


# Pandemic Pivot: ADR Poised for Prominence During Recovery

By Tracy L. Allen

 In January 1, 2020, “zoom” was a verb, a noise a car makes. Three months later, Zoom became a noun. It happened in the blink of an eye, like when Amazon no longer referred to a river in the rainforest, and Apple was no longer a fruit. Just as suddenly, Corona isn’t a beer served with lime.

No one can honestly say the legal profession was prepared for a pandemic. While some companies had a long history of team meetings via WebEx and GoToMeeting, lawyers and the judiciary were far away from regularly using these tools. Yes, we could do arraignments via video from the jail. We could do video depositions. But no one voluntarily selected those options very often, especially when in-person transactions seemed more convenient. Now a virtual platform is our default. Anything in person is the second choice for most. Quite the pivot, born of necessity.

Technology had started to infiltrate the practice of law, especially for those who graduated from law school in this millennium. COVID-19 broke down the door. It has forced lawyers to rethink almost everything they do and the way they do it. The practice will never be the same.

As frustrating as technology can be, perhaps the bigger current stressor is the uncertainty of it all: “Will this ever end? Will we ever get back to ‘normal’? What is ‘normal?’”

Do not despair. Together, even with our adversaries, we have made significant prog-

ress in harnessing technology to meet the challenges we face.

This pandemic has been a lot like the first semester of law school because we have learned so much in such a short span. We sorted through office “junk,” identified the necessary files and tools, packed them up, and headed to our makeshift home offices. We invested in new computers, printers, cameras, lighting, green screens, and headphones. We established lifelines with every tech employee in our offices and every 13-year-old in our orbit or, failing that, we signed a long-term contract with a tech company that makes house calls in the middle of the night. We learned to type while pets crawled across our keyboard and figured out how to burp a baby while on mute. We invented every kind of game and distraction for preschoolers and figured out how to teach and learn online. We were smart enough to know business attire was still necessary for virtual courtroom events. We were empathetic and cooperative with adversaries, and we shared our common pains. We grew up.

We are still in the midst of what appears to be a much longer journey than anyone anticipated. Notwithstanding an apparent decline in workload for some, prognosticators are of the opinion that the law business will thrive in six to 10 months. The reasons are obvious: judicial backlog, economic crunch, all sorts of new and unused theories of liability stemming from

COVID-19, insurance contract disputes over business interruption coverage, lease clauses with force majeure provisions that no one has mentioned since first-year property class, the true meaning of acts of God, impossible contract performance due to governmental regulations, and more.

In just seven months, we have adapted, invented, and shared many takeaways to help us plan for the next tsunami. There is still time to prepare for these future eventualities and we are marching wisely toward them. Clearly, alternative dispute resolution will be a valuable tool for advocates pressed into action under less-than-desirable circumstances. What will be the landscape henceforth?

A pivot toward alternatives to the courthouse should not be seen as unexpected. Pre-suit negotiations and mediation will be normal. Those needing finality will seek out arbitral processes and contracts will be adjusted to fit the forum to the dispute. There will be more private arbitration agreements to avoid the cost of agency administration. Arbitration will be driven by more than just existing and vague contract clauses. Immense judicial caseloads and the increasing inability of clients to endure the economic outlays and uncertainty of litigation in the traditional systems will cause an uptick in ADR caseloads and adaptations. Transactional and litigating attorneys will collaborate on contract language to move forward with disputes in alternative forums.

---

“Best Practices” is a regular column of the *Michigan Bar Journal*, edited by Gerard V. Mantese and Theresamarie Mantese for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Mantese at [gmantese@manteselaw.com](mailto:gmantese@manteselaw.com).

---

Clearly, alternative dispute resolution will be a valuable tool for advocates pressed into action under less-than-desirable circumstances.

For those clients needing faster justice, lawyers will deftly adjust to virtual arbitration. I expect proceedings will likely look something like this:

- Formal hearings will be held via Zoom or some other virtual platform.
- New protocols will be introduced into the arbitral process; numerous arbitration organizations have already issued proposed templates for arbitral proceedings.
- Lawyers will focus on efforts to collaborate in exchanging documents and discovery; there will be fewer motions and longer exchange time due to limited information access caused by remote proceedings.
- There will be fewer logistical and scheduling challenges due to travel—because there won't be any.
- Video depositions will be utilized in the case in chief for the sake of expediency when the matter comes before the arbitrator(s).
- There will be more direct factual evidence via affidavits coupled with the right to conduct “live” cross examination at the hearing.
- More advanced planning will be required for all participants: technical practice sessions to test electronics, sound, PowerPoint presentations, videos, screen sharing for exhibits, and multiple backup plans in case of technical glitches. Arbitrators and provider agencies will offer tutorials and virtual practice sessions before hearings to familiarize participants with the processes. This may be particularly important for pro se participants testing bandwidth and competencies with technology and exhibits.
- Arbitrators will expand oaths and representations of witnesses and counsel during the hearings, including being alone and not in a public place or on public Wi-Fi; not texting or emailing counsel during testimony; no coaching from persons who aren't supposed to be present; no notes being used to testify; and mobile phones in view but away from the witnesses.
- Participants will use hybrid session formats—some participants will be at the same physical location, wearing masks and maintaining proper social distance while others participate via a virtual platform from their offices or homes. Will any of these present issues of due processes, ethics, or propriety for arbitrators, counsel and/or participants?
- “Zoom fatigue” and home distractions will affect attention spans, requiring more frequent breaks during testimony.
- Technical glitches and breaks will affect the advocates' flow of inquiry of witnesses.
- Hearings will have more participants. There could be an increase in requests to sequester. Administrative and technical staff will facilitate presentation of exhibits, troubleshoot technical difficulties, and help with the order of the hearings. Arbitrators may have such persons as well. These additional support people may be privately retained, while some may already be on the payroll.
- Participants will be less visible; their whole-body language will be hidden. Advocates will have to weigh the impact of witnesses appearing with masks, on a screen, or both.
- Arbitrator impressions of counsel and witnesses may be impacted by limited visibility—think of those who watched the 1960 Nixon-Kennedy debates on television versus those who listened on the radio or merely read the transcripts.
- The possible impact on the demeanor and testimony of witnesses participating from the comfort of home as opposed to a courtroom or office conference room. Lawyers will have to weigh these dynamics as they work toward constructing the actual formats to be used for hearings.
- Will we ever get used to speaking and hearing through masks?

