

Outside Counsel

Is Virtual ADR the “New Normal”?

According to a COVID litigation tracker (www.huntonak.com/en/covid-19-tracker.html), more than 3,400 COVID-related complaints have been filed. This number is only likely to increase. These cases are on top of the already large accumulation of cases pending in the courts. A New York Times report from several weeks ago noted that the pandemic had created a backlog of nearly 40,000 criminal cases.

In response to COVID-19, there has been an explosion in virtual alternative dispute resolution (ADR). One day, the threat from COVID-19 will pass and in-person proceedings will again be an option. But will things return to how they had been or is virtual ADR here to stay? This is a critical question. Lawyers, clients, mediators and arbitrators all need to know what the future will look like and what options are available will be available. As discussed in more detail below, the authors posit that the answer is yes, it is here to stay, but maybe not in this precise form or as widely used. We review the good, the bad, and the future of virtual ADR.

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How Did We Get Here?

At the outset, it is important to realize that virtual ADR pre-dates the current crisis. Per www.virtualmediationlab.com, mediators have used Zoom since at least 2013. In fact, there were already mediators with national practices devoted almost entirely to virtual mediation well before March 2020. And, most ADR

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institutions already had provisions in their rules allowing for virtual arbitration hearings, or at least portions thereof. *See, e.g.*, JAMS Comprehensive Rules, effective January 1, 2014, rule 22(g): “The Hearing, or any portion thereof, may be conducted

telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.”

What happened in March of 2020 was that all in person ADR was prohibited so virtual ADR scaled up exponentially to meet the need. Not every case converted over and certainly many lawyers and clients are patiently awaiting the time when in-person mediation will return, as it has in limited forms in certain regions. (ADR offices are opening, subject to local laws and rules regarding social distancing and face masks.) Because all of this took place in a crisis atmosphere, the flight to virtual took place as a direct substitute for in person, changing as little as possible along the way except to adapt to the technology.

Will this last when full in-person ADR resumes in full force? This depends on how the marketplace of insurance ADR users view the experiences they have had. Based on the experiences and comments received by the authors, the experience has been mixed

The Good

On the favorable side, virtual ADR has proven to be flexible. It is easier to undertake mediations and arbitrations in segments. This is partly due to scheduling - there is no longer

travel the day before and the day after. During the day, parties work in brief but intense increments, fitting into schedules in ways not previously imaginable. We hear stories of insurance adjusters attending four virtual mediations in a week, all nominally in very different locations but conducted virtually. The absence of travel means significant cost and time savings. If nothing else, these cost and time savings due to a lack of travel may help virtual mediation live on as an option even when a vaccine becomes widely available.

In arbitrations and mediations, it is easy to share screens and documents. And while a lot has been said about reading people and credibility and the value of these in-person determinations, the general view appears to be that credibility can be judged reasonably well by video. See Wayne Brazil, *Credibility Concerns About Virtual Arbitrations Are Unfounded*, Law360, May 26, 2020.

The Bad

The challenges are significant as well. There is a risk that participants will lack focus and concentration. In this environment, participants may be at home and face competition for their attention by pets, children, spouses, and even delivery or utility persons. For those who are in the office, they can even more easily divert to other work during downtime. For busy insurance adjusters, with dozens or hundreds of other files, the temptation may be strong. For in-house counsel, the impulse will be similar. This may interfere with the creation of settlement momentum.

There is also concern about lack of pressure to do a deal in the absence of normal constraints like flights or

the evening. For arbitrations, dealing with documents requires a bit more thought (although vendors can handle most of this very well) and certainly lawyers would prefer to at least be able to make eye contact with their witnesses as they are conducting cross-examinations.

There are also the inevitable technical glitches. Someone often freezes on screen. There may be issues with someone's WiFi. Companies aren't thrilled with the security of lots of externally enabled cameras and microphones having access to their secure systems and devices.

The Future

When we look towards the future, most likely the cost savings will cause a continuing focus on this space and this likely will drive improvements, creativity and process improvement. The meeting platforms are all competing over features, and video and sound quality. Mediators and arbitrators are exploring the contours of process improvements and what the marketplace preferences are. Lawyers and clients will soon start to make their voices heard about how things can be better for them. The feedback loop will make its circuit and likely render virtual ADR an option on dispute resolution menus. Every time someone puts in a request to travel to a mediation, the investment will be scrutinized. What are the advantages? Why does this case need in person face-to-face attention? What is the payoff for the travel costs and expense?

Most likely, though, virtual insurance ADR will be on the menu in a piecemeal way. There are ways to blend telephone, video and in-person to create a process that is unique to each case and helps all participants

fully engage in the process in a productive and comfortable way. There are choices to be made at each step about which format will work best.

The most important thing is to understand the players and the dispute and to think through process possibilities in a disciplined way. What are the features of each way of communicating and how will each move a case forward productively? The telephone has had a sad let down in all this but most mediation processes and certainly a lot of arbitration scheduling conferences can very successfully be handled by telephone. Telephone can be a lot less stressful than being on screen. Participants can be more relaxed. There are no delays for transmission. Certainly, there are now, and have been for a long time, purely telephonic mediations and arbitration hearings. This is particularly true in the international ADR context.

Conclusion

While we wish COVID-19 a rapid departure from the world, we see virtual ADR as here to stay. Although some will no doubt seek to return to the old ways in a COVID-free world, virtual ADR's prominence is unlikely to recede. It may, however, arise in a new form that draws upon the good (efficiencies) that virtual ADR can provide while minimizing the challenges (distractions and technical issues).

