



Online Dispute Resolution

A Digital Door to Justice or Pandora's Box?
Part 1

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This three-part series takes a deep dive into the future of online dispute resolution in Colorado. Part 1 discusses how videoconference mediation can bridge geographic distances, address obstacles to gathering in the same physical location, and deliver a satisfying “face-to-face” experience.

Litigators and their clients know the power of mediation as an efficient and effective tool to resolve disputes. Colorado courts have likewise embraced the idea that almost every dispute can and should be referred to mediation.¹ Traditionally, mediation is held in person or telephonically. But current technology allows mediation participants to choreograph the mediation dialogue using a wide array of electronic media and online tools.

This series explores online dispute resolution (ODR) tools currently used in U.S. courts and other countries. Part 1 discusses using videoconferencing, with a focus on web-based videoconferencing, to deliver traditional-style mediation, with mediators, clients, and attorneys participating “live” in virtual videoconference rooms.² Part 2 will discuss artificial intelligence assisted ODR, online settlement tools derived from e-commerce and now offered by the private sector to facilitate quick resolution of conflicts. Part 3 will discuss ethical considerations for practitioners who use these technologies, given the introduction of ODR tools, a “fourth party,” into dispute resolution.³

Why Use Videoconferencing?

Attorneys and self-represented litigants in the Front Range have access to a large number of professional and well-qualified mediators offering a robust menu of hourly rates and payment options. However, attorneys and self-represented litigants in smaller communities, such as Eastern Colorado, the Western Slope, Southwest Colorado, and the mountains, face logistical and geographic challenges in

scheduling and attending conventional mediations. First, the availability of trained mediators in rural communities is limited. Second, factors such as weather, long distances between parties, high mountain passes, and farm and ranching duties make dedicating one full day to mediation difficult. While some mediators are willing to travel throughout Colorado, the costs associated with such mediator travel can be significant. And third, compounding these issues, if expert information is needed for a full and fair evaluation of settlement options, parties are often pressed to resolve cases in one session. This latter factor can sometimes lead to “buyer’s remorse” and the potential unraveling of a negotiated settlement agreement.

At the same time, Colorado has taken initiatives to allow remote participation in court proceedings statewide with e-filing, telephone appearances for hearing and status conferences, and reduced requirements for in-person calendar calls or other appearances. These flexible practices facilitate the court’s handling of cases. Similar practices can assist parties with mediation as well; ODR can be used to expand the reach of mediation to more litigants, at lower cost, and with greater efficiency.

ODR Overview

ODR is a general term describing a variety of online platforms, programs, and systems. ODR can be loosely defined as “a digital space where parties can convene to work out a resolution to their dispute or case.”⁴ ODR thus describes any mediation or dispute resolution process delivered remotely.

The need for ODR, from simple videoconferencing to “smart” ODR, is apparent to any practitioner who has engaged in a statewide or regional practice. Courts have also seen the need for powerful ODR tools to help them manage overwhelming dockets of smaller civil, family law, and traffic cases. These tools are particularly effective where the parties or their decisionmakers are located in multiple states, or where the parties have difficulty taking time away from work or face transportation challenges.

ODR offers new ways to overcome these challenges. It also can facilitate access to civil justice for unrepresented litigants or those seeking resolution of smaller dollar matters. It is thus important to become familiar with these new tools, which promise to change the ADR landscape significantly.

Videoconferencing Generally

Even as recently as a few years ago, commercially available videoconference systems were not accessible to any but the largest firms or government law departments. Dedicated-line videoconference system costs and the unreliability of the technology made real-time mediation all but impossible for a general practice attorney or self-represented litigant. Today, both the cost and technology barriers have been overcome, and commercially available web-based videoconferencing software is readily available without the need for expensive hardware. Real-time, conventional, “everyone is there” mediations online, using simple, inexpensive web conferencing tools, are available to anyone with a laptop, tablet, or mobile phone and dependable broadband

or cellular data availability. And these tools are often available for free.⁵

Web-Based Videoconferencing

Web-based videoconference mediations aim to keep things simple and affordable. Participants are sent an email with an invitation to join the online conference, including a weblink. Participants click on the weblink a few minutes before the appointed time and “enter” the mediation room, complete with a face-to-face view of the mediator, parties, and counsel. The mediator, as meeting organizer, may begin by gathering everyone into a single “conference room” for preliminary discussions. After a joint preliminary discussion, the mediator can easily separate the disputants into separate, secure “rooms” in which the aligned parties and counsel may speak to each other privately. The mediator then has the ability to virtually shuttle between rooms to caucus with the parties individually. The mediator may also share documents through his or her screen.

