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EMBRACING TECHNOLOGY IN THE FACE OF THE CORONAVIRUS: VIRTUAL REALITY IN ARBITRATIONS AND MEDIATIONS

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Several years ago, I served as a member of a tri-panel in a commercial arbitration. It consisted of three neutrals who were based in various locations on the East Coast. The attorneys were located on both the East and West Coasts. To accommodate the witnesses, a decision was made that the arbitration would be held in Los Angeles.



With that background, it is easy to see that the logistics involved were difficult and the expense significant. Before the commencement of the arbitration, there was the need for numerous teleconferences on a variety of issues. Additionally, oral argument was requested on various motions. The technology possessed by the ADR provider, NAM (National Arbitration & Mediation), made it relatively simple to handle this. Based upon a decision made by the panel on a Frye-Daubert motion, it also became necessary to take testimony from expert witnesses. It was suggested by NAM that, rather than have the panel and counsel travel to Los Angeles, we should use their technology to conduct the hearing virtually by video conference. While all were a bit skeptical as to whether this could be done, lengthy direct and cross-examinations of two experts were conducted with the panel members, counsel and witnesses on both the East and West Coasts. The process

was quick and efficient, saving both time and money. There was no qualitative difference in doing the hearing virtually as opposed to doing it in person.

Several months later, the arbitration took place in Los Angeles. After taking testimony for approximately two weeks, there was one remaining witness whose testimony was needed. However, there was no time left to do so. It was late in the day and all were scheduled to fly home due to other professional commitments. Difficulties immediately arose as to scheduling an adjournment date. Accommodating the schedules of so many people was daunting. All were concerned at the prospect of a lengthy delay. Returning to Los Angeles several months later to take the testimony of a single witness would have been a great inconvenience to the panel, a significant expense to the parties and simply made no sense. A decision was made to complete the arbitration virtually by videoconference as had been done with the experts at the Frye -Daubert hearing. The arbitration was completed "virtually" shortly thereafter.

Why Are we Hesitant to Embrace New Technology?

There have been many major technological innovations that have positively impacted the practice of law in the last 40 years: the word processor, fax machines, pagers, cell phones, the internet, email, and smart phones, to name a few. Acceptance of these new technological tools took time. There was resistance at the outset, much in the way there was to the ADR process when it was new. Everyone looks upon any major change with suspicion as they are unsure that it will work. People are afraid that they will not be able to master new technology. Sometimes, change becomes inevitable.

The Coronavirus as a Stimulus for Change

Necessity precipitates change. The Coronavirus has created a necessity that is going to force radical change in our society, business and government. The way in which we conduct ADR will evolve as part of that change.

The technology to conduct virtual arbitrations and mediations has been available for many years. It was developed to improve the delivery of ADR services. The acceptance of the technology has been slow. However, it has now become a necessity because of the Coronavirus. The alternative is to cease operations. As such, the current situation that we find ourselves in may lead to the widespread acceptance and use of this new technology.

The Technology

The first thing that consumers always ask is what will this cost me? The answer is nothing. That should be incentive enough to explore its use. The next question is how complicated is it to use? The answer is that it is very simple and anyone can use it.

Virtual technology creates the ability to host mediations and arbitrations while allowing participation from any location. Once you become familiar with it, there is little difference between conducting a mediation or arbitration in-person or virtually. The technology allows attorneys and their clients to continue with the ADR process even if their offices are closed and they are in self-quarantine due to the pandemic. This is not to say that it should entirely displace the face-to-face process. There is value in both.

With regard to the mediation process, the technology allows multiple participants to engage with the neutral in joint and break-out sessions by video or telephonically. Attorneys will be able to have private conferences with their clients, with or without the mediator. The technology allows for virtual private break-out rooms for party caucusing. The neutrals are fully trained to hear cases in this manner. The neutral serves as a host with the ability to control the creation of the various virtual rooms that are needed for the process. There is no need to worry about confidentiality as the neutral, through a fail-safe system, ensures that when the parties need privacy, whether by video or teleconference, they get it and it is absolute. For example, the neutral can leave you and your client to speak privately about a demand and/or offer and then give a knock on the door of your virtual room to check in and see if you are ready to speak. The mediator can bring the parties back together and separate them again as needed. Whether the neutrals or parties are working from their offices or from their homes, the quality of the video or audio-transmissions is exceptional. The only equipment you need is a desktop, laptop, iPad, surface pro or a cell phone. It is simple to install a free download and familiarize yourself with the technology.

The Benefits of the Virtual ADR Process

Business Continuity

During this time, business continuity is paramount. The virtual technology allows the ability for all parties in the ADR process to continue their work. The neutral, counsel, and clients could be in their offices or in their home. As long as they have internet connectivity, the ADR process will continue as usual.

You Do Not Need to Cancel

The current pandemic is having a radical effect on the ability to conduct business. However, natural disasters, weather, strikes, accidents, equipment failure or a reduction of services interrupted our daily life long before the coronavirus. Anything that affects our ability to travel can disrupt business and result in the cancellation of a scheduled mediation or arbitration. With the benefit of virtual ADR, this need not happen.

Scheduling

A great deal of effort goes into the setting up of a mediation or arbitration. It takes time, especially in multi-party cases, to coordinate the schedules of the neutrals, the parties and their clients. A cancellation can result in the mediation or arbitration being adjourned for several months. The virtual ADR process dramatically reduces this possibility by creating greater flexibility. Some may choose to appear in person or others may appear virtually, making scheduling easier.

Savings in time

Whether you travel nationally or locally to attend an arbitration or mediation, significant time is spent getting to and from the physical location. If you are traveling from out of state, there can be a minimum of one to two days of time lost. Even if you are traveling locally, you will likely spend several hours commuting. Virtual technology can eliminate the need for travel, resulting in the savings of a significant amount of time.

Reduction of Cost

Whenever travel is involved, there is expense. As discussed at the beginning of this article, three neutrals and numerous attorneys were required to travel considerable distances to attend an arbitration. The use of virtual technology will give the parties the ability to reduce, if not eliminate, the cost of air travel, hotels, meals and other related expenses. Again, some parties may be present in person and others may attend virtually- it is a choice.

Conclusion

It is hard to think about silver linings when we are besieged by a pandemic that is causing us to stop and change our day-to-day lives. Hopefully, our society will be better prepared to cope with situations like this in the future from lessons to be learned now. For those involved in the ADR process, the choice may be to postpone a mediation or arbitration indefinitely. However, as we try to carry on and find our new normal, this may be an opportunity to explore the use of a new technology which will make this unnecessary. It may be effectively utilized long after the current situation resolves. There is everything to gain and nothing to lose.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Commercial and Civil Divisions, Westchester County, New York. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. In 2020, Judge DiBlasi was ranked a Top Three Mediator in the United States by The National Law Journal Annual Best of Survey for the seventh straight year (#1, 4 years in a row) and was voted a Top Ten Mediator in The New York Law Journal Annual Best of Survey for the tenth consecutive year. He was also voted the #1 Mediator in the country by the 2018 Corporate Counsel Best of Survey and for the third straight year, was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide. Judge DiBlasi has consistently been designated a Super Lawyer and holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

Meet the Author



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