

**PANEL DISCUSSION:
MEDIATION IN THE AGE OF COVID
AND BEYOND**

PANELISTS: STEPHEN GEALY,[†]
JEAN STERNLIGHT,^{††}
& AMY VAN HORNE^{†††}

MODERATORS: RACHEL GOEDKEN* & DON HARSH**

ABSTRACT

The following is a lightly edited transcript of a panel discussion from the 2021 Creighton Law Review Symposium: Alternative Dispute Resolution in the Business Setting, on February 26, 2021. This Symposium combined the latest academic research, practitioner expertise, and legal updates on the use of negotiation, mediation, and arbitration in business and the workplace. In addition, the program celebrated the Werner Institute's 15th Anniversary at Creighton University.

[†] Stephen Gealy is of counsel with Baylor Evnen, LLP. As a trial lawyer in a personal injury defense practice, he has tried more than 100 cases. Mr. Gealy is a Fellow of the American College of Trial Lawyers, an Emeritus Fellow of the International Society of Barristers, a Fellow Emeritus of Litigation Counsel of America, and a member of the American Board of Trial Advocates. While Mr. Gealy maintains his zeal for the courtroom, the focus of his practice has recently shifted towards mediation. Mr. Gealy has been honored with membership in the National Academy of Distinguished Neutrals.

^{††} Professor Jean Sternlight is the Michael and Sonja Saltman Professor of Law at the University of Nevada, Las Vegas William S. Boyd School of Law. She received her J.D. from Harvard University, where she served as editor in chief of the Harvard Civil Liberties-Civil Rights Law Review. Professor Sternlight clerked for Federal District Court Judge Marilyn Hall Patel and subsequently practiced employment law in Philadelphia.

^{†††} Amy Van Horne is a partner at Kutak Rock, LLP. She was the first female in Nebraska to be accepted into the National Academy of Distinguished Neutrals. She is a Fellow in the American College of Civil Trial Mediators and an American Arbitration Association Panel Arbitrator and Mediator. Ms. Van Horne has also served as an adjunct at Creighton Law School, teaching alternative dispute resolution.

* Professor Rachel Goedken is a Professor of Law and the Director of the Werner Institute at Creighton Law School. Professor Goedken teaches arbitration, mediation, and negotiation courses. Professor Goedken attended law school at William Mitchell College of Law. Professor Goedken served as labor counsel for Northwest Airlines, where she negotiated labor agreements, arbitrated contract disputes, and responded to complaints of employment discrimination.

** Don Harsh is an Associate Staff Member of Creighton Law Review, J.D. 2021. Mr. Harsh completed his basic and parenting mediation training and is affiliated with the Concord Mediation Center in Omaha, Nebraska.

This panel discussion was during session 2: “Mediation in the Age of COVID and Beyond.” Panelists Stephen Gealy, Jean Sternlight, and Amy Van Horne discussed the recent move to online mediation and the psychological impacts of online lawyering, commenting on which approaches enhance effective advocacy and how technology might influence psychological factors such as fatigue, empathy, perception, and credibility. This panel was moderated by Professor Rachel Goedken and Creighton Law Review Associate Staff Member Don Harsh.

I. THE TRANSITION TO ONLINE MEDIATION	520
II. TECHNOLOGY, PSYCHOLOGY, AND LAWYERING	522
III. MEDIATION IN THE CONTEXT OF ZOOM	525
A. ASSESSING CREDIBILITY: MORE LIKELY TO LIE ON ZOOM?	525
B. ZOOM’S EFFECT ON EMOTIONS	527
1. <i>Do People Manage Their Emotions and Behavior More Effectively?</i>	527
2. <i>Can Zoom Reduce “Mediation Resentment”?</i>	529
3. <i>Procedural Justice and Zoom</i>	530
4. <i>Interpreting and Preparing for Emotions on Zoom</i>	531
5. <i>The Importance of Increasing Comfort with the Technology</i>	531
C. PRACTICAL CONSIDERATIONS	532
1. <i>Verifying Parties’ Identities</i>	532
2. <i>Using Zoom Breakout Rooms</i>	533
3. <i>Fatigue and Virtual Mediation</i>	534

I. THE TRANSITION TO ONLINE MEDIATION

Rachel Goedken: Let’s talk first about the transition to online mediation last March. The [COVID-19] pandemic hit. We didn’t necessarily even know what that had in store for us at the time and it wasn’t even a thoughtful and intentional move to online mediation so much as it was a creature of requirement. So, tell us a little bit about what cases moved online and which cases stayed in person.

