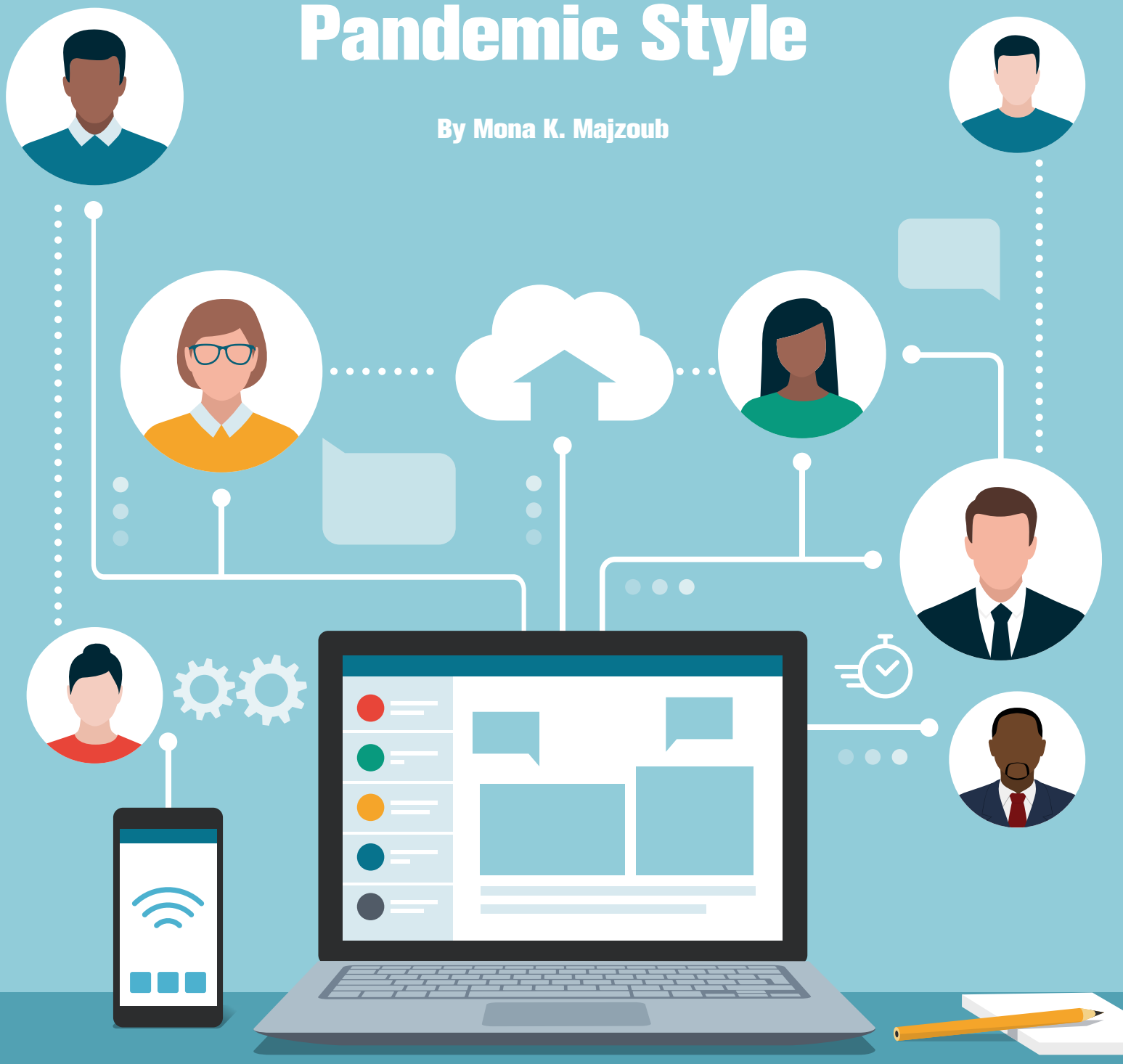
Mediation, Pandemic Style

By Mona K. Majzoub



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 longstanding disputes; it stops the meter and contains costs; it compels litigants and lawyers to put down their weapons and focus on a dialogue that contemplates resolution; it encourages the parties to reach agreements and understandings, which may allow for the continuation of business relationships without the impediment of pending litigation; it avoids the uncertainty of jury verdicts and bench trials; and in some cases, such as class actions, it provides an ideal opportunity for the parties to agree on terms of injunctive relief that work to the good of all.

