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# Utilizing Virtual Arbitration during the Pandemic

A promising alternative provided you know what you are doing.

By P. Jean Baker

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

[As the country's legal system adjusts to a "new normal" clients may want to quickly resolve their disputes via virtual](#)

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*Credit: Pexels, Burst*

Unfortunately, levels of sophistication and experience can differ greatly for both counsel and alternative dispute resolution (ADR) practitioners when it comes to using an online platform to conduct a private or confidential proceeding. Recent headlines demonstrated the risks associated with not fully understanding how to use the security features of a videoconference platform. The American Arbitration Association (AAA) recently posted on its website a [Virtual Hearing Guide for Arbitrators and Parties](#) and a

[Model Order and Procedures for a Virtual Hearing via Videoconference](#). The model procedures seek to provide guidance to parties, counsel, and arbitrators as to different ways they can 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 before embarking on a virtual arbitration.



## 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, any associated risks regarding security, privacy, or confidentiality, and for obtaining 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 the 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 use 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's party objection. The NAA found that the need to "provide a fair and adequate hearing" and to "provide effective service 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 before issuing such an order, an arbitrator should be confident that he or she, as well as the parties and counsel, is familiar with the video platform to be used.

The model procedures provide that, should one party not agree to a virtual hearing, the arbitrator or panel may order that the hearing be conducted via videoconference provided it will give the parties "a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the dates previously scheduled."

## 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. 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 will 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.

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## Recording the Virtual Hearing

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

## Technical Issues

If not addressed prior to a virtual proceeding, a number of technical issues can 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, included in an order issued by the arbitrator.

**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 unauthorized individuals and that the password will change daily for greater security. The hearing host should circulate a list of authorized attendees 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 or dates they are to attend the hearing. A party seeking to add a participant to the approved attendee list should contact the arbitrator so an invitation can be sent prior to the start of the proceeding. The arbitrator should not allow individuals who are not on the approved attendee list 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 plans 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.

**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 is 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, the participant 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. 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 or time lags, clarity, volume, and feedback. In addition, each party should be responsible for testing the videoconferencing system with each of the party's 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 virtual hearing begins. If corrections cannot be made the parties and the arbitrator will need to address whether all parties can still be provided with a "fair and reasonable opportunity to present their case."

**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 poor in 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. Should one participant's videoconferencing connection fail, 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 will need to "pause" the proceeding. If the arbitrator determines that it would be unfair to a participant experiencing technical difficulties to continue with the scheduled videoconference, the arbitrator should either reschedule the virtual hearing or take any other appropriate steps as may be necessary to ensure the fairness and integrity of the proceeding.

Another way to deal with potential disconnects is to have the parties agree to real-time production of a live transcript. If an approved attendee temporarily loses his or her internet connection, the attendee can review the live transcript to quickly ascertain what transpired during the portion of the virtual hearing he or she missed. In addition, a live transcript allows expert witnesses an opportunity to read questions during cross-examination before answering. To use this feature,

participants will need to have access to a second screen on which to display the real-time live transcript.

## Hearing Logistics

During the advance test, the arbitrator should provide written instructions regarding 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 hearing to ensure there are no last-minute technical glitches. Participants will be placed in 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 will be sequestered in a “breakout” room until they are scheduled to testify. To avoid delay and difficulty reconnecting, participants will be asked not to disconnect from the videoconference platform during any recess or pause in the proceedings; however, participants may mute their audio during a recess or pause, and during this time, the arbitrator may elect to move participants to “breakout” or virtual waiting rooms. The private “chat” function will have been disabled by the arbitrator prior to commencement of the hearing. If requested, however, the arbitrator may use a virtual “breakout” 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 the arbitrator may allow members of a legal team to use WhatsApp to send private messages to each other. Participants will be requested to mute their audio until they are asked by the arbitrator to speak. An attorney, however, may interrupt to interpose an objection to a question. A participant may also interrupt to alert the arbitrator of a technical difficulty.

## Maintaining the Integrity of Witness Testimony

Unless the parties agree otherwise, the logistical order issued by the arbitrator should provide that expert witnesses may attend the entire hearing. Other nonparty witnesses, however, will be sequestered until they testify. A witness will be directed to testify sitting at an empty desk or table. The webcam should be focused on the witness’s face to aid assessment of credibility. A witness may not use a “virtual background” to ensure there are no unauthorized persons in the room with the witness. Authorized persons in the room, such as counsel, should be required to identify themselves. All nonparty or nonexpert witnesses will be asked to sign off from the platform at the conclusion of their testimony. A witness who has never testified via

videoconference should probably be given an opportunity to familiarize himself or herself with the process.

The logistical order should also address the issue of exhibits. Before the hearing begins, 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's testimony. In addition, the witness should be provided with a clean, unannotated copy of his or her witness statement, if any. During the hearing, the arbitrator may ask a witness to display the set of exhibits and the witness statement to confirm there are no annotations. 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.

## Costs of Conducting the Virtual Hearing

A virtual hearing may incur additional costs, and this needs to be discussed with the parties and included in an order issued by the arbitrator. If costs will be incurred, the hearing host should require that the parties equally divide the anticipated costs, unless the governing arbitration rules provide otherwise, and deposit the applicable sum with the hearing host prior to conducting the advance test. Should a party refuse to pay its share of the anticipated costs, the paying parties would be required to pay the nonpaying party's share of the deposit. Failure to pay the full amount of the deposit would 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 use this tool, counsel will 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.

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**LITIGATION SECTION**

**TOPIC:****ALTERNATIVE DISPUTE RESOLUTION, TECHNOLOGY**

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