Amy Van Horne: Intentional—I wish. At Kutak Rock, our Omaha office closed on March 20th at the end of the day, although we had been gradually migrating home before that. Basically overnight, we went from an in-person mediation world to an online mediation world. I have mediated in-person a few times with everyone observing proper CDC guidelines, masks, and social distancing. Everything else has been online. My partner, Mike Mullin, is also a mediator. He has

gone 100% online. But again, it wasn't a thought-out process; it was a reaction to the world that we were all of a sudden living in.

In terms of what cases moved, I would say for my practice, and I'll ask Steve to fill in on his experience because I think it was slightly different than mine, we had about two weeks of panic: we're under a court deadline and we have to get this mediated, or the judge is going to be mad at us. After about two weeks, everybody realized this wasn't going to go away overnight and they needed to do something about their mediation. For the most part, with a couple of exceptions with attorneys that held out for quite a while, I have gotten back pretty much everybody, and the people that postponed at the beginning of the pandemic have now either mediated with me or are back on my calendar once again. Steve, what was your experience?

Stephen Gealy: My experience was very similar, Amy. Our office closed at almost the same time that Kutak Rock closed. Baylor Evnen maintains kind of a "skeleton crew." We have document handling personnel there and we have someone there to handle the telephone, and the managing partners are in the office most days. Aside from that, almost everyone has worked virtually exclusively online. I will tell you that at one point in time, I had a list of probably fifteen mediations that were indefinitely postponed because people didn't want to give up the chance that perhaps they could do those in-person. I think, with an exception or two, all of those have now been completed on Zoom.

As a person who's been in practice for nearly 40 years, I had some significant trepidation about the prospect of moving online and my ability to deal with the technology, but I have been pleasantly surprised at how well Zoom works for mediations in a lot of respects. I honestly believe that Zoom may be more effective than in-person mediations because of the isolation that can be created. Now, I don't know that I can say that I've had any specific sort of case remain in-person. I have done a couple of will contest cases and the parties who all hated each other insisted those be in-person, but the vast majority of my practice is mediation of personal injury cases—a lot of truck accident cases. Those have almost all been accomplished online, and the success rate is at least as high, and perhaps higher, than it was in in-person mediations.

Amy Van Horne: My favorite transition story: I had five or six cases where I offered to meet in-person, as long as everyone was socially distanced and masked up, but I said: "You know I can't do it here. We cannot have anybody from outside of the building, so if you're willing to host, let's pick a day." The comment invariably was our office is closed and I can't have anyone in. Well, let's go to Zoom then.

So, as we were working through this and looking ahead to probably mid-2020, one of the things that we've been talking about internally is whether or not we should continue mediating online or return to in-person or do some kind of hybrid. Jean, can you talk to us a little bit about how technology is going to impact the lawyering?

II. TECHNOLOGY, PSYCHOLOGY, AND LAWYERING

Jean Sternlight: Yes, what I'd like to do is just give you a little bit of a taste of this project that I'm working on. I have a co-author, Jennifer Robbennolt, and she and I have written a book on psychology and lawyering.¹ We decided there's an awful lot of psychology that goes into the question of which technology you want to use for dispute resolution in looking ahead to the post-COVID era. One day we won't have to be on Zoom if we don't want to. On the other hand, I totally agree with Stephen and Amy that we've learned that Zoom is a lot better than we thought. So, Jennifer and I are hoping to help lawyers and others think about, once we get a choice: Which technology do we want to use? When do we want to be in-person? When do we want to be on Zoom? When do we want to be on the phone? When do we want to use just text boxes?

What we've done in this article, that is still yet a work in progress, is two things: [1] we've looked at a whole lot of psychology that relates to a whole lot of aspects of those kinds of choices—because as you'll see in a few minutes there's an awful lot to it—and [2] the other thing that we've done is offer a framework for how to even think about the problem, because frankly when Jennifer and I started to think about it, we were awed by the fact there's so many complexities to the issue.² The framework we think makes sense is to consider the particular features of the alternative types of communication.

