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COVID Considerations when Choosing ADR Format

BY LISBETH M. BULMASH
AND SHARMEEN LADHANI

In March 2020, the COVID-19 pandemic disrupted our world. People sheltered at home, while businesses and governments faced competing priorities of protecting constituents and keeping the economy afloat. Courts shut down, leaving disputes unresolved, and alternative dispute resolution (ADR) practitioners were forced to conduct mediations and arbitrations virtually.

Parties have now grown accustomed to appearing in the virtual space, which offers convenience, flexibility, and cost savings. For complex cross-border disputes with multiple parties, scheduling is simpler, as there is no need to travel. In heated conflicts, the virtual format can help to diffuse tension between the parties; there is no risk of an uncomfortable interaction in the hallway. Despite the convenience and accessibility benefits of virtual ADR, humans still crave live connections. Some disputes are better suited for in-person proceedings, such as those involving personal relationships.

Businesses have reopened and employees are returning to the office. Courts remain saddled with backlogs, highlighting ADR as a viable option. ADR practitioners now have a variety of formats at their disposal: in-person, virtual, and hybrid, which combines aspects of in-person and virtual proceedings. Choosing a format requires examining the relative advantages and disadvantages of each. But as the pandemic marches on, it is imperative that ADR practitioners manage health and safety with knowledge and care.

First, ADR professionals should be aware of the latest local orders, state mandates, and Centers for Disease Control (CDC) guidelines, as well as the potential intersections

with health privacy laws.

For example, the reach of the Health Insurance Portability and Accountability Act (HIPAA) is often overestimated. Many ADR practitioners avoid asking questions about vaccination status because they do not want to run afoul of HIPAA. This is a common misconception. While HIPAA prevents medical providers from disclosing a patient's confidential information, it is not a prohibition on asking whether a person has been vaccinated. Nevertheless, though not a violation of HIPAA, soliciting personal health information should be done with discretion.

Responding to the nationwide surge in COVID-19 hospitalizations caused by the Delta variant, the CDC in July 2021 recommended that fully vaccinated people should wear masks in public indoor spaces within high-transmission areas and advised students and staff to wear masks during in-person learning, regardless of vaccination status.

Texas Governor Greg Abbott has issued several executive orders contradicting CDC guidelines. The orders restrict Texas counties, cities, school districts and public health authorities from enacting mask mandates, and ban Texas public and private entities from requiring consumers to prove that they are vaccinated. Violators risk fines and the revocation of state funds.

However, these orders appear to be silent on whether employers can require employees to be vaccinated. A federal judge recently dismissed a lawsuit filed by employees of Houston Methodist Hospital after the hospital required its staff to be vaccinated. The court upheld the hospital's right to mandate vaccination, rejecting claims that the vaccine is "experimental and dangerous," and upholding the hospital's interest in a safe environ-

ment for staff and patients. Over 150 hospital employees either resigned or were terminated due to their refusal to be vaccinated. While an appeal is pending, the dismissal has empowered several hospital systems around the state to mandate vaccinations.

After determining the current state of the law, ADR practitioners should carefully probe parties' feelings regarding vaccination. Asking open-ended questions about a client's preference for a remote or an in-person session can provide the practitioner with useful insight to avoid assuming certain views or passing judgment on a client's sensitivities. Perhaps a family member of a party cannot receive the vaccine due to medical reasons. Religious beliefs may be another reason for declining to be vaccinated. ADR practitioners should be accommodating and nonjudgmental in receiving and safeguarding sensitive information.

Showing flexibility to adapt policies and procedures will protect both practitioners and clients alike. It would be prudent for providers to check the requirements of their landlord, firm and/or building to confirm that their policies are not in conflict.

For example, while a practitioner's firm may not require masks for vaccinated clients, the building's policy may mandate masks in common areas. Advising clients of these policies in advance will prevent confusion and misunderstanding.

Finally, ADR providers who wish to conduct a hybrid mediation should connect with the parties to iron out logistics and build rapport ahead of the mediation. If one party will be appearing virtually and the other will be in the same room as the mediator, the mediator should be deliberate in eliminating any perception that one party has an advantage over another. Such efforts will help the mediator build trust and encourage cooperation among the parties during the mediation.

As ADR practitioners determine the most appropriate forum for their mediations and arbitrations, they should keep in mind that COVID-19 guidelines will continue to evolve.

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Lisbeth M. Bulmash, Esq., is a JAMS mediator and arbitrator. She can be reached at lbulmash@jamsadr.com. Sharmeen Ladhani, Esq., is a mediator for the Aga Khan Conciliation and Arbitration Board. She can be reached at sharmeenladhani@gmail.com.