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Online Dispute Resolution as Healthcare Litigation Tool: Mediation Tips, Lessons Learned, and Looking Ahead

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Introduction

Since the Coronavirus pandemic struck the United States in early 2020, the healthcare sector has been on the front lines. Doctors, nurses, first responders, and all manner of practitioners stepped up to treat those inflicted with COVID-19 as hospital beds filled and critical supplies dwindled. Healthcare institutions and emergency rooms faced caring for patients, managing the health and safety of staff, and withstanding revenue drops amidst a drastic decrease in non-emergency and elective procedures. Over the past 18 months or so, improved COVID-19 treatment modalities and, of course, effective vaccines, have allowed the healthcare industry, along with U.S. society more generally, to continue onward and gradually return to our “normal” way of life.

Meanwhile, the COVID-19 crisis has severely impacted the legal field, as well. As courthouses closed and judges were forced to postpone in-person trials and hearings during the pandemic, mediators, arbitrators, and the alternative dispute resolution (ADR) sector have adapted to afford relief. While shutdowns have continued during 2020-21, some courts were able to pivot, with varying degrees of success, to virtual hearings and trials, utilizing videoconferencing and other technologies. However, the

judicial system is notoriously slow to change, and its supporting bureaucracy is not inherently nimble. On the other hand, methods of ADR, notably mediation and arbitration,^[i] are more flexible tools that even during a pandemic provided resolution processes and venues to litigants and backlogged courts.

As of mid-2021, to varying degrees across the United States, courthouses are beginning to resume in-person proceedings. Lawyers must grapple with challenges related to returning to offices and conference rooms, and once again occupying physical spaces together with colleagues, clients, and adversaries. “Live,” face-to-face mediations and arbitrations are resuming, as well.^[ii] However, it is reasonable to project that online dispute resolution (ODR), a subset of ADR, will continue to serve as a litigation tool, in evolving forms, for the foreseeable future.

Thus, this time of transition is an ideal opportunity to review ODR practice tips, highlight associated pandemic lessons learned, and look ahead to the future of ODR. This article features virtual mediation and the ongoing evolution of videoconference negotiation processes.

Alternative and Online Dispute Resolution Generally

As dispute resolution mechanisms that serve as alternatives to traditional litigation, mediation and arbitration share certain similarities but also differ from each other in important ways. Generally speaking, in both mediation and arbitration a third-party neutral – the mediator or arbitrator, respectively – helps parties resolve disputes through private processes and procedures that take place outside of the court system. In arbitration, disputing parties agree to allow a single arbitrator (or panel of arbitrators) to conduct an informal resolution process by reviewing evidence, hearing arguments, and conducting hearings, tailored to the parties’ needs and nature of the dispute. Arbitration can resemble an informal trial, as parties make opening statements, submit documentary and testimonial evidence, and present their cases to the arbitrator. After the hearing, the arbitrator issues an award, much like a judge would, to decide the case.

Mediation is an ADR process in which a neutral – the mediator – helps parties arrive at mutually agreeable solutions to conflict in lieu of going to court or arbitration. Although mediating parties can describe their contentions, interests, and concerns with the mediator, mediation is

unique in that the result of the process depends on the parties' mutual agreement. That is, unlike arbitrators, mediators lack the authority to decide a case or mandate a result; instead, the mediator helps the parties discuss their contentions and try to resolve the matter through communication, negotiation, and good-faith compromise. Ideally, the mediator guides the parties to craft an agreement that settles their dispute and addresses the parties' needs to their mutual satisfaction.

With the assistance of skilled neutrals and commitment of the parties to a dispute, ADR forms like mediation and arbitration typically offer a range of potential advantages compared to trying a lawsuit before a judge or jury. Such advantages include cost and time savings, the parties' ability to control the outcome of their case, confidentiality, limited risk and greater certainty, reduced stress, and overall flexibility.