For today, we're really just talking about Zoom versus in-person mediation. First, I'm going to talk to you about what are the distinguishing features of in-person versus the distinguishing features of Zoom. The second part of our analysis says: "Okay, well, we know what those features are. How do those relate to things we care about in dispute resolution? What are the impacts on important aspects of dispute resolution?" Then, the third piece of the analysis brings in a lot of contextual considerations. Stephen, for example, mentioned

1. JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* (ABA Book Publishing, 2d. ed. 2021).

2. Jean R. Sternlight & Jennifer K. Robbennolt, *High-Tech Dispute Resolution: Lessons from Psychology for a Post-Covid-19 Era*, 70 DEPAUL L. REV. (forthcoming 2022).

having disputants who already hated each other. Sometimes you do have that in a mediation—folks who already hate each other. On the other hand, sometimes you have folks who actually like each other. Things like that are going to make a difference.

So, not to be mysterious, what I'm talking about with respect to the alternative features of various kinds of technology are these four aspects: [1] richness/leanness, [2] formality/comfort, [3] synchronicity/speed, and [4] transparency/privacy.

First, technologies differ from one another in terms of what researchers have called the richness or the leanness of the channels of communication. That's a big mouthful, but it's completely common sense. What we're talking about is when you're in-person, there are lots of ways that you can communicate with another person. You can use your words, of course, and you use your tone of voice. You use your hands and you use your body language, but even beyond those most obvious things, you can also use touch. You can even use taste if you want to give somebody some food to share. Sometimes smell becomes relevant. There are many, many, many ways that we can communicate in-person, and it's a very rich form of communication. Zoom is not as rich, but it's certainly a lot richer, generally, than something like the phone. On Zoom we do still see each other and we do still hear each other, but we only see each other's faces or sometimes we see the torso. On the other hand, sometimes we see the face actually better than we would in-person. So, it's not going to be all one way, but we're going to consider the richness and the leanness of these different forms of communication.

The second feature that we look at is how formal or how comfortable—and those are kind of opposites of each other—is the particular mode of communication. With in-person, it can be more formal. If you have to go to an attorney's office or if you have to go to court to do the mediation, that to a lot of people will feel pretty formal. Whereas, if you're doing Zoom at least you can be in the comfort of your own home or the comfort of your own office.

A third difference that doesn't really matter for in-person versus Zoom is that some modes of communication are faster than others. Some are synchronous, meaning you're talking to each other simultaneously versus if we were talking about something like texting or email, then you wait—one person talks and then the other person responds. But, that's really a wash with Zoom versus in-person.

The last factor that we look at is we compare these modes of communication based on how transparent they are so you know what's going on, and potentially whether you'll be heard and seen by other people versus how private it is. Ideally, in-person and Zoom wouldn't

be very different in this regard. With Zoom, we would say: “This is just supposed to be you and we’re only going to record if everybody has agreed to record.” That would be the same as in-person. Zoom and in-person could be pretty similar, but people do worry with Zoom that maybe somebody is on the sly doing a recording and sometimes weird things can happen with Zoom, like somebody is off to the side and coaching or providing extra information, or perhaps somebody is behind an open door listening. It’s not quite as obviously private as in-person would be.

There’s a long list of why we care and I’m not going to have a lengthy discussion of them, but one difference that these features could make would be how you make credibility assessments. People at least think it’s easier to make good credibility assessments in-person than in other ways. Obviously, there can be differences in terms of trust and rapport. So, trust and rapport can be important for conflict resolution and it can be harder and easier to build in certain contexts. Emotion can play out differently depending on the form of communication. We can focus better or worse, or get more tired using certain modes of communication. Some modes of communication may encourage us to exchange more information with each other and others may encourage us to not want to share information. Some modes of communication may cause participants to lie more, act out more, or “flame” each other, as we see with things like Twitter. Sometimes we can be more persuasive or less persuasive in one mode of communication than another. That’s why we care about what the features are.

The last thing I want to get to is the idea that I mentioned at the beginning, which is: there’s going to be a lot of “it depends.” Neither I nor anybody else should say Zoom is always better or Zoom is always worse for mediation, just like we shouldn’t say it’s always better or always worse for a court hearing or a client interview. Rather, what you’re going to want to think about are three main things: (1) what are your goals and what are your clients’ goals if you have clients, or what are the participants’ goals; (2) who are the particular disputants, because for some people, one format will be better and another format might be worse; and (3) what’s the nature of the dispute itself—not just whether it’s personal injury versus a contract dispute, but also things like the background of the disputants to each other.

