COMMENTARY

Revisiting Alternative Dispute Resolution in Light of COVID-19

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THE UNDERSTATEMENT OF the year is that 2020 will change the way we practice law, both short term and long term. COVID-19 essentially shut down commerce for months. Declarations of judicial emergencies had a particular influence on litigation, halting cases in state courts and impacting how business is done in federal courts. Litigators were forced to become comfortable with remote depositions and video court hearings. In short, how lawyers and clients both approach the resolution of disputes has been interfered with beyond imagination. These changes require parties and attorneys to creatively work together to find alternative methods of resolving disputes.

The Way We Litigate Will Change

Courts have turned to remote audio and video proceedings, with North Carolina Chief Justice Cheri Beasley making her state the latest to encourage that on May 1. Despite that, once the judicial emergencies are lifted, courts will still be backlogged with cases that were stayed for months. Priority will be given to many matters that are not business disputes. Also, how long will it be before a judge is comfortable selecting six to 12 citizens to be confined to a single room as a jury, let alone 50 or 60 to serve on a voir dire panel? Indeed, in an April 28 seminar, Georgia Chief Justice Harold Melton noted it was unlikely that jury trials would be held until it was safe for kids to return to schools and stadiums to be opened. If, as some predict, shelter-in-place decisions come and go until a vaccine is found, the way we have traditionally done business in courts could change for more than a year.

This reality will require adjustments, not only from litigators but also businesses. As noted by John Miles, founder of Miles Mediation & Arbitration, a leading alternative dispute resolution provider in the Southeast, what clients "really need is closure. Closure is what allows them to get back to doing what they do best." If that closure is not to be found in a timely manner in courts, lawyers representing business, both in house and outside counsel, have to be prepared to present viable alternatives. That means revisiting the opportunities presented by ADR, both to protect the health and safety of participants and to resolve disputes faster.

Mediation

Mediations, which have become ubiquitous in the best of times, should become even more pervasive due to their ability to bring people together while maintaining social distance. Placing isolated groups of people into separate virtual "rooms," with the mediator passing between them, provides for a mechanism to handle most of the traditional shuttle diplomacy that is a key part of mediation. South Carolina Chief Justice Donald W. Beatty, for example, recently amended ADR rules to temporarily allow parties to participate in mediation by video. How big an impact the lack of face-to-face interaction has remains to be seen. Some think that institutional participants, such as insurance companies, will be less focused if adjusters never have to leave their offices and can easier multitask. Others see advantages in removing artificial deadlines related to the end of the business day or the need to be somewhere else at a later time.

Arbitration

According to the American Arbitration Association, it took twice as long to get to trial in federal court than it did to complete an arbitration even before COVID-19. That disparity is likely larger in many state courts. If the coming years lead to stops and starts in the ability to litigate cases in a courtroom, perhaps the more accelerated timeline of arbitration will outweigh concerns about the process. Remote arbitrations in particular are almost certain to increase. The AAA and the International Centre for Dispute Resolution on April 20 updated their guidance for remote hearings, saying that online video and other forms of teleconferencing, "can facilitate a full and equal opportunity for all parties to present evidence in a hearing."

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The Need to Get Creative

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ADR providers already are expanding their services. Miles Mediation and others are offering their neutrals to act as a special master, making recommendations on disputed matters. The number of retired judges serving as neutrals throughout the Southeast make this service a natural extension of paid-for judicial substitutes.

As an example of a creative methodology, consider a nonbinding arbitration using only basic discovery to provide the parties an understanding of their side's strengths and weaknesses. Imagine an agreement between the parties that, upon notice of a dispute, requires them to produce within 30 days information that would be required in mandatory disclosures in federal court. A nonbinding evidentiary hearing limited to those materials can then be held within another defined period of time, either in person or remotely. The arbitrator then issues a nonbinding determination as to who is entitled to what award. Only after that process could either party file a lawsuit. Hopefully, the parties would be able to use the process to resolve their dispute before going to court while at the same time limiting the costs incurred.

As a second example, what if you took the same situation above but the parties agreed the arbitrator would produce a range of possible damages to be awarded, with the parties having to negotiate a final number within the range? There can be a lot of discussion about what new methods of ADR may be useful, but given the concerns about courthouse delays, new methods of ADR are worth exploring.

Act Now

It is ADR 101 that all methods of ADR are pursued only upon the agreement of the parties. This is something that should be considered as you draft contracts today in order to have ADR in the future. Do you wish to include an arbitration clause in your contract? An agreement to pursue ADR before filing a lawsuit? Do you want that ADR to be binding? Whatever your preference, it would be beneficial to include the concepts in your drafting today. DR