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Lessons Learned from Running a Virtual Arbitration: A First-Person Account



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By: Cristina Ryan, Director of ADR Services, Construction Division, AAA®

Initially scheduled for a live hearing in April 2020, this large, complex, multi-party matter changed to a virtual one when COVID-19 cancelled in-person hearings and the participants decided not to wait until restrictions were lifted and concerns alleviated.

The 12-day hearing that ensued could have been a disaster! All manner of problems could have interrupted the hearing and tainted the process for the parties. Instead, the hearing went off almost without a hitch—and that sole issue was a nationwide cell-service provider failure.

The participants in this nearly \$10 million commercial case were:

- Four parties (five individuals and five corporate entities)
- Four sets of attorneys
- Panel of three arbitrators
- Multiple experts and witnesses
- One court reporter

In addition, there were 1,000+ exhibits, including numerous videos clips of prior testimony.

The arbitrators did not have experience in using Zoom in a professional capacity, and the non-technologically inclined parties had no experience using it at all.

14 video participants and as many as seven non-video participants, not including myself. To learn more about cookies and how we use them, please see our [Privacy Policy](#).

Lessons Learned

Planning and Preparation: Leave as little as possible to chance.

Test Sessions. Hold ample test sessions early so that counsel and arbitrators can identify their issues and concerns and address them via hearing orders and protocols.

In preparation for the virtual hearing, I held four Zoom “test sessions”—one for the Claimant, one for the Respondents, and two for the Panel (one two weeks before the hearing and one a few days before). Counsel invited all their party principals and all witnesses, encouraging them to run the test under the same conditions that would exist at the time of the hearing (i.e., to consider if Internet service would be shared simultaneously with anyone else in the household).

Each test session lasted about an hour and included a short training on the features of Zoom that would be in use during the hearing. For example, during each test, participants practiced moving in and out of breakout rooms and counsel and/or their assistants practiced the screen-share feature.

Thoughtful test scheduling is key. This case was somewhat contentious, so counsel requested separate tests for the parties, as did the arbitrators, who wished privacy for their learning curve. The second test for the panel also served as their pre-hearing executive session; I initiated the session, addressed any last-minute questions, turned over hosting to the chair, and then turned off my video and sound, as I would be doing during the hearing.

Exhibits. Given the number of hard copy exhibits, we initially suggested that the parties use a document-management platform in conjunction with Zoom, but there was concern among counsel that there was inadequate time to learn a second application. Instead, the parties used a combination of paper exhibits and screen sharing.

Thirty-plus binders containing copies of the exhibits were sent to each arbitrator at their homes a few days prior to the first hearing date, along with shelving provided by the parties for easy access during the hearing. Each witness received copies of relevant exhibits. Impeachment documents were provided via email at the time of introduction, with hard copies subsequently sent to the arbitrators to add to the binders.

Virtual Hearing Order and Protocols. To ensure the hearing went as smoothly as possible, the panel issued a virtual hearing order as well as a set of virtual hearing protocols designed to limit delay while recognizing the uniqueness of Zoom hearings. For instance, the night before each hearing day, counsel were required to provide notice of the exhibit binders expected to be in use the next day so the arbitrators could pull those binders in advance.

Protocols are a work in progress, amended as needed, and parties are encouraged to develop additional protocols that would help the process move along fairly and efficiently. A protocol could require witnesses to keep their hands and their cell phone visible at all times, for example, if counsel is concerned that about witness-coaching via text messaging.

Case managers should use their experience and the experience of others, whenever possible to avoid unnecessary and duplicative work. The order and protocols used in this case were developed from an order and protocols from another case I administered, which I shared—stripped of any party-identifiable information—with the drafting arbitrator’s consent. Furthermore, the order and protocols in this case, again stripped of party-identifiable information, subsequently were used in another case. They get better with each revision.

Support for the Parties and the Process: Administrators must be available to participants.

The administrator can and should provide a sense of calm by being accessible to panel and counsel throughout the hearing as needed, even if the case is not a “full-service” one (i.e., the AAA will not remain on the Zoom all day) and even if the administrator is not the Zoom host.

For this matter, I stayed connected to the Zoom all day but was not actively participating; I left my sound and video off, turning it on only as needed, and provided counsel with my cell phone number in case of an emergency.

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In addition, I set up a group text message between the panel members and myself the day before the hearing, which they used throughout the hearing to address technical, procedural, and other non-substantive matters. By using text messaging in this way, the arbitrators were able to avoid unnecessary interruptions to testimony and likely shaved some time off the total number of hearing hours.

All Hands on Deck: Counsel should utilize support staff.

I recommended that a co-counsel, a paralegal, or other legal assistant be available and prepared during the hearing to share exhibits while counsel was questioning the witness. This utilization of support staff for screen sharing made a huge difference (as compared to an earlier hearing I had where counsel did their own sharing). This allows counsel to focus on being counsel and lets someone else deal with the technical aspects, especially useful in document-heavy cases such as this one.

Be Specific Yet Flexible: Arbitrators can make changes if necessary.

The arbitrators tried to be as specific as possible about how they expected the hearing to proceed but were prepared to be flexible, asking the same of the parties. When it was determined a given protocol was not serving its intended function, changes were made quickly and without confrontation.

Creativity and Cooperation: Work together to make it work—for everyone.

Even with a somewhat confrontational matter, when it was hearing time, everyone worked together to find solutions to issues and concerns that arose. For example, it turned out that the carts requested by the arbitrators for the binders would arrive on time only unassembled, so counsel found an alternate shelving system that would arrive assembled in two days—and, as a bonus, was less expensive.

Organization of virtual hearings can take many forms. Encourage parties and arbitrators to find unique solutions to address the circumstances in any given matter. In some situations, such as this one, a fully virtual hearing may be required; in others, a hybrid format might be possible.

Top 10 Tips for a Successful Virtual Hearing

Zoom hearings may seem intimidating and difficult, but with the right planning and support, they can be no less stressful or trying than a live one. Quick notes gleaned from the above:

- Frequent breaks are essential to combat Zoom fatigue.
- The use of an online document-management tool with advanced functionality is beneficial.
- Screen sharing works best when the questioning lawyer has technical assistance from someone else.
- Protocols should be used to address concerns about the process.
- Trust is key.
- Creativity also is key.
- The value-added service of administrators remaining logged in to the hearing with sound and video off is invaluable.
- Cross-case collaboration of orders and protocols (with arbitrators' consent and removal of any party-identifiable information) is constructive as the use of Zoom for virtual hearings develops.

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