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Keeping Cases Moving During a Pandemic: Virtual ADR Works

By Deborah Fleck

The coronavirus pandemic has turned the legal field upside down, but perhaps on the other side, we will find we have really broadened our horizons in alternative dispute resolution (ADR).

I will discuss how mediators and arbitrators can help in this new online reality — but first, let's take a look at where we are right now.

We know that with orders from the governor, the supreme court and trial courts, the civil litigation field is almost entirely shut down. Even as we move into a careful phase-in, many people won't feel comfortable in the short term (or even the longer term) in a group setting.

Second, some cases simply can't wait, especially in family law and other time-sensitive areas.

And third, we all know cases can get worse, not better, with delay: witnesses experience loss of memory (or disappear) as do documents and other information. We can also expect a significant increase in bankruptcy filings.

By keeping cases on track through online dispute resolution, we all can help avoid a bottleneck at the courthouse as things begin to open back up.

The question in virtual ADR is how do we develop engagement, rapport and trust in a virtual mediation? The pleasant surprise is that many of us have found we are still able to build that critical rapport.

We know you want to help your clients resolve their disputes, and online ADR can keep your cases moving forward.

For those who haven't used an online platform such as Zoom, Microsoft Teams,

or Webex for ADR yet and want to develop a comfort level with it, mediators can offer pre-mediation practice sessions with you and your clients.

Some things don't change at all with virtual mediation. Neutrals can continue making separate, pre-mediation calls with counsel, which may be facilitated easily on an online platform. These calls get parties off to an efficient start on the day of mediation. It is helpful to confirm with counsel and later with their clients that they are present in good faith with an understanding that mediation involves compromise.

We are able to discuss procedural issues, including operating in a joint or separate caucus format. Neutrals can ask whether parties want an evaluative approach at some point. To avoid lengthy drafting issues after an agreement has been reached, it is helpful for counsel to bring templates on their laptops for releases and Civil Rule 2A Agreements. If counsel bring drafts of all final papers, parties are able to leave mediation with a case fully and finally resolved.

Mediators also learn a great deal by discussing the case itself in these calls: the challenges we need to overcome; the risks as well as the costs, both financial and emotional, of trial; any concerns that the lawyers and clients have; and creative solutions that may be available. If a mediator learns that an attorney has a problem with client control, for example, that information helps the mediator finesse through a difficult session.

A neutral can help reduce concerns for first-time users by simply talking about the new challenges and distractions

in online mediation and emphasizing the need to be flexible. Especially where parties and counsel are conducting business in their homes, they may have children who need attention. Juggling family and business responsibilities may add an extra layer of strain for the attorney or client during mediation. Understanding and empathy go a long way.

Finally, one of the key benefits to online mediation is the ease of having a decisionmaker, such as an insurance adjuster, actually be a live and engaged participant.

Security is also a significant concern for many entering the online ADR world. At JAMS, for example, neutrals receive ongoing training on how to maximize privacy and confidentiality. As additional security-enhancing steps, we use Zoom's HIPAA-compliant platform as well as strong encryption to access that platform. We also ensure that the chat feature uses the strongest possible encryption.

For further protection, passwords are sent in separate emails from the ones containing meeting links. The waiting room feature precludes strangers from entering the mediation or arbitration unless they are specifically moved into a room by the neutral or their staff. Once all attendees are present, the waiting room may be locked.

At JAMS, we assign a case manager to each session who will be available throughout if any technical help is needed. Like front desk staff, they greet the attorneys and parties in the virtual waiting room, explain how things will work, and move parties into their breakout rooms.

No one is able to enter your secure

breakout room except the mediator and only the mediator is able to move parties from one room to another. The mediator can convene all parties in the main room, or move the attorneys to a separate breakout room for a discussion.

Although mediators can't knock on a physical door, we are able to loudly announce our presence as we "arrive" in your breakout room. With a slight delay built into the audio function, parties are able to stop speaking if they want to avoid the mediator overhearing a comment. As an alternative, we can use your cell phone to let you know we will be joining your breakout room.

Zoom's recording function can be disabled, and it is important to emphasize that "smart speaker" types of devices, or other recording, violates the confidentiality agreement most mediators have the parties and attorneys sign.

In arbitrations, preparation is even more important than it has been with in-person hearings. For online arbitrations, arbitrators emphasize the importance of building what some call the "architecture" in advance.

Arbitrators should discuss issues including when witnesses will arrive in the waiting room, how they will be moved to a breakout room while they wait to testify, how exhibits will be made available to witnesses, how to address objections, talking over one another, how and when to use the mute button to avoid distractions, when to turn off the audio and video, and when to take breaks. We need to recognize we won't see body language, fidgeting, glancing at another person for a cue, and the like.

And then there is the question of possible coaching. We can confirm when

swearing in witnesses that they agree not to receive information or coaching from anyone — essentially appealing to their sense of duty, responsibility and professionalism.

Zoom and other platforms work on desktop computers, laptops, tablets, and smart phones. I have learned a few practical steps that make a big difference in your ability to create as close to an in-person experience as possible:

- Be sure you aren't seated with a window behind you or your face will be obscured.

- Position yourself so the camera on your computer is at eye level or just above. If it is lower, the camera is focused essentially looking slightly up your nose – not the best option!

- Ensure your face fills at least two thirds of the screen, if not more.

- Avoid distracting backgrounds, sounds and clothing. You can use a virtual background — perhaps a solid color, or a photograph you like — to avoid others being distracted by your home or office environment. Learn where your mute button is located in case you need to access it quickly, and wear plain or neutral clothing.

It works! I was initially concerned that it would be difficult to build rapport and trust with the parties and their counsel during online mediation. As it turns out, while not exactly the same as in-person mediation where I am able to read a bit more body language, it has worked very well. We are all able to see each other's faces clearly, counsel and the parties quickly become comfortable with the virtual environment and I am able to move the attorneys to an extra breakout room to discuss legal or drafting

issues. I am able to "toggle" to another room to get an answer to a question and return to the first room with the answer, within a matter of seconds. Attorneys are able to share documents on the screen, allowing their clients to see edits they are proposing while considering client feedback, all in real time.

As always, I give parties rough time limits when I will be away, suggest "homework" for the room I am leaving, and sometimes offer ideas foreshadowing what I think might be the other room's reaction to the offer I am taking to them, so that they are able to do some potential creative problem-solving. Attorneys can send me a quick message

Exchanging cell phone numbers and email addresses gives assurance that we can solve technical difficulties if any arise.

Having a staff person who is available to assist if I run into difficulties gave me the confidence that online mediation would work well — and it has. As counsel and litigants recognize the convenience, and the time and cost-savings of meeting in a virtual world, it is clear the use of this technology will expand. I am looking forward to the future of ADR and how this extraordinary time we are in is likely to change the way we all use technology to help parties resolve their cases. ■

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