

Recalcitrant Parties in the Days of Virtual ADR

Standards of conduct mandate that counsel refrain from the illegitimate invocation of COVID-19 as a tactic for buying time or delaying arbitration.

By **Charles H. Dick Jr.**

The coronavirus pandemic has forced us to adopt some new behaviors. Who could have imagined being ordered to stay home and later to wear face masks when in public, cars sitting idle or graduation ceremonies taking place virtually? Further, could anybody have envisioned federal and state courts being shut down for months? One thing that hasn't changed is that disputes are still arising.

Faced with a deadly virus and the resultant need for isolation, alternative dispute resolution (ADR) was forced to pivot. Videoconferencing technology existed but had been used only occasionally in ADR. Seemingly overnight, Zoom and the names of other videoconferencing platforms became part of the legal vocabulary. In a matter of weeks, virtual mediations became more popular, and arbitration hearings with parties scattered across the country began to seem ordinary.

As society reopens, how long will this reliance on videoconferencing platforms continue? This pandemic is unprecedented, and predicting the future is a challenge. Caution becomes an obsession. Think slow walk.

Recent cellphone location data indicates that people are slowly starting to venture away from their homes. A survey by Democracy Fund + UCLA Nationscape reports that three out of four Americans believe social-distancing restrictions are being relaxed too quickly, and USA Today has reported that only 10% of Americans think it safe to have gatherings of 10 or more people. Federal and state jury trials are not going to occur for at least six months, and potentially not until well into 2021. Lawyers and clients prefer greater predictability, and until the future is more certain, we should expect ADR to proceed cautiously in spite of the increasing demand for dispute resolution.

As providers of dispute resolution services reopen their facilities, will there be people who are apprehensive to return? Is it sensible to be in the conference room with others who may be asymptomatic? Add masks to the equation, and everyone's anxiety is compounded. Those who are still reluctant to travel will most likely opt for a virtual hearing rather than postpone a final resolution of the dispute. The cost savings of a virtual arbitration



(courtesy photo)

Charles "Chuck" H. Dick, JAMS mediator and arbitrator.

can be significant: Travel and lodging expenses are eliminated, as is the time spent traveling.

Old ADR habits are difficult to change, and in-person arbitrations will resume. Some disputants will be put off by the perceived sterility of a proceeding that lacks the warmth of interpersonal contact; for those individuals, waiting until it is safe for a face-to-face session may be preferable. To delay or not delay becomes the question, and professionalism makes it difficult to postpone a resolution without considering its impact on justice.

Most providers' arbitration rules authorize the arbitrator or tribunal to decide how evidence will be presented. It is commonly believed there is no entitlement

to an in-person hearing. Thus, Rule 22(g) of the JAMS Comprehensive Arbitration Rules & Procedures states, “The hearing, or any portion thereof, may be conducted telephonically or video-graphically with the agreement of the parties or at *the discretion of the arbitrator*” (emphasis added). (See also American Arbitration Association (AAA) Rule R-32(c) and CPR Rule 12.4.) However, having the power to decide does not mean it is wise to exercise that power. The main focus should be to determine which method of receiving the evidence will best balance competing interests. Expect an arbitrator to focus on the nuances of procedural due process; the objective of producing a confirmable award will weigh heavily in any decision regarding the form of the hearing.

There are legitimate reasons that a virtual arbitration may be problematic. Is there adequate security and privacy built into the software being used the hearing? Who will be liable for any breach of security or if any confidential information is compromised? If witnesses appear remotely, are there assurances that their testimony will be given without any guidance or assistance? Can a client’s interests still be served if counsel and the client appear from separate locations? Is it even feasible for everyone to be in the same room? Will documents be readily available for use by witnesses testifying remotely? Can the hearing be conducted effectively without children, pets or other predictable interruptions? As a practical matter, these and other arguments may hamper conducting an arbitration “in a

manner that upholds the integrity and fairness of the arbitration process.” (See Standard 5 of the California Ethics Standards for Neutral Arbitrators.)

Just as there may be compelling reasons to decline a virtual hearing on the merits, fairness may require avoiding an in-person arbitration hearing, at least for now. How can the participants reasonably be assured that everybody in attendance is healthy? Can the number of people in attendance be controlled without disadvantaging a party? Is social distancing possible? Is a party immunocompromised or subject to a compelling health reason for staying away from strangers? Can credibility accurately be assessed if people are wearing masks? Is it safe for the parties and/or counsel to travel for an in-person hearing? These considerations shape the arbitrator’s dilemma.

Many arguments against virtual hearings can be resolved with the cooperation of the parties. Conversely, counsel actually might work together to satisfy the concerns that initially augur against in-person hearings. Witnesses can be scheduled to minimize the number of people at the hearing site at a given time. Hearing rooms can be reconfigured to give people more space. Evidence can be presented through stipulation of uncontested facts, written statements, depositions and remote testimony. At the same time, a party’s genuine fears may persuade an arbitrator that a reasonable delay is the only way to ensure fairness.