During the pandemic, with courts shuttered, juries unable to convene, and social-distancing measures in place, ODR formats like mediation and arbitration have allowed litigants and their counsel needed relief. As transactional, regulatory, and litigation counsel to healthcare clients well know, ADR clauses are now ubiquitous in healthcare and other industries, including in most written agreements involving purchases and sales, mergers and acquisitions, managed services contracts, joint venture agreements, employment and independent contractor agreements, nursing home admission agreements, and medical director agreements. Thus, aggrieved parties seeking legal redress pursuant to contracts equipped with ADR provisions increasingly must do so through arbitration, mediation, or similar mechanisms. Personal and workplace injuries, medical malpractice, and employment disputes also lend themselves well to the use of ADR mechanisms. And now, even as the courts have been closed and backlogged, ODR – in shorthand, online forms of ADR – has enabled dispute resolution to continue to serve parties' needs throughout the COVID-19 era and beyond.

ODR has been around for over 20 years, though its popularity and demand accelerated exponentially during the pandemic. Videoconferencing has emerged quickly as a popular means of staying connected to friends, family, colleagues, and clients. And it's no wonder why. Even when unable to occupy the same physical space as others – because of impassible travel, time, or monetary constraints, or even drastic circumstances like a global pandemic – video technology allowing the sharing of real-time audio and visuals has proven to be the “next best thing” option to fill those distance gaps.

Videoconferencing has been technically possible for some time, but only in the last decade or two has this mode of communication become widely accessible and improved such that conferencing by video is a more than feasible alternative to talking face to face. With just a smartphone in hand, or a nearby wired tablet or laptop, millions around the world can connect through high-definition images and stereo sound from practically anywhere.

That brings us squarely to ODR which, despite what might seem an overnight revelation, was in 2020 thrust into the spotlight after years of simmering development.^[i] Mediators and arbitrators across the country – and around the world – quickly mobilized to continue to offer dispute resolution services while leveraging videoconferencing platforms. Of course, ODR fairly encompasses other technological tools that can be used to help resolve disputes, like email and text messaging. But at the moment video has vaulted to the forefront as the go-to tool of choice.

Mediation by Videoconferencing

Mediators, attorneys, and party-participants have adapted relatively quickly to video-assisted mediation, as in many ways it resembles the customary, face-to-face process. Through videoconferencing platforms like Zoom, WebEx, Google Meet, GoToMeeting, and others, mediators can “meet” with litigants, help them communicate and negotiate with each other, and work toward agreements acceptable to all parties that resolve their lawsuits. Mediators can replicate, through secure video,^[ii] the structure of a mediation process, enabling parties to see and hear each other, share audio and video, as well as other digital files, and even execute settlement documents remotely through online tools.^[iii] Mediators can interact with parties together in joint session or in private caucus – using virtual “room” groupings on platforms that have that capacity, like Zoom – and conduct back-and-forth discussions that ultimately help disputes move toward resolution.

Videoconference Mediation Practice Tips, Lessons Learned, and Looking Ahead

Over the past year or so, neutrals and counsel who utilize mediation have gained invaluable experience in collaborating by video and resolving legal conflicts. Here are some points to help advocates maximize online mediation effectiveness:

Adapting Mediation Styles

Tempting as it is to assume videoconference mediation is just like mediating in person, recognizing the subtleties of a videoconferencing environment gives adept mediation participants an appreciable advantage.

Nuances of mediating by video arguably place even greater emphasis on sound fundamentals and negotiation skills. Attorney-advocates can start by asking themselves some basic questions, like: *How do I like to persuade at mediation? What are my preferred and most effective negotiation styles?* For example, some attorneys prioritize relationship- and trust-building as a means of winning over an adversary, while others take a colder, hard-lined approach. Some routinely share extensive written arguments with the mediator and the opposition prior to mediation; others are more comfortable ad-libbing and reacting to visual and other cues they detect during a negotiation session. Online mediation participants should spend time thinking about these questions and then consider how much their answers depend on the medium through which they conduct a mediation or negotiation. As one might expect, certain techniques work better in person than over the phone, some are best by text or email, and others can be adapted and optimized for ODR.

