Insurer Considerations For Post-Pandemic Virtual Mediation

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As the number of COVID-19 cases increased in the course of the pandemic, so too did the use of virtual mediation as a means of dispute resolution. The utilization of mediation to resolve disputes has quickly become even more popular as it can be done in a completely virtual setting, eliminating the need for face-to-face meetings or travel.

In addition to the social distancing perks, mediation offers the benefit of allowing parties to avoid the court systems, which have been completely disrupted during the pandemic. Also, virtual mediations may be especially useful in insurance litigation where the mediation may be court-mandated, resulting in requirements for insurance carriers to offer and pay for mediations in matters dealing with large losses.

Despite the ease of online mediations, virtual settings are not without complexities and drawbacks. For example, choice of law considerations may play a more significant role to the extent they have an impact upon applicable confidentiality rules or the availability of specific causes of action, like bad faith or extra-contractual claims in the insurance context.

Although the world started to return to a pre-pandemic normal after the rollouts of vaccines, mediations are likely to continue to be held in virtual settings at a higher rate than they were pre-pandemic, especially with the new threats of the delta and delta-plus variants on the horizon. This article provides an overview of the positives and negatives of virtual mediations in insurance matters and identifies potential future uses of this method of alternative dispute resolution.

Powerful Potential of Virtual Mediation

While virtual mediations became the norm during the pandemic largely out of necessity — e.g., to address safety guidelines and avoid an overburdened court system — it is clear that there are many benefits of the online platform in addition to mitigating health concerns.

For many lawyers, and their clients too, virtual mediations have saved time and money because individuals do not have to travel, much less leave their homes, to participate in dispute resolution.[1] This fact alone is a huge gain for businesses, including insurers, who may be facing tighter travel budgets.[2]

Virtual mediations may offer significant time and cost savings where courts mandate the mediation of particular types of insurance claims after large catastrophes. For example, in the wake of Superstorm Sandy, the state of New Jersey established an insurance mediation program to allow policyholders to settle disputed cases without having to file suit.[3]

This mediation program was available to policyholders that suffered losses greater than $1,000.[4] While policyholders were not required to participate in this program, insurers
regulated by the state were forced to become participants.[5] Superstorm Sandy also spurred the state of New York to create a mandatory mediation program.[6]

Similarly, after Hurricanes Katrina and Rita hit, both Louisiana and Mississippi created catastrophe-claims mediation programs. These programs ended in the mediation of 17,831 cases, with an overall settlement rate of 76%.[7]

In the wake of the pandemic, large-scale mediation programs have also become increasingly more popular and may continue to gain popularity in the future.[8] The use of a virtual format for these large-scale mediations would allow companies to cut back on travel time and expenses that may become extremely burdensome after large catastrophes.

In eliminating the need for travel and changing the landscape of how mediations are carried out, virtual mediations have also allowed individuals who are typically not as involved in the mediation process to have a voice. Virtual mediations allow attorneys and clients alike to have an equal virtual presence and, through the utilization of tools like joint sessions, have led to a reported increased engagement and participation by clients.[9]

These online mediations may also allow parties who are not normally able to travel but who may hold the ultimate power to resolve a dispute, to participate in the proceedings, which could ultimately lead to a faster resolution.[10]

With the onslaught of cases arising out of pandemic-related claims, mediation has been recommended as an appropriate means for dispute resolution, specifically for insurers.[11]

Proponents of mediation have looked at property insurance disputes focused on business interruption claims and have noted the stark differences in court opinions that have come out over the past year, which have created a clear jurisdictional split between courts holding in favor of insureds and those holding in favor of insurers.[12]

Mediation may also be the most effective form of a resolution as policyholders have begun to assert allegations that are more geared toward overcoming any argument that their losses are not "physical loss or damage," as has been the basis of many court opinions finding for insurers.[13] As these cases continue to be litigated at growing rates, insurers may decide that virtual mediation will be the most cost-effective and efficient way to resolve these matters.

Further, while internet platforms are consistently associated with promoting online bullying by providing a semi-anonymous space for communication, parties have reportedly been more amicable over virtual platforms during mediations.[14] Contributing to this lack of animus may be the lower levels of stress people have in their own homes, the ability to see an opposing party in his or her home or the lack of personal contact with the opposing party, and may end in easier resolutions for parties.

**Potential Drawbacks of Virtual Mediations**

Despite the ease and popularity of virtual mediations, there are unique challenges parties may grapple with that may not be present during in-person mediations.

