



Laura C. Caldera  
Portland, Shareholder

Direct Dial: 503.499.4602  
Fax: 503.295.0915  
Email Attorney

## Mediating in a Social Distancing Environment

By Laura C. Caldera

Life as we know it changed in January of this year upon confirmation that the Coronavirus had reached the US. As of this writing the United States has seen at least 217,263 confirmed cases of Coronavirus, and at least 5,151 Coronavirus deaths. The Coronavirus has been declared a pandemic, and is taking its toll on our physical, mental, and economic health. At present, the CDC advises that all events in the United States of 10 or more people should be cancelled, or conducted virtually.

As the country learned more about the deadly consequences of the Coronavirus, the states of Washington, Oregon, California, Idaho, Colorado, New Mexico, Minnesota, Wisconsin, Illinois, Indiana, Michigan, Louisiana, Ohio, W. Virginia, New York, Vermont, Massachusetts, Connecticut, New Jersey, and Delaware issued shelter in place, or stay home orders. Whether voluntarily, or under a shelter in place/stay home order, many businesses moved to remote working situations. Similarly, the courts in many states are closed to the public, offering limited remote hearings on motions, and no ability to hold trials.

Is it possible, then, to resolve lawsuits in this environment? The short answer is, yes. For years, many cases have been resolved by video-conference or virtual mediations. Although not every case will be appropriate for a virtual mediation, many cases will be resolved during this pandemic with the mediator, the lawyers, and the litigants participating in a mediation from the comfort of their homes.

There are some practical issues to consider before consenting to participate in virtual mediation. For example, what software platform will the parties use? Skype, WebEx, Zoom, and others provide users with the opportunity to connect with others with limited equipment – a computer, a microphone, and a webcam. Note, however, that it is important to work with your IT department to ensure appropriate securities are in place with any third-party application to avoid potential cyber-threats.

Another issue that bears consideration is how lawyers and clients communicate confidentially when they are in the virtual mediation room with the mediator. In a traditional in-person mediation it is relatively easy for a lawyer to maintain the flow of communication. A similar result can be accomplished in a virtual mediation by good pre-mediation communication between the client and the lawyer; utilization of private chats built into the software program and/or private virtual meeting rooms separate from the "main" mediation room.

Another issue to consider is whether the parties can resolve their dispute without the pressure present in a traditional in-person mediation in which the case must resolve before the day's mediation ends. While this is a legitimate concern, many multi-party and complex mediations do not resolve in a single sitting. Many mediators are accustomed to helping parties resolve their disputes after the in-person mediation session through individual communications and conference calls. In this way, virtual mediation is similar to traditional mediations.

There is also the concern that virtual mediations do not have the formal pomp and circumstances of a traditional mediation because the parties participate in the comfort of their own space. Again, this is a legitimate concern, but as those who have been practicing social distancing while working from home have come to understand, a Zoom video conference may allow one to wear a suit jacket with sweats or shorts and flip flops, the face-to-face video interaction mandates a high level of professionalism and decorum.



When considering scheduling and costs, virtual mediations provide the parties several advantages. Virtual mediations permit parties to avoid both the cost of long-distance travel and the corresponding time spent traveling. Further, because virtual mediations do not require parties to wait in a conference room while the mediator works with the other side, parties can make other, perhaps more productive, use of the long waits that inevitably accompany any mediation.