A video platform brings negotiating attorneys, in particular, a unique set of advantages and challenges. Consider that a negotiator who habitually relies on bluster and physical imposition in the mediation setting (note: not a recommended technique!) will obviously need to adjust dramatically to flourish on an ODR platform. After all, mediating by videoconference confines participants to a video screen of a few square centimeters. Standing up and pacing, in an attempt to fluster the opposition, will do no good remotely, either, as parties exchange physical presence for virtual presence. And because everyone's volume can be adjusted (or even muted) when the conversation becomes loud or less than civil, yelling or talking over others – again, never a preferred tactic – becomes wholly ineffective.

Awareness of Facial Expressions

When mediating by videoconference, people in the same “virtual room” can observe each other's faces at all times, regardless of who is speaking.

[iv] Unless someone's video has been turned off or has a camera

otherwise disabled, others in the virtual meeting room will be privy to that person's facial expressions and, depending on their viewing settings, those other people could be watching the person even when someone else is talking.

Facial expressions can have a significant impact on decisions about whether or not to trust a counterpart. The level of trust between negotiating parties, in turn, can greatly impact the outcome of a mediation. Moreover, it can be difficult to maintain a pleasant-to-neutral expression, or "poker face," during an extended videoconference mediation proceeding. It can also be challenging to project a facial gesture that conveys continued attention and focus as someone else continues to talk. On video, reactions participants convey through movements of the eyes, eyelids, eyebrows, nose, and mouth become accentuated under especially careful watch.

Monitoring Tone of Voice

Advocates and parties should also be mindful of vocal tone during video-based mediations. A surprisingly high degree of what participants communicate is transmitted non-verbally, which includes not only one's facial gestures but also vocal intonation and inflection. For example, a varied tone is more interesting than a monotone, and a slower, more calming speaking pace will tend to put someone at ease more so than would a quickened, frantic delivery. How listeners perceive tone will likely impact their willingness to trust the speaker, and trust is critical in building good rapport and a cooperative process, cornerstones of effective mediation practice.

Part of vocal tone control in an online environment depends on equipment. Of course, it is important to ensure a strong internet connection, so that sound will transmit without gaps or delays, as well as a decent microphone or headset and a quiet surrounding workspace. A focused awareness of online tone is surprisingly impactful and can meaningfully improve a negotiator's ability to communicate and persuade.

The Importance of Video Quality and Eye Contact

On videoconference calls, participants communicate through their

computers, tablets, or phones, by transmitting video via their devices' internal or external cameras. For that reason, counsel and parties need to be cognizant of exactly where their respective cameras are (e.g., where indicated by a green light on a device), to remain fully aware of what images are sent to others on video calls.

Of course, it is important that participants use a computer or other device that allows the transmission of high-quality video, to help ensure the transmission of visual clarity and detail. Though late-model laptops, tablets, and phones are now frequently equipped with 1080p HD resolution (or better) video capability, external webcams can provide useful alternatives to those inclined to upgrade video quality. Likewise, participants can enhance video transmission with appropriate lighting on the face – not from behind, but from the direction of the camera – to help eliminate shadows and darkened screens that can limit visual clarity.

Common advice to participants in video calls or video-based mediations is, not surprisingly, to look at the camera, positioned at eye-level or slightly above, so that people can see the participant without having to look up from under one's chin. If a speaker looks directly at the camera, others will feel that the speaker is looking directly at them.

Counsel experienced in mediation and negotiation know how important eye contact can be, too. Where people's eyes focus, how long they maintain their gaze, whether they shift in any direction, how the eyes change shape, and so on, all facilitate communication. Effective use of eye contact with others in mediation can serve as a means of both communicating and also of forming a bond with process participants.