I’m going to end there, so that we can discuss more of this together, but that’s how we suggest we think about these things in a very global way.

III. MEDIATION IN THE CONTEXT OF ZOOM

A. ASSESSING CREDIBILITY: MORE LIKELY TO LIE ON ZOOM?

Amy Van Horne: Do you believe that you can assess credibility better in-person or online? Jean, what does research tell us about credibility assessments?

Jean Sternlight: Most of us, including myself, have tended to believe that you can assess credibility better in-person than on Zoom, but what the research has shown for many, many, many years and lots of different studies, is that although we think, in general, we are pretty good at assessing credibility, basically all of us stink at assessing credibility in any context. We stink at it in-person and we stink at it on Zoom. It's probably not any worse on Zoom than it would have been in-person. It might even be better because at least we won't think we're good at it when we're really not good at it. Zoom does add one complexity to this issue. When people think they're being good at assessing credibility, it is because they're assessing body language. However, people may get more twitchy or uncomfortable on Zoom than in person. So, maybe we make some extra mistakes assessing credibility on Zoom because a person is just getting tired or something like that.

Amy Van Horne: I will say this was the biggest shock to me as we were preparing for this panel in terms of credibility assessments, because I would have 100% said I am better at assessing credibility in-person—and that's just me speaking as a litigator. I have some partners that won't do depositions online because they need to be face-to-face to be able to read the reaction.

For those of you that are practitioners, when you're helping your client prepare for an online-mediation, it is important to help your client make the best presentation of themselves. Don't allow them to have half of their face squished up against the camera and don't have them be fifteen feet back. Position them in front of their computer screen so that at least their face and a portion of their torso are visible.

Steve, my experience has been that if I can't see somebody's shoulders, in addition to their face, it's really difficult for me to decide where we're at and what kind of reactions I'm getting in terms of credibility.

Stephen Gealy: I think that's a really valid point, Amy. When I look at this question, I have to take off my mediator hat for a moment and put on my litigator hat. I admit that I'm probably a bit old-school in this regard but, having been a litigator for almost 40 years, I have developed the sense that [when I have locked eyes with a person, that

it's much more difficult for them to lie to me]. Typically this involves an opposing party—when I look at a deposition and I am called upon as counsel for a party to assess the credibility of the opposing party for my own client's benefit in order to allow my client to be able to evaluate the case, I have always felt the need to sit across the table from that person. If that person is going to lie to me, they're going to do it when they are looking me in the eye.

It's the looking me in the eye piece that I think is missing from Zoom. As much as I appreciate Zoom, it is impossible to actually make eye contact with someone. I can stare into the camera or I can look at Professor Sternlight or I can look at Amy, but you don't see me looking at you. You see me looking in a different direction. When I have locked eyes with a person across the table from me—now, this is my lawyer psychology hat—it's always been my sense as a trial lawyer that it's much more difficult for a person to be untruthful with me (unless they're completely narcissistic) if their eyes are locked on mine. It tells me a lot if they're not willing to make eye contact with me. So, I think those things when it comes to credibility assessment are critical.

Jean Sternlight: I think what you're saying, Stephen, is really interesting. I actually think you're right, but not exactly for the reason you're saying. You may not be that good at assessing their credibility; however, the fact that the person, exactly as you said, has to look you in the eye in-person, may discourage them from lying. The studies have shown that making a record of a communication is also a good way to discourage lying. Whether or not you're assessing properly is separate from the question of whether the communication may encourage or discourage somebody from lying.

Stephen Gealy: The other piece of this puzzle that we talked about as the three of us prepared for this presentation, and that I was kind of shocked to learn from Professor Sternlight, is that we're really not very good at assessing credibility. I have been reasonably confident in my ability to do that for a long time. My confidence has now been severely undermined, but I think a tangential question that arises when we talk about this is: How does my personal assessment of another person's credibility, whether or not it's accurate, affect my future dealings with that person whether in a mediation, litigation, or anywhere else?

