

Dispute Resolution Options in the Age of COVID-19

By Rochelle B. Grossman

As I write this, the court systems have been shut down for all but emergencies by the COVID-19 pandemic for the past eight weeks. In addition to the denial of case resolution and turmoil for children caught in limbo amidst their parents' custody differences, the closure of courts has caused a reduction in revenue for the litigators who rely upon court appearances and the preparation for such for their livelihood. Even when the courthouse doors do re-open, the backlog and congestion caused by months of court closure will linger for far longer with lasting impact. Still, clients require and deserve closure and rely upon their lawyers to make creative game-day adjustments in order to bypass, or at least minimize, the need to depend upon a court system that will be bogged down with inherent delay. Fortunately, alternatives do exist, and an informed advocate will utilize them to their and their clients' benefit in the absence of court options. The virtual platforms we have been thrust into learning and using during the stay-at-home orders are here to stay and provide an effective venue for such alternatives as mediation and arbitration. Adapting to the new method of practicing law will enable litigators to advance their cases, and their workflow and cash flow.

During the shut-down, I had the opportunity to speak with many lawyers who, although generally aware of ADR, have not availed themselves of the option, not realizing the crucial role they can play in the process, nor how it, coupled with basic technology, can be effective in our new social distancing world. Among the available options are mediation (with lawyers or without) and arbitration (binding or non-binding), all of which can be accessed and facilitated with a computer (with camera accessory) and an internet connection. One may find these alternative dispute resolution options a welcomed adjunct to their scope of practice, and even preferable to court intervention.

The following is a brief summary of the various methods by which parties, with counsel's assistance, may commence and pursue dispute resolution processes during our new world of quarantine and social distancing:

Mediation: The parties meet with a mediator recommended by their counsel who facilitates agreements on as many of their outstanding issues as possible. Lawyers act as coaches, counseling their clients throughout the process, and stepping in when suggested by the medi-

ator. Ideally, each party should review discussions occurring during each mediation session with their counsel so they may strategize and develop their settlement goals and present them at the next ses-

sion. With the benefit of their lawyer's coaching during the process, the parties can avoid the frustration that results from engaging in negotiations during mediation that are later deemed detrimental to them by their counsel. The parties are more likely to reach terms that are equitable, comprehensive and satisfactory to them in the long term if counsel is involved along the way. Although the most cost-effective means of resolution for parties, mediation may not be appropriate in situations where there is a high level of volatility, where one party dominates family decisions, or where there exists substantial mistrust among the parties.

Lawyer-Assisted Mediation: Lawyers attend mediation sessions with their clients, advocating for their positions, raising issues and negotiating a resolution. With both parties having representation, the parties' interests are protected, thereby leveling the playing field. The volatility controlled, all participants are engaged in finding a creative solution to bring the dispute to an amicable resolution. The neutral guides the discussion, suggesting alternative solutions in this non-binding process. Lawyer-assisted mediation continues to be extremely cost effective and time efficient as no time is spent waiting for the court. Using a virtual platform, this process respects time and social distancing safeguards. If a resolution cannot be reached, the parties maintain the option of going to court or turning the process into binding arbitration.

Arbitration (binding or non-binding): The neutral becomes the decision-maker; calling balls and strikes. If binding, the arbitrator acts as the judge with the parties waiving their right to appeal. If non-binding, the arbi-



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trator presides over a settlement conference-like proceeding, making recommendations for settlement which simulates a result that could have been obtained if the matter had gone to court. Similar to a restaurant, parties can select to address isolated issues, “a la carte,” such as disputes surrounding the sale of real estate, reconciliation of child-related expenses, personal property division, etc. If a more comprehensive approach is desired, clients can opt for the “full course meal” submitting the entire case, including equitable distribution, alimony, child support, etc. for disposition. Interim and discovery disputes are raised by counsel via email or letter to the arbitrator; formal petitions are not necessary. The arbitrator issues a directive after both sides have had an opportunity to be heard (via email, letter, phone, or video conference), usually within days of the issue being raised. Prior to the arbitration hearing, counsel submits their pre-arbitration statements or trial binder, to be reviewed and analyzed by the arbitrator in advance of the hearing. As a result of the arbitrator’s advanced preparation and review of the evidence and exhibits, the hearing, whether in person or virtual, moves quickly. A trial that would have taken three days in court can be completed in a one-day arbitration hearing, with a final arbitration award issued within 30 days of the hearing. While arbitration necessitates the hiring of a third lawyer, the process is extremely efficient, ultimately saving the parties time and money, and bringing needed closure.

The coronavirus has rapidly changed the manner in which business is conducted. There has been an overnight shift toward virtual ADR which will likely survive the pandemic. It is likely that ADR will become part of the mainstream of family law post-pandemic. Virtual ADR offers flexibility and safety in our new social distancing world. Participants are able to see each other and interact with one another as though they were sitting across a conference room table. Having the ability to attend from anywhere avoids the time and expense of travel, and makes scheduling as easy as selecting a date and time to meet.

Online mediations and arbitrations are made possible by such platforms as Zoom, GoToMeeting.com, Skype, Cisco WebEX, Microsoft Teams or Google Hangouts, requiring only an internet connection and a computer or tablet accessorized with a camera. Some the video conferencing features include:

- Screen sharing: Through the screen sharing fea-

ture, exhibits, documents and spreadsheets can be displayed and shared in real time.

- Breakout Rooms: When an attorney and client need to meet privately during a proceeding on the Zoom platform, the neutral can assign them to a private “Breakout Room,” ensuring confidentiality and a forum in which to strategize before returning to the main meeting. The Breakout Room feature can be used by the arbitrator or mediator to caucus with one side or the other to facilitate the negotiation – not unlike one side moving to an auxiliary conference room.
- Muting (my personal favorite, especially amidst contentious participants): Participants tend to be more polite during video conferencing, awaiting their turn to speak. However, when not speaking, participants can be muted to eliminate background noise, or to confer with counsel.
- Security Concerns: To ensure security and protect privacy, a unique password is assigned to each meeting invitation.
- Waiting Room: To avoid uninvited guests, attendees enter the meeting via a “Waiting Room.” Only those granted access by the administrator/neutral may join the main meeting.
- Lock the Room: Just as if you were closing your office door, the meeting can be locked to prevent entry, or crashing, by others.
- Recording: If agreed, meetings can be recorded but only by the administrator/neutral.

The coronavirus pandemic has accelerated the use of virtual ADR, and its strengths have been tested and are known. Given the flexibility, convenience, and cost savings afforded by virtual ADR, some in person meetings may become obsolete or, at least, obsolescent. Clients rely upon their lawyers to guide them toward solving their outstanding issues, and if the courts are not available, virtual ADR offers an effective platform. Alternative dispute resolution may become your and your clients preferred dispute resolution choice long term.

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