For example, in a recent survey conducted by Baker McKenzie and KPMG polling lawyers, judges, arbitrators, barristers and clients, 46.5% of respondents believed that it was harder to concentrate during a virtual hearing.[15] This may be attributed to lawyers feeling less
emotionally invested in virtual mediation, which may result in less preparation than may normally take place when a party is required to travel and actively participate in an in-person mediation.[16]

This may also be due to the fact that parties do not appreciate the formality required in the mediation process despite the fact that their presence may be solely through video calls.[17] In addition, as a society, we have become increasingly familiar with the term "Zoom fatigue," which may result in parties becoming increasingly tired throughout a virtual mediation process.[18]

The Baker McKenzie and KPMG study also revealed that 27.8% of respondents believed that virtual hearings may be less secure or confidential.[19] The fear that security may be compromised was made a clear reality early in the pandemic.

In Bexar County, Texas, for example, multiple virtual court hearings were "zoom-bombed" with inappropriate images.[20] These security fears have largely been ameliorated, however, as the public has become more familiar with the security features available on these online platforms. Confidentiality may be a bigger area of concern, as parties must ensure that they participate in mediations in an area away from any nonparties or recording devices, such as Google Home or Alexa devices, which are present in many homes.[21]

Virtual mediations may also present added issues of which jurisdiction's law will apply, which can have a huge impact on the outcome of the matter. Using an online platform to mediate allows parties in different cities or states to easily try to reach a resolution and further allows the parties to engage a mediator who is also in a separate jurisdiction.

This may lead to more complicated questions of which relevant law will apply to the mediation and which law may apply to any potential subsequent litigation.[22] For example, in a claim for bad faith, an insurer will want to carefully review and analyze choice-of-law issues as there may be potential conflicts between jurisdictions over issues such as whether a third-party claimant can bring a bad faith claim, the level of misconduct required to recover under a bad faith claim and the type of recoverable damages available to an insured.[23]

Specifically, because virtual mediations allow for more opportunities for parties who are not in the same geographical location to easily engage in dispute resolution, parties may find themselves practicing in an area where bad faith remedies are drastically different from those in their own state. In addition, a party may need to be cognizant of whether their conduct during the mediation could become the basis of a bad faith claim, and what state law may apply to that subsequent claim.

In addition, virtual mediations may bring different confidentiality concerns in subsequent litigation depending on the jurisdiction. For example, jurisdictions take different approaches to how broad privilege applies in mediation and how easily that privilege may be waived.[24]

These differences in confidentiality and choice of law considerations may be especially important for parties, and more specifically insurance carriers, to consider when they do proceed with virtual mediation as communications that might be marked as confidential in one state throughout the mediation process may be produced in another state in subsequent litigation.
Predictions for a Not-So-Post-Pandemic World

Widespread access to effective COVID-19 vaccines in the U.S. initially seemed to providing many companies throughout the country the ability to return their workforce to the office.[25] This "return to normal" mindset may not, however, translate to the world of mediations, especially as we expect to see companies begin to rethink their return with the rise of the delta and delta plus variants.[26]

Although virtual mediations were previously available as a means for alternative dispute resolution, the pandemic has been the driving force in allowing parties to see how beneficial an online format may be, and it is likely that these virtual resolutions will continue to be popular even as courts continue to open and in-person meetings become more common.[27] The cost and time savings alone will likely be enough to drive many parties to continue to mediate virtually, especially if the party is subject to numerous mediations on specific types of claims.

On the other hand, Baker McKenzie and KPMG's survey revealed that only 18.6% of respondents found that an online mediation was as effective as in-person mediation.[28] Further, 63.9% of respondents reported that they would rather conduct an in-person mediation if they had the option.[29]

This lingering hesitancy to fully participate in a virtual medium may lead to a hybrid approach to mediation for many parties.[30] This hybrid approach may end in parties determining, on a case-by-case basis, whether virtual mediation may be beneficial as an initial step or whether it may not be conducive to resolving a matter at all.

Conclusion

While people are beginning to see a return to a more normal pre-pandemic world, the positives that have accompanied the growing use of virtual mediation will continue to be prevalent for parties interested in alternative dispute resolution and may begin to be used as a tool to resolve the numerous cases related to the pandemic.

Although virtual mediations come with their own set of challenges and concerns, the decrease in time and costs, the increased participation of clients, and the decreased hostility between parties will be driving factors in whether parties want to employ virtual mediations in their cases. These positives may be especially appealing for insurance carriers who may be subject to large-scale mediations or may be involved in numerous mediations after catastrophic events, especially as the delta variants begin to cause more uncertainty across the world.

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[7] *Id*.


[12] *Id*.


[22] Sarah R. Cole et al., Choice of Law, 1 Mediation: Law, Policy and Practice § 8:3 (2020).


[25] Jessica Dickler, Employees Could be Heading Back to the Office Sooner Than They Think, CNBC (Apr. 2, 2021, 9:00 a.m.).


[29] Id.