

In-person vs. virtual ADR — How to choose?

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Alternative dispute resolution (ADR), a common technique parties can use to settle disputes with the help of a third party, offers several unique benefits over traditional litigation. It is typically more cost-effective, confidential and generally a preferred method to resolving disputes. As a result, counsel and their clients often view ADR as a no-brainer. But the once simple decision to engage in ADR is now complicated by whether to proceed in-person, virtually or with a hybrid approach.

Now that remote work is omnipresent, many ADR organizations and independent neutrals offer to conduct ADR proceedings virtually as a convenience to all participants. Further, given today's unsettled economic environment and the cost-cutting that many clients are imposing in response, virtual ADR proceedings might seem particularly attractive given the potential savings compared to in-person proceedings.

The once simple decision to engage in ADR is now complicated by whether to proceed in-person, virtually or with a hybrid approach.

However, while virtual ADR may seem more convenient and cost-effective than in-person proceedings, it does not mean that virtual ADR is the right choice for every dispute. Here are some key considerations for clients and their counsel as they weigh the decision between virtual and in-person ADR.

Virtual ADR

Pros:

- (1) Virtual ADR provides greater flexibility and decreased costs (e.g., no travel expense). This consideration is especially relevant for international arbitrations, which can be logistically difficult to coordinate and can quickly get expensive.
- (2) A virtual session may lead to parties being more relaxed and willing to engage in settling the dispute. A remote setting provides physical distance that may be helpful in particularly contentious cases.
- (3) Remote proceedings expand the pool of available mediators and arbitrators, providing parties with the ability to select the right neutral for the needs of the case, regardless of where the neutral may be located.

- (4) During virtual sessions, parties will have less idle time while the neutral is discussing the case separately with the other party. Traditionally, the neutral goes between rooms to discuss the case separately with each party. The discussions can be quite lengthy, leaving the other side with little to do while they wait for the neutral party to return. Virtual sessions allow participants to attend to other matters (such as responding to emails, phone calls, and other in-office work) more effectively, while waiting for the neutral to return from a caucus with another party.
- (5) Virtual ADR presents potential training and development opportunities for junior team members to observe ADR proceedings at little or no cost.

While the cost-savings promised by virtual ADR are undoubtedly attractive, virtual ADR should be approached with caution so as not to jeopardize the optimal outcome for your dispute.

Cons:

- (1) Due to the lack of travel time, lower costs and added flexibility in virtual ADR proceedings, parties in high-stakes cases may be tempted to draw out the ADR process over a longer period of time until they achieve their desired outcome. To compensate for this tendency, parties may preemptively limit the maximum time for the ADR process.
- (2) Virtual procedures may hinder the natural flow of conversation and discussion. For example, during virtual conferences, if two parties are speaking at once (even incidentally), the audio will be impacted. This may lead to a more mechanical and slowly paced virtual session. This is particularly relevant in international cases where the services of an interpreter may be needed.
- (3) For ADR proceedings where witnesses are testifying, virtual sessions may be less effective. Necessary parties, including the neutral, may not be able to interpret a witness's non-verbal behavior or general mannerisms the same way they would during an in-person discussion. There is no assurance that

witnesses do not have notes or other restricted materials in front of them in a virtual setting. Additionally, parties may turn off the camera even if instructed not to.

- (4) Depending on the type of case, virtual discussions can present a greater security risk. In a virtual setting, parties have less control over who could be privy to the information being discussed. This is particularly relevant to cases where discussions need to remain highly confidential, or confidential documents need to be shared during the course of discussions.
- (5) Technical issues may arise, even if the parties have taken precautions beforehand.

In-person ADR

Pros:

- (1) Because the parties have gone to the trouble and expense of attending the ADR proceeding in person, they may be more likely to ultimately reach an agreement.
- (2) In arbitration hearings with witnesses, in-person testimony may result in a more effective presentation of evidence. Having a witness (or client) present with no distractions in a controlled environment can be invaluable to case resolution.
- (3) In person, parties can exercise more control over the security and privacy of an ADR proceeding. This consideration is particularly relevant in cases involving highly sensitive and confidential matters.

About the author



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Cons:

- (1) While often more cost-effective than traditional litigation, in-person ADR still requires parties to coordinate their travel schedules, which can be particularly difficult in complex cases involving parties spread across the country or the world. It may take weeks or months for all of the necessary parties to have a schedule that coordinates.
- (2) There are more costs associated with in-person mediation. The costs may quickly increase depending on the location of the session, and the number of people who must be present. This consideration is especially relevant for cost-sensitive clients.

Conclusion

In today's economic environment, it is important to avoid the tendency to be pennywise and pound-foolish with ADR. While the cost-savings promised by virtual ADR are undoubtedly attractive, virtual ADR should be approached with caution so as not to jeopardize the optimal outcome for your dispute.

The choice between in-person and virtual ADR is more important than clients and their counsel may think. It is vital to weigh the benefits and drawbacks of both when evaluating the most effective and cost-efficient way to resolve your dispute. There is no "one-size-fits-all" answer, and you may find the best solution is somewhere in between.

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