momentarily put down their weapons and focus on a dialogue that contemplates resolution; it allows the parties to reach agreements and understandings which may allow for the continuation of business relationships without the impediment of pending litigation between the affected parties; it avoids the uncertainty of jury verdicts and bench trials; and in some cases, such as class actions, it allows the parties to come to agreement on terms of injunctive relief which works to the good of all.

A variety of factors will determine the success of evaluative or facilitative mediation. First, the parties must all agree that mediation is appropriate and that the case is ripe for mediation. In other words, timing matters. If any one party is not invested in the process, the likelihood of success is minimized from the outset. Conversely, mediation may be court ordered at an early juncture in the case, before the parties are prepared to mediate. When this happens most attorneys, for obvious reasons, will be loath to disobey the judge's order to mediate, and may or may not be given an opportunity to discuss why delaying mediation might be more appropriate. Mediation under these circumstances will often be a waste of time and resources and may very well dampen prospects for further attempts at resolution.

Careful selection of an appropriate mediator for any given case is imperative if mediation is to be successful. The mediator must be perceived as being neutral by all parties. Neutrality allows both the lawyers and their clients to feel as if they are entering a process where they will be heard, understood, respectfully challenged, and thoughtfully engaged. Neutrality builds fairness into the process. The perceived absence of neutrality builds in bias, which does not bode well for a successful outcome.

Additionally, the mediator must have the necessary breadth of credentials and depth of experience in the subject matter. A mediator whose professional background and qualifications are mismatched with a given legal dispute may not bring the parties to resolution as effectively as a mediator with the appropriate expertise and experience. To work successfully with lawyers and litigants to resolve their cases, a mediator must have an intimate knowledge of the discovery process, full familiarity with evidentiary and court rules, and the tools necessary to figure out the end game, and then be able to devise the best strategy to get there. These litigation skills are acquired through trial training and experience and, when applied to the



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settlement process, allow a mediator to instinctively analyze and "bottom line" the issues in any case, assess damages and collectability accordingly, and work towards resolution.

COVID-19 and the ensuing pandemic have altered all of our lives immeasurably, both personally and professionally. With regard to docketed civil cases, discovery has been impeded, the prospect for jury trials in the near future is elusive, and stays and adjournments have all but paralyzed lawyers' caseloads. Now that some law offices are re-opening, lawyers are pursuing the prospect of mediation with an eye towards prompt settlement of their civil cases with renewed zeal.

But mediation during the pandemic is not the same mediation we knew pre-pandemic. It takes the form of Zoom, Webex, Go to Meeting, and other formats. We log in remotely and show up as faces in boxes on a screen, we hear children and dogs in the background of our conversations, we go to virtual breakout rooms, and we sometimes have technical difficulties that can kill the momentum. There is no "in-person" opportunity for engagement, no eye to eye contact, no ability to offer a consoling touch or tissue. In-person participation reflects a certain commitment to the process. Those who agree to fly long distances or change their schedules in an effort to mediate their case to resolution demonstrate a level of engagement that is undiscernible when one merely logs in from a home office or personal laptop.

On the other hand there are great efficiencies that accompany remote mediation. Experts can appear remotely without the parties incurring the costs associated with long distance travel and overnight stays. Lawyers and their clients can appear and attend virtually from anywhere in the world to conduct the business at hand. Evidence can be marshaled and displayed by screen sharing or by PowerPoint demonstrations. Remote mediations can set the stage for continued negotiations, which can take place by telephone, in person, or remotely, or in some hybrid combination of these methods.

Clearly some cases are better suited to mediation on a virtual platform than others. Commercial cases and business contract cases, by their very nature, along with class actions, all lend themselves well to remote mediation. Damages are more formulaic. These cases are resolved by staging and mapping out processes which define groups or classes, reaching agreements on attorney fees, and sometimes require a defined schedule for obtaining authority to conclude negotiations regarding specific requests for injunctive relief. On the other hand, some litigants and their attorneys, especially in professional liability and tort cases, may insist on in-person mediation because their perceived damages are driven by an overriding emotional component. There may be a need to vent on the part of one or more parties, a need to be heard, or a need for personal validation or instant gratification which is more directly accomplished in an in-person setting than online. When there is friction between attorney and client, having a neutral mediator physically present in the room can be the necessary key to getting past the impediment. Nonetheless, in the hands of a skilled mediator, almost all of these cases can still be settled effectively using remote audiovisual platforms, even though some of the shared catharsis following resolution may be slightly diminished.

This pandemic has been a great teacher on many levels. In the field of evaluative and facilitative mediation, we have learned that the efficiencies of remote mediation will long outlast COVID-19 and will forever change the way we conduct mediations in the future. Although I firmly believe that there is no true substitute for the gravitas of in-person mediations, I also believe that we as mediators going forward will approach mediation more creatively and perhaps more thoughtfully, and that hybrid mediations—those mediations in which there will be in-person appearance(s) coupled with remote appearance(s)—will be the mediation model of the future.

MONA K. MAJZOUB retired from the federal bench after serving 16 years as a United States Magistrate Judge for the Eastern District of Michigan. Judge Majzoub returned to private practice, launching Mona K. Majzoub Dispute Resolutions PLLC, where she offers facilitative and evaluative mediation services. You may learn more about her professional background and practice at **www.mkmpllc.com**.