

LEGAL PERSPECTIVE

THE CORONAVIRUS DOESN'T CARE ABOUT YOUR CLAIM: NAVIGATING AND PLANNING DISPUTE RESOLUTION FOLLOWING THE COVID-19 PANDEMIC

BY HAIG M. SAKOIAN

The COVID-19 pandemic has upended the often predictable dispute resolution procedures litigants and practitioners take for granted. While state courts, federal courts, and arbitration administrators employ different rules to shepherd disputes to resolution, their procedures are properly understood at the outset of a case and can be planned and managed. Mediations will be scheduled. Discovery deadlines will be set. Trial or hearing dates will be calendared and so forth.

At the outset of the COVID-19 pandemic, however, many of these otherwise reliable tools were rendered impracticable as case milestones were postponed, sometimes indefinitely. How, for example, can parties convene in person to mediate or arbitrate disputes at the contractually specified location with governmental-mandated social distancing, quarantines, and travel restrictions? Likewise, trials by jury are rendered even more difficult, if not impossible, as they require large pools of potential jurors to gather indoors for selection. Even some of the necessary precursors to case investigation – such as witness interviews, site inspections, document review, and forensic data collection are complicated by shutdowns and social distancing.

Faced with these obstacles, federal and state courts quickly moved to protect the health and safety of litigants and the public. On March 13, 2020, the United States District Court for the Western District of Pennsylvania continued all jury trials until further notice, which, as of the date of this writing, have yet to recommence. The Court of Common Pleas of Allegheny County similarly suspended all jury trials around that time. It was not until September 15, 2020 that the Allegheny County court announced its plan to recommence jury trials starting on October 19, 2020. Rather than taking place in the usual venue (the Allegheny County City-County Building), trials will be conducted at the David L. Lawrence Convention Center, with all persons being subject to temperature checks and COVID-19 screening.

While encouraging, it remains to be seen whether the changing conditions will permit Allegheny County's jury trials to continue as planned. In June 2020, the United States District Court for the Northern District of Texas – Dallas Division successfully held jury trials after a temporary closure. Due to a significant increase in reported COVID-19 cases in that location, however, the court was forced to postpone further jury trials on July 8, 2020. Moreover, as the Western District of Pennsylvania recently observed, health and safety circumstances caused by COVID-19, as well as the health and safety directives from local, state and federal authorities, make it "highly unlikely" that a jury can be impaneled in any case in person.

The challenges faced with resumption of jury trials are not necessarily shared with other court proceedings.

Motion arguments, conciliations, and pre-trial/scheduling conferences are all well-suited for telephone or video conference platforms. As with most industries, the courts have rapidly evolved to adopt video conference technology to handle these procedures where feasible. For example, the Western District of Pennsylvania has "encouraged" all judicial officers to conduct non-jury trial proceedings by telephone or video conference, including non-jury trials themselves, and to take reasonable measures to avoid the necessity of out-of-town travel for counsel and participants. The Allegheny County court has gone one step further and mandated that most civil court proceedings be conducted via Microsoft Teams, including non-jury trials "where appropriate and feasible." Thus, under current rules and procedures, proceeding with a virtual non-jury trial may be an option to progress a dispute despite COVID-19 restrictions.

There is, however, one critical precondition to conducting a non-jury trial in either federal or state court: all parties must waive their right to a trial by jury. If time is critical, and if both parties agree to waive any previously asserted jury trial demands, consideration should be given to this option. Otherwise, given the growing jury trial backlog created by the pandemic, trial may be postponed far into the future. Also to consider in construction and commercial disputes, the guarantee to speedy criminal trials by the Sixth Amendment of the U.S. Constitution will give those cases priority when jury trials resume.

Virtual Arbitration Hearings

Given the uncertainty surrounding traditional, in-person court proceedings, the more flexible approach afforded by arbitration may be a faster way to resolve disputes. Under most circumstances, standard arbitration rules and agreements contemplate the parties meeting at a pre-determined location to conduct the arbitration hearing. Arbitration, by its nature, involves an agreement by the parties to resolve their dispute outside of court using pre-selected rules or procedures. The parties are, therefore, free to convert an arbitration hearing from in-person to video conference by mutual agreement.

Difficulties arise, however, if one party refuses to conduct an arbitration hearing virtually. A recent opinion issued by the National Academy of Arbitrators suggests that an arbitrator may order video arbitration over the objection of a party but only if the arbitrator can provide "effective service" in "a fair and adequate hearing." Before compelling arbitration, the National Academy of Arbitrators advises balancing whether "the global pandemic makes it virtually impossible for an in-person hearing to be safely conducted" with countervailing factors, such as "difficulty in preparing and marshalling witnesses."



