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Virtual Arbitrations and Mediations Are Here to Stay

By **Steven Gilford** | 2020-May-28



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Courts around the world have been closed, and litigation backlogs are growing every day. Even with all its ramifications, the coronavirus pandemic has not eliminated the business pressures to get cases resolved, money in the door, and reserves off the books. One solution is mediation or arbitration by videoconference — virtual alternative dispute resolution (ADR).

Virtual and telephonic ADR have actually been around a long time, particularly in smaller mediations and certain components of litigation and arbitration. Mediators confronted with relatively small claims have conducted mediations by phone or videoconference to streamline the process and reduce costs.

Courts and arbitrators commonly hold non-evidentiary hearings, including on important substantive topics — by phone or online — and evidence is often presented by video-recorded deposition or through live videoconference when a witness cannot be physically present. JAMS and other ADR organizations have rules that explicitly provide for such proceedings.

JAMS has long offered proceedings online and conducted thousands of cases successfully via videoconference. While virtual ADR had been around in various forms for several years, the current pandemic has brought it to the forefront in major commercial and insurance cases.

Many of these are large, multi-party matters involving complex issues such as multi-carrier insurance coverages, construction defects, and class actions. The surprise is how quickly clients, advocates, mediators, and arbitrators are adapting to the process, with seasoned attorneys and neutral parties recognizing the benefits and many believing the experience is likely to change the ADR landscape for the long term.

Benefits of virtual ADR

Some of the benefits of virtual ADR, in addition to allowing cases to proceed towards resolution while the courts are closed, include the following.

Expense reduction

All of us are under pressure to reduce costs. Two of the obstacles to in-person mediation and arbitration are the time and expense to get the participants to a common location, which often involves days of travel in addition to the time for the hearing itself. Virtual ADR can significantly reduce expenses by eliminating the cost of travel and the time getting and being out of town.

Scheduling

Two issues that often arise at the beginning of a mediation or arbitration concern the date and location for the proceeding, especially when parties are spread across the country in different time zones. Virtual ADR eliminates much of the problem by allowing the participants to appear from their own homes or offices. It also diminishes the pressure to have everyone block off full days for a session.

Flexibility

One of the great advantages of virtual ADR is flexibility. Without the time and expense concerns that often lead parties to schedule full-day sessions, the parties and the mediator or arbitrator can schedule chunks of time that are more appropriate to the matter at hand.

For example, in one recent insurance case, the parties scheduled an initial session to exchange information about the facts, status, and litigation strategy of the underlying case, and left coverage negotiations for another day after the information could be digested and the insurers could have internal discussions about settlement authority.

Similarly, many mediations are resolved in calls and discussions days, weeks, or months after an initial session. Having a virtual follow-up session instead of a phone call can allow more effective mediation facilitation and negotiation among the parties. When appropriate, arbitrations can also be scheduled in smaller chunks of time around particular issues or witnesses.

Improved access to decision-makers

Most mediators request, or indeed require, individuals with full authority to attend a mediation so they can experience and appreciate the evolving dynamics of the mediation. Nonetheless, in many cases, particularly in significant insurance and commercial cases, this request is honored in the breach with the presence of a person with authority to settle at a particular level, rather than a person with full authority.

In many cases, this is because the ultimate decision-maker is either unable or unwilling to take the time to travel and attend a full mediation session. A virtual ADR platform helps to solve this problem by making it easier for a more senior executive to participate in some or all of the mediation.

It also enables senior decision-makers to attend all or important parts of an arbitration and to obtain a first-hand appreciation of the proceeding and critical testimony. This allows their understanding of settlement value to evolve over the course of the proceedings based on first-hand experience instead of periodic reporting by others.

Improved logistics

Many online ADR platforms facilitate the sharing of documents, annotations, and virtual whiteboards. These are effective tools and can often be used more efficiently online than in person. In arbitrations, electronic exchange and sharing of documents and exhibits can reduce the substantial logistical challenges of setting up war rooms and presenting physical documents at a hearing.