It may be wishful thinking that adversaries can agree on procedures in dispute resolution.

However, there may be legitimate reasons a party or counsel cannot accommodate an opponent’s request. An advocate may defer to the bona fide concerns of a client, and it is foreseeable that a party might stand firm in its opposition to whatever decision an arbitrator makes, whether in a virtual or in-person hearing. The arbitrator may have the authority to control how evidence will be received, but a “cram down” is uncomfortable. How easy will it be for an arbitrator to decide whether a party’s fears or anxieties are contrived? If there is a case in which a party’s paranoia causes an eyebrow to be raised, that is likely to be the exception proving the rule. Even the most seasoned arbitrator will have difficulty ignoring a party’s strongly held views, and most arbitrators will be circumspect when determining how and when a hearing will be conducted.

If an arbitrator overrules a party’s views regarding the form of the hearing, then counsel and a client will be forced to weigh the considerations of personal safety with the implications of refusing to participate further. Failure to appear and advance one’s interests in civil court litigation could lead to a quick judgment once an adversary proves damages. Arbitration is different. Even if a respondent is nonresponsive, a claimant still must submit evidence sufficient to establish a prima facie case on liability and injury. (See JAMS Rule 22(j) and AAA Rule R-31.)

If due process means anything, each party should have an opportunity to present its case. That is why the absence of a party is fertile ground for vacating an arbitral

award. An arbitrator should require proof that the absent party has notice of all proceedings and provide an adequate period of time (after notice) for a party to justify its nonparticipation.

Faced with “sufficient” cause, failure to postpone a hearing is grounds for vacatur. (See 9 U.S.C. §10(a)(3) and California Code of Civil Procedure §1286.2(a)(6).) Two implications are clear: Sufficiency of cause is bound to be a subjective decision, especially considering an arbitrator’s tendency to err on the side of the party reluctant to proceed. Second, an arbitrator should substantiate any decision to proceed in the face of one party’s opposition to a hearing in the near term.

Each party is entitled to a fair and expeditious resolution of their dispute, and it is possible one party’s opposition to a hearing at present is unsupported. Due process is poorly served by allowing a party’s intransigence to prevail when bad faith, irrationality or other unreasonableness is apparent. Notice and an opportunity to be heard are procedural due process demands, and an arbitrator remains duty-bound to ensure the dispute resolution process remains fair, economical and efficient for all. Gaming the system with an unreasonable invocation of public health should never be countenanced.

These are times that call for the better angels of the legal profession. Standards of conduct mandate that counsel refrain from the illegitimate invocation of COVID-19 as a tactic for buying time or delaying arbitration. (See

California Rules of Professional Conduct Rule 3.2.) A lawyer must not make a false statement of fact to an arbitrator. (See California Rules of Professional Conduct Rule 3.3(a)(1).) In parlous economic times, it is incumbent on parties, counsel and arbitrators to embrace a fair and efficient dispute resolution process. The profession demands nothing less.

Faced with doubts about the reasonableness of a party’s position regarding the form of the hearing, the arbitrator must deal with some practical realities. In a California consumer arbitration, if the claimant is the party arguing for delay, a continuance may be all but assured. If the respondent is the objector, will fees and expenses of arbitration continue being deposited if objections are overruled? Sure, it is possible that the claimant would step forward and make the deposits so the case can proceed. If the dispute was originally filed in court and stayed pending arbitration, the claimant might consider returning to court and arguing that the respondent was in default under the arbitration agreement (See, e.g., *Sink v. Aden Enterprises*, 353 F.3d 1197 (9th Cir. 2003).) Is that a real solution when the resumption of jury trials is perhaps a year down the road? If these choices are not feasible, the case will likely be suspended until the concerns related to the pandemic abate. (See JAMS Comprehensive Arbitration Rules & Procedures Rule 6(c) and AAA Rule R-57(e).)

In commercial disputes, fees and expenses are shared. A claimant unreasonably resisting the

hearing schedule and declining to deposit fees risks losing a right to arbitrate. (See, e.g., *Pre-paid Legal Services v. Cahill*, 786 F.3d 1287 (10th Cir. 2015).) A respondent who is recalcitrant may lose the right to present evidence to support affirmative claims (see JAMS Comprehensive Arbitration Rules & Procedures Rule 31(b) and AAA Rule R-57(b).) Of course, a final award may well reallocate fees and expenses, but the thicket remains, and a reasonable delay in the hearing will usually be the best course of action. A relatively brief continuance is likely to bring about a final resolution quicker than relying on the courthouse.

In sum, there is little precedent for scheduling an arbitration amid a global pandemic, and resorting to rules-based solutions is unlikely to be helpful. Caution is paramount. These circumstances call for the parties, counsel and ADR professionals to be flexible and cooperate in designing a schedule that accommodates legitimate arguments for and against proceeding in a particular fashion. All of this begs for a renewed commitment to civility so a party’s reluctance to proceed does not become obstinacy. Fair-minded people should be able to work through these issues.

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