For those hoping to find solutions sooner in a dispute, we expect to see expanded use of the neutral. The mediator may become the go-to resource for early resolution. Certainly, the mediator may also be a resource in discovery disputes before filing

motions to compel. Using the mediator will be presumably faster, cheaper, and, hopefully, more effective. The mediator may also help preserve collaboration among disputants as they prepare and exchange information. In preparation and negotiation, mediators and litigants will find leverage in the uncertainty of the future of the civil jury trial.

What could the mediation process look like on a virtual platform?

- Scheduling will be easier, but mediation will require more advance preparation from all participants. This may include practice sessions or trial runs on the virtual platform with participants prior to the actual mediation session. This may also provide the opportunity to “meet and greet” stakeholders before the negotiation session.
- Geography won't matter. People won't be traveling. You might actually get the true decision makers into the process, albeit from afar.
- The selection of mediators will go global. Advocates will not be limited to selections in their own networks because there will be no travel costs for the neutral.
- Lay participants may be in the comfort of their own homes or in their attorney's office, six feet apart on a single screen, likely with masks. Lawyers may or may not be working from their homes or offices.
- The mediator will become a wizard of the virtual platform with breakout rooms, shared screens, and exhibit sharing.
- Everything will be submitted electronically starting with the agreement to mediate, the summaries, the exhibits, and even the potential settlement documents. Lawyers will use shared screens and exchange drafts of final settlement proposals via email as a potential resolution comes into view. DocuSign or a similar mechanism will be used to finalize the deal.
- The pace will be different. The tone and temperature of the participants will be different. Some will feel more comfortable in familiar surroundings as opposed to being in an office or conference room. Proceedings will seem more informal.

- Building rapport among participants will be strange, especially if they don't know each other. Ironically, building trust may be easier because everyone will be doing something sort of new without much experience.
- Everyone will experience the pain and annoyance of technical glitches and will work together to solve them, even as adversaries.
- Fatigue will set in sooner, but breaks will be more frequent. Each participant controls what they do and how they use their break, non-caucus time. Lawyers with clients in a different location will not be tied to their clients for the entire day.

Regardless of the forum or format, the dynamics of how attorneys will undertake

zealous representation of their clients is now irrevocably changed. There is no going back. Despite the surprise of a pandemic, our profession has never been stronger or more adept at delivering services.

When we were called to the bar, we took an oath to serve the public. Lawyers and the judiciary have worked tirelessly to ensure there is due process, public access, and legal services for those in need. We stepped up as our own form of first responders. We have proven once again that we measure up. We count. We are a most valuable and sacred element of our democracy. And in a time when the rule of law is in free fall, we are at the ready.

Never have we been more needed and never have we been prouder. Go ahead, take a bow. We have learned some new things, after all, with more to come. ■



*Tracy L. Allen is a mediator, arbitrator and ADR professor. As a former business, tax, real estate and estate planning attorney, she specializes in national and international mediation and arbitration, strategic management and design of corporate and cultural conflict resolution processes, and ADR training. She is a distinguished professor of conflict management at Lipscomb University and serves as an adjunct professor to the Pepperdine School of Law Straus Institute. Allen served on the Michigan Supreme Court ADR Task Force, which designed and implemented guidelines for court ADR plans and online and in-person training of mediators in Michigan. She served as co-chair of the mediation committee of the ABA Dispute Resolution Section and is a distinguished fellow, dame, and past president of the International Academy of Mediators.*

## DID YOU KNOW?

**DID YOU KNOW** that only about 15% of business law practitioners in Michigan are persons of color?

**DID YOU ALSO KNOW** that an overwhelming majority of business law practitioners are male, and that there are other traditionally underrepresented groups, including those with special needs, and those who have been excluded from business law practice for other reasons unrelated to their ability to succeed that could also use our support?

**DID YOU KNOW** that the Business Law Section of the State Bar has a Directorship on Diversity & Inclusion?



We want to diversify the Section by increasing the opportunities for traditionally underrepresented groups to practice business law in our state.

**FIND OUT** how you can become more involved and keep an eye out for our Facebook Page—Coming Soon!

**EMAIL:** [abeebe@grand-rapids.mi.us](mailto:abeebe@grand-rapids.mi.us)  
Amber Beebe, Chair of Directorship on Diversity & Inclusion  
Business Law Section