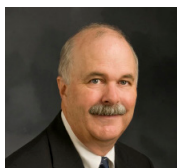


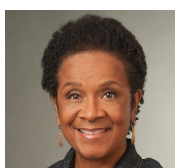


Dispute Resolution Responds to COVID-19

Dispute resolution goes virtual.




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In March of this year, the judicial landscape in Georgia changed in a way completely unimaginable just weeks before. On March 14, 2020 **Chief Justice Harold Melton** (Supreme Court of Georgia) issued his order declaring a statewide judicial emergency bringing most matters to an unprecedented pause. Criminal, civil and domestic cases all were affected. News travelled fast as COVID-19 precautions forced courthouses located throughout the 159 Georgia counties to shut their doors to all “non-essential” business for the foreseeable future. Judges, clerks, court administrators, attorneys and their clients, self-represented litigants, court reporters and law-related service providers all were left with the daunting task of prioritizing work based on this standard of being essential and engineering new ways for resolving matters, all the while maintaining obedience to the letter and spirit of the Chief Justice’s Order and ensuring compliance with COVID-19 recommendations for staying healthy and safe from the adverse effects of the pandemic.

The timeline moved quickly as we all digested the Chief Justice’s Order, wrapped up as many in person matters as practicable prior to the effective date for sheltering in place, and transitioned to a new routine of juggling telephone and video conferencing and blurred lines between office work and home responsibilities. Of course, the occupational stress associated with the rat race of feeding parking meters, navigating rush hour traffic and dashing between conflicting court appearances likely pales in comparison to the new stresses of being inundated with virtual platform training, overlapping Zoom meetings, intermittent IT blackouts and simultaneous homeschooling and remote learning by kids




Neutrals use secure online platforms to conduct virtual mediations and arbitrations with **great success**. The Atlanta Bar Dispute Resolution Section recently hosted a virtual coffee and conversation on the use of Zoom for mediations.

Miles Mediation & Arbitration is hosting weekly webinars on virtual ADR and to date has conducted over 200 mediations and arbitrations through video conferencing. For **mediations** specifically, it is important that the participants feel **comfortable** throughout the process. You do not want the technology to be a distraction or a frustration the day of the mediation. Therefore, I suggest walking the lawyers and their clients through a **brief tutorial** in advance of the mediation just to work out any technical glitches and make sure both are comfortable with the platform. Zoom is intuitive and easy to use. Our clients enjoy using it and we have found it to be very efficient and the **next best thing** to a face-to-face mediation.

Jennifer B. Grippa, Esq., Board member of the Atlanta Bar Dispute Resolution Section, and serves as a Neutral with Miles Mediation & Arbitration

Breakout rooms are one of the most beneficial features of the Zoom process for mediations. They simulate an “in-person” mediation by creating confidential caucus rooms that allow the parties to speak privately and use the “ask for help” feature to request the mediator to return to their breakout room when they are ready. The **process can be fluid** and additional breakout rooms can be created for an attorney caucus or for a lawyer to talk with the mediator outside of the presence of their client. By mediating via videoconferencing the participants are able to protect their health and importantly have the ability to **resolve disputes** without having to wait for an unknown time.

Ellen Malow, full-time Neutral with Malow Mediation & Arbitration, Inc.



ranging in age from preschool to college. Yet did we all not go to law school because we were committed to assuring justice for all and engineering solutions for individuals and entities alike? Of course we did, and together we will overcome even this.

One of the collective benefits of this sequestered period is that we all will emerge more efficient and comfortable with using technology to leverage case management and dispute resolution. Instead of last minute canceling or continuing proceedings due to in person appearance conflicts, judges and attorneys can better coordinate schedules through use of video hearings and status conferences. Hopefully, the new normal will dispense with delays caused by courts holding for attorneys to report as they travel from one county to the next, or judges managing dockets spanning multi-county judicial circuits. There should be less courtrooms packed with counsel and their clients waiting to provide reports in person and status conferences. An out of town witness no longer will require a mediation or arbitration to be continued. We may also find the scheduling of mediations and other events become somewhat easier when they require participation – but not necessarily in person – of several people from out of town, each of whom needs to schedule the event around her or his other professional commitments, grandpa's birthday, kids' school plays and so forth.

The judicial closures also have halted court annexed mediations. Several courts located in Metropolitan Atlanta and elsewhere across the state rely on court appointed mediators to resolve cases. When courtrooms suspended calendars, case referrals for mediations also ceased. In speaking with Executive Director **Edith Primm** (Justice Center of Atlanta), two-thirds of the mediations on the books for the second half of March were canceled by parties or their counsel upon the issuance of the Chief Justice's Order. When Governor Brian Kemp announced his entry of the April 2nd Shelter in Place Executive Order, the Justice Center reacted further by closing its doors. Most of its mediations are referred from judges presiding over small claims, probate and juvenile court matters. Without those referrals, the steady demand for mediation has largely ceased. While the Justice Center stands ready to provide alternative means for mediation services, the reality is that the majority of the parties served by the Justice Center do not have access to devices that comply with the technical requirements for video mediation such as a computer with a camera and microphone¹. When the courts reopen, Edith Primm and her array of Justice Center mediators will be ready to resume with providing court annexed mediation services and to conduct mediation training, admittedly in smaller numbers per class to accommodate the social distancing we all expect will continue to be practiced for the indefinite future.

