



During the Pandemic, Virtual Arbitration Offers a Promising Alternative—Provided You Know What You Are Doing*

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Court proceedings have been seriously impacted by the pandemic and stay-at-home orders. The impact will be especially hard on court systems that were already experiencing backlogs handling commercial litigation cases. Adding to the strain will be the flood of new filings arising from pandemic-related disputes. Stay-at-home orders have also impacted in-person arbitration proceedings. Parties seeking a speedy resolution of their dispute are seeking online alternatives.

Unfortunately, levels of sophistication and experience using online platforms to conduct private or confidential proceedings can vary greatly. Recent headlines demonstrated the risks associated with not fully understanding videoconference security features. The American Arbitration Association recently posted on its website a Virtual Hearing Guide for Arbitrators and Parties and an Order and Procedures for a Virtual Hearing via Videoconference.¹ The model procedures provide guidance to parties, counsel, and arbitrators on different ways to address issues that may arise during a virtual hearing. Per party agreement the model procedures can be applied or modified to fit the specific needs of a particular case. Below are a number of key issues arbitrators might want to discuss with parties prior to embarking on a virtual arbitration.

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¹American Arbitration Association, Virtual Hearings, <https://go.adr.org/covid-19-virtual-hearings.html>.

I. Issues Related to Mutual Selection and Party Consent

One of the first issues that might need to be addressed involves mutual selection of the videoconference platform. The best approach might be to have the parties agree that they shall be responsible for conducting their own investigation as to the suitability and adequacy of a specific platform and any associated risks regarding security, privacy, or confidentiality and an estimate of the costs. This approach would help to ensure that all parties and legal counsel are equally familiar with and comfortable using a mutually chosen platform and clearly understand that parties may incur additional costs—although these costs could be less than the costs associated with travel to a physical hearing location.

What happens, however, if a party refuses to utilize videoconferencing? On April 1, 2020, the National Academy of Arbitrators (NAA) issued Advisory Opinion No. 26 regarding whether an arbitrator may order a video hearing over another party's objection.² The NAA found that the need to “provide a fair and adequate hearing” and to “provide effective services to the parties” would allow an arbitrator to issue such an order without mutual consent in certain extraordinary circumstances. For example, during a pandemic, “an in person hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters.” The NAA Advisory Opinion stresses that prior to issuing such an order an arbitrator should be confident that they, as well as the parties and counsel, are familiar with the video platform to be used.

The AAA Model Order provides that, should one of the parties not agree to conduct a virtual hearing in accordance with the AAA Procedures, the arbitrator/panel may order that the hearing be conducted via videoconference, so long as the parties are given “a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the dates previously scheduled.”

²National Academy of Arbitrators, Video Hearing, Op. No. 26 (Apr. 1, 2020).

II. Hearing Locale or Place of Arbitration

The state in which an in-person arbitration proceeding is conducted may determine the procedural law that will govern the proceeding, absent agreement of the parties otherwise. However, merely including a choice of law provision in a contract does not definitively constitute agreement by the parties as to the hearing locale or place of arbitration. Because parties in a virtual hearing may be physically located in different states, they should be asked to confirm in writing that the virtual hearing shall be deemed to have taken place in the state specified in the arbitration agreement, mutually agreed to by the parties or designated in an arbitrator's order.

III. Recording the Virtual Hearing

As users of Zoom recently discovered, unless hearing hosts implement specific security precautions, it is possible for participants to secretly record conferences. Currently no videoconferencing technology can detect with 100% certainty whether someone participating in a video conference has a recording device. It is, therefore, probably prudent to request that the parties agree that all participants, including witnesses, will be asked to confirm in writing that they will not record via audio, video, or screenshot, any part of a confidential or private hearing and that participants not join a private hearing from a public setting or connect to a conference via unsecured public Wi-Fi.

IV. Technical Issues

If not addressed prior to a virtual proceeding, a number of technical issues may result in a less than satisfactory result. The following are some commonly encountered technical issues and potential solutions that parties, legal counsel, and arbitrators should be prepared to discuss and, if agreed upon, include in an order issued by the arbitrator.

