

WEDNESDAY, MARCH 11, 2020

PERSPECTIVE

Virtual mediation of ERISA benefit claims in a pandemic environment

By Adrienne Publicover

Despite the copious amounts of hand sanitizer and disinfectant wipes available at my downtown Los Angeles office this week, I could see the concern on counsel's and litigants' faces as they listened to the latest update about the coronavirus. I'm sure they were asking themselves, "Do I really have to come to an office in order to resolve my ERISA litigation?" The answer is maybe not.

As a mediator, I am more than happy to travel. Indeed, flying has become more enjoyable, as the aircrafts are no longer filled to capacity. My flights this week generally had one passenger per row. We exchanged knowing looks as we wiped down our respective spaces with our personal supply of disinfecting towelettes.

But I am only one in a cast of many parties to a successful resolution. As companies continue to impose travel restrictions, and ERISA claimants are (understandably) concerned with exposure to unnecessary health risks, I realized that my virtual mediation program — launched nearly three years ago — may have been created just for this moment.

What is a virtual ERISA mediation? The idea for my program arose out of a coffee meeting with a nationally respected ERISA plaintiff's lawyer. We discussed the various challenges of resolving ERISA benefit claims, such as helping parties close the gap after multiple attempts at informal resolution, resolving small benefit or limited benefit claims

and dealing with a plaintiff who may be uncomfortable attending a mediation in person because he or she has a compromised immune system or even agoraphobia. She helped me devise a virtual mediation program in which I work with counsel and their clients over the telephone for a two-hour period to help them resolve their dispute. An added benefit is that it costs less than a traditional mediation.

After having conducted these virtual mediations for the past three years, I have learned a number of things. They work best and have the highest chance of success when:

- (1) I have a strong relationship with and have earned the trust of the lawyers involved in the case;
- (2) the benefit amount is relatively low (e.g., less than \$200,000) or the case involves a discreet time period (e.g., a 24-month own occupation period);
- (3) the legal issues are relatively straightforward;
- (4) it is not absolutely necessary for the mediation process to be conducted in person; and
- (5) the parties trust their counsel. The final point is not always easy to ascertain. However, knowing the lawyers involved certainly helps in that regard.

The process is fairly simple. The lawyers provide me with a brief summary of their case and arguments. The submission can be informal; I have no objection to receiving bullet points with a few key documents attached. We schedule a two-hour block of time when all lawyers and their clients will be available. I first meet with the plaintiff and their counsel,

and then the defendant and its counsel. Like a traditional mediation, we discuss the facts first and then move on to the numbers. If we cannot get the matter resolved within the two-hour time frame, I will follow up, as is my standard practice. Occasionally, I have determined that a particular matter was better suited for a traditional mediation. In that circumstance, I will offer the parties a credit in the amount they have already paid that can be applied toward a full-day in-person mediation.

Virtual mediation can be appropriate in cases other than those involving ERISA, such as employment, commercial or personal injury. Similar parameters apply. I have mediated nearly 100 virtual cases (not all ERISA) by telephone, FaceTime, Skype, Zoom and other technology allowing for virtual conference rooms. By working with counsel to identify cases appropriate for these virtual proceedings, I have had tremendous success in helping parties achieve resolution.

Selfishly, I prefer traditional mediations. There is a different dynamic involved when working in person with the lawyers and their clients that I find energizing and incredibly gratifying. Sometimes a difficult message might need to be delivered, and it's often best to do that in person. A mediation is often an individual's "day in court," and it can provide structure and immediate closure through resolution for parties that might have otherwise embarked on a stressful and uncertain journey into litigation.

We need to balance health concerns with efficient and effective resolution strategies. Although mediators are trained to leverage uncertainty, we now are living in uncertain times. While I sincerely hope we do not reach a point where in person mediations are halted, I am grateful to have laid the groundwork for this virtual program. Lawsuits will continue to be filed, and parties will continue to seek resolution. Virtual mediation may be the answer. ■

Adrienne Publicover counseled domestic insurers and brokers in litigation matters in state and federal courts throughout the U.S. and in the London market before joining JAMS. Ms. Publicover brings energy and enthusiasm to mediating complex first- and third-party insurance disputes, including those involving life, accident and disability claims, as well as healthcare, commercial general liability, property, directors and officers, and employment practices liability policies. She can be reached at apublicover@jamsadr.com.

