

## Focus | Employee Benefits/Executive Compensation and Health Law

# Virtual Health Law ADR – What’s Working?

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Health care is the fastest expanding sector of our economy, and health care costs account for a quarter of government spending. COVID-19 has been a disruptive force in the industry. However, alternative dispute resolution (ADR) processes are alive and well in the health law space. Most proceedings are now being conducted virtually in order to maintain security and follow social distancing guidelines.

ADR professionals have used virtual meeting technologies to conduct proceedings for years. Arbitration witnesses have testified by live video feed from across the country, individuals have attended mediations via videoconferencing platforms from across Texas, and administrative proceedings have been conducted remotely from all over the state. Likewise, health care professionals have used virtual communications platforms in the name of public health for decades. Health care industry records in the U.S. are electronic-only by mandate. Health care, health law, and ADR professionals were already well-suited to the contemporary virtual-first work environment.

In the wake of the pandemic, virtual meeting platforms like Zoom, Webex, Microsoft Teams, and others have allowed most health law practitioners and neutrals to continue moving their clients' matters toward resolution. Regardless of the platform, the claims, or the proceeding, ADR

will continue to thrive in health law as long as neutrals are prepared and proper decisionmakers are available to resolve disputes.

### Virtual Security and Confidentiality Measures

Early in the mid-2020 transition to a virtual-first paradigm, meeting platforms struggled to build out their digital infrastructures to meet increasing user demand. This led to some high profile and well-publicized security scares. Practitioners and neutrals had well-founded concerns about information security and confidentiality in conducting proceedings involving Protected Health Information (PHI). As platforms began instituting increased security measures, those concerns have largely subsided.

Practitioners know, however, that all communications and information sharing platforms are susceptible to security breaches. Health law practitioners and neutrals handle PHI regularly and take pains to remain HIPAA compliant. Those compliance duties extend to the exchange and use of PHI in ADR proceedings. To stave off potentially costly HIPAA violations, best practices by all parties should include transferring confidential and sensitive documents and files to and from each other and neutrals only via secure, password-protected means.

### Virtual Proceedings

Most ADR professionals in the

Texas market use Zoom for virtual mediations. Health law-related administrative bodies in Texas use a number of platforms to conduct business. Peer reviews are conducted via Zoom, while the Texas Medical Board uses Microsoft Teams. The Texas State Board of Dental Examiners originally continued to require in-person appearances but has since begun to offer virtual options. "Balance billing" ADR before the Texas Department of Insurance is conducted solely via written submission with teleconferencing used only when necessary. Federally, the Drug Enforcement Administration is resolving matters using Webex.

Anecdotally among neutrals, resolution rates using these virtual platforms have not dropped significantly across the health law sector compared to pre-pandemic, in-person resolution rates. Regardless of the platform, practitioners and neutrals have continued resolving disputes for their clients during the pandemic.

### Working Virtually

The shift to virtual-first presents new considerations for health law practitioners and neutrals. Foremost is that virtual ADR is here to stay. Neutrals and practitioners must stay up to date with and practiced in multiple platforms because of the diversity of software in use. The legal community has not coalesced around a single platform, so we will need a working knowledge of many. For those unwilling or unable to invest the time to learn the various virtual platforms, it is impera-

tive to have a technically proficient assistant at hand to administer your virtual appearances. A lack of knowledge in the technical aspects of a platform may hinder efficient resolution of your clients' matters.

Neutrals have reported a discernible rise in executive-level management participating in virtual ADR. The perceived inconvenience of in-person participation is significantly lower for virtual attendance. With the time and money previously spent on travel to a proceeding no longer a hindrance, there is little excuse for their non-participation. Participation of high-level decisionmakers in the ADR process from an early stage means neutrals have been able to settle matters more quickly and cost-effectively.

As more people are vaccinated and begin to feel more comfortable with in-person meetings, we may see an increase in hybrid ADR proceedings with some participants on site and others joining remotely. We should anticipate an increase in mediations and arbitrations of malpractice claims involving long-term care facilities and in False Claims Act actions against medical practices after CARES Act and Paycheck Protection Program audits are complete. ADR in such matters will continue to be conducted to a large degree via virtual platforms. They are safer, more cost-effective, and they work. **HN**

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