Indeed, one of the key benefits of the web-conference model is that the parties and mediator retain a great deal of flexibility to design the process to cater to party needs. One highly useful feature is the chat format, which parties can use for one-on-one correspondence with the mediator. Parties can also send confidential chat-based text messages through the tool to counsel or allied parties, even outside the session hours. Or the mediator may control the chat by only allowing chats to occur during working hours or during a session.

Web-based videoconferencing also offers screen sharing tools, which make it easy for mediators, parties, and counsel to share key pieces of evidence, such as videos, documents, and proposed agreements, all with just a click of the mediator’s keyboard authorizing the screen share. Settlement agreements can be drafted, exchanged, signed, and filed electronically. Adjourning and reconvening is also easy because the web conference link can be scheduled to remain active as long as necessary, or it can be rescheduled.

The ease and accessibility of the web conference format lends itself to quick rounds of mediation to deal with discrete matters, such as

preliminary issues and information exchange.

Web-based videoconferencing tools offer the typical scheduled mediation model, guided by a professional human mediator, that practitioners are already familiar with. The only difference between the online web conference experience and the brick-and-mortar mediation experience is that the meeting occurs entirely online, supported by text or other communication tools.

Useful Applications of Videoconferencing

Videoconference tools are useful in almost any case type but may be especially helpful in family law matters, because 80% of Colorado courts require mediation before setting a contested hearing in pre- and post-decree matters.⁶ Moreover, parents often live great distances from each other and have a difficult time missing work or paying for travel. And where appropriate, the parties can consent to allow for the online participation of ancillary professionals, such as guardians ad litem or financial experts, who can log in, render feedback, or provide background, and then log out of a session after providing the information sought. This saves the parties money and the professionals time.

Cases involving intimate partner violence may also be appropriate for a videoconference mediation, which allows the parties to remain unaware of their physical locations. But similar to in-person mediation, if there is a protection order in place, care must be taken to ensure that an exception exists to allow contact for the videoconference mediation.

Videoconference tools can also be used with traditional in-person mediations. For example, in many personal injury or other insurance disputes, the defendant’s claim professional may not be located in the state where the claim is pending. By using a quick, web-based videoconference connection, the mediator can bring the claim professional (or remote client) “into the room” whenever needed to discuss the case, meet the other parties, have confidential discussions with counsel, view on-screen presentations or evidence, and otherwise efficiently immerse themselves in the mediation as they would if they were there in person.

Likewise, the plaintiff may live out of state and be unable to attend the mediation in person. This format will accommodate any party or participant.

Arguably, trying to mediate with parties remotely may introduce obstacles to settlement. There are tangible benefits to being in the same physical space: seeing and speaking with the mediator, meeting the other parties, and hearing all of the discussions. Moreover, parties may find it easier to maintain a rigid position if they are not in person with the other party and mediator. Some mediators maintain that body language informs a large part of their practice and unless the parties are physically in the room, they are unable to do their best work to facilitate settlement. But videoconference mediation mitigates these obstacles by allowing the parties to have a virtual presence. And the mediator and counsel often find that nonverbal cues are just as easy to pick up on in the virtual world.

To be sure, there are benefits and obstacles to in-person and videoconference mediations. The biggest practical obstacle when considering videoconference mediation, especially in rural communities, is bandwidth.

Technology Challenges

As recently as a few years ago, many attorneys were reluctant to embrace electronic and data-driven practice tools. Some regarded themselves as not tech-savvy and feared they would lack the time or inclination to learn how to use and manage these often complicated new tools. When videoconferencing first emerged, the same resistance was common. In fact, the challenges were even greater, because the videoconference products available when the technology first emerged were not as sophisticated.

In addition, the equipment and software required to run the dedicated network connections and video/audio interfaces, even within the last five years, were priced out of reach for all but the largest firms or companies. Operating the systems required trained audiovisual professionals. Even then, the connections were often dodgy and unpredictable, different systems could not communicate with each other at different ends of the conversation,

and video quality was often poor. And as more affordable web-based systems emerged, they too suffered latency, connection, and dependability problems. If you've ever suffered through a "Skype" conversation with someone lacking sufficient bandwidth, you understand.