However, although video-based mediation allows participants to see one another, it is extremely difficult – if not impossible – to simultaneously *look at* someone (i.e., at the camera) and also *see* someone (i.e., watch the other person on the screen). This presents a challenge, particularly to a mediator or advocate accustomed to facilitating negotiation through building rapport and keen observation.

Though it's not as simple as staring directly into the computer camera, establishing awareness of the difference between making eye contact with mediation participants and actively observing them is a good first step toward developing a comfortable sense of where to look during video mediations. Some combination of establishing eye contact and

watching the faces of the other participants will serve negotiators best, adjusted based on personal negotiation style and preferences.

Online Mediation Fatigue is Real

Counsel should not be lulled into thinking that ODR will be easy and won't demand direct attention. Mediators should prepare their parties, and parties should be prepared, to expect fatigue – of a somewhat distinct nature from what they might face in person – and formulate a strategy to remain honed in on settlement.

Although ODR features the advantage of allowing people to participate from their locales of choice, mediating online is not “easier” than mediating in person. In fact, effective videoconference mediation can at times feel even more intense than face-to-face mediation, as participants are tasked with reading visual and audio cues, as well as working to resolve an active dispute, all while operating within the confines of a small, digital screen. Mediating well online requires a high degree of focused effort, and exerting this type of effort over an extended period can lead to fatigue. Fatigue can lead to sub-optimal decision-making.

Parties and mediators, then, are wise to allow for coffee breaks, bathroom stops, and walks around the room when needed during a mediation. They can let participants get up, stretch, go to the restroom, or get a snack from the fridge, for example, while discussion centers on the opposing caucus room. The need for these breaks may be more obvious and intuitive during in-person mediations, but during online sessions, especially with participants sitting in front of screens for long periods, incorporating deliberate recesses can be valuable. Clients and counsel will often benefit from taking 10 minutes to check email and return urgent phone calls, or from breaking for air when discussions become tense or counterproductive.

Looking to the Future of ODR

It is a good bet that ODR, in some form, will be a routine part of litigation and ADR practice going forward. Even in the pre-COVID-19 era, and likewise into the future, there will be cases in which mediating by phone, videoconference, or some other technology-enabled means – or even through a hybrid format, by which parties participate through a

combination of media – remains preferable to in-person negotiation.

For example, parties to a case might reside in different places that render meeting in person impractical and inefficient. This could occur whether process participants live on separate continents or simply work across town and can't spend three hours fighting rush-hour traffic to get to and from the mediation conference center. Perhaps litigants in a hotly contested matter are hostile toward each other and don't want to be even in the same building. Busy healthcare providers and facility administrators can join mediation sessions when their clinical schedules permit, without the need to travel or set aside an entire day (or multiple days). Out-of-state insurance adjusters can participate in mediations by video without leaving their desks, or maybe even their living rooms. Examples of potentially increased mediation participation through ODR are endless. Thus, through ODR, negotiations can include key individuals who might otherwise have been unable to attend in person. Some lawyers and parties could just enjoy mediating from the comfort and familiarity of their own offices (or homes) and find available technology to be so easy that they prefer remote to in-person mediation.

Approaching ODR with an open mind and willingness to take advantage of available technology provides exciting opportunities to leverage these tools and enhance negotiation processes. Beyond the initial desire to recreate familiar in-person experiences in the online environment, asking a bigger question is worthwhile: *In moving to ODR, how can mediators, attorneys, and other participants actually improve the mediation process, fully embracing the various advantages technology provides?*

The key to improving mediation processes is recognizing the opportunities ODR affords and then being willing to adapt. For example, the ability to share documents online is an instant advantage ODR brings. The more user-friendly online mediation platforms allow for seamless use of PowerPoint, screen-sharing and document exchange, video-sharing, and so much more.