Jean Sternlight: That's also consistent with what Amy was saying earlier. Amy said it's very important to coach your client if you're an attorney who has a client appearing in mediation or, for that matter, in a litigated deposition or other hearing. You want to coach your client how to behave and speak so that they will be persuasive and

trusted and so they can build rapport. All of that absolutely is true, and it may be harder to do that on Zoom, but certainly not impossible. It's just different. If you're going to be appearing as an attorney or as a client in a mediation, of course you want to try to be persuasive just like you would in-person. You want to be persuasive and create rapport on Zoom. It's harder because you're not there with the folks on the other side, so you have to take extra steps to try to build that, including what Amy was saying, like showing more of your body and worrying about your background. You all might have seen my dog wandering back and forth, and then you think nicer things about me: "Oh, she has a dog, she can't be that evil." Little things like that make a difference.

B. ZOOM'S EFFECT ON EMOTIONS

1. *Do People Manage Their Emotions and Behavior More Effectively?*

Don Harsh: This question can be for Mediator Gealy and Mediator Van Horne: Has anyone found that in Zoom mediations people behave better, such as more politely and listen more effectively?

Stephen Gealy: That's a really fascinating question and I'm not sure that I've really noticed a discernible difference. Now, I do know that in an in-person mediation, particularly in a personal injury mediation, there is always a sense in the plaintiff's room, because the plaintiff is the person who was injured and the plaintiff has dealt with things personally, there's often a degree of anger that goes with that and sometimes these folks are willing to act out more so than they typically would. Although I don't know that there's any real difference between a virtual presence and actually sitting across the table from somebody, because my sense is that typically these people look at the mediator as a facilitator who can maybe take them seriously and help them resolve their dispute. Now, the reason for this is that the dichotomy arises: there is always a disconnect between the two rooms in a personal injury mediation. You've got this injured individual in one room with counsel. In the other room, you have a person who is a risk manager with a corporation and somebody who is a claims adjuster or a claims manager who looks at this purely as an economic exercise. That person's obligation to his or her employer is risk assessment and risk aversion. That person's job is to find a number that will obviate the need to entrust the case to a jury, which is inherently unpredictable. It's really not a personal thing, whereas for the plaintiff it's horribly personal and that has a whole lot more tendency to affect the actions of the plaintiffs than it does the people in the defense room. This is not universally true, but typical.

Amy Van Horne: Just thinking about the question, I think I have noticed a difference in behavior and it ties into what Steve was just talking about. First of all, normally the plaintiffs and their clients, although I've had some be together, are separated and both in their own secure environment. In which case, I've noticed a lessening of the need to posture by the attorney, because they're not there. They don't seem to need to "puff up" as much to make their client know that they're fighting hard on their behalf. But also, I seem to be getting slightly less of a dismissive attitude from the defense on my personal injury cases. I'm wondering if that is an environmental thing, because, first of all, they're in their own environment as well, although many of them have been working at home for decades. Rather than seeing this disembodied person outside their own environment, they're seeing somebody with their kids in the background or their dog or the family pictures or whatever it is that's behind them. I wonder if that helps humanize them a little bit. Jean, does research tell us anything?

Jean Sternlight: What you guys are both saying is consistent with what the research says, because the research would suggest that this is one really huge "it depends." There are ways in which aspects of Zoom might lessen the "bad" emotions, because people might, as you said, feel more comfortable or they might be able to humanize each other better. On the other hand, there can be aspects of Zoom that make things worse. One is something that I'd never known about it. There is research that looking at your own picture on Zoom can actually have an impact on you. Not just the impact of "I should have combed my hair better," but an impact of if you're angry making you angrier. So, looking at your own image could make things worse.

Also, the lack of connection sometimes can make things worse. There's an interesting way in which in-person can sometimes have the potential to make the "nice" emotions nicer. So, if people are in the more collaborative mode or if they're open to restoring their relationship, that kind of restoration can work even better in-person. I think we've all experienced or read stories about those beautiful mediations that ended with a big hug or something. You're not going to have the hug on Zoom. On the other hand, the bad stuff as we've also all either seen, or at least read, can go really wrong in-person. It depends a lot on the people, the dispute, the environment—all that stuff we were talking about before.