A. Access to the Hearing

To protect the security of a private hearing, access should probably be by invitation only and password-protected. Best practice is to have the ADR provider or the arbitrator—the hearing host—send an invitation to those

authorized by the arbitrator to attend. The invitation should clearly state that the embedded hearing link or password should not be shared with non-authorized individuals and that the link or password will change daily for greater security. A list of authorized attendees should be circulated by the hearing host prior to the hearing. The list should include each attendee's name, email address, dates they will be attending, and a phone number where they will be reachable on the date(s) they are to attend the hearing. A party seeking to add a participant to the approved attendee list should be required to contact the arbitrator so an invitation can be sent prior to the start of the proceeding. Individuals who are not on the approved attendee list should not be allowed by the arbitrator to participate absent agreement of all parties. Attendees should stay in the "waiting room" until granted access by the arbitrator to join the virtual hearing room. During the hearing participants and witnesses should always remain in view of a camera to maintain the integrity of the proceeding. If two or more people are expected to attend a hearing while in the same room, at a minimum a single camera should be positioned to provide a view of the entire room.

If the hearing host or a participant plan to have a technical assistant present during a hearing, that individual should be added to the attendee list prior to commencement of the proceeding. Before each session starts each invited attendee should be asked to disclose the names of all persons in the room with the attendee. If an unauthorized individual enters the room of an attendee, the attendee should immediately notify the arbitrator. If there are security concerns, an unknown or unauthorized attendee may be asked to display photo identification.

B. Advance Testing of the System

A lot of little things can go very wrong during a videoconference if they are not anticipated and addressed in advance. For example, monitor size will likely be especially important during hearings if there are a large number of participants. Participants, therefore, might want to plan on using a desktop or laptop computer and not a smartphone or tablet. Participants need to ensure all devices are adequately charged and that power cables or backup batteries are readily accessible. If a participant plans to take

notes or view documents during the proceeding they might want to consider using dual monitors or a single monitor with a laptop screen. Audio quality can be affected by the manner in which a participant is connected to the conference—by phone, computer speakers, or a headset. The best approach is to turn off the computer speakers and use a headset microphone. If more than one person will be participating in a room there needs to be a sufficient number of microphones to allow for adequate amplification of each person's voice. A high-speed, hard-wired internet connection might be preferable to a wireless connection.

For these reasons counsel and the arbitrator should test the system and note any type of disruptions, such as camera setting, lighting, delays/time lags, clarity, volume, feedback, etc. In addition each party should be responsible for testing the videoconferencing system with each of their witnesses, especially witnesses who will not be located in counsel's office on the day of the hearing. Tests should be conducted early enough for corrections to be made before the commencement of the virtual hearing. If corrections cannot be made the parties and the arbitrator will need to address whether all parties can still be provided with a "a fair opportunity to present its case."³

C. Technical Failure

At a bare minimum, the hearing host might want to reserve an optional dial-in conference call number in case the audio from a participant's computer is of poor quality. The hearing host should probably also provide the name and telephone number of a designated person to contact in the event any participant is disconnected. If one participant's videoconferencing connection fails, the arbitrator should ask participants remaining on the conference to mute their audio and turn off their video to avoid concerns regarding potential *ex parte* communications. If a participant is disconnected or experiences some other technical failure and the problem cannot be rectified after a reasonable period of time the arbitrator needs to "pause" the proceeding. If the arbitrator determines that it would be unfair to a participant experi-

³American Arbitration Association, Commercial Arbitration Rules, Rule R-32(a) (eff. July 1, 2016).

encing technical difficulties to continue with the scheduled videoconference, the arbitrator should either reschedule the virtual hearing or in accordance with the AAA Model Order “take any other appropriate steps as may be necessary to ensure the fairness and integrity of the proceedings.”⁴

Another way to deal with potential disconnects is to have the parties agree to the real-time production of a live transcript. The advantage of such a transcript is that, should an approved attendee temporarily lose internet connection, they can review the live transcript and quickly ascertain what transpired during the portion of the virtual hearing that they missed. In addition, should there be an issue with the audio, a live transcript will provide an expert witness an opportunity to read a question during cross-examination before answering. To utilize this feature, participants will need to have access to a second screen on which to display the real time live transcript.