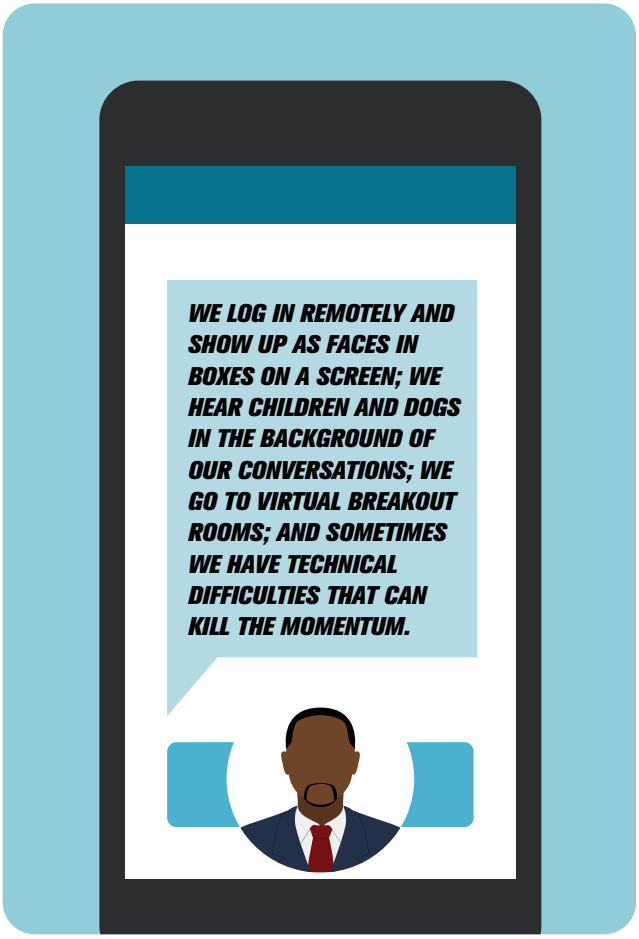
A variety of factors will determine the success of any given evaluative or facilitative mediation. First, the parties must agree that mediation is appropriate and that the case is ripe for it. In other words, timing matters. If any party is not invested in the process, the likelihood of success is minimized 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 often wastes time and resources and may very well dampen prospects for further attempts at resolution.

Selecting the appropriate mediator for a given case is imperative if mediation is to be successful. All parties must perceive the mediator as neutral. Neutrality allows both the lawyers and their clients to feel that they are entering a process in which 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 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 settlement process allow a mediator to instinctively analyze and "bottom line" the issues in any case, assess damages and collectability accordingly, and work toward resolution.

COVID-19 and the ensuing pandemic have altered all of our lives immeasurably, both personally and professionally. Regarding 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 reopening after the lockdown, lawyers are pursuing with renewed zeal the prospect of mediation with an eye toward prompt settlement of their civil cases.

But mediation during the pandemic is not the same mediation we knew pre-pandemic. It takes the form of Zoom, Webex, GoToMeeting, 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 sometimes we 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 to mediate their cases 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, 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, business contract cases, and class actions, by their very nature, lend themselves well to remote mediation. Damages are more formulaic. These cases are resolved by staging and mapping out processes that define groups or classes, reaching agreements on attorney fees, and sometimes requiring 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, all of which are 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 key to getting past the impediment. Nonetheless, in the hands of a skilled mediator, almost all of these cases can 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 likely 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 going forward, we as mediators will approach mediation more creatively and perhaps more thoughtfully, and that hybrid mediations—those in which there will be in-person appearances coupled with remote appearances—will be the model of the future. ■

Mona K. Majzoub is a recently retired federal judge with more than 25 years of previous trial experience. After serving 16 years as a United States magistrate judge in the Eastern District of Michigan, she recently returned to the private practice of law (Mona K. Majzoub Dispute Resolutions PLLC) where she offers arbitration, and evaluative and facilitative mediation services. To learn more about her professional credentials and the scope of her legal services, please visit www.mkmpllc.com.