Thankfully, the technology and hardware that supports the latest versions of videoconferencing have made epochal jumps in power, dependability, cost efficiency, and ease of use. Today, videoconferencing can be as easy as reaching for an iPhone or dropping into a website. The financial barriers to entry for most of these tools have fallen so low as to have virtually disappeared. The personal resistance to the use of technology has faded too. And while there is yet a wide comfort range among tech users, most attorneys and clients are comfortable enough with Facetime, Skype, and Amazon "Echo" style AI personal assistants to effectively use web-based videoconferencing. Further, law office tech tools are now almost universally accepted as critical parts of every law practice, whether large, small, or solo.

But one frustrating ogre of underperformance and interference remains, especially for practitioners in many parts of Colorado outside the Front Range. Even the mention of the word causes shudders if you are the one in your firm charged with making sure you have enough of it: bandwidth.

Former CBA President John Vaught wrote an article considering the bandwidth problem in its historical context and the steps the CBA was taking to remedy the problem.⁷ The article pointed out that attorneys in Denver or Colorado Springs were enjoying electricity and telephone access in their practices in the early 1900s. But many practitioners in rural areas didn't see electric lights until the 1940s, and they waited for telephone access until well into the 1960s. Access to these basic systems was that generation's "bandwidth" dilemma, and it caused real hardship for rural practitioners.

Similarly, many Colorado attorneys today face frustrating shortfalls in cellular coverage; Internet access, reliability, and speed issues; and other roadblocks in the use of cutting-edge tech tools in their practices. While it is beyond the scope of this article to get into the weeds on

the intricacies of broadband Internet access, the fact remains that much of Colorado falls well short of even the low 2015 federal minimum expectations for broadband Internet access: 25 mbps (megabits per second) download and 3 mbps upload.⁸ As the Vaught article pointed out, some rural towns have *no* broadband access at all.

Even Front Range practitioners need to pay attention to bandwidth because more is better, and higher speed is better. The incremental cost of a high speed or, if available, gigabit connection is easily recouped by the increased productivity it can deliver. If you haven't upgraded your office's Internet service in the last two years, you may face a bandwidth roadblock when trying to use online videoconferencing. Speed that was more than sufficient to handle email, e-filing, or

general web research and browsing as discrete tasks may be incapable of processing those functions simultaneously with videoconference mediation. Fortunately, most videoconference tools are not bandwidth hogs, but obtain the maximum available bandwidth speed and size to keep office systems running smoothly.

Conclusion

Videoconference mediation, part of the breaking ODR wave, addresses obstacles participants face in trying to meet in the same physical space to settle disputes. Inexpensive web conferencing tools are available to anyone with an Internet-accessible device and dependable broadband. Practitioners should incorporate these tools to enhance the mediation experience for themselves and their clients. 



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NOTES

1. See, e.g., <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr>.
2. This is also referred to as "hybrid" mediation. Exon, "Ethics and Online Dispute Resolution: From Evolution to Revolution," 32 *Ohio St. J. on Dis. Resol.* 609 (2017).
3. Rainey, "Third-Party Ethics in the Age of the Fourth Party," 1 *Int'l. J. Online Disp. Resol.* 37, 40 (2014).
4. Joint Technology Committee, JTC Resource Bulletin: ODR for Courts at 1 (Version 2.0 Nov. 29, 2017), <https://www.ncsc.org/-/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.
5. There are many such tools out there, including Zoom, <https://zoom.us>; Skype, <https://www.skype.com/en>; and proprietary tools such as Google Hangout, hangouts.google.com, and Apple's FaceTime, <https://support.apple.com/en-us/HT204380>. The authors do not endorse any particular tool.
6. See https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Court%20Programs/ODR/Mediation%20Guide%20for%20Colorado%20Courts/Mediation%20Guide%20for%20Colorado%20Courts%20as%20Posted%20on%20Intraweb.pdf.
7. Vaught, "Access to Justice—One Fiber Optic Cable at a Time," 48 *Colo. Law.* 4 (Feb. 2019). The CBA supports efforts to resolve "last mile" issues, and Governor Polis has also made statewide last mile high-speed broadband infrastructure development a high priority. See also Vaught, "Saving the Practice of Law in Rural America: CBA Heads to Congress for Broadband Funding," 48 *Colo. Law.* 4 (Dec. 2019).
8. <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report>.