V. Hearing Logistics

During the Advance Test the arbitrator should discuss with the parties the manner in which the arbitrator plans to conduct the virtual hearing and either obtain their agreement or address any objections raised by a party. The arbitrator should then issue an order that might include the following logistical steps. Participants will be directed to connect to the conference prior to commencement of the actual hearing to ensure there are no last minute technical glitches. Participants should initially be placed into a virtual waiting room. At the designated time the arbitrator will admit parties, counsel, corporate representatives, and experts to the hearing at the same time. All other witnesses should be sequestered in a “break-out” room until they are scheduled to testify.

To avoid delay and difficulty reconnecting, participants will be asked by the arbitrator to not disconnect from the videoconference platform during any recess or pause in the proceedings. Participants, however, may mute their audio during a recess or pause and during this time the arbitrator may elect to move participants to “break-out” and/or virtual waiting

⁴American Arbitration Association, Virtual Hearings, <https://go.adr.org/covid-19-virtual-hearings.html>.

rooms. Prior to commencement of the hearing the arbitrator will disconnect the private “chat” function. If requested, however, the arbitrator may agree to use of a virtual “break-out” room to facilitate private conversations between other participants as may be appropriate—for example, to allow members of a party’s legal team to confer with each other privately. Or members of a legal team may be allowed by the arbitrator to use WhatsApp to send private messages to each other. Participants will be expected to mute their audio until they are asked by the arbitrator to speak to eliminate background noise. An attorney, however, may interrupt to interpose an objection to a question or a participant may interrupt to alert the arbitrator of a technical difficulty.

VI. Maintaining the Integrity of Witness Testimony

Unless the parties agree otherwise, the logistical order issued by the arbitrator should provide that expert witnesses be allowed to attend the entire hearing while other non-party witnesses be sequestered until they testify. Witnesses will be expected to testify sitting at an empty desk or table with a webcam focused on the witnesses’ face to aid assessment of credibility. A witness will be directed to not use a “virtual background” to ensure there are no unauthorized persons in the room with the witness. Authorized persons in the room with a witness, such as counsel, should be required to identify themselves. All non-party or non-expert witnesses will be directed to sign off from the platform at the conclusion of their testimony. Parties should be advised that if a witness has never testified via videoconference they might want to consider giving that witness an opportunity in a test run to familiarize themselves with the process.

The logistical order should also address the issue of exhibits. For example, prior to commencement of the hearing counsel will be directed by the arbitrator to provide each witness with a clean, unannotated hard copy set of exhibits to be referred to during the witness’ testimony. In addition, the witness may be provided with a clean, unannotated copy of his or her witness statement, if any. During the hearing the arbitrator should be allowed to ask a witness to display the set of exhibits and/or witness statement to confirm there are no annotations. Finally, a witness may not be aided

by notes unless upon a motion for good cause submitted by a party the arbitrator has approved the use of notes.

VII. Costs of Conducting the Virtual Hearing

A virtual hearing may entail additional costs. This needs to be discussed with the parties and addressed in an order issued by the arbitrator. Parties should be expected to equally divide the anticipated additional costs, unless the governing arbitration agreement or rules provide otherwise. The applicable sum should be deposited by the parties with the hearing host prior to conducting the advance test.

Should a party refuse to pay their share of the anticipated costs the paying parties will be asked to pay the non-paying parties' share of the deposit. Failure to pay the full amount of the deposit might result in the arbitrator refusing to conduct a virtual hearing. In the order the arbitrator should also have the parties confirm in writing whether the costs of conducting a virtual hearing are subject to allocation by the arbitrator in the final award.

Conclusion

As the country's legal system adjusts to a "new normal," clients may want to quickly resolve their disputes via virtual arbitration. To effectively utilize this tool, counsel need to familiarize themselves with the different videoconferencing platforms' features, especially as they relate to online security. Parties and counsel might want to include questions regarding familiarity with conducting virtual hearings when screening prospective arbitrators.