Turning to the private sector, over the past thirty days, major changes have been made in order to provide the flexibility in services their clients demand. Although court mediations have stopped for the time being, private mediation and arbitration continues to serve the unceasing demand of clients to have their

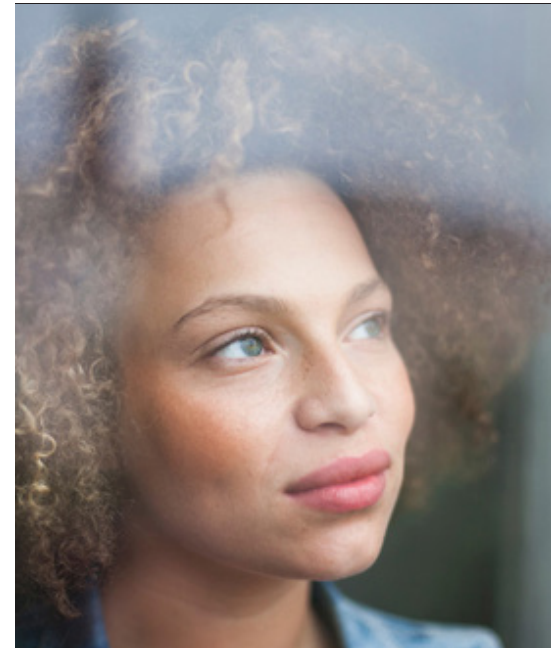
cases resolved. Cognizant that attorneys and their clients want to keep their matters moving toward effective resolution, a centerpiece of dispute resolution is the conduct of mediations and other hearings by video, including the use of Zoom, Endispute/CourtCall and other similar platforms. Many disputes are time sensitive and should not wait until the courts reopen. (And in-home use of video has the collateral benefit of enabling participants to take occasional breaks to deal with other professional matters or the kids' geometry or poetry assignments).

Likewise, there is a need for interim evidentiary decisions to move cases along. Special Masters can conduct Daubert hearings, resolve discovery disputes, address petitions for appointment of receivers and hear and decide dispositive motions. In family law matters, a virtual mediation or arbitration might be helpful for parties in need of a temporary or final financial or custody decision.

William Shakespeare once said, "The eyes are the window to your soul." And while there may not be anything better than a face to face interaction, in this time of partial masks and social distancing, flexibility and a willingness to try new things is the order of today. Most mediators and arbitrators have had positive experiences with video-based meetings and hearings long before any of us had heard of COVID-19. There have always been special circumstances requiring a virtual view of a witness or the decision maker. Those neutrals that have conducted effective sessions using video typically can identify several factors contributing to their success in conducting mediations and arbitrations. Counsel and their clients appreciate the opportunity to have a brief "test run" of the technology a few days ahead, which allows everyone to go forward with confidence that their equipment is reliable and compatible. If the neutral selected does not offer that opportunity, you should ask him or her for a trial run. Videoconferencing affords the ability to have as relaxed or formal of a proceeding as dictated by the nature of the dispute involved.

Arbitrations are also proceeding by remote means. American Arbitration Association Commercial Rule 32(c) allows for an arbitrator to use video "when deemed appropriate." Anecdotal evidence indicates that arbitrators, and most important, parties and

Video conferencing is providing an effective means to keep matters moving towards resolution when in person hearings are essentially unavailable.



counsel, are satisfied to be moving forward with both motions and full evidentiary hearings. While every lawyer, judge, or arbitrator who has participated in any sort of evidentiary hearing can appreciate the benefit of seeing witnesses in person, video conferencing is providing an effective means to keep matters moving towards resolution when in person hearings are essentially unavailable. And as the bar and courts get more familiar with these processes, even traditional in person hearings may move along in a more orderly manner when one or more witnesses can appear by video.

Finally, we can all start to imagine disputes arising precisely because of the pandemic itself: parental disputes about custody when a parent is working in conditions creating unusual exposure to the virus; employment issues about safety, layoffs and pay cuts; business disputes about performance of contracts in the face of shelter in place orders; claims against healthcare providers relating to quality of care; and demands against insurance companies for a variety of coverages in a factual landscape no one seriously envisioned when policies were drafted. Parties and counsel may be disputing these types of issues for many years. For a possibly analogous context, there is still litigation around that arose from the 2008-09 Recession!

The service the legal profession provides to society, and society's need for access to justice should not, and cannot, go on hold. The upshot is that lawyers, judges, mediators, and arbitrators are adapting and will continue to do so in order to continue to provide that critical service.

Senior Judge Gail S. Tusan joined the JAMS Atlanta panel as an arbitrator/mediator in 2019. Previously, she served as Chief Judge of the Atlanta Judicial Circuit where she tried and resolved civil, criminal, and family law matters for 27 years.

R. Wayne Thorpe has been a full-time mediator and arbitrator with JAMS since 1998. He has handled over 2500 mediation or arbitration cases in more than 25 states.

¹Video Mediation: A Guide for Mediators, Georgia Office of Dispute Resolution (April 9, 2020).