

MEDIATION NEWS FOR THE 21ST CENTURY™

Mediation and Arbitration News

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Advantages and Disadvantages of Virtual Dispute Resolution.

Virtual Dispute Resolution brought on by the pandemic has revolutionized social communication and interactions. The new technologies, developed and introduced by Zoom, Teams, Blue Jeans and others, have advantages and disadvantages. Here is a collection of observations and opinions from arbitrators, mediators, litigators and other ADR professionals.

Mediation

- ❖ There is no denying that the ease, convenience and efficiency of Zoom for conducting mediations is very appealing. Mediations can be effectively conducted using the virtual platform.
- ❖ Forcing people to travel, find parking, and sit for hours on end in conference rooms waiting for the mediator or meaningful settlement discussions creates frustration.
- ❖ Participants have planes to catch, need to pick up children, tend to other business, etc. If settlement discussions are not progressing quickly enough for participants who must leave, the process is stifled. Imposing pressure on parties to make a deal out of frustration or fatigue is also counter to the core principle of mediation. Namely, self-determination and resolving claims without undue influence.
- ❖ For construction cases and other large multi-party cases, there are multiple decision makers, executives and

insurance adjusters involved. Parties have varying degrees of involvement and exposure. Requiring all parties to have their key representatives to travel and be physically present is wasteful and impractical. Scheduling and targeted focused meetings using the virtual technology tool are far more efficient and productive.

- ❖ The use of virtual technology tools will reduce the cost, stress, inconvenience and inefficiencies associated with in person mediations.
- ❖ Virtual mediations are better for some kinds of matters but not all. Participants in the virtual platform sometimes are distracted and less engaged in the process.
- ❖ For disputes that involve important past and continuing business, partnership and family relationships, strong emotional elements and psychological dimensions, mediating in person is more effective and often critical. In such situations, there is no substitute for the immediacy, attention and warmth of the human touch. The mediator is able to observe the interplay and body language of all participants more completely than can be done through watching small rectangle images on a computer screen. Mediators can connect, establish rapport and relate to individuals more effectively in person.

Arbitration

- ❖ Video hearings are no different from in person hearings regarding the assessment witness credibility.
- ❖ Some arbitrators feel that they have a better view of witnesses on a video screen than in person.
- ❖ Video hearings lack some, perhaps intangible, social aspect of in person hearings

- ❖ Looking at a small image on a screen diminishes the process for all parties including the arbitrator.”
- ❖ “Human contact with one another . . . makes us who we are and that is the loss that takes place when the ‘process’ is reduced to robotic screen time only” deprives everyone involved in the process of opportunities to network and get to know each other.
- ❖ “Many arbitrators prefer virtual hearings because it allows us to extend our careers and avoid the downsides of travel and extended periods away from home.”
- ❖ In labor arbitration grievance cases, union advocates often prefer to have in person hearings so grievants can see and feel that they have had their “day in court”.
- ❖ A labor arbitrator observed and suggested that only during in person hearings can she observe the reactions of everyone in the room and use her body language to cue advocates to move on or to behave better.
- ❖ Advocates for employees opine that it is important that management attends and participates in person as often employees feel that management has not given real and sufficient attention to their issues and concerns.
- ❖ Some arbitrators observe that settlement rates are higher with in person hearings than with virtual hearings.
- ❖ Virtual hearings and the reduction of delay and expenses of travel expands the pool of arbitrators from which advocates can choose.

Litigation

- ❖ Some litigators find that being physically present for cross examination can be helpful because “[t]here may be ‘tells’ that an advocate who knows the witness will spot and use to shape subsequent questioning.”

- ❖ Some advocates prefer and request in person hearings because “the grievant wanted to be in the same room with the arbitrator and have their day in court.”
- ❖ Grievants must feel a profound loss of the human aspect of arbitration when hearings take place “impersonally over a screen . . . [as opposed to] having their case conducted in-person.”
- ❖ The distance and impersonality of video communication can affect the empathy and connection of jurors and decision makers.
- ❖ Virtual technologies encourage and allow for easier shadowing and training opportunities for younger advocates, mediators and arbitrators.

Judicial Administrators:

- ❖ Video as the format for civil service hearings “will result in a fair, more efficient hearing process that saves all hearing participants time and resources, in addition to resulting in significant cost savings to taxpayers.”

For a business located in Hawaii, can a national company compel arbitration in Texas? Evident partiality, forum non conveniens and adoption of Federal Arbitration Act

Sprint Corp. v. Shichinin, LLC, No. 3:21-CV-2308-N, 2022 WL 4360872 (N.D. Tex. Sept. 20, 2022) (LLC member dispute). Award confirmed. Arbitration was conducted in Dallas, Texas. In a motion to compel arbitration filed in Hawaii state court, movant was alleged to have relied on the Hawaii Arbitration Act and it was argued it should not be allowed to rely on the Federal Arbitration Act in the post-arbitration litigation. The limited liability company agreement provided that the “arbitrators shall be governed by the United States Arbitration Act, 9 U.S.C. Sections 1-16.” The court applied the Federal Arbitration Act. In assessing the

public and private interest factors under the doctrine of *forum non conveniens*, the court considered the Texas-seated arbitration, and not the underlying dispute. Evident partiality was not shown by 1) JAMS's failure to state that it is for-profit; 2) multiple appearances by opposing counsel or its client in JAMS administers arbitrations; 3) a former attorney with opposing counsel's firm joining JAMS prior to the start of the arbitration; 4) judicial campaign contribution made in 2006 to tribunal chair. Claim that arbitrators lacked subject matter expertise "cannot amount to evident partiality."

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