Amy Van Horne: In terms of making sure that you can build trust and rapport as you go through the mediation process, I have noticed that the biggest surprise that I've had for myself as the mediator, but also heard of from practitioners, is how quickly they forget that

they're virtual. Once you start moving back and forth, you leave the breakout room and they're hanging out, I've been told that, at least in the defense room, most of the attorneys don't turn off their camera and start working on something else. They might not have otherwise because they're their client is right there. It's a great opportunity to connect with them, but it doesn't seem to take as long as I was afraid it was going to, to get to build rapport with either room.

Stephen Gealy: I've never really thought about this and there's not a very good way for me to quantify it, but my sense is that with the cases that I mediate, those people who have a tendency toward being angry tend to get angry whether we're on Zoom or we're in-person. I can't measure that because it is rare. I have never mediated with the same party more than one time, and I have never, therefore, mediated with one party virtually and in-person. So, I am comparing apples to oranges, but I'm not sure I've noticed that being on Zoom, even if somebody's more comfortable, makes them less likely to be angry because there's somebody in the other room "trying to cheat them out of what they're rightfully entitled to."

Jean Sternlight: One of the reasons that you probably haven't noticed that much difference is that you're a really good mediator. One of the things that research shows is, even though it tends to be a bit harder to build rapport in non-in-person settings, people who really want to focus on it can do a good job with it. I would suspect that you are both good mediators, and I suspect that as good mediators you naturally focus on things like making rapport as good as it can be and making communication as good as it can be. To the extent people do that on Zoom, they can do a really good job of it. You want to have a little bit of conversation before you plunge right in and you want to think about what backgrounds are and you want to set up the sessions to try to maximize the good and minimize the bad. If you are focused on that sort of thing, you can make Zoom work darn well.

2. *Can Zoom Reduce "Mediation Resentment"?*

Don Harsh: A challenge I have faced with clients is something I describe as "mediation resentment," particularly if court ordered. It is time consuming, it can be expensive, it can require travel, etc. So, the clients resented having to mediate. To what extent do you think a greater embrace of virtual mediation could be a way to get larger buy-in or support by people or entities that are required to mediate?

Stephen Gealy: That sounds to me like a question that came out of a commercial context—people who are involved in mediation on a regular basis. Without any question, the ability to conduct a mediation on Zoom obviates the need to travel. That's one of its real benefits

and, in that regard, it saves not only travel expense, but considerable travel time depending on where the parties are coming from. So, I understand that sentiment. I think the extent to which that attitude pervades may depend a little bit on the context of the of the mediation situation. My sense is, in most personal injury cases, plaintiffs are anxious to resolve their claims, because the prospect of a jury trial is horrifying to a lot of plaintiffs. They want to find a way to resolve it and they welcome the chance to mediate. Amy, what's your experience with this?

Amy Van Horne: No, I agree. I see where the questioner is coming from as well. I think that's probably going to lend itself in the future to a hybrid approach to mediation where some of them just naturally fall into an online format, or perhaps there are some parties who will appear in-person and you have the Senior Vice President at his computer screen in New York rather than sitting next to you. It's important to explain to the client that there are certain times when it's better for everyone to be in the same locale, and not to mention the fact that there are certain times when the judge tells you that you need to have everyone in the same locale. The costs or expense, or the difficulty of that is not going to be handled by Zoom, because the judge told you that you couldn't.

Jean Sternlight: This is a great illustration of the comfort thing. How expensive is it? How long is going to take me to get there? This is a piece of comfort and comfort really does matter. People are going to get more ticked off potentially if they're not comfortable or if they have to spend a lot of money. It's also a great illustration of the "it depends" thing, because it is going to vary according to who the participant is. A client might treat it one way, a pro se person might view it one way, and an attorney another way, especially if they're billing by the hour and get to charge for some of their travel time. It also could vary depending on the type of dispute.

3. *Procedural Justice and Zoom*

Jean Sternlight: One of the things we didn't talk about yet is procedural justice. A lot of times people care a lot about the way in which they're able to tell their story and be able to say to somebody who they think is a neutral: "This is what happened to me, I want to tell my story. I want to feel like I got treated with dignity and respect." For some people, that's going to be a lot easier if it's in-person. They really want to be able to look somebody in the eye and say: "This is what happened. This is the way it was." That will be very meaningful. For other people, they don't want to look them in the eye, but they

do want to have the hearing. Zoom might really be better for them. It beautifully illustrates a lot of what we've been talking about.