Furthermore, although traditionalists might contend that in-person mediation is the standard by which all other negotiation formats should be measured, video-based mediation technology has risen to such a level that this assumption can legitimately be questioned. Even in a pre-pandemic world, as noted above, an entire ODR field has been quietly developing a set of remote mediation techniques and strategies that allow the negotiation of satisfactory resolutions without the necessity of live, in-

person exchanges.

After all, in virtual and face-to-face mediations, a participant's task is the same: Watch, listen, and observe with the tools at your disposal. Take in as much as you possibly can, create mental notes, consider your instincts, and make the most informed negotiation decisions based on the information at hand. The richness of the video medium has now advanced technologically to the point that interacting with parties by video is the next best thing to being in the same room and, in some cases, it can even be better.

A dark blue banner with a bar chart in the background. The text reads: "Quickly analyze market trends to make better deals, in less time." The LexisNexis logo is on the left. On the right, it says "LexisNexis Practical Guidance — Driven by data." At the bottom left, there is a blue button that says "Start your free trial" with a right-pointing arrow.

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Footnotes

- 1 Although this article focuses on online mediation, a few words about online arbitration provide useful context. The use of videoconference technology and virtual arbitration hearings were not especially common before 2020. Nonetheless, institutional arbitration rules and procedures contemplated virtual proceedings pre-pandemic, and over the past months these rules and procedures have become more comprehensive. For example, the American Arbitration Association (AAA)-International Centre for Dispute Resolution (ICDR) has supported a virtual option for years. However, AAA-ICDR has now developed a suite of video hearing services to promote privacy, security, and ease of use, along with best-practices training guides for staff, arbitrators, counsel and parties. See <https://go.adr.org/covid-19-virtual-hearings.html>. Another example: Though American Health Law Association (AHLA) commercial rules of procedure in healthcare cases previously contemplated the possibility of conducting hearings by telephone or videoconference, those rules were amended in

2020 to address more explicitly and in greater detail an arbitrator's authority to conduct hearings and receive evidence by video. *See* AHLA Dispute Resolution Service Rules of Procedure for Commercial Arbitration, Rule 5.7, *available at* https://www.americanhealthlaw.org/getmedia/a5cf9c95-7ee6-47ff-b3d9-468fa8ff55d/20_DRS-Commercial.pdf. Similarly, JAMS Comprehensive Arbitration Rules (Rule 22(g)) were amended as of June 1, 2021, in part, to make explicit an arbitrator's full authority to conduct a hearing in person, virtually, or in a combined form, and with participants in more than one geographic location. *See* <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/2021-Summary-of-Comprehensive-Rules-Changes.pdf>.

- 2 For example, effective August 2, 2021, all Financial Industry Regulatory Authority (FINRA) Dispute Resolution Services locations will be open for in-person arbitration hearings and mediations. *See* <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation>.
- 3 The ABA Center for Innovation surveyed the extent of court-annexed ODR in the United States as it existed as of the end of 2019, helping to quantify the general upward trend in ODR use pre-pandemic. *See* <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>. For an updated illustration of ODR growth, the AAA-ICDR maintains an interactive statistics sheet, tracking the use of virtual proceedings from March 2020 to mid-June 2021, *available at* <https://go.adr.org/virtual-hearing-statistics>.
- 4 A critical component of effective ODR is that all neutrals, counsel, and parties must work to maintain process privacy, confidentiality, and security. These efforts must encompass the use of secure technology and online platforms. To address the ethical and appropriate use of ODR and associated technologies, organizations such as the International Council for Online Dispute Resolution (ICODR) have created standards to guide best practices in these and related areas. *See* <https://icodr.org/standards/>.
- 5 For example, products like DocuSign, HelloSign, and similar options allow for easy integration of e-signatures into ODR processes.
- 6 Whereas in an in-person setting social norms and cues would

generally restrict one person from staring at another, for example, especially while someone else in the room was talking, those restrictions fade in the virtual world of video ODR.

About the Author

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