Challenges of virtual ADR

While virtual ADR has many potential benefits, it also presents challenges, though many of these can be managed with proper preparation.

Security

The most common concern raised about virtual ADR is security. The coronavirus pandemic, along with market pressures, have been a decisive force in driving vendors to address these concerns. Online platforms are being updated continuously to resolve security issues as they arise. For example, JAMS frequently uses the Zoom HIPAA-compliant platform in mediations and arbitrations where the parties need a platform that can satisfy the requirements of the Health Insurance Portability and Accountability Act (HIPAA).

In addition, neutrals and their organizations have become more adept at using virtual platforms and developing methods to enhance security. At JAMS, for example, neutrals receive ongoing training on the use of available security measures. Neutrals working with trained online moderators use a virtual waiting room to verify the identities of all participants before beginning a proceeding and then “lock the session” to prevent the subsequent entry of uninvited guests.

Similarly, the ability of participants to record the proceeding is disabled, and all participants are requested to confirm that there will be no recordings and no unidentified observers. Unique passcodes and data encryption are also used to enhance security. While neither law firms nor neutrals are likely to guarantee the security of any particular ADR platform or proceeding, JAMS has conducted numerous virtual proceedings without encountering any known security breach.

Look and feel

Another common objection to virtual ADR proceedings is that they do not have the same look and feel as in-person proceedings. To some degree, that is necessarily true, but this has not been a serious practical issue. Using the mosaic view on a virtual ADR platform allows the neutral and the participants to see reactions of everyone involved at the same time.

Platforms such as Zoom allow for individual breakout rooms that the neutral can move among easily. The kind of social interchange and banter that often contributes to a successful mediation can also occur virtually.

Indeed, most younger participants are already comfortable with online interactions, and many of us have had recent experiences with virtual family gatherings, business meetings, school classes, and cocktail parties that have given us a level of comfort with virtual interactions we would not have dreamed of even six months ago.

Testing the technology

We know from experience that the technology can and will work. But that experience is not a substitute for careful planning and preparation by the neutral and the participants. In our practice, we try to schedule a test run beforehand to make sure that everyone has the right equipment and understands how to use the features of the platform.

This is also a good time for participants to experiment with lighting and camera positions to confirm they are presenting themselves effectively. Discussing the dress code and breaks can also help to make sure everyone is on the same page before a proceeding begins.

One of the things that has made virtual ADR so successful recently is the increasing realization that most of us have more experience with this kind of technology and presentation than we might initially think. Corporations and law firms, particularly large international ones, have been using videoconference technologies with various degrees of sophistication for years, both internally and for important external conversations and negotiations.

Lawyers have been taking video depositions for decades and presenting excerpts from those depositions in court. Arbitrators frequently accept important arguments and live testimony by videoconference.

While some of these procedures require advance planning, especially when a lawyer cannot be in the same room as a client or witness, advocates and neutrals are increasingly familiar with such situations and their abilities to test and evaluate testimony on-screen. With ever-improving technology and growing comfort with the medium, it is a small step to move from these more traditional experiences to effective virtual ADR.

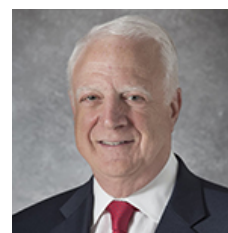
Parting thoughts

Mediation and arbitration are designed to be flexible, efficient, and less costly mechanisms for the resolution of disputes unconstrained by some of the practical and procedural constraints of the courts. The recent experience with closures and stay at home orders in response to the coronavirus pandemic has highlighted the effectiveness of these kinds of procedures, and the demand for virtual ADR has increased dramatically.

Every client and attorney will have to decide how virtual proceedings will fit into their options for dispute resolution. One thing is for certain: Virtual ADR is here to stay, and its use will continue to grow as technology continues to improve, participants continue to use and become comfortable with the process and the marketplace continues to recognize the benefits.

About the Author

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