Stephen Gealy: Jean, I think that's a really important point that goes to the effectiveness of mediation in general, regardless of whether it's in-person or online. My sense has been that, particularly in a plaintiff's room, mediation is effective when the plaintiff feels as though someone has taken him or her seriously that she or he has actually had a day in court. They feel vindicated after this process is over and that's the reason that so many plaintiffs are willing to settle cases for an amount of money that they would have said pre-mediation: "I would never ever accept that amount of money." I think that's a lot of what you're talking about, Jean.

4. Interpreting and Preparing for Emotions on Zoom

Amy Van Horne: That actually ties right into our next area of exploring and one of the questions, which is the emotion piece. We had the anger of the person that didn't want to have to go mediate, but also whether or not there's a difference in terms of reading or managing emotions in a face-to-face setting versus by Zoom. Like you, Steve, I do a lot of personal injury mediations and I have found that sometimes people aren't expecting to have to manage their emotions when they're sitting in front of a computer screen. They're expecting it to be a more passive experience than it actually is. It is important to make sure that you remind them: "Make sure your Kleenex are there. If you get upset easily and you need your dog right there, make sure your dog is in the room."

I have noticed that it's difficult, depending on how the person is sitting or where the person is sitting, to be able to determine whether I'm seeing fatigue or whether I'm seeing distress. I like to be able to read shoulders, because if they're up that's generally: "I'm stressed out," and if they're kind of slumped over that's: "I'm tired." As a mediator, you need to give them a break or remind them to go get a cup of coffee or whatever. But I haven't seen a huge difference in managing the emotions virtually versus in-person, except that if you have the attorney that's good at touching a shoulder, touching an arm, holding hand, or whatever—they can't do that over the computer screen.

5. The Importance of Increasing Comfort with the Technology

Jean Sternlight: Those instructions make a lot of sense. The other thing that is kind of obvious but should be said is it's also important to just make sure everybody's on the same page regarding how to use the technology, because we now have all gotten somewhat adept at Zoom, but a lot of times the participants may not be that good. If

they're not that good at Zoom, that's going to be adding an additional stress. That's going to be hurting their emotions. So, whether it's the attorney or the mediator, if somebody can, at the beginning, just as you would in a face-to-face, explain how the mediation is going to work. You literally want to walk people through how they're going to use Zoom and the controls, and make sure they're comfortable so that it does feel natural and comfortable. Some people, maybe stereotypically older people, might not be as familiar with the technology. That alone could put them off.

Stephen Gealy: That's something I always do. I know that Mike Mullin does that routinely. He talks about the buttons at the bottom of the screen and how to get his attention and those kinds of things. So, I think you're right, Jean. That's a really critical concept, because it's easy for us to forget that a lot of these people use Zoom very rarely, if at all.

Amy Van Horne: I've also been starting to give everyone not just my email address but also my cell phone number if they get disconnected, and I explain that it's normal and it's not a big deal so that there's not a stigma attached to: "I'm the person that just disconnected from the negotiation."

Jean Sternlight: Zoom can make some people feel more comfortable. There are some interesting articles about people doing either mediations or some kind of a family law hearing where let's say a kid has to talk about being abused or something horrible and they're actually seemingly more comfortable on Zoom than they would have been going into an attorney's office or a courtroom. That makes sense because the kid is used to technology and they can be in their own room, and they can have their stuffed animals all around. But, then again, if it would be my parents, who are in their 90s, trying to do something on Zoom, they'd be so much more comfortable going into a courtroom. They don't even know how to do Zoom. So, you've got to think through who the person is, what their background is, and what you can do to help a particular person with the situation.

C. PRACTICAL CONSIDERATIONS

1. *Verifying Parties' Identities*

Don Harsh: I have another question: Do you have concerns about verifying the identity of parties on video conferences or if the parties are alone in the room and not under duress?

Stephen Gealy: That's a really interesting question. The answer to that question is that it depends—which is what lawyers always tell you. Typically, with my mediations, I ask for a list of participants and email addresses, so I can tell exactly who it is that is seeking my con-

sent to come into the meeting. I also always set up the Zoom meeting where I am the “Moderator” of the meeting, so I am the one responsible for allowing people to come in. Early in the pandemic, there were some problems with “Zoom bombing,” as they call it, but it turned out the vast majority of those circumstances were situations where the Zoom link was widely disseminated and people were coming into those meetings and nobody knew who they were. That was nipped in the bud pretty well by making sure that participants are allowed into the meeting only with the consent of the host and that beforehand you know who the participants are so you know who you’re looking for. If somebody is using somebody else’s email address and claims to be a different person, I’m not sure I would have a very good way of determining that at least at the gate, but that’s never happened to me.

