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The True Alternative

Return to In-Person Mediation? For Some but It's Not Automatic.

By Gene Witkin

On March 2, 2021, the Orange County Business Journal (OCBJ) reported that "Orange County's (Ca) positive coronavirus testing percentage, one of two main metrics used to determine a county's tier, fell to meet the third, or orange, tier requirements on Tuesday for the first time in several months." The article goes on to report that the county's positivity case rate "fell from 11.9 to 7.6 this week nearing the second, or red, tier's case rate requirements..." (Murar, Katie, "Healthcare," OCBJ March 2, 2021.)

On March 10, the OCBJ updated: "Orange County has met requirements to enter the red tier for the first time in several months, paving the way for the region to enter into the second tier and lessening business restrictions" and that "[e]ntering the red tier would bring new business openings and increased capacity for those already open, such as restaurants, malls and salons." (Murar, Katie, "Healthcare," OCBJ March 10, 2021.) Elsewhere around the nation, business openings are already taking place. For example, in Texas, the governor lifted the restrictions statewide, stating "it is now time to open Texas 100%." (Fitzsimons, Tim, "Texas and Mississippi to lift mask mandates and roll back Covid restrictions," NBCnews.com, March 2, 2021). Stated differently, to one extent or another, stay at home and "safer at home" restrictions are coming to an end in many venues, particularly with ramped up vaccines. And relevant to alternative dispute resolution, in-person mediations can resume in some states, and certainly in some counties, but will they?

Over the past several weeks, I've spoken to dozens of practitioners on both the plaintiff and defense side of the bar, as well as counsel for insurers. There seems to be a fairly even split between those eager to return to in-person mediations, and those preferring to keep them virtual.

On what many may consider a parallel track, numerous courts are back in session, at least partially. For example, in Arizona, "courts were permitted to "begin transitioning to in-person operation starting June 1, 2020," while at the same time "remote proceedings will continue to be utilized to the extent necessary." (Justicia, "Court Operations During COVID 19: 50 State Resources," Justicia.com 2021). Likewise, in California, courts are back in session for some, but not all purposes, albeit with limited courtroom availability, e.g., due to minimum courtroom size necessary to accommodate coronavirus concerns. While there is "no statewide suspension of jury trials," at the same time, "subject to judicial discretion, local courts may use video conferencing or telephonic hearings to conduct civil matters..." (Justicia, *supra*.) And in Texas, "courthouses no longer need a state safety review before conducting in-person hearings, including jury trials." (McCullough, Jolie, "Texas courts cleared for in-person trials ...," Texas Tribune, March 5, 2021.)

One material difference in the alternative dispute resolution world is while in court, there remains an issue with courtroom size and similar spacing concerns to comply with state or county guidelines (see, e.g., Los Angeles County Superior Court General Order 2020-GEN-025-00, filed November 23, 2020, stated concern "to reduce the number of people in its courthouses"), this would appear to be more easily alleviated (in most cases) by "breakout rooms" in many ADR facilities. Even for smaller ADR facilities, those in favor of in-person will argue that mediations can take place at court reporting services, which have similar large breakout rooms.



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But this is not the end of the discussion. It should be remembered that mediation is, generally speaking,¹ a voluntary process. See, e.g., California Rules of Court, Rule 3.853: “A mediator must conduct a mediation in a manner that supports the principles of voluntary participation and self-determination for the parties.” And there is also the issue of travel cost. Proponents of continued videoconference mediations will argue that many cases (especially those of smaller dollar value) simply do not justify paying for counsel (and often claims representatives) to drive, say, two hours each way for a one hour or even half day face-to-face with the opposing party(s), or in some cases with just the mediator. Added to this is the argument that obviously many cases have been resolved over the past year via videoconferenced mediation.

On the other hand, proponents of in-person mediation will argue that the human connection during in-person mediation makes a real difference towards resolving a dispute. Specifically, the intangible benefit of being face-to-face makes successful ADR all the more likely, and the avoidance of massive litigation costs through a successful ADR resolution clearly warrants the travel expense. And in my experience, the psychological commitment of “showing up” also has value.

So what can we expect in the latter half of 2021 and going into 2022? At this point it appears likely that many litigants will be returning to in-person mediations. Many, but not all.

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¹ There is, of course, compulsory mediation for certain conflicts, varying by jurisdiction. E.g., Cal. Ins. Code section 10089.70-10089.83 (certain fire loss, earthquake or automobile insurance claims in California at insured’s request); Tex. Ins. Code Section 1467.054- 1467.056 (certain out-of-network health insurance claims in Texas).

² Regarding AMCC’s position, as reported by Ross Hart in May 2020, if and when the parties in any particular case all agree that it is time for an in-person mediation, and that they are willing, able and permitted to go forward, AMCC will work with the parties to help plan and coordinate as safe and healthy a protocol as possible for such an event within government mandates.

³ With grateful acknowledgement to Blake Evans, Schubert & Evans, P.C.