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The American Arbitration Association (AAA) recently issued a Model Order and Procedures for a Virtual Hearing via Videoconference which also contemplates ordering a video arbitration hearing over the objection of a party. The AAA Model Order, similar to the National Academy of Arbitrators opinion, permits a remote arbitration hearing if “conducting the hearing via videoconference is a reasonable alternative to an in-person hearing in light of the COVID-19 pandemic, stay-at-home orders, and travel limitations” and that arbitration by video conference “will provide the parties a fair and reasonable opportunity to present their case” without postponement.

Whether an arbitrator ultimately has authority to compel virtual arbitration hearings will depend on the circumstances of the case, the terms of the parties’ arbitration agreement, and the arbitration rules incorporated therein. For existing contracts and disputes, parties may have little control over whether or not arbitration will be heard virtually during the pandemic. For future agreements, however, parties should give serious consideration to whether arbitration provisions should incorporate, or expressly reject, rules and procedures for video conference arbitration hearings. In doing so, parties should carefully weigh the relative merits of such a selection.

Weighing the Benefits of Virtual Dispute Resolution

Even if available, litigants should consider the relative advantages and disadvantages before committing to video conference litigation proceedings or incorporating video arbitration rules into future construction or commercial agreements. Some of the advantages of conducting a virtual trial or arbitration hearing are fairly obvious. Operating remotely protects participants from contracting or spreading COVID-19. Video conference proceedings are likely more convenient for parties, witnesses, and counsel. The cost of the technology involved may also be less expensive than the travel costs traditionally incurred. Perhaps most importantly, virtual dispute resolution proceedings can be conducted safely without waiting for the pandemic and related risks and restrictions to break.

Despite the benefits, there are disadvantages to virtual dispute resolution proceedings. Foremost, the experiences offered by video conference platforms are not the same as litigating in person. Participants are deprived of the opportunity to observe everyone in the hearing room in person. It is therefore more difficult to read visual cues, to gauge the credibility of a witness or to judge how the factfinder is reacting to testimony or a line of questioning. Also, party representatives, counsel, and expert witnesses may be separated, requiring technological, rather than in-person, means to discuss real time developments and strategy.

Trials or arbitration hearings by video conference raise additional logistical questions litigants must address. With respect to arbitration hearings, the parties must evaluate, select, and agree on the video conference

platform - e.g., Microsoft Teams, Zoom, Cisco WebEx, etc. – that will be used for the hearing, creating a potential area of dispute should the parties fail to reach an agreement. Each platform will also have its own associated costs, and security issues, which the parties will need to discuss and allocate.

The participants' proficiency with the selected video conference platform is also important to ensure a smooth and productive proceeding. While most are now familiar with the basic video conference platform functions, multiparty arbitration will require use of additional features such as screen sharing, passing control, and breakout rooms. Parties should consider training sessions for all participants, as well as their witnesses, in advance of the hearing to better understand the platform being used. Indeed, as one recent video conference scheduling order issued in the Western District of Pennsylvania cautioned, the party calling a witness "shall be responsible" for making necessary arrangements for its witnesses to participate remotely. Serious consideration should, therefore, be given to the technology and training provided to witnesses to ensure effective participation and avoid potential sanctions for preventable errors.

There may also be additional costs for equipment to be used during the hearing, including providing witnesses with the devices needed to participate in the video conference and view exhibits simultaneously. While counsel may show exhibits to witnesses using the video conference platform's screen sharing function, witnesses are entitled to review each exhibit in full at their own pace.

Many of these considerations can and should be formalized in the parties' agreement to conduct a virtual arbitration hearing or other procedural order issued by the arbitrators. Standard procedural orders offered by the various arbitration administrators, such as the Model Order recently published by the AAA, may be fully adopted or tailored to suit the needs of the parties. Consideration should be given to selecting the video conference platform, hearing schedule and logistics, instructions for witness examinations and exhibits, and procedures in the event of technical failures. In contrast to arbitration hearings, the logistical details of a virtual trial may be dictated by the court rather than subject to party negotiation. Nonetheless, the court may still look to the parties for guidance on crafting a procedural order for the conduct of a virtual trial. The parties should, therefore, be prepared to address any and all attendant logistical details.

The shift from in-person to virtual dispute resolution has been rapid and represents a significant learning process for all involved.

What was first done out of necessity may indeed become a preferred and customary method for certain cases going forward. Mediation was one of the first dispute resolution tools to go virtual during the early stages of the pandemic, and practitioners expect these to continue even after the pandemic breaks. It will be interesting to see in the coming months and years the extent to which parties, courts, and arbitration administrators permanently adopt and continue to use virtual trials and arbitration hearings as well. **BG**

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