Amy Van Horne: In mediation, if it’s high-conflict mediators and mediators that do family law, there is a greater concern and they do some things, like asking a party to “take your computer and show me your room. Show me who’s there.” I had an issue arise in an arbitration, where I had the parties swear under oath that everyone who was in the room was on camera. With one of the witnesses, that was actually not the case and her attorney was mortified, but then also requested a recess. I’m sure she gave the client holy heck for lying under oath, but I think that’s a real concern.

I do the same thing Stephen does with a “waiting room” feature. In mediation, there’s always a weird dynamic of people participating that you might not necessarily know about because invariably there’s always some plaintiff whose great uncle Harry used to be a personal injury lawyer or an insurance adjuster and they’ll call them after every meeting with a mediator and describe what’s going on. There’s always a weird dynamic there.

2. *Using Zoom Breakout Rooms*

Don Harsh: Okay and for the last question: I have in my experience a one-on-one conversation between an attorney and the mediator in the hallway can help break “log jams.” Can or does this still happen virtually in a remote mediation?

Stephen Gealy: Absolutely it does. I always know how many parties we’re going to have, and I create a “breakout” room for each party and counsel. In almost every case, I create an extra “breakout” room or two, so that if I need to separate people who are, most of the time, in the same room, I can do that. If I need to step into a separate room with counsel for one party or the other to have a kind of a lawyer-to-lawyer conversation, I can do it. We can be absolutely assured

that there is no way that the sound is going to travel through the wall, because it won't happen. Amy, what about you?

Amy Van Horne: I definitely use separate "breakout" rooms. Also, if the attorney didn't want their client to know they were talking to me privately, I've actually had a completely separate cellphone conversation where I took my headset off and went into another room and had a private telephone conversation with them to discuss whatever their concerns were. But yes, that can still happen. It happens regularly. With the technology, you don't have to worry about how loud your voices are. If the attorneys need to yell at each other, they can do it.

Stephen Gealy: To that extent, Zoom, in my opinion, is preferable to in-person, depending on how your conference rooms are situated. But, if you've got two conference rooms that are next to each other, you've got to be really cognizant of the fact that sound does travel through walls, and it doesn't do that on Zoom.

Amy Van Horne: Now, the thing that doesn't happen technologically is the conversation that the attorneys sometimes have in the hallway as they went to refill their coffee pot or something like that. Those don't happen. The attorneys would have to make an effort to do that. They could all go to the "main room" and leave their conference room and have that same kind of conversation, but normally they don't do that.

Stephen Gealy: I have, on a number of occasions, experienced situations where the mediator and counsel will adjourn to a separate "breakout" room, so there can be a meeting that sometimes breaks the ice and facilitates a settlement, because the two lawyers and the mediator can talk about legal issues involved in the case and how those might be resolved. That works pretty well in a virtual setting.

3. Fatigue and Virtual Mediation

Amy Van Horne: I want to make sure that we have a chance to hear from Jean on the research on fatigue and virtual mediations.

Jean Sternlight: Well, this is a place where, unlike with credibility, nobody's going to be surprised to learn that Zoom is fatiguing. Looking at too many little faces for too long, is more tiring than it would be to look at people in-person. There's some interesting brain science as well as psychology about things like blue-light and your brain trying to figure out who the whole person is when you're only seeing a little head. On the other hand, the good news is Zoom can be less fatiguing, because you could be at your home and you didn't have to travel. The other good news is as long as you're conscious of it, you can make good adjustments. Whether as an attorney or mediator, you

might need to take more frequent breaks and you might need to organize things a little bit differently. It is something important to be aware of.

Amy Van Horne: For those of you that are mediators, you do need to pay attention to your own fatigue level, because you will wear out faster too and it's way too easy to jump back and forth between conference rooms and keep mediating—not getting even those three deep breaths that you used to get when you were walking between conference rooms.

Don Harsh: On behalf of Creighton Law Review and the Werner Institute, thank you for speaking today. This has been a